

January 29, 2007

Mr. G.E. Muckenfuss
125 Gadsen Street
Summerville, South Carolina 29483

Dear Mr. Muckenfuss:

We understand from your letter that you currently serve as a Commissioner on the South Carolina Forestry Commission (the "Forestry Commission") and have been asked to serve as a member of the Town of Summerville's Zoning Board of Appeals. Thus, you ask for "an opinion from your office as to whether this would constitute 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 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).

In various opinions of this Office, we considered whether members of municipal zoning boards of appeals are office holders for purposes of dual office holding. Ops. S.C. Atty. Gen., November 8, 2006; August 2, 2006 (City of Conway Zoning Board of Appeals); March 16, 1999 (City of North Myrtle Beach Zoning Appeals Board); May 2, 1977 (City of Greenville Zoning Appeals Board). In each of these opinions, we found service on these boards to be an office within the meaning of article XVII, section 1A of the Constitution. Id. Although, we have not particularly dealt with a position on Summerville's Zoning Board of Appeals, in keeping with our prior opinions, we opine that such a position is an office.

Finding a membership on Summerville's Zoning Board of Appeals to be an office, we next must determine whether your current position as a Commissioner on the Forestry Commission is an office for purposes of dual office holding. Chapter 23 of title 48 of the South Carolina Code calls for the establishment of the Forestry Commission. Section 48-23-10 of the South Carolina Code (1987), contained among these provisions, provides:

There is created and established a State Commission of Forestry to consist of nine members, each of whom shall be a resident of this State and shall be appointed by the Governor. Of this commission, two members shall be practical lumbermen, one member shall be a farmer who is a landowner, three members shall be selected and appointed from the public at large, two members shall be appointed by the Governor from the public at large upon the advice and consent of the Senate and the ninth member shall be the President of Clemson University or the Dean of the School of Forestry to serve as his designee on the commission. The members of the commission shall be selected and appointed with reference to their knowledge of and interest in the forests of the State and the products derived therefrom. In making his appointments, the Governor shall make all reasonable effort to provide representation from every geographical section of the State and a reasonable balance between the interests of corporations and individuals.

Section 48-23-20 of the South Carolina Code (1987) instructs that Commissioners are to serve six-year terms, with the exception of the president of Clemson University, who is to serve as long as he serves as Clemson's president. Section 48-23-40 of the South Carolina Code (1987) calls for members of the Forestry Commission to receive reimbursement for their actual expenses with regard to meeting attendance. Section 48-23-80 of the South Carolina Code (1987) sets forth the general powers of the Forestry Commission as follows:

The State Commission of Forestry may acquire, own, sell, lease, exchange, transfer, rent, pledge and mortgage real and personal property and cooperate with all agencies of the Federal Government in all matters pertaining to reforestation and providing employment for the benefit of the public and may also cooperate with any other department of government of this State to accomplish the intent and purposes of this chapter, and any and all powers deemed necessary for the Commission to conform to any act of Congress or to any rule or regulation promulgated by any duly authorized agency of the Federal Government is hereby vested in the Commission.

In addition to section 48-23-80, numerous other provisions in chapter 23 afford specific powers to the Forestry Commission. Section 48-23-50 allows the Forestry Commission to appoint a State Forester. S.C. Code Ann. § 48-23-50 (1987). Section 48-23-85 gives the Forestry Commission the power to negotiate agreements with federal agencies to provide fire, detection, presuppression, and suppression services on federal lands. S.C. Code Ann. § 48-23-85 (1987). Section 48-23-86 instructs the Forestry Commission to assist “other state agencies, utility companies and cooperatives in the clearing of transportation routes, and power and communications” during a forest disaster and to develop a Forest Disaster Plan. S.C. Code Ann. § 48-23-86 (1987).

Section 48-23-70 of the South Carolina Code (Supp. 2005) sets forth certain unlawful acts with regard to State Forestry Commission land and the criminal penalties associated with these acts. Section 48-23-96 of the South Carolina Code (Supp. 2005) permits the Forestry Commission to appoint law enforcement officers to carry out enforcement of the acts described in section 48-23-70. Moreover, section 48-23-95 of the South Carolina Code (Supp. 2005) allows the Forestry Commission to prescribe and prepare a special official summons form to be used by these law enforcement officers in making arrests. Furthermore, in addition to the powers already listed, the Legislature gave the Forestry Commission the authority to grow and sell forest tree seedlings and transplants; acquire land for the production of timber and to use as state forests; borrow money; pledge revenue derived from the sale of timber; accept gifts and donations; disburse funds; sell, exchange, and lease lands; execute deeds, mortgages or contracts; and provide forestry services to landowners in the State. S.C. Code Ann. §§ 48-23-100; 48-23-120; 48-23-130; 48-23-135; 48-23-136; 48-23-140; 48-23-150; 48-23-160; 48-23-170; 48-23-220; 48-23-295 (1987 & Supp. 2005).

According to the provisions cited above, the Commissioners’ positions are established by statute, which specifies their qualifications, compensation, and terms of office. These facts provide considerable support for finding the Commissioners hold offices. Furthermore, and perhaps most important, the statutes proscribe the duties of the Forestry Commission, which include the significant law enforcement authority and oversight, the ability to buy and sell public land, and the capability to raise revenue and expend funds. In our opinion, these duties indicate the Commissioners’ ability to exercise some portion of the sovereign power of the State. Accordingly, we believe the Commissioners’ positions are offices for purposes of dual office holding. Furthermore, while we have not addressed this issue in any recent opinions, our opinion as to the status of the Commissioners’ positions comports with opinions of this office rendered in the late 1950s and 1960s in which we concluded “[t]he duties of the South Carolina State Forestry Commission undoubtedly constitute the members thereof ‘offices’ within the constitutional meaning.” Op. S.C. Atty. Gen., May 28, 1959. See also, Op. S.C. Atty. Gen., September 6, 1960 (“Without question, a member of the State Commission of Forestry holds a ‘public office’ . . .”).

In summary, we find both a position on the Forestry Commission and service on the Summerville Zoning Board of Appeals are offices for purposes of dual office holding. Therefore, we opine that if you assume a position with the Summerville Zoning Board Appeals while

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continuing to serve on the Forestry Commission, you will run afoul of article XVII, section 1A of the South Carolina Constitution.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General