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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

February 18, 2003

The Honorable William C. Mescher
Senator, District No. 44
303 Gressette Building
Columbia, South Carolina 29202

Dear Senator Mescher:

You have posed a number of questions to this Office regarding the legal and constitutional status of the Hunley Commission. Specifically, you have asked the following:

1. Is the Hunley Commission (hereinafter Commission) an office of the Executive Department?

2. Is membership and/or chairmanship on the Commission an "office or position of profit or trust" as that terminology is meant in the dual office holding prohibitions of the Constitution of the State of South Carolina (hereinafter the Constitution)?

3. Is there any provision(s) in the Constitution, which specifically grants any member(s) of the Commission an exemption from the dual office holding prohibitions of the Constitution?

4. Is there any provision(s) in the Constitution, which specifically grants members of the General Assembly an exemption from the dual office holding prohibitions of the Constitution?

5. Would membership and/or chairmanship on the Commission by any member(s) of the South Carolina General Assembly constitute the holding of two office(s) or position(s) of profit or trust?

6. Article 3, Section 24, of the Constitution reads in part "If any member (of the General Assembly) accepts or exercises any of the disqualifying offices or positions he shall vacate his seat." Therefore, if membership on the Commission is an office or position of profit or trust, shouldn't the

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acceptance of membership and/or chairmanship on the Commission by any member(s) of the General Assembly result in such member(s) vacating his/her seat in the General Assembly? Since the Constitution also states that its provisions "shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissory by its own terms," does that not mean that member(s) of the General Assembly would be required to vacate their seat in the General Assembly after they have accepted membership and/or chairmanship on the Commission and would not merely allow them to choose the office or position they would prefer to have?

7. The Separation of Powers section of the Constitution states "In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." By statute, six of the nine members of the Commission are members of the General Assembly and that gives the General Assembly an automatic majority on the Commission. Does that mean that any of the six members of the General Assembly (i.e., persons who are exercising the functions of Legislative Department) have assumed the functions of an office of the Executive Department? Does the General Assembly's majority position on the Commission and/or its chairmanship by a member of the General Assembly violate any portion of the Separation of Powers section(s) of the Constitution?

8. The Commission, which is chaired and controlled by members of the General Assembly, has unequivocally assumed by statute (and/or by actions not intended by statute) functions, which other statute(s) had given to the South Carolina Institute of Archaeology & Anthropology (an office of the Executive Department). Would assumption of those function of SCIAA by the Commission, which is controlled by persons also exercising the functions of the General Assembly, violate any portion of the Separation of Powers section(s) of the Constitution?

9. If the Commission has, either by statute and/or by actions not intended by statute, assumed functions, which by either the Constitution or by statute(s) were functions of the Judicial Department would such assumption violate any portion of the Separation of Powers section(s) of the Constitution?

10. Is the statute that created the Hunley Commission in violation of the Constitution?

Law / Analysis

We begin with the basic premise that in any interpretation of the South Carolina Constitution, those rules relating to the construction of statutes are equally applicable. J.K. Construction, Inc. v. Western Carolina Regional Sewer Authority, 336 S.C. 162, 519 S.E.2d 561 (1999). Most importantly, the intent of the framers and the people who adopted the Constitution is paramount. Neel v. Shealy, 261 S.C. 266, 199 S.E.2d 542 (1973). Moreover, the particular words used in the Constitution should be given their plain and ordinary meaning. Johnson v. Collins Entertainment, 333 S.C. 96, 508 S.E.2d 575 (1998). Interpretation of the Constitution is guided by the "ordinary and popular meaning of the words used ... ." Abbeville School Dist. v. State, 335 S.C. 58, 67, 515 S.E.2d 535, 539-40 (1999) (internal citation omitted). The Court must give clear and ambiguous terms their plain and ordinary meaning without resort to subtle or forced construction either to limit or expand the constitutional provision's operation. J.K. Construction, supra.

Significant also is the fact the South Carolina Supreme Court has often recognized the powers of the General Assembly as plenary, unlike those of the federal Congress which possesses only those powers enumerated in the United States Constitution. As the state Supreme Court emphasized in State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231, 233 (1956),

> [t]he powers of the General Assembly are plenary and not acquired from the constitution and it may enact such legislation as is not expressly or by clear implication prohibited by the constitution.

Accordingly, any act of the General Assembly is presumed valid and constitutional. A legislative act will not be declared void by the courts unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939). Every doubt is resolved in favor of the statute's constitutional validity. Importantly, only a court and not this Office may strike down an act of the General Assembly as unconstitutional; while the Attorney General may, in his opinion, comment upon what is deemed an apparent unconstitutionality, he may not declare the act void. In other words, a statute "must continue to be followed until a court declares otherwise." Op. S.C. Atty. Gen., June 11, 1997.

The Hunley Commission's membership and authority is set forth at S.C. Code Ann. Sec. 54-7-100. This provision states:

[a] committee of nine members 'Hunley Commission' shall be appointed, three of whom must be members of the House of Representatives to be appointed by the Speaker, three of whom must be members of the Senate to be appointed by the President Pro Tempore, and three members to be appointed by the Governor. The committee shall make a study of the law regarding the rights to the salvage of the Hunley and any claim that a person or entity may assert with regard to ownership or control of the vessel. The committee is authorized to negotiate with appropriate representatives of the United States government concerning the recovery, curation, siting, and exhibition of the H. L. Hunley. Provided, inasmuch as actual locations or geographical coordinates of submerged archaeological historic properties are now exempt from disclosure as public records pursuant to Section 54-7-820(A), the geographical coordinates of the Hunley's location, regardless of the custodian, upon receipt from the Navy or receipt otherwise are expressly made exempt from disclosure pursuant to the Freedom of Information Act or any other law and no remedy for the disclosure of such coordinates exists pursuant to the Freedom of Information Act; and provided further, that with respect to the Hunley project, as described herein, the applicable duties and responsibilities contained in Article 5, Chapter 7 of this title shall be vested in the Hunley Commission; and provided further, that with respect to the Hunley project that the Hunley Commission shall be exempt from compliance with the provisions of Chapter 35 of Title 11. However, the committee may not negotiate any agreement which would result in the siting outside South Carolina of any remains, not claimed by direct descendants, found in the Hunley or which would relinquish South Carolina's claim of title to the Hunley unless perpetual siting of the submarine in South Carolina is assured by the federal government in the agreement.

The committee shall make recommendations regarding the appropriate method of preservation of this historic vessel and is also authorized to direct the Attorney General on behalf of South Carolina to take appropriate steps to enforce and protect the rights of the State of South Carolina to the salvage of the Hunley and to defend the State against claims regarding this vessel. The committee shall submit a recommendation for an appropriate site in South Carolina for the permanent display and exhibition of the H. L. Hunley to the General Assembly for its review and approval.

The committee members shall not receive the subsistence, mileage, and per diem as may be provided by law for members of boards, committees, and commissions.

Your ten questions can be categorized into two basic legal issues: first, does the presence of legislators on the Hunley Commission contravene the dual office holding provisions of the South Carolina Constitution; secondly, does the fact that a majority of legislators sit on the Hunley Commission violate the Separation of Powers provision of the state Constitution? Our conclusion with respect to both of these issues is "no." We will address each of these in turn.

Dual Office Holding

Article XVII, Section 1A of the State Constitution provides that "no person may hold two offices of honor or profit at the same time ...," with exceptions specified for an office of the militia, member of a lawfully and regularly organized fire department, constable or notary public. Article III, § 24 of the Constitution addresses members of the General Assembly specifically, and provides that

> [n]o person shall be eligible to a seat in the General Assembly while he holds any office or position of profit or trust under this State, the United States of America, or any of them, or under other power, except officers in the militia and Notaries Public; and if any member shall accept or exercise any of the said disqualifying offices or positions he shall vacate his seat.

For these provisions to be contravened, a person concurrently must hold two offices which 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).

While these constitutional provisions clearly prohibit the simultaneous holding of dual offices, the Supreme Court of South Carolina has concluded that the dual office holding prohibition does not apply when one of the offices is held ex officio. The phrase ex officio is defined as "[f]rom office; by virtue of the office" or "[f]rom office; by virtue of office; officially. A term applied to an authority derived from official character merely, not expressly conferred upon the individual, but rather annexed to the official position." Lobrano v. Police Jury of Parish of Plaquimines, 150 La. 14, 90 So. 423 (1921). In Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E.2d 88 (1947), our Supreme Court commented extensively on ex officio memberships:

> [t]he rule here enforced with respect to double or dual office holding in violation of the constitution is not applicable to those officers upon whom other duties relating to their respective offices are placed by law. A common example is ex officio membership upon a board or commission of the unit of government which the officer serves in his official capacity, and the functions of the board or

> commission are related to the duties of the office. Ex officio means "by virtue of his office." ... Similar observation may be made with respect to ex officio membership upon a governing board, commission or the like of an agency or institution in which the unit of government of the office has only a part or joint ownership or management. In mind as an example is an airport operated by two or more units of government. A governing board of it might be properly created by appointment ex officio of officers of the separate governmental units whose duties of their respective officers have reasonable relation to their functions ex officio.

Ashmore, 211 S.C. at 92. See also, Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967) [Court upheld constitutionality of composition of Budget and Control Board against allegation that Board members are violating dual official holding provision of South Carolina Constitution on ground that the membership is ex officio].

This Office has frequently applied the principles expressed in Ashmore to the situation where, by statute, members of the General Assembly are required to serve on a particular board or commission. For example, in an opinion dated June 5, 1981, we concluded that §§ 1-19-60 and 59-123-40 mandated that certain members of the General Assembly were designated to serve on the State Reorganization Commission and the Board of Trustees of the Medical University of South Carolina. We noted that Ashmore dictated the conclusion that such additional service on those boards and commissions as designated by state law did not created a dual office holding situation. Similarly, in an opinion of April 3, 1979, we advised that a State Senator who also served as a member of the Atlantic States Marine Fisheries Commission pursuant to § 50-7-10 (one of the Commissioners shall be a legislator and member of the Commission on Interstate Cooperation of this State, ex officio, designated by the Commission on Interstate Cooperation) did not contravene the dual office holding provision of the South Carolina Constitution.

Significantly, in Op. S.C. Atty. Gen., Op. No. 77-171 (June 2, 1977), we concluded that four members of the General Assembly could be appointed to the South Carolina Coastal Council ex officio without any dual office holding problem. The relevant statute provided that two of the ex officio members were to be appointed from the House by the Speaker and two from the Senate, appointed respectively by the President of the Senate and Senate Fish, Game and Forestry Committee. Our conclusion as to whether or not a dual office holding violation occurred with respect to those four members was that it did not. We noted that "[o]f course, a member of the General Assembly may be named by the President of the Senate Fish, Game and Forestry Committee or appointed by the Speaker of the House to serve ex officio as members of the Council. The Act so provides." In contrast, we advised that other legislative members who were appointed to the Coastal Council in a non-ex officio capacity, but instead pursuant to the general appointment powers of the legislative delegations or the governing bodies of the affected counties, were not exempted from the dual office holding requirement of the Constitution.

Based upon the foregoing, we are of the opinion that there is no dual office holding problem with respect to the legislative membership on the Hunley Commission. While Section 54-7-100 mandates that six of the nine members of the Hunley Commission must be members of the General Assembly, appointed by the Speaker and President Pro Tempore of the Senate respectively, in our view, this designated membership may be characterized as "additional duties" placed upon these legislators by virtue of their legislative offices. Furthermore, this legislative membership closely comports with Ashmore's test. Unquestionably, the functions of the Hunley Commission "are related to the duties of the office" of members of the General Assembly. Ashmore, supra. Indeed, §54-7-100 provides that the Hunley Commission (which is designated by the statute as a "committee") must "submit a recommendation for an appropriate site in South Carolina for the permanent display and exhibitions of the H. L. Hunley to the General Assembly for its review and approval." In view of the fact that the Commission ultimately must recommend a site for permanent display to the General Assembly, as well as make a recommendation to the General Assembly regarding the method of preservation of the vessel, it is logical that the Legislature prescribed that members of the General Assembly must serve as members of the Hunley Commission. This is little different from a joint legislative committee making a recommendation to the full General Assembly.

Separation of Powers

Your second question is whether the fact that a majority of the Hunley Commission is comprised of members of the General Assembly violates the South Carolina Constitution's Separation of Powers Clause. We conclude that it does not. Art. I, § 8 of the Constitution provides that

> [i]n the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

Art. III, § 1 further provides that "[t]he legislative power of this State shall be vested in .... the General Assembly of the State of South Carolina." Art. IV, § 1 states that "[t]he supreme executive authority of this State shall be vested in a Chief Magistrate, who shall be styled 'the Governor of the State of South Carolina.'"

In State ex rel. McLeod v. McInnis, 278 S.C. 307, 295 S.E.2d 633 (1982), the South Carolina Supreme Court explained the basic purpose served by the Separation of Powers Clause of our Constitution. The Court noted:

> [o]ne of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances. The legislative department makes the laws; the executive department carries the laws into effect; and the judicial department interprets and declares the laws.

278 S.C. at 312. Further, in Tucker v. S.C. Dept. of Highways and Public Transp., 309 S.C. 395, 424 S.E.2d 468, 469 (1992), the Court cautioned that "[b]y constitutional mandate, the legislature may not undertake both to pass laws and to execute them by bestowing upon its own members functions that belong to other branches of government."

The cornerstone South Carolina case involving membership of legislators on executive boards is State ex rel. McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406 (1977). In Edwards, the Court addressed the constitutionality of legislative membership of the Budget and Control Board, comprised of the Governor, the State Treasurer, the Comptroller General, the Chairman of the Senate Finance Committee and the Chairman of the House Ways and Means Committee. Former Attorney General McLeod argued that this inclusion of legislators on the Board, which performs executive functions, unconstitutionally mixes the powers of the legislative and executive branches, and thus violates Article I, § 8 (Separation of Powers). In addition, it was contended that "membership of the two legislators on the Board usurps executive powers" in violation of Article IV, Section 1. This provision states that "the supreme executive authority of this State shall be vested in ... The Governor of South Carolina." Id.

The Court rejected these arguments, relying principally upon its earlier decisions in Elliott v. McNair, supra and Mims v. McNair, 252 S.C. 64, 16 S.E.2d 355 (1969) as well as Harper v. Schooler, 258 S.C. 486, 189 S.E.2d 284 (1972). Elliott had upheld the constitutionality of the Budget and Control Board's composition against the principal attack that the constitutional provision prohibiting dual office holding was violated by the Budget and Control Board's membership; but the Court had also concluded that the Board's membership did not violate the Separation of Powers mandate of the Constitution. Mims and Schooler had revisited the Separation of Powers issue, reaching the same conclusion.

In Edwards, the Court reexamined these earlier holdings and, in doing so, defined the parameters of the Separation of Powers Clause in terms of legislative membership on executive boards and commissions:

> [i]mportant in this case is the fact that the General Assembly has been careful to put the legislative members in a minority position on the Board. The statutory composition of the Board does not represent an attempt to usurp the functions of the executive department, but apparently represents a cooperative effort by making

> available to the executive department the special knowledge and expertise of the chairman of the two finance committees in the fiscal affairs of the State and the legislative process in general. We view the ex officio membership of the legislators on The Board as cooperation with the executive in matters which are related to their function as legislators and not usurpation of the functions of the executive department. The Supreme Court of Kansas recently expressed this view in State ex rel. Schneider v. Barnett, 219 Kan. 285, 547 P.2d 786, 792 as follows:
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> > [t]he separation of powers doctrine does not in all cases prevent individual member members of the legislature from serving on administrative boards or commissions created by legislative enactments. Individual members of the legislature may serve on administrative boards or commissions where such service falls in the realm of cooperation on the part of the legislature and there is no attempt to usurp functions of the executive department of government.

236 S.E.2d at 408. Edwards further distinguished cases such as Bramlette v. Stringer, 186 S.C. 134, 195 S.E. 257, Ashmore, supra and Dean v. Timmerman, 234 S.C. 35, 106 S.E.2d 665. The Court noted that in Bramlett and Dean, "the executive or administrative function was wholly usurped by the legislative branch" and in Ashmore "there was no proper ex officio relationship between the legislative duties and the functions assumed ...." Id. In contrast to those cases, concluded the Court, "the minority legislative representation on the Board in this case was apparently intended to allow the chairman of the two committees to cooperate with the executive branch in action reasonably incidental to their legislative duties. These considerations were lacking in Bramlette, Ashmore and Dean."

Likewise, Edwards rejected any argument that the Budget and Control Board "usurps the executive powers of the Governor." Id. None of the powers of the Governor were limited in any way by the statutory enactments concerning the powers and authority of the Board, the Court reasoned.

Revisiting the Separation of Powers issue in 1987 in Tall Tower, Inc. v. South Carolina Procurement Review Panel, 294 S.C. 225, 363 S.E.2d 683 (1987), the Supreme Court addressed the question of the constitutionality of the composition of the Procurement Review Panel. That Panel is "charged with conducting an administrative review of formal protests of decisions arising from the solicitation and award of contracts pursuant to the Procurement Code." 294 S.C. at 228. The Procurement Panel is comprised of a member of the Budget and Control Board; the chairman, or his designee, of the Procurement Policy Committee; a member of the House, Labor, Commerce and Industry Committee; a member of the Senate Labor, Commerce and Industry Committee; and 5

members appointed by the Governor from the state at large who represent professions governed by the Procurement Code. Appellants argued that the statutory makeup of the Panel "impermissibly authorizes legislative branch members to assume and discharge executive branch duties." Id.

Notwithstanding these contentions, the Court found "the legislative 'overlap' [of the Procurement Panel] constitutionally valid." The Court emphasized that "[e]ach contest involving alleged encroachment of powers must be determined on its own facts." This is necessary, advised the Court, because "'there is tolerated in complex areas of government of necessity from time to time some overlap of authority and some encroachment to a limited degree.'" Referencing Edwards, the Court stated:

> [i]n Edwards, we set forth two major criteria for determining the constitutionality of the membership of a creature of legislative enactment (e.g. the Board) which garnered membership from different branches of government: (1) the legislators should be a numerical minority; and (2) the body should represent a cooperative effort to make available to the executive department the special knowledge and expertise of designated legislators in matters related to their function as legislators. The statutory composition of the Panel comports with both these criteria.

Id.

The Court also stressed that "[w]e necessarily give great weight to legislative discretion in the designation of which members of which committees possess the requisite 'special knowledge and expertise' to increase cooperation between executive and legislative branches." The justices found "no evidence sufficient to denigrate the legislature's conclusion that the House and Senate Labor, Commerce, and Industry Committee members possess the skills to help reach this goal." Id., 294 S.C. at 230. Because "the five executive appointees will always constitute a majority ..." of the Panel and in view of the fact that the legislative members met the "special knowledge" prerequisite, the Court upheld the statute, concluding as follows:

> [t]he degree of involvement here was much closer to the cooperative spirit in matters related to legislative duties envisioned in Edwards than it was to prohibited legislative domination. We discern no usurpation of executive function, and accordingly hold the Panel does not violate Article I, § 8. Id.

The question, in this instance, is whether the Legislature, by designating that a majority of members serving upon the Hunley Commission are legislators, has violated Article I, § 8. We conclude that in § 54-7-100, the General Assembly is not undertaking "to pass laws and execute them by bestowing upon its own members functions that belong to other branches of government." Tucker, supra. Instead, it is our opinion that the Hunley Commission is simply exercising authority

"reasonably incidental to the performance of any legislative duty ...." State ex rel. McLeod v. McInnis, 278 S.C., supra at 316.

The statute creating the Hunley Commission is not an effort on the part of the General Assembly to "usurp the functions of the executive department" of state government. Salvage and preservation of the H. L. Hunley – one of the State's most treasured historic landmarks – is certainly not exclusively an executive function. Far from it, more likely, this is a function primarily within the province of the legislative branch, the South Carolina General Assembly. Thus, cases such as Edwards and Tall Tower are distinguishable.

In Timmons v. S.C. Tricentennial Commission, 254 S.C. 378, 175 S.E.2d 805 (1970), the Supreme Court of South Carolina reviewed authorities in which either Congress or a particular state's legislative branch had enacted legislation regarding a particular historic site. The Court referenced in particular United States v. Gettysburg Electric R. Co., 160 U.S. 668, 16 S.Ct. 427, 429, 40 L.Ed. 576 (1896) in which the condemnation by Congress of property for the preservation of the site of the Battle of Gettysburg was upheld as a public use. Also cited by the Court in Timmons was the case of In re Opinion of the Judges, 297 Mass. 567, 8 N.E.2d 753 (1937) which authorized the condemnation of lands for a memorial to the sailors of Salem, Massachusetts. As the Court stated in Gettysburg Elec. Ry. Co. case,

> [a]ny act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country, and to quicken and strengthen his motives to defend them, and which is germane to, and intimately connected with, and appropriate to, the exercise of some one or all of the powers granted by Congress, must be valid.

160 U.S. at 680.

Likewise, in Stutsman v. State Historical Society of North Dakota, 371 N.W.2d 321 (1985), the North Dakota Supreme Court recognized that the preservation of historic sites is principally a legislative function. In examining a statute delegating certain duties regarding the placement of historic sites on the sites registry, the Court concluded that the statute did not constitute an unlawful delegation of legislative power. While the Court observed that the designation of historic sites is not a power exclusively legislative in nature and, as a result, may be properly delegated to the executive branch so long as sufficient standards are set forth as part of such delegation, the Court nonetheless emphasized that historic preservation is a power which may be exercised exclusively by the Legislature itself. Indeed, the Court recognized, the Legislature had exercised this power prior to 1975. In the Court's view,

> ... the authority to put historical sites on the Registry is a proper delegation of power by the Legislature. The Legislature could, and before 1975, did place sites on the Registry. However, our increasingly complex society and the detailed nature of the issues with which the Legislature must deal makes this a task which the Legislature cannot conveniently perform. The Legislature has conferred upon the Board the power to ascertain, under the law enacted by it, the facts of each particular situation to determine whether a site has historical value. The power granted does not give the Board the authority to make law but pertains only to the execution of a law enacted by the Legislature.

371 N.W.2d at 326. In other words, concluded the Court, the Legislature may reserve to itself, or it may delegate, the authority over the designation of historical sites.

Consistent therewith, is the recognition by our Supreme Court that the Legislature has paramount authority over public ways and public places. Antonakas v. Anderson Chamber of Commerce, 130 S.C. 215, 126 S.E. 35 (1924). In Leonard v. Talbert, 222 S.C. 79, 71 S.E.2d 603 (1952), the Supreme Court reached the same conclusion.

In this instance, the Legislature has retained the ultimate authority of oversight over the salvage, title, preservation and display of the H. L. Hunley unto itself. The General Assembly has assigned to the Hunley Commission, which it deems a "committee," comprised principally of members of the General Assembly, the task of implementing this work day-to-day. Required of the Hunley Commission is the duty to "make recommendations regarding the appropriate method of preservation of this historic vessel" and to "submit a recommendation for an appropriate site in South Carolina for the permanent display and exhibition of the H. L. Hunley to the General Assembly for its review and approval." This assignment of functions the General Assembly can properly make under the Separation of Powers Clause of the Constitution of South Carolina.

In short, we read the statute creating the Hunley Commission, § 54-7-100, as an example of the "cooperative effort" to which the Supreme Court was referring in Edwards. The only difference is that, with respect to the salvage, preservation and siting of the Hunley, the General Assembly has reserved this task to itself, acting through its "committee," the Hunley Commission. Moreover, as the Court recognized in Tall Tower, supra, there is tolerated in complex areas of government of necessity from time to time some overlap of authority and some encroachment to a limited degree." Truly, the salvage, restoration, preservation and display of the Hunley is an inordinately complex undertaking.

As an integral part of this "cooperative effort" between the legislative and executive branches, the General Assembly has included three persons appointed by the Governor to serve as members of the Commission as well as six members from the General Assembly, three appointees

each of the Speaker and President Pro Tem from the House and Senate respectively. As the Supreme Court emphasized in Edwards, we cannot conclude that such an allocation and distribution of representation is unreasonably related to the purpose of the Act or that powers of the legislative or executive branches are unconstitutionally distributed. In our view, rather than usurpation of executive power, the statute represents cooperation between the respective branches. The duty of preserving historic sites or artifacts is primarily legislative in nature and the Legislature has designated its "committee" – the Hunley Commission – to advise and make recommendations to it regarding this preservation and display. The fact that it may have delegated authority in other similar matters to the South Carolina Institute of Archaeology and Anthropology, see, § 54-7-610 et seq., and not so in this instance, is a policy matter for the General Assembly. The creation of the Hunley Commission and the assignment of the referenced duties to it is "reasonably incidental to the performance of any legislative duty." State ex rel. McLeod v. McInnis, supra.

In addition, the fact that the General Assembly maintains ultimate authority over the preservation and display of the Hunley further insures that no Separation of Powers violation has occurred. See, Tucker v. S.C. Dept. of Pub. Transp., supra. Like all other public property, the Legislature, in this instance, possesses ultimate control. Antonakas, supra.

Conclusion

The answer to your questions is summarized as follows:

1. It is the opinion of this Office that membership on the Hunley Commission by members of the General Assembly does not constitute dual office holding under the South Carolina Constitution.

2. It is the further opinion of this Office that the fact that the Hunley Commission is chaired by and that a majority of the Commission is comprised of members of the General Assembly does not contravene Article I, § 8 of the South Carolina Constitution (Separation of Powers Clause). In our opinion, the statute creating the Hunley Commission is constitutional.

Yours very truly,

Henry McMaster

HM/an

cc: The Honorable Larry L. Koon