ALAN WILSON
ATTORNEY GENERAL

April 22, 2022

Brittany L. Ward, Esq.
Deputy County Attorney
Beaufort County
Post Office Drawer 1228
Beaufort, SC 29901-1228

Dear Ms. Ward:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states the following:

> Beaufort County ("County") has received a request from a local municipality ("Town") to enter into an intergovernmental agreement to provide services for animal control. The Town recently adopted the County's animal control ordinance. The County has historically entered into intergovernmental agreements with municipalities located within the County's jurisdiction to provide the same animal control services as being requested by the Town. Contrary to the other municipalities, this Town is located in both Beaufort County and an adjacent County ("Adjacent County").
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> The County is requesting an opinion on certain aspects of entering into an agreement with the Town, specifically:
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> 1) Whether Beaufort County may expend funds in the Town limits that are located in the Adjacent County; and
> 2) Whether the agreement would result in dual-office holding by Beaufort County animal control officers.

Law/Analysis

I. Whether Beaufort County may expend funds in the Town limits that are located in the Adjacent County.

It is this Office's opinion that a court would likely hold a county that agrees to the joint administration of functions with a political subdivision outside its geographic boundaries is permitted to expend its funds in furtherance of that agreement. South Carolina Code section 4-9-41(A) states, "Any county, incorporated municipality, special purpose district, or other political subdivision may provide for the joint administration of any function and exercise of powers as authorized by Section 13 of Article VIII of the South Carolina Constitution." South Carolina Constitution Article VIII, § 13 explicitly addresses the sharing of costs with other political subdivisions.

> (A) Any county, incorporated municipality, or other political subdivision may agree with the State or with any other political subdivision for the joint administration of any function and exercise of powers and the sharing of the costs thereof.
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> (B) Nothing in this Constitution may be construed to prohibit the State or any of its counties, incorporated municipalities, or other political subdivisions from agreeing to share the lawful cost, responsibility, and administration of functions with any one or more governments, whether within or without this State.

S.C. Const. art. VIII, § 13 (emphasis added). Your letter notes that the specific terms of the intragovernmental agreement have not been determined, but we presume the county funds would be spent according to such an agreement. In that case, a court would likely hold this type of expenditure of county funds is consistent with the legislative intent of S.C. Code § 4-9-41(A) and the plain language of Article VIII, § 13 of the South Carolina Constitution.

II. Whether the agreement would result in dual-office holding by Beaufort County animal control officers.

It is unclear whether an agreement for the joint administration of animal control services by county code enforcement officers would result in a violation of the dual-office holding prohibition in the South Carolina Constitution. Your letter states that while the specific terms of the intragovernmental agreement have not been determined, the County is seeking an opinion on "whether a code enforcement officer would be holding dual-offices if employed and commissioned by Beaufort County, and also commissioned in the Adjacent County as a consequence of an intergovernmental agreement."

Article XVII, § 1A of the South Carolina Constitution prohibits a person from holding "two offices of honor or profit at the same time," with certain exceptions which are inapplicable to this analysis. A person violates this provision if he holds two or more public offices which "involv[e] an exercise of some part of the sovereign power, either small or great, in the performance of which

the public is concerned, and which are continuing, and not occasional or intermittent, ..." Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907). In State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980), the South Carolina Supreme Court stated that the relevant factors for determining whether a position would be considered a public office include whether statutes, or other such authority, establish the position, the qualifications for appointment, duties, tenure, require an oath for the position, or otherwise authorize the position to exercise a sovereign power of the State. No single criterion is dispositive and it is not necessary that a position exhibits all the criteria to find that an individual is a public officer. Id.

Your letter refers to this Office's March 27, 2012 opinion which summarized why we have repeatedly concluded county code enforcement officers hold an office of honor or profit.

> The appointment of county code enforcement officers is authorized by S.C. Code Ann. § 4-9-145 (Supp. 1996). Pursuant to this statute, the governing body of the county may appoint and commission as many code enforcement officers as may be necessary for the proper security, general welfare, and convenience of the county. Code enforcement officers are vested with all the powers and duties conferred by law upon constables in addition to the duties imposed upon them by the governing body of the county. Id. These code enforcement officers are authorized to exercise their powers on all private and public property within the county. Id. Code enforcement officers commissioned under this statute are not permitted to perform a custodial arrest. Id. However, they are authorized to issue an ordinance summons to cite a violation of a county ordinance. S.C. Code Ann. § 56-7-80 (Supp. 1996).
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> Based on the foregoing description of the powers of a code enforcement officer, it is apparent that the officer exercises one of the traditional sovereign powers of the State: police power. While code enforcement officers are not given the power to perform a custodial arrest, they are given many of the other powers traditionally accorded to peace officers in this state, including the power to issue an ordinance summons on behalf of the county. Accordingly, I am of the opinion that a code enforcement officer ... would be considered an officer for dual office holding purposes.

Op. S.C. Att'y Gen., 2012 WL 1154553, at 2 (March 27, 2012). It remains this Office's opinion that the position of a county code enforcement officer holds an office for dual-office holding purposes.

Next, turning to the proposed approach to commission Beaufort County's code enforcement officers with a second commission in the adjacent county raises issues concerning whether such a dual commission is permissible under Article XVII, § 1A and the general law of the state. Generally, county code enforcement officers are authorized to exercise their powers on "all private and public property within the county." S.C. Code § 4-9-145. Section 4-9-145 permits

county councils to limit both the scope of authority and "the geographic area for which [county code enforcement officers are] authorized to exercise the authority granted." Id. The statute does not permit a county to expand the territorial jurisdiction of county code enforcement officers in the same way other types of law enforcement officers' jurisdiction can be expanded.[1] Because the municipality at issue straddles the county line, section 4-9-145 would not, by itself, allow Beaufort County's code enforcement officers to exercise their authority in the portion of the municipality beyond the county's geographic limits.

The letter proposes to commission Beaufort County's code enforcement officers for a second time in the Adjacent County as a solution to allow code enforcement operations on both sides of the county line, but it also identifies that this solution might offend the dual-office prohibition. As is discussed above, a county code enforcement officer holds an office for dual-office holding purposes. Therefore, unless there is some exception, holding two separate commissions as a county code enforcement officer would violate the prohibition against dual-office holding. Initially, we look to the exceptions listed in Article XVII, § 1A of the South Carolina Constitution which states, "No person may hold 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." See also S.C. Const. art. VI, § 3 ("No person may hold two offices of honor or profit at the same time. This limitation does not apply to officers in the militia, notaries public, members of lawfully and regularly organized fire departments, constables, or delegates to a constitutional convention."). While section 4-9-145 vests county code enforcement officers with "all the powers and duties conferred by law upon constables," this Office has repeatedly concluded that they do not, in fact, hold constable commissions and, therefore, the exception to the dual-office prohibition for constables is inapplicable. See Op. S.C. Att'y Gen., 2001 WL 265263, 2 (February 9, 2001) ("[T]he fact that a code enforcement officer is not listed as an exception, when other officers so clearly are, indicates that the position should not be viewed as an exception.").

Next, Article VIII, § 13 of the South Carolina Constitution contains an exception to the dual-office holding prohibition which specifically addresses the joint administration of functions between political subdivisions stating, "The prohibitions against dual office holding contained in Article VI of this Constitution do not apply to any elected or appointed official or employee who serves on a regional council of government created under the authority of this section." Because Article VIII, § 13 contains an exception for service on a regional council of government, it is reasonable to interpret this provision is not designed to provide an exception for other unnamed positions. See Hodges v. Rainey, 341 S.C. at 86, 533 S.E.2d at 582 (The rule of statutory construction "'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' ... holds that 'to express or include one thing implies the exclusion of another or the alternative.'").

[1] *See, e.g.*, S.C. Code §§ S.C. Code Ann. § 5-7-30 ("Each municipality of the State ... [has] the authority to provide police protection in contiguous municipalities and in unincorporated areas located not more than three miles from the municipal limits upon the request and agreement of the governing body of such contiguous municipality or the county"); 5-7-110 ("[T]he municipality may contract with any public utility, agency or with any private business to provide police protection beyond the corporate limits.").

Therefore, a court would likely hold Article VIII, § 13 does not provide an exception from the dual-office prohibition for county code enforcement officers who are commissioned in a second county.

Lastly, our state courts have recognized an "ex officio" exception to the dual-office prohibition. The South Carolina Supreme Court explained the exceptions as follows:

> Our jurisprudence has a narrow, yet firmly established, exception which provides that "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." Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 92, 44 S.E.2d 88, 95 (1947) (emphasis added). This exception is commonly referred to as the "ex officio" or "incidental duties" exception.
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> ... The "ex officio" or "incidental duties" exception may be properly invoked only where there is a constitutional nexus in terms of power and responsibilities between the first office and the "ex officio" office. This narrow construction of the "ex officio" or "incidental duties" exception preserves inviolate the central feature of separation of powers in our constitution. S.C. Const. Art. I, § 8.

Segars-Andrews v. Jud. Merit Selection Comm'n, 387 S.C. 109, 125-126, 691 S.E.2d 453, 462 (2010). It may be argued that if the County contracts with the Town to provide code enforcement within the municipal limits under S.C. Code § 4-9-41(A), a second commission in the Adjacent County would be necessary and therefore fall under the "ex officio" exception.[2] However, this Office has not identified an order from our state courts applying the ex officio exception to county code enforcement officers with a second commission. If the County does enter into a contract with the Town to provide animal control services, it may find itself subject to litigation challenging whether its county code enforcement officers can receive a second commission in the Adjacent County. It should also be stated that if a court does not find an exception to the dual-office prohibition applies, the county code enforcement officers may be found to have forfeited their commission in the County.

> When a dual office holding situation occurs, the law operates automatically to "cure" the problem. 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 is deemed by law to have vacated the first office held. Thus, the law operates automatically to create a vacancy in that first office.

[2] S.C. Code § 6-1-20 also authorizes local governments to contract to provide both "joint public facilities and services." The governing body of each local government entering into such an agreement is required to approve and be parties to the agreement.

Op. S.C. Atty. Gen., 2007 WL 1651345 (May 9, 2007).

III. Does the Adjacent County need to be a party to the agreement since the services being provided are in the incorporated area of the Adjacent County?

The letter asks whether the Adjacent County would necessarily need to be a party to the agreement to provide animal control services in the Town. As a general matter, sections 4-9-41 and 6-1-20 only require the political subdivisions that agree to the joint administration of functions and exercise of powers to be parties to such a contract. Therefore, only the County and the Town would need to party to an agreement to provide services within the municipal limits of the Town. Yet, the proposal to seek a second commission in the Adjacent County to extend the County's code enforcement officers' commission suggests, as a practical matter, the Adjacent County would need to be consulted even if it is not a party to such a contract.[3]

Conclusion

As is discussed more fully above, it is this Office's opinion that that a court would likely hold a county that agrees to the joint administration of functions with a political subdivision outside its geographic boundaries is permitted to expend its funds in furtherance of that agreement. See S.C. Const. art. VIII, § 13; S.C. Code § 4-9-41. Further, it is this Office's opinion that a court may well find the proposal that the County's code enforcement officers receive a second commission in an adjacent county violates the dual-office holding prohibition in South Carolina Constitution. See S.C. Const. art. XVII, § 1A.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General

[3] This opinion has not evaluated potential alternative authority allowing political subdivisions to agree to jointly provide services. See S.C. Code §§ 8-12-10 et seq. (interchange of governmental employees); 23-20-30 ("Any county, incorporated municipality, or other political subdivision of this State may enter into mutual aid agreements as may be necessary for the proper and prudent exercise of public safety functions. All agreements must adhere to the requirements contained in Section 23-20-40.").