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March 17, 1995

Emil W. Wald, Esquire  
Attorney for the City of Rock Hill  
Post Office Box 790  
Rock Hill, South Carolina 29731

RE: Informal Opinion

Dear Mr. Wald:

By your letter of February 27, 1995, to Attorney General Condon, you have sought an opinion as to whether an individual may serve simultaneously on the Rock Hill City Council and on the governing board of the Rock Hill Economic Development Corporation (in an ex officio capacity as a member of City Council) without running afoul of the dual office holding prohibitions of the South Carolina Constitution. You had enclosed with your request a number of attachments which explain the creation and history of the Rock Hill Economic Development Corporation, as well as a copy of an opinion which you rendered on December 13, 1994 and subsequent correspondence concerning the issue.

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 officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public. For this provision to be contravened, a person concurrently must hold two public 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 tenure, 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).

This Office has advised on numerous occasions that one who serves on a city council would be considered an office holder for dual office holding purposes. See Ops.

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Att'y Gen. dated February 4, 1994; July 23, 1993; August 14, 1992; and July 24, 1991, to list but a few. Thus, a member of the Rock Hill City Council would most certainly be considered an office holder for dual office holding purposes. It thus remains whether membership on the Rock Hill Economic Development Corporation, particularly in an ex officio capacity, would be considered office holding.

From the enclosures attached to your letter, it appears that the Rock Hill Economic Development Corporation is an eleemosynary corporation, the charter for which was granted by the Secretary of State on February 15, 1983. The purpose of the Corporation is

to further economic development in the City of Rock Hill; to promote and assist in the growth and development of business concerns, including small business concerns within the City of Rock Hill; to promote and assist in the development of residential housing in the City of Rock Hill; and to engage in those activities which are in furtherance of, or related to, the purposes herein stated. The principal objective of the Corporation shall be to benefit the City economically by fostering increased employment opportunities and by expansion of business and industry; thereby, lessening the burdens of government and combating community deterioration. ...

Charter, fourth paragraph. I have not located, through the Index to Local Laws of the South Carolina Code, any legislative enactments relative to the Economic Development Corporation.

The affairs of the Corporation appear to be conducted according to general, applicable corporate law rather than by enabling legislation. You had enclosed a copy of the Corporation's bylaws, which govern such matters as membership on the Board of Directors of the Corporation and Executive Committee, Officers, and other matters. No statute or ordinance of the City Council of Rock Hill has created the Corporation, established qualifications or duties of members of the Board of Directors, provided for an oath or compensation of members, provided a specific tenure for the members, or otherwise provided for the Corporation. Nor does it appear that the members of the Board are exercising a portion of the sovereign power of the State, though the mission of the Corporation certainly has public aspects. It appears that this entity is quite similar to the Charleston Citywide Local Development Corporation, an eleemosynary corporation about which this Office opined on April 12, 1993 (copy enclosed); therein, membership on the Board of Directors was deemed not to be holding an office for dual office holding purposes. I am of the opinion that membership on the Board of Directors of the Rock Hill Economic Development Corporation similarly would not be considered as holding a

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public office for dual office holding purposes, as the factors usually present in an office are lacking in the instant situation.

In so concluding, I observe that this Office has examined membership on a number of boards of directors of eleemosynary corporations, in the context of dual office holding, concluding each time that such membership would not constitute an office for purposes of dual office holding purposes. See, as examples of the numerous opinions, Ops. Att'y Gen. dated April 12, 1993 (in addition to the Charleston Citywide Local Development Corporation, addressed the Community Young Men's Christian Association of Rock Hill, S.C.); January 11, 1991 (addressed membership on the Francis Marion Foundation); October 18, 1988 (addressed the Children's Trust Fund of South Carolina); September 8, 1987 (Horry County Council on Aging); and October 20, 1983 (York County Council on Aging, Inc.). I can discern no reason to treat the Rock Hill Economic Development Corporation any differently.

While I have concluded that membership on the Board of Directors of the Corporation would not constitute an office, I would further advise that even if such were deemed to be an office, the *ex officio* status of the City Council members serving on the Corporation would remove any dual office holding difficulty. The leading South Carolina decision on the issue is Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E.2d 88 (1947); therein, the court stated:

The 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. [Cites omitted.] *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 officer 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. Assuming that the Corporation were created by some law of the General Assembly, so that extra duties were imposed on City Council members in an

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ex officio capacity by operation of law, the ex officio status would operate to prevent membership on the Board of Directors of the Corporation from being an office. However, as observed earlier, the Corporation was not created by act of the legislature but by the incorporators named in the corporate charter. Thus, again, we do not perceive a dual office holding problem in the instant situation.

The foregoing addresses only the constitutional issue of dual office holding and no other issue. I observe that guidance on the ethics issues appears to have been sought from the State Ethics Commission, the entity which provides guidance on ethics issues, or at least that previous opinions of the Ethics Commission have been obtained on ethics issues. I further observe that your enclosures indicate that the Corporation would be subject to the terms of the Freedom of Information Act, as a "public body" as that term is defined by the Act, see S.C. Code Ann. §30-4-20 (1976, as revised), due to the support of the entity by a large amount of public funding. Due to the broad definition of "public body" contained in that Act, it is entirely possible that an entity could be subject to that Act without its members being public officers. Thus, while the Corporation or the members of its Board of Directors may well be subject to various state laws, the members would not be considered office holders.

In conclusion, I am of the opinion that one who would serve on the City Council of the City of Rock Hill and as a member of the Board of Directors of the Rock Hill Economic Development Corporation simultaneously would not be considered as holding dual offices in violation of the South Carolina Constitution.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the opinion of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion. I trust that you will find it responsive to your inquiry and that you will advise me if additional assistance or clarification should be necessary.

With kindest regards, I am

Sincerely,

*Patricia D. Petway*

Patricia D. Petway  
Assistant Attorney General

Enclosure