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ATTORNEY GENERAL

August 19, 2014

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Dear Ms. Turner:

In your letter dated August 4, 2014 and written on behalf of the Horry County Legislative Delegation, you request the opinion of this Office as to whether serving concurrently on the South Carolina State Board for Technical and Comprehensive Education and the Horry County Solid Waste Authority Board of Directors would contravene the dual office holding prohibition set forth in our State's Constitution. Based on the analysis below, we conclude that it would.

### Law/Analysis

#### **1. Dual Office Holding Prohibition**

Article XVII, Section 1A of the South Carolina Constitution states that "[n]o person may hold two offices of honor or profit at the same time . . ." with the exception that individuals serving as officers in the militia, a member of a lawfully and regulated organized fire department, constable, or notary public may hold an additional office. A person not falling into this exception would violate the dual office holding prohibition by concurrently serving in two offices "involving an exercise of some part of the sovereign power [of the State], either small or great, in the performance of which the public is concerned. . . ." *Sanders v. Belue*, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). One court has gone as far as saying that "[t]he most important characteristic of a public office, as distinguished from any other employment, is the fact that the incumbent is entrusted with a part of the sovereign power to exercise some of the functions of government for the benefit of the people." *Clark v. O'Malley*, 169 Md. App. 408, 437, 901 A.2d 279, 296 (Md. Ct. Spec. App. 2006) (quoting *Buchholtz v. Hill*, 178 Mo. 280, 283, 13 A.2d 348, 350 (Md. 1940)). Other authority has held that in determining whether or not a position constitutes as a public office, "[t]he primary, necessary and fundamental test . . . is that it should involve the exercise of some portion of the sovereign power of the state." *Smith v. Jansen*, 85 Misc.2d 81, 84, 379 N.Y.S.2d 254 (N.Y. Spec. Term 1975) (citations omitted). It has been said that the public policy behind the dual office holding prohibition is "to prevent public officials from acting in circumstances in which their personal interests conflicts with the public whose interest they have been elected to represent." 63C Am. Jur. 2d *Public Officers and Employees* § 63 (2014) (citing *Dykeman v. Symond*, 54 A.D.2d 159, 388 N.Y. S.2d 422 (NY 4th Dep't 1976)).

In considering whether a particular position is an office in the constitutional sense, South Carolina courts look to whether “[t]he power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public.” Willis v. Aiken County, 203 S.C. 96, 103, 26 S.E.2d 313, 316 (1943). “The powers conferred and the duties to be discharged with regard to a public office must be defined, directly or impliedly, by the legislature or through legislative authority.” 63C Am Jur. 2d Public Officers and Employees § 5 (2014) (citations omitted). In addition, “[t]he duties must be performed independently and without control of a superior officer, other than the law, unless they are those of an inferior or subordinate officer, created or authorized by the legislature and by it placed under the general control of a superior officer or body.” Id. (citations omitted). Our Supreme Court has recognized that the criteria to be considered in determining whether an individual holds an office for the purpose of dual office holding analysis includes “whether the position was created by the legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond and oath are prescribed or required; whether the one occupying the position is a representative of the sovereign; among others.” State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980). However, it has also been determined that “no single criteria is conclusive” and it is not “necessary that all the characteristics of an officer or officers be present.” Id. (citing 67 C.J.S. Officers § 8(a) (1978)).

## **2. SC State Board for Technical and Comprehensive Education**

Prior opinions of this Office have consistently concluded that serving on the South Carolina State Board for Technical and Comprehensive Education classifies as an office for dual office holding purposes. See Ops. S.C. Att’y Gen., 2006 WL 2849797 (Sept. 21, 2006); 2005 WL 1024598 (April 22, 2005); 2002 WL 1925759 (July 26, 2002); 2001 WL 790258 (May 8, 2001); 1995 WL 233148 (March 22, 1995).<sup>1</sup> While we have opined that there is “little doubt” that membership on the South Carolina State Board for Technical and Comprehensive Education constitutes an office for dual office holding purposes,<sup>2</sup> whether service on the Board of Directors for the Horry County Solid Waste Authority (HCSWA) would also classify as an office has not been previously determined by this Office and is far less certain.

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<sup>1</sup> This conclusion was reached on the basis that the Board for Technical and Comprehensive Education was created by S.C. Code Ann. §§ 59-53-10 *et seq.*; has jurisdiction over all state-supported technical institutions and their programs that are presently operating and those that may be created in the future; has board members who are appointed by the Governor for terms of six years and until their successors are appointed and qualify; is authorized to enter into contracts and promulgate regulations; has the powers of developing, implementing coordinating and operating adequate post-high school vocational, technical and occupational diploma and associate degree courses; can establish criteria for approving and awarding diplomas and degrees, accepting and administering donations of funds, grants and real property from individuals, corporations, foundations and governmental bodies; and can employ an executive director and such other personnel as may be necessary to fulfill its duties and responsibilities. See Op. S.C. Att’y Gen., 2001 WL 790258 (May 8, 2001).

<sup>2</sup> See Op. S.C. Att’y Gen., 2005 WL 1024598 (April 22, 2005) (“[W]e have consistently recognized there can be little doubt that membership on the Board for Technical and Comprehensive Education constitutes an office for dual office holding purposes”).

### **3. The Horry County Solid Waste Authority**

#### **a. Federal and State Solid Waste Management Legislation & Horry County's Response**

In a 2011 Opinion, our Supreme Court provides a comprehensive chronology of state and federal legislation that has been enacted to manage the increasing levels of solid waste across the United States that is both helpful and important to the analysis of this opinion. See Sandlands C & D, LLC v. County of Horry, 394 S.C. 451, 455-59, 716 S.E.2d 280, 282-84 (2011). As the Supreme Court recapitulates in further detail, in 1976 Congress passed the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.* (1976, as amended) to manage solid waste across the nation, address environmental concerns related to waste disposal, and mandate the promulgation of corresponding guidelines and regulations regarding solid waste management by the Environmental Protection Agency. *Id.* at 455-56, 716 S.E.2d at 282 (citing 42 U.S.C. §§ 6901(a), (b); § 6907; § 6942(b); 40 C.F.R. §§ 255.1 *et seq.*; 40 C.F.R. § 256.01 *et seq.*). One of the duties given to the Environmental Protection Agency includes oversight of the creation of state solid waste management plans. See 42 U.S.C. § 6942(b) (1976, as amended).

In response to the RCRA, our General Assembly enacted the South Carolina Solid Waste Policy and Management Act (SWPMA) in 1991, which established the mandatory formation of a state solid waste management plan by the Department of Health and Environmental Control (DHEC) and the requirement that counties prepare an individual solid waste management plan or participate in a regional plan. *Id.* at 456, 716 S.E.2d at 282 (citing S.C. Code Ann. § 44-96-20(A)(14); § 44-96-60; § 44-96-60; § 44-96-80(A)). While the SWPMA encourages regionalism, it explicitly allows single-county solid waste management planning. See S.C. Code Ann. § 44-96-80(G). As a result of the SWPMA, DHEC promulgated regulations which govern *inter alia*, the ““minimum standards for the site selection, design, operation, and closure of all solid waste landfills and structural fill areas.”” *Id.* at 457, 716 S.E.2d at 283 (quoting S.C. Code Ann. Regs. § 61-107.19.I.A.1). Also among DHEC’s authority is the exclusive responsibility to grant permits to create new or expand existing solid waste facilities after a “demonstration of need” is shown and approved. *Id.* (citing S.C. Code Ann. § 44-96-290(E); § 44-96-290(D); S.C. Code Ann. Regs. § 61-107.17 (Supp. 2010) (DON Regulation)). In its ruling the Supreme Court makes clear that while the SWPMA does prohibit counties from issuing permits to create a new or expand existing solid waste management facilities – an exclusive authority left to DHEC – it does not prohibit county regulation of solid waste management, including the ability of counties to regulate the “flow” of solid waste. *Id.* at 463, 716 S.E.2d at 286.

The Fourth Circuit Court of Appeals has summarized information relating to the HCSWA, also pertinent to this opinion, which we have set forth below. See Sandlands C & D, LLC v. County of Horry, 737 F.3d 45, 49 (4th Cir. 2013). The HCSWA was created by Horry County Council on December 21, 1990 to manage Horry County’s solid waste; this entity was deemed necessary because of Horry County’s sixty-mile coastline, large geographic size, seasonal population change, and high water table that make landfill waste disposal expensive and difficult. *Id.* (citing Horry Co., S.C., Ordinance 60-90, § 1, § 1.4 (Dec. 21, 1990)). The HCSWA is incorporated as a nonprofit corporation, and it owns and operates a municipal solid waste landfill, a construction and demolition (C & D) landfill, and a recycling center in Horry County. *Id.* at 49. Although the HCSWA is a separate legal entity, Horry County maintains power over

the HCSWA in multiple ways, including “approving its budget, large capital expenditures, and real estate transactions; appointing its board of directors; wielding approval authority over all bylaw amendments; and requiring that the Horry County Treasurer hold all of its funds and issue its checks.” Id. at 48. Furthermore, the Court noted that the IRS categorizes the HCSWA as a “governmental unit” or “affiliate of a governmental unit” for tax purposes and clarified that for purposes of the case before it, “it is undisputed that the [HC]SWA is a public entity.” Id. While not addressed by the Fourth Circuit, we have discovered the mission of the HCSWA, as published on its website, is “[t]o be an independent, innovative, responsive organization that aggressively provides comprehensive, cost-effective solid waste management in an environmentally sound manner, incorporating state-of-the-art methods and technology, and educating the public on responsible waste management.” Horry County Solid Waste Authority, <http://www.solidwasteauthority.org/about.html> (last visited Aug. 14, 2014).

Also important to this Opinion is Horry County Council’s enactment of the “Flow Control Ordinance” on March 17, 2009, which was the first ordinance in South Carolina to regulate the flow of solid waste. Sandlands C & D, LLC v. County of Horry, 394 S.C. 451, 458, 716 S.E.2d 280, 283-84 (2011) (referencing Horry Co., S.C., Ordinance 02-09 (April 7, 2009, as amended)). The Flow Control Ordinance, as codified in the Horry County Code, states that its purpose is:

to protect the health, safety and general well-being of the citizens of Horry County, enhance and maintain the quality of the environment, conserve natural resources and to prevent water and air pollution by providing for a comprehensive, rational and effective means of regulating the collection and disposal of solid waste generated in Horry County and for the prohibition of the disposal of any waste materials in any matter except as set forth in this chapter.

The management of solid waste is the inherent responsibility of local government, whose authority in this area is derived from its police powers. County-wide collection and disposition of solid waste will allow for more effective and environmentally responsible waste planning and management, and more effective implementation of the county’s integrated solid waste management plan.

Horry Co., S.C., Code Art. II, § 10.5-17(a). To effectuate its purpose, the Flow Control Ordinance establishes a county-wide plan for solid waste disposal through the creation of “designated facilities” defined as “solid waste facilities owned and/or operated by the [HC]SWA and/or publicly owned facilities designated by the [HC]SWA for the acceptance or disposal of solid waste and construction and demolition debris, including, but not limited to, landfills and transfer stations.” Id. § 10.5-18. Furthermore, the Flow Control Ordinance prohibits any person from dumping or depositing acceptable waste generated within the County at any place other than the “designated facilities” owned and/or operated by the HCSWA or designated by the HCSWA. Id. § 10.5-25.

The HCSWA is provided with “management authority” within the Ordinance over the “[a]dministration of acceptable waste disposal,” and is specifically responsible for

- [i]mplement[ing] and administer[ing] the provisions of this law related to:
- a. Determination of the designated facility that shall serve a particular hauler;
  - b. Determination of the types of wastes that shall be handled and processed at each designated facility;
  - c. Designation of those materials that can be separated and collected for recycling at the [HC]SWA facilities;
  - d. Coordination with the Horry County Code Enforcement Department on the implementation and enforcement of this law, and exchange of information with the Horry County Code Enforcement Department related to such implementation and enforcement; [and]
  - e. Promulgation of such internal administrative policies and performances of such other duties and functions determined by the [HC]SWA to be in furtherance of the goals of this law.

Id. at § 10.5.21.

**b. Solid Waste Management: A Local Police Power**

In addition to the legislative history of solid waste management and information pertaining to the HCSWA that the Supreme Court and the Fourth Circuit Court of Appeals provide in the cases cited above, they also make other noteworthy points regarding the HCSWA relevant to our dual office holding analysis. Both cases concern challenges to the Flow Control Ordinance's mandate of the use of HCSWA owned landfills or those approved by the HCSWA brought by private landfill companies suffering financially from the loss of business resulting from the Ordinance. See Sandlands C & D LLC v. County of Horry, 737 F.3d 45 (4th Cir. 2013); Sandlands C & D, LLC v. County of Horry, 394 S.C. 451, 716 S.E.2d 280 (2011). In Sandlands C & D LLC v. County of Horry, 737 F.3d 45, 54 (4th Cir. 2013), the Fourth Circuit Court of Appeals held that the Flow Control Ordinance did not violate the Constitution's Dormant Commerce Clause or the Equal Protection Clause. Of relevance to our opinion, the Court indicated that "[t]rash disposal is a traditional function of local government, so county waste-management ordinances can permissibly distinguish between private business and those controlled by the states, counties, and municipalities. . . . the Horry County Flow Control Ordinance benefits a clearly public facility." Id. at 52 (citations omitted) (internal quotations omitted). Also of importance, the Court noted that the "Flow Control Ordinance's waste management program is a quintessential exercise of local police power, which courts are loathe to overturn by substituting their judgment for that of local elected officials" (citations omitted). Id. at 54.

Secondly, answering a certified question from a United States District Court Judge for the District of South Carolina as to whether the Flow Control Ordinance was preempted by the SWPMA, the Supreme Court held that the Ordinance was validly enacted by the County in furtherance of its police powers. Sandlands C & D, LLC v. County of Horry, 394 S.C. 451, 455, 716 S.E.2d 280, 282 (2011). Specifically, the Court stated that:

[w]hile the SWPMA provides for a statewide management system, it also places the onus on the counties to plan and provide for solid waste collection and disposal at the local level. Horry County's passage of an ordinance regulating the

flow of waste neither frustrates the purpose of the SWPMA, nor interferes with need determination for landfill permitting pursuant to the DON Regulation.

Id. at 471, 716 S.E.2d at 290. The Court also provided insight on the reason why waste management has largely been managed at the local level rather than by the state:

[ ] we find that the field of solid waste management does not require statewide uniformity. While the SWPMA implements a statewide regulatory framework overseen by DHEC, it still provides for flexibility so that the counties can address their individualized solid waste needs. . . . [I]n the solid waste field, statewide uniformity is not necessarily beneficial, given the various solid waste needs specific to each county, which differ in size, geography, and population.

Id. at 467, 716 S.E.2d at 288. Thus, both the Fourth Circuit and Supreme Court make clear that solid waste management is considered a local police power, provides a direct benefit to the public, and is best regulated at the local level.

### **c. Relevant Attorney General Opinions**

From the authorities cited above, we discerned that the HCSWA is a nonprofit corporation, providing a direct benefit to the public through management of the “flow” or administration of acceptable waste and disposal in Horry County, with oversight in some areas by Horry County Council. Using that context, we looked to prior Opinions of this office speaking to these issues, notably nonprofit corporations and members of the board of directions on a waste and recycling board relating to dual office holding, for guidance. Our office has also repeatedly recognized that a member of a nonprofit corporation’s board of directors generally does not classify as an office holder for dual office holding purposes.<sup>3</sup> However, in rare instances, a nonprofit corporation has been held to constitute a state, local, or other governmental agency. See Op. S.C. Att’y Gen., 1996 WL 599391 (Sept. 6, 1996) (discussing relevant decisions on this issue). Our Office has recognized that “courts sometimes look beyond a non-profit corporation’s status as such to determine whether, in reality, the corporation is an ‘alter ego’ of the State.” Id. at \*7. In our September 6, 1996 opinion, we referenced the case of Philadelphia Nat. Bank v. United States, 666 F.2d 834 (3rd Cir. 1981) which held that Temple University, a nonprofit corporation, was not a political subdivision of the State of Pennsylvania. Op. S.C. Att’y Gen., 1996 WL 599391 (Sept. 6, 1996). Applying the “state sovereignty test” the Court found that the University did not possess any of the “three sovereign attributes” being “the power to tax, the power of eminent domain, and the police power” and would therefore not constitute as an alter ego of the state. Philadelphia Nat. Bank, 666 F.2d at 839. In regards to a state’s police

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<sup>3</sup> See, e.g., Op. S.C. Att’y Gen., 2005 WL 2415980 (Sept. 14, 2005) (finding that membership on the board of directors of Rubicon Counseling Center, if indeed a private nonprofit eleemosynary corporation, would not constitute as an office for the purpose of the dual office holding provision); Op. S.C. Att’y Gen., 2005 WL 1983350 (July 5, 2005) (concluding membership on the South Carolina Museum Foundation, a private nonprofit corporation, does not constitute as an office for dual office holding purposes”); Op. S.C. Att’y Gen., 2003 WL 21040140 (Feb. 14, 2003) (opining that membership on the board of directors of the nonprofit Mount Pleasant Space Foundation did not constitute as an office for dual office holding purposes); Op. S.C. Att’y Gen., 2002 WL 31341816 (Sept. 20, 2002) (finding that a member of the governing board of North Greenville College, a private, eleemosynary Christian college, was not an office); Op. S.C. Att’y Gen., 1995 WL 803335 (March 17, 1995) (concluding membership of the board of directors of Rock Hill Economic Development Corporation, an eleemosynary corporation, would not constitute as an office).

power, quoting the United States Supreme Court, the Third Circuit Court of Appeals noted that such power “‘embraces regulations designed to promote the public convenience or the general prosperity as well as regulations designed to promote the public health, the public morals or the public safety.’” Id. at 840 (quoting Chicago, Burlington & Quincy Railway Co. v. Illinois, ex. Rel. Drainage Commissioners, 200 U.S. 561, 592, 26 S. Ct. 341, 349 (1906)). Thus, we take from this authority that while rare, members of a nonprofit corporation can be deemed to be officers in the constitutional sense if the entity is found to be an alter ego of the state possessing some of its sovereign powers.

Our Office has also issued one former opinion regarding members of a county waste and recycling board in the context of dual office holding. See S.C. Op. Att’y Gen., 2004 WL 439320 (Feb. 24, 2004). In that opinion, we addressed service on the Beaufort County Solid Waste and Recycling Board, and, after review of relevant Beaufort County Ordinances<sup>4</sup> (specifically Beaufort Co., S.C., Code § 62-66, stating the purpose statement of the Board,<sup>5</sup> and Beaufort Co., S.C. Code § 62-68, enumerating the powers and duties of the Board<sup>6</sup>), we concluded that such position did not constitute as an office for dual office holding purposes. Id. at \*1. Applying the criteria set forth in State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980), we reached this conclusion on the basis that the Board is “advisory only in nature”; does not exercise “any real sovereign power of the State”; “act[s] as an advisor and consultant to the Beaufort County Council on matters of solid waste and recycling”; and was created by a county ordinance, not by state statute, “to assist County Council in carrying out its statutorily-authorized management role over solid waste disposal and recycling efforts within Beaufort County. S.C. Op. Att’y Gen., 2004 WL 439320 (Feb. 24, 2004). While this opinion is helpful to our analysis, we do not believe it is dispositive as the HCSWA’s management role appears to be vastly different than the advisory nature of the Beaufort County Solid Waste and Recycling Board.

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<sup>4</sup>Beaufort Co., S.C., Ordinance 2007/37 (2007) amended Beaufort Co., S.C., Code Ch. 62, which contained the sections examined S.C. Op. Att’y Gen., 2004 WL 439320 (Feb. 24, 2004). While the pertinent code sections to that opinion have been re-codified, the content has been left unchanged.

<sup>5</sup> The Board’s purpose is now codified in Beaufort Co., S.C., Code § 62-52 (2007), and reads: the county council establishes the solid waste and recycling board ... to advise the council and county staff in determining appropriate levels of public solid waste management services for residential, commercial and industrial taxpayers and governmental entities within the county; to recommend appropriate funding levels for provision of services in the aforementioned sectors; and to support and promote source reduction, recycling and composting and means of diverting and managing the solid waste stream within the county.

<sup>6</sup> The Powers and Duties of the Beaufort County Solid Waste and recycling board are codified in Beaufort Co., SC, Code § 62-54, and are as follows:

(1) Review and recommend to the county council for approval, a comprehensive county solid waste management plan which is in accordance with the state Solid Waste Management and Policy Act of 1991; (2) Develop and submit to the county council for approval service level plans for each of the five unincorporated area solid waste districts; (3) Review and approve the annual solid waste and recycling budgets prepared for each of the nine solid waste districts before submission to the county administrator; and present to the county council comments on the budget recommended by the county administrator; (4) Seek development of public/private partnership and facilitate intergovernmental contracting for provision of services where appropriate; (5) Cooperate with the state department of health and environmental control, office of waste reduction and recycling, as well as other public and private agencies having programs directed toward solid waste management programs; and (6) Review and make recommendations concerning development of any new public or private solid waste management facilities, programs or changes in existing solid waste management facilities or programs to ensure such programs or changes are consistent with the comprehensive solid waste management plan of the county.

**d. Application**

At first glance, it does not appear that serving on the HCSWA's board of directors would qualify as an office for dual office holding purposes. As we noted above, Horry County maintains power over the HCSWA by approving its budget, large capital expenditures, and real estate transactions; appointing its board of directors; wielding approval authority over all bylaw amendments; and requiring that the Horry County Treasurer hold all of its funds and issue its checks. See supra p. 4. It therefore seems the entity is not performing its duties "independently and without control of a superior officer," as is pertinent in dual office holding analysis. See supra p. 2. Moreover, the HCSWA is a creation of county ordinance, rather than state statute. See Horry Co., S.C., Ordinance § 60-90. Horry Co., S.C., Code § 2-75(a)(1)(a) also provides that members of boards of county government are nominated by the resident county council member with the consent of and appointment by county council, and that county government board members serve for staggered four year terms with the possibility of re-appointed for a second consecutive term. While the aforementioned factors suggest service on the Board of Directors of the HCSWA would not constitute as an office, it is our opinion that a closer analysis indicates differently.

In regards to the powers Horry County maintains over the HCSWA, it is our opinion that these are powers the County must retain, or, in other words, are inclusive in enumerated legislative authorities that local governments are statutorily restricted from delegating to other entities. In pertinent part, S.C. Code Ann. § 4-9-30 (1996) states that

each county government within the authority granted by the Constitution and subject to the general law of this State shall have the following enumerated powers which shall be exercised by the respective governing bodies thereof:

....

(2) to acquire real property by purchase or gift, to lease, sell or otherwise dispose of real and personal property . . . ;

....

(5)(a) to . . . make appropriations for functions and operations of the county, including . . . sanitation, [which] include[es] solid waste collection and disposal . . . and to provide for the regulation and enforcement of the above. . . .

....

(6) to establish such agencies, departments, boards, commissions and positions in the county as may be necessary and proper to provide services of local concern for public purposes, to prescribe the functions thereof and to regulate, modify, merge or abolish any such agencies, departments, boards, commissions and positions, except as otherwise provided for in this title . . . ; [and]

....

(8) to provide for an accounting and reporting system whereby funds are received, safely kept, allocated and disbursed. . . .

Relating to the powers set forth in S.C. Code Ann. § 4-9-30 (1996), we have previously opined that whether a county board can delegate its authority depends on the nature of the duty to be performed. Op. S.C. Att'y Gen., 2004 WL 736933 (March 10, 2004) (citing 20 C.J.S., Counties,



§ 89). While duties that are “purely ministerial and executive” which do not “involve the exercise of discretion” may be delegated, “powers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated to a committee of agent.” Id. at \*2. Thus, it is our belief that Horry County Council’s retention of power over the HCSWA in regards to approval of its budget, large capital expenditures, and real estate transactions; appointment of the Board of Directors; approval authority of its bylaw amendments; and requiring that the treasurer hold HCSWA’s funds are duties of discretion and judgment that county council cannot delegate pursuant to S.C. Code Ann. § 4-9-30 (1996). It follows that while the Horry County Council has retained some powers over the HCSWA, the County Council does not control the HCSWA. Stated differently, the “management authority” issued in the Flow Control Ordinance to the HCSWA over administration of acceptable waste is an administrative, ministerial power specific to the HCSWA, not County Council.

Secondly, as previously indicated, solid waste regulation is historically a function of local government due to the need of flexibility among counties to individualize their solid waste needs based on size, geography, and population. See supra pp. 5-6. Due to legislation mandating county or regional regulation of solid waste, Horry County has implemented the “county approach” by regulating solid waste through the creation of the Flow Control Ordinance and giving the HCSWA “management authority” over the administration of acceptable waste disposal. See supra p. 4. We believe it is unquestionable that the functions of the Board of Directors of the HCSWA are exercised for the benefit of the public, as is clearly portrayed by the duties of the HCSWA and further solidified by the Ordinance’s Statement of Purpose as well as the HCSWA’s own Mission Statement. See supra p. 4.

Unlike the Beaufort County Solid Waste Board discussed above, the duties given to the HCSWA are not advisory in nature. See supra p. 7. Instead, exercising “management authority” over Horry County’s acceptable solid waste disposal, it is our opinion that members of the Board of Directors are in some capacity “representatives of the sovereign” whose duties are exercised solely for the benefit of the public. Furthermore, we believe that a court would find the HCSWA’s management of the administration of acceptable waste disposal would constitute as part of local government’s police power in this area being that it concerns the regulation of solid waste disposal that promotes public convenience, general prosperity, and public health for purposes of the “state sovereignty test” that has been imposed by other jurisdictions. See supra pp. 6-7.

While the HCSWA Board of Directors was established by County Council and its duties were created by Ordinance, it can be argued that the powers granted to the HCSWA and to its Board are implicitly derived from legislative authority being that the SWPMA mandates that counties impose an individualized or regional solid waste management plan. See supra p. 3. While not a direct creation of the Legislature, the HCSWA’s control over the administration of acceptable waste disposal in Horry County falls within the state’s mandate of county or regional solid waste management plans. We note again that our Legislature has purposely left regulation of solid waste management to local government because state wide uniformity would not necessarily be beneficial in this area due to geographical and population differences among counties. See supra pp. 5-6. Thus, we would not expect the Legislature to create offices concerning solid waste management.

As a result of this analysis, we believe the HCSWA, through its Board of Directors, is exercising a sovereign power that provides a direct benefit to the public. It follows that although incorporated as a nonprofit corporation, overseen in part by the Horry County Council, and created by local ordinance, the HCSWA is a rare entity acting as an alter ego of the state. As a result, it is our opinion that a Court would find individuals serving on the HCSWA Board of Directors would be considered officers for dual officer holding purposes.

As discussed in previous opinions of this Office, when a dual office situation occurs, the law operates automatically to "cure" the problem. See Op. S.C. Att'y Gen., 2007 WL 1651345 (May 9, 2007) (citations omitted). If an individual holds one office on the date he assumes a second office, assuming both offices fall within the purview of Article XVII, Section 1A of the Constitution (or one of the other applicable constitutional prohibitions against dual office holding), he or she is deemed by law to have vacated the first office held. Id. at \*3. Thus, the law operates automatically to create a vacancy in the first office. Id. However, the individual may continue to perform the duties of the previously held office as a de facto officer, rather than de jure, until a successor is duly selected to complete his term of office or assume his duties if the term of service is indefinite. Id.

#### Conclusion

Based upon a thorough review of the relevant case law, applicable sections of the Horry County Code, Horry County Ordinances, and previous Opinions of this Office, we believe a court would find that service on the Board of Directors of the HCSWA would constitute as an office for dual office holding purposes. Accordingly, we advise that one should not serve concurrently as members of the Board of Directors of the HCSWA and the South Carolina State Board for Technical and Comprehensive Education.

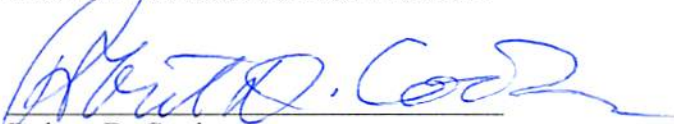
We caution that whether a member of the Board of Directors of the HCSWA would constitute as an office in the constitutional sense is a novel issue for this Office and an extremely close determination. For this reason, clarification is strongly recommended from the judiciary on this complex factual issue. Please note all opinions expressed herein are informative only and should not be construed as official. If we can answer any questions, please do not hesitate to contact our Office.

Sincerely yours,



Anne Marie Crosswell  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General