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HENRY McMASTER  
ATTORNEY GENERAL

May 31, 2006

W. Thomas Sprott, Jr., Esquire  
Fairfield County Attorney  
Post Office Drawer 329  
Winnsboro, South Carolina 29180

Dear Mr. Sprott:

We understand from your letter you request an opinion of this Office on behalf of the Fairfield County Council (the "Council") concerning the Fairfield County Recreation Commission (the "Recreation Commission"), the governing body of the Fairfield County Recreation District (the "District"). Attached to your request, you included a copy of a letter from Councilmember Kanau Marcharia to David Ferguson, Chairman of the County Council, detailing the various issues. One issue Mr. Marcharia raised in his letter concerns the Carnell Murphy. Mr. Murphy is a member of Council and is simultaneously employed as the Director of the District. As you indicated in your letter, the South Carolina State Ethics Commission (the "Ethics Commission") issued an informal opinion concerning Mr. Murphy's service in both capacities. As you pointed out, "the letter from the Ethics Commission suggested that [our] office be contacted regarding the dual office holding prohibitions."

Additionally, in Mr. Marcharia, in his letter, states that he serves as an ex-officio member of the Recreational Commission. He maintains he has not been given notices of the Recreation Commission's meetings and "was treated rudely and very disrespectfully." Thus, he wishes to obtain an opinion from this Office as to "Council's authority to discipline or remove Recreation Commission Members for such behavior."

### Law/Analysis

#### Dual Office Holding

The Ethics Commission, in issuing an opinion on whether a councilmember may serve as the director of a recreational commission, suggested contacting this Office regarding dual office holding prohibitions under the South Carolina Constitution. Article XVII, section 1A of the South Carolina Constitution (Supp. 2005) states, except as specified: "No person may hold two offices of honor or profit at the same time." Furthermore, in Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907), our Supreme Court explained who holds a public office.

*Request Letter*  
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One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public office. Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employé.

Id. at 174, 58 S.E. at 763. The Court further explained the criteria for a public officer in State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980).

Criteria to be considered in making the distinction between an officer and an employee include whether the position was created by the legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond and oath are prescribed or required; whether the one occupying the position is a representative of the sovereign; among others. No single criteria is conclusive; neither is it necessary that all the characteristics of an officer or officers be present.

Id. at 478, 266 S.E.2d at 62-63.

On numerous occasions this Office determined a member of a county council is an officer for purposes of dual office holding. See Op. S.C. Atty. Gen., January 18, 2006; November 2, 2005; March 18, 2004; July 26, 1999. Thus, we must only determine whether or not the Director of the District is an officer.

We previously addressed whether the Director of the Greenville Recreation Commission is an officer for dual office holding purposes in an opinion dated September 15, 1983. Op. S.C. Atty. Gen., September 15, 1983. We reviewed the legislation creating the Recreation Commission and subsequent amendments, finding no mention of a director, his or her term, or his or her salary. Id. Thus, in light of our Supreme Court's decision in Sanders, as cited above, we determined the Director is an employee rather than an officer. Id.

In a more recent opinion, we remarked: "this Office has repeatedly concluded over the years that the position of executive director of a board or commission does not constitute an office." Op. S.C. Atty. Gen., January 27, 2004. Quoting an opinion issued in 2001, we reiterated "the fact that the executive director served at the pleasure of the governing board or authority." Id. (quoting Op. S.C. Atty. Gen., July 24, 2001). Furthermore, we made note of the fact that none of the qualifications for an executive director were set forth in law and concluded: "In short, in virtually

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every previous instance in which the question has arisen, we have concluded that an executive director of a governing board or commission is an 'employee' rather than an 'officer.'" Id.

Specifically, with respect to the Recreation Commission we reviewed the enabling legislation for the District and found it does not mention the employment of an executive director. 1970 S.C. Acts 2365; 1992 S.C. Acts 3626. Thus, like the situations described in prior opinions, we find no statutory term, qualifications, or salary for the position. Furthermore, we presume the Director serves at the pleasure of the Recreation Commission. Thus, in keeping with prior opinions and the Supreme Court's conclusions in Sanders and Crenshaw, it is our opinion the Director is an employee of the District rather than an officer. Accordingly, a member of County Council who also serves as the Director of the District does not violate the dual office holding prohibition of the South Carolina Constitution.

As you noted in your letter, you received a copy of an informal opinion from the Ethics Commission addressing potential ethical problems that may arise due to one individual serving both as a member of County Council and being employed as Director of the Recreation Commission. In keeping with this opinion and despite finding no constitutional violation, we reiterate that an individual serving in both capacities must also adhere to the constraints of the State ethics laws.

#### **County Council's Ability to Discipline or Remove Recreation Commission Members**

Mr. Marcharia's letter indicates he wishes to know if the County Council can discipline or remove members of the Recreational Commission based their behavior. As for County Council's ability to discipline or remove member, we look to the District's enabling legislation. The Legislature created the District in 1970 via Act No. 1059. 1970 S.C. Acts 2365. Furthermore, the act provides the Recreation Commission is to be composed of nine resident electors of the District "to be appointed by county council." Id. The act states members of the Recreation Commission shall serve three-year terms. Id. However, it does not provide any means by which County Council may discipline or remove members of the Recreational Commission. Id.

"As a general rule, the power to remove an officer is vested with the authority having the power to make the appointment." Op. S.C. Atty. Gen., March 15, 2000. This rule, as stated in numerous opinions of this Office, is supported by the South Carolina Supreme Court's decision in State ex rel. Williamson v. Wannamaker, 213 S.C. 1, 9-10, 48 S.E.2d 601, 604 (1948). The Court held: "It is a general rule that when the term or tenure of a public officer is not fixed by law, and the removal is not governed by constitutional or statutory provision, the power of removal is incident to the power to appoint." Id. at 9-10, 48 S.E.2d at 604. However,

the power of removal is not incident to the power of appointment where the extent of the tenure of office is fixed by the statute. In the absence of any provision for summary removal, expressed in terms as being at will or words of similar import, appointments for a fixed

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term of years cannot be terminated except for cause. It is the fixity of the term that destroys the power of removal at pleasure.

Id. at 10-11; 48 S.E.2d at 605.

As previously mentioned, the enabling legislation establishing the Recreation Commission affords the County Council the authority to appoint the Recreation Commission's members. Thus, because the County Council is vested with the authority to appoint the Recreation Commission's members, incident to that authority is the power to remove those members. However, because the enabling legislation also sets a fixed term of three years for the Recreation Commission's members, if the County Council wishes to remove members before the expiration of their term, it must establish cause for doing so.

Mr. Marcharia's letter indicates certain behavior on the part of members of the Recreation Commission, which he believes is grounds for their discipline or removal. However, because we are unable to adjudicate or investigate questions of fact in a legal opinion of this Office, we do not possess the authority to determine whether this conduct, if it occurred, is cause for removal of such members. See Op. S.C. Atty. Gen., April 4, 2006 ("this Office does not have the authority of a court or other fact-finding body, and therefore, it is unable to adjudicate or investigate factual questions"). Furthermore, with regard to Mr. Marcharia's question as to the County Council's authority to discipline members of the Recreational Commission, we find no authority allowing for such in the District's enabling legislation. However, we note this Office has on occasion recognized the power to suspend is implied in the power of removal. See Op. S.C. Atty. Gen., March 15, 2001.

It has been the opinion of this Office in the past that the authority to suspend depends on the limitations placed on the power to remove. In particular, an arbitrary power to remove is generally not held to include the power to suspend. However, when the power to remove is limited to removal for cause, then the power to suspend is viewed as a part of the disciplinary process leading to removal, and is considered an incidental power thereto.

Id. However, we also qualified our opinion on this matter, recognizing the Supreme Court may find otherwise based on its opinion in Rose v. Beasley, 327 S.C. 197, 489 S.E.2d 625 (1997) (determining the Governor did not hold a inherent or removal or suspension). Id. (citing Rose, 327 S.C. at 197, 489 S.E.2d at 625).

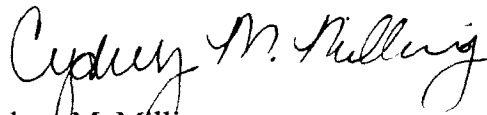
### **Conclusion**

In conclusion, we believe an individual serving as both a member of County Council and as the Director of the District is not in violation of the dual office holding prohibition pursuant to the South Carolina Constitution. However, we caution that an individual serving in both capacities is subject to the rules of ethics and therefore, close attention should be paid to the determinations made

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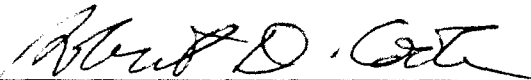
by the Ethics Commission in its informal opinion, as well as, other ethics considerations. In addition, although we find County Council has the power to remove members of the Recreation Commission pursuant to its power to appoint those members, it must justify such removal by establishing just cause for such removal. As for County Council's authority to discipline the members of the Recreation Commission, we find no such authority specifically contained in the District's enabling legislation, but recognize a court may find County Council has the authority to suspend members assuming it has the power to remove such members for cause.

Very truly yours,



Cydney M. Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Assistant Deputy Attorney General