



HENRY McMASTER
ATTORNEY GENERAL

September 6, 2006

The Honorable John Dervay
Councilmember, City of Tega Cay
114 Palmyra Drive
Tega Cay, South Carolina 29708

Dear Councilman Dervay:

We received your letter requesting an opinion of this Office concerning dual office holding. Per your letter, you informed us you currently serve as a councilmember for the City of Tega Cay and have been approached to serve on the Lake Wylie Marine Commission. You ask "whether or not this appointment would constitute 'Dual Office Holding' as defined in the SC Constitution per Article VI, Section 3." Furthermore, you provided us with the following information:

The Lake Wylie Marine Commission (LWMC) members are appointed by the County Councils of York (SC), Gaston (NC), and Mecklenburg (NC). The LWMC's charter is to regulate public safety and water quality of Lake Wylie. Appointees to the LWMC are not paid and adjacent municipalities to the Lake do not have jurisdiction over the Lake.

Based on our analysis below, we believe both membership on the Tega Cay City Council and service on the Lake Wylie Marine Commission constitute offices for purposes of dual office holding. Therefore, your simultaneous service in both positions is precluded by the constitutional prohibition on dual office holding.

Law/Analysis

Article XVII, section 1A of the South Carolina Constitution (Supp. 2005) prohibits a person from holding "two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public." In order to contravene this provision, a person concurrently must hold two offices having duties that involve the exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 174, S.E. 762, 763 (1907). Furthermore, our courts recognize other relevant considerations in determining whether an individual holds an office, such as, whether a statute, or other such authority, establishes the position, proscribes

Request Letter

the position's duties or salary, or requires qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475,477, 266 S.E.2d 61, 62 (1980).

On numerous occasions, this Office advised that holding a position on a town or city council is an office for dual office holding purposes. Ops. S.C. Atty. Gen., September 14, 2005; September 12, 2003; April 5, 1995. Therefore, we must address whether service on the Lake Wylie Marine Commission ("LWMC") also constitutes an office for dual office holding purposes.

Sections 49-27-10 et seq. of the South Carolina Code (Supp. 2005) pertain to the creation of LWMC. Section 49-27-20 of the South Carolina Code, contained within these provisions, provides Mecklenburg and Gaston Counties (located in North Carolina) and York County with the authority to enter into a joint ordinance to create LWMC. Furthermore, the joint ordinance also confers upon the counties their "powers, duties, and responsibilities . . ." S.C. Code Ann. § 49-27-20. Section 49-27-30 of the South Carolina Code establishes LWMC's governing board, which consists of seven board members, three from Gaston County and two each from Mecklenburg and York Counties. This section also provides that each commissioner serve a three or four-year terms depending on the year and the county as set forth in the statute. S.C. Code Ann. § 49-27-20. Section 49-27-40 refers to the joint ordinance to establish compensation and expense reimbursement for commissioners, consultants, and staff. Section 49-27-60 sets forth the powers and duties of LWMC as follows:

(A) Within the limits of funds available to it and subject to the provisions of this chapter and of any joint ordinance, the commission may:

(1) hire and fix the compensation of permanent and temporary employees and staff as it may consider necessary in carrying out its duties;

(2) contract with consultants for such services as it may require;

(3) contract with the States of North Carolina, South Carolina, or the federal government, or any agency, department, or subdivision of them for property or services as may be provided to or by these agencies and carry out the provisions of these contracts;

(4) contract with persons, firms, and corporations generally as to all matters over which it has a proper concern and carry out the provisions of contracts;

(5) lease, rent, purchase, or otherwise obtain suitable quarters and office space for its employees and staff, and lease, rent, purchase, or otherwise obtain furniture, fixtures, vessels, vehicles, firearms, uniforms, and other supplies and equipment necessary or desirable for carrying out the duties imposed in or under the authority of this chapter;

(6) lease, rent, purchase, construct, otherwise obtain, maintain, operate, repair, and replace, either on its own or in cooperation with other public or private agencies or individuals, any of the following: boat docks, navigation aids, waterway markers, public information signs and notices, and other items of real and personal property designed to enhance public safety in Lake Wylie and its shoreline area, or protection of property in the shoreline area subject, however, to the provisions of Title 50, Code of Laws of South Carolina, 1976, or regulations promulgated under that title as to property within South Carolina and Chapter 113 of the General Statutes of North Carolina and rules promulgated under that chapter as to property within North Carolina.

(B) The commission may accept, receive, and disburse in furtherance of its functions any funds, grants, services, or property made available by the federal government or its agencies or subdivisions, the States of North Carolina or South Carolina or their agencies or subdivisions, or by private and civic sources.

(C) The governing bodies of the three counties may appropriate funds to the commission out of surplus funds or funds derived from nontax sources. They may appropriate funds out of tax revenues and may also levy annually taxes for the payments of such appropriation as a special purpose, in addition to any allowed by the Constitution or in North Carolina as provided by G. S. 153A-149.

(D) The commission is subject to those audit requirements as may be specified in any joint ordinance.

(E) In carrying out its duties and either in addition to or in lieu of exercising various provisions of the above authorization, the commission may, with the agreement of the governing board of the

county concerned, utilize personnel and property of or assign responsibilities to any officer or employee of any of the three counties. Such contribution in kind, if substantial, may, with the agreement of the other two counties, be considered to substitute in whole or in part for the financial contribution required of that county in support of the commission.

(F) Unless otherwise specified by joint ordinance, each of the three counties shall annually contribute an equal financial contribution to the commission in an amount appropriate to support the activities of the commission in carrying out its duties.

In addition to the powers enumerated in section 49-27-60, section 49-27-80 provides LWMC with the authority to "make regulations applicable to Lake Wylie and its shoreline area concerning all matters relating to or affecting the use of Lake Wylie." Moreover, this provision states: "Violation of any regulation of the commission commanding or prohibiting an act is a misdemeanor punishable by a fine not to exceed two hundred dollars or thirty days' imprisonment." S.C. Code Ann. § 49-27-80(B). Section 49-27-90 refers to the joint ordinance for jurisdiction of law enforcement to enforce LWMC's regulations.

In addition to reviewing the statutory authority establishing and governing LWMC, we also reviewed the ordinance passed by York County concerning LWMC. This ordinance is found in section 153.45 of the York County Code of Ordinances. Subsection (B) of this ordinance establishes terms and conditions governing LWMC. We find the following provisions contained in this subsection pertinent to our analysis:

(1) A commissioner may be compensated pursuant to the provisions of the annual budget ordinances of the three counties and by joint resolution of the three counties;

(2) The commission may exercise such powers and duties as are authorized by the General Assemblies;

...

(5) All law enforcement officers with territorial jurisdiction as to any part of Lake Wylie or its shoreline area, within the limitations of their subject matter jurisdiction, have authority of peace officers in enforcing the laws over all of Lake Wylie and its shoreline area;

(6) The commission may hire special officers to patrol and enforce the laws on Lake Wylie and its shoreline area.

York County, S.C., Code of Ordinances § 153.45.

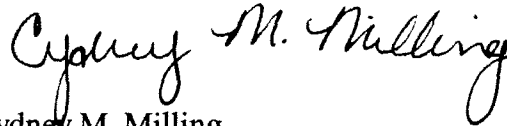
The commissioners' positions are clearly established by statute and the joint ordinance enacted by York County. Section 49-27-30 of the South Carolina Code establishes a term of office for each commissioner. Although you indicate LWMC commissioners do not receive compensation and section 49-27-40, as well as, the ordinance do not specifically state the compensation to be afforded to the commissioners, we find both section 49-27-40 and the ordinance indicate a commissioner may under certain circumstances receive compensation. Neither the statutes nor the ordinance require the commissioners to take an oath. However, the Legislature affords the commissioners numerous powers and duties including the power to hire and fire personnel; the ability to lease, rent, or purchase office space and certain structures on Lake Wylie; and the authority to enter into various contractual relationships with the State of South Carolina, North Carolina, and the federal government. S.C. Code Ann. 49-27-60. Most significantly, the Legislature afforded to the commissioners the power to make regulations applicable to Lake Wylie and its shoreline area. These regulations are enforced through various North Carolina and South Carolina law enforcement officers, the violation of which is punishable as a misdemeanor. In our opinion, these powers and duties involve the exercise of a portion of the sovereign power of the State. See Ops. S.C. Atty. Gen., November 5, 2005 (finding duties and powers afforded to the Darlington County Historical Commission including "various corporate powers and duties; acquisition of land, buildings, and such structures; to employ a secretary and set the remuneration and duties of the secretary; prescribing rules and regulations; and other similar powers, all of which appear to involve an exercise of a portion of the sovereign power of the State."); March 10, 1993 (considering the duties to be exercised by the South Carolina Wildlife and Marine Resources Commission, we concluded, "Clearly, these powers, duties, and responsibilities exercised by the Commission involve an exercise of a portion of the sovereign power of the State, particularly in its role of enforcing the various wildlife and marine laws of the State, selecting officers to do so, investigating game and fish conditions and making reports to the General Assembly, establishing regulations, and the like.").

We acknowledge a question may arise as to whether the South Carolina commissioners are in fact exercising the sovereign power of the State because they are but two members on a seven-member commission dominated by commissioners from North Carolina. However, we do not believe this fact impacts our conclusion. Previous opinions of this Office judge the exercise of sovereign power in the case of a member of a body, not on whether the individual exercises sovereign power, but whether the body to which they are a part exercises sovereign power. See Op. S.C. Atty. Gen., May 9, 1972 (viewing a commission as a whole to determine whether its member exercises some portion of the sovereign power of the State). Because LWMC exercises a portion of the sovereign power of the State, we conclude an individual serving as one of its commissioners

The Honorable John Dervay
Page 6
September 6, 2006

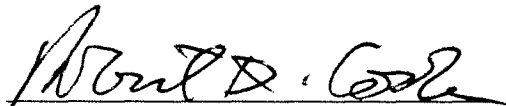
also exercises sovereign power of the State. Therefore, we believe a LWMC commissioner holds an office for dual office holding purposes. Accordingly, article XVII, section 1A of the South Carolina Constitution prohibits your service as both a member of the Tega Cay City Council and as a commissioner on LWMC.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General