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HENRY McMASTER
ATTORNEY GENERAL

May 9, 2006

David Burnette, Executive Director
Patriots Point Development Authority
40 Patriots Point Road
Mount Pleasant, South Carolina 29464

Dear Mr. Burnette:

We received your letter expressing your concern about a member of the Patriots Point Development Authority's (the "PPDA's") decision to run for a position on the Town Council for the Town of Mount Pleasant (the "Town Council") in a special election to be held this month. You state: "There is some question about whether there is a prohibition involving an individual holding two simultaneous "commissions" that will require that he resign from the PPDA's board if he wins the special election and is sworn in as a council member." Based on our analysis provided below, we find both a position on the Town Council and a position on the PPDA to be offices for dual office holding purposes. Thus, the South Carolina Constitution's prohibition on dual office holding prevents an individual from simultaneously holding both positions.

Law/Analysis

Article XVII, section 1A of the South Carolina Constitution prohibits a person from holding "two offices of honor or profit at the same time" S.C. Const. art. XVII § 1A (Supp. 2005). For this provision to be contravened, a person concurrently must hold two public offices that have duties involving an exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907). Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its duties or salary, or require qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980).

In numerous opinions, this Office found a member of a city or town council to be an officer for dual office holding purposes. See e.g., Op. S.C. Atty. Gen., April 4, 2006; Op. S.C. Atty. Gen., September 14, 2005; Op. S.C. Atty. Gen., July 16, 1993. Therefore, we must only determine whether a member of the PPDA is an office holder for dual office holding purposes.

The Legislature created the PPDA by statute in 1962 and amended this legislation on numerous occasions. Presently, the PPDA consists of six members. S.C. Code Ann. § 51-13-710-425 (1992 & Supp. 2005). Statutes governing the PPDA provide that five of the members shall be appointed by the Governor, one based on "the joint recommendation of the Chairman of the

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House Ways and Means Committee and the Speaker of the House, one upon the joint recommendation of the Chairman of the Senate Finance Committee and the President Pro Tempore of the Senate, and three to be appointed by the Governor.” S.C. Code Ann. § 51-13-720 (Supp. 2005). The statute provides these members are to serve four-year terms. Id. In addition, section 51-13-725 of the South Carolina Code (Supp. 2005) establishes the mayor of the Town of Mount Pleasant as an ex officio sixth member of the PPDA. Although, we found no reference to an oath requirement in the enabling legislation creating the PPDA, from our conversations with you, we understand the members are asked to take an oath prior to assuming their position on the PPDA. With regard to compensation, section 51-13-730 mandates the members of the PPDA “shall receive per diem for each day of performance of official duties and actual expense, including travel expense, shall be allowed for attendance thereon.” S.C. Code Ann. § 51-13-730 (1992).

The provisions of the Code pertaining to the PPDA also provide it with power to employ an executive director and other employees to carry out its duties. S.C. Code Ann. § 51-13-470 (1992). In addition, section 51-13-770 enumerates the various powers afforded to the PPDA by the Legislature in order to carry out the PPDA’s proposes as stated in section 51-13-760 of the South Carolina Code (1992). S.C. Code Ann. § 51-13-770 (1992). The PPDA’s enumerated powers are as follows:

- (1) Shall have the powers of a body corporate, including the power to sue and be sued, to make contracts and to adopt and use a common seal and alter it as may be deemed expedient;
- (2) May rent, lease, buy, own, acquire, mortgage and dispose of such property, real or personal, as the Authority may deem proper to carry out the purposes and provisions of this article, all or any of them;
- (3) May acquire, construct, maintain, equip and operate docks, ships, piers, quays and other structures and any and all facilities needful for the convenient use of them in the aid of Patriot’s Point development, including the dredging of approaches thereto and the construction of roads and highways thereon and bridges and causeways necessary or useful in connection therewith and transportation facilities incident thereto and useful or convenient for the use thereof, including a marina, except that these piers, ships, docks, quays or similar structures shall be used exclusively for fulfilling the educational, recreational and tourist missions of Patriot's Point and shall not be used for any active ocean-going cargo or passenger vessels;
- (4) Shall establish an office for the transaction of its business in the County of Charleston and such other offices within and without the State as may be deemed by the Board to be necessary or useful in carrying out the purposes of this article;

(5) May create and operate such agencies and departments as the Board may deem necessary or useful for the furtherance of any of the purposes of this article;

(6) May pay all necessary costs and expenses involved in and incident to the formation and organization of the Authority and incident to the administration and operation thereof and all other costs and expenses reasonably necessary or expedient in carrying out and accomplishing the purposes of this article;

(7) May apply for and accept loans and grants of money from any Federal agency, private sources or any other source for any and all of the purposes authorized in this article and expend such moneys in accordance with the directions and requirements attached thereto or imposed thereon by any such Federal agency and give such evidences of indebtedness as shall be required by any such Federal agency, except that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State, or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State, or any political subdivision thereof;

(8) May adopt, alter or repeal its own bylaws, rules and regulations governing the manner in which its business may be transacted and in which the powers granted to it may be enjoyed; may provide rules and regulations for the use of its facilities by the public, and may provide for the appointment of such committees, and the functions thereof, as the Authority may deem necessary or expedient in facilitating its business;

(9) May do any and all other acts and things authorized or required to be done by this article, whether or not included in the general powers mentioned in this section;

(10) May do any and all things necessary to accomplish the purposes of this article; and

(11) May promulgate rules and regulations governing the use of or doing business on the Authority's property or facilities, including the adoption of safety standards and insurance coverage or proof of financial responsibility, and may provide for the licensing of or enter into concession and use contracts with persons, firms or corporations using or doing business on such property or facilities and require license or other fees therefor. Licenses or concession and use

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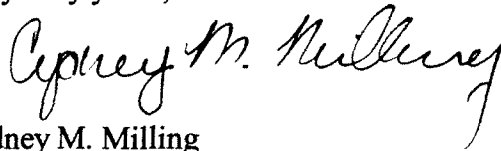
contracts may be revoked after notice and hearing by the Authority for willful breach of or failure to comply with such rules and regulations.

Id. In addition to the powers listed above, section 51-13-780 of the South Carolina Code (1992) affords the PPDA the power to acquire property by purchase or eminent domain. The PPDA may also exchange property, transfer property to the United States government, borrow money, and accept contributions of money or property. S.C. Code Ann. §§ 51-13-790-820 (1992).

Based on the powers given to the PPDA by the Legislature, we believe the PPDA is authorized to exercise the sovereign power of the State. This finding, in addition to the fact that the Legislature created the PPDA via statute and specified its members' terms of office and compensation, and the fact that the members are required to take an oath prior to assuming their positions on the PPDA, we believe a member of the PPDA holds an office for dual office holding purposes.¹

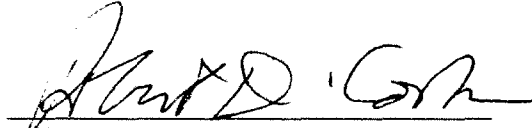
As we stated on numerous occasions, "the constitutional prohibition on dual office holding does not prevent an individual from running for office." Op. S.C. Atty. Gen., April 21, 2006. However, when a dual office holding situation occurs, the law operates automatically to "cure" the problem. Id. When the individual assumes the second office, he or she is deemed by law to have vacated the first office. Id. This process then creates an automatic vacancy the first office. Id. Accordingly, article XVII, section 1A of the South Carolina Constitution does not prohibit a member of the PPDA from running for a position on the Town Council. However, if the member is elected to the Town Council, he automatically vacates his position on the PPDA.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General

¹Note: We believe our conclusion is inapplicable to the Mayor as a member of PPDA due to the fact that he serves as an ex officio member. See Op. S.C. Atty. Gen., April 4, 2005 ("If the position is held ex officio, or "by virtue" of holding a separate office, the dual office holding provision of the state constitution is not violated.").