



ALAN WILSON
ATTORNEY GENERAL

February 23, 2023

Tim McSwain
438 Turkey Farm Road
Blythewood, SC 29016

Dear Mr. McSwain:

You have requested an opinion of this Office regarding whether it would constitute dual office holding for you to serve on the Richland County Conservation Commission and on the Richland Soil and Water Conservation District.

LAW/ANALYSIS

The South Carolina Constitution provides for dual office holding:

[n]o 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 The limitation above set forth does not prohibit any officeholder from being a delegate to a constitutional convention.

S.C. Const, art. XVII § 1A.

The South Carolina Supreme Court explains that an “office” for dual office holding purposes is:

“[o]ne who is charged by law with duties involving 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, is a public officer.” Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). “In considering whether a particular position is an office in the constitutional sense, it must be demonstrated that “[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 (2009).

Segars-Andrews v. Judicial Merit Selection Commission. 387 S.C. 109, 691 S.E.2d 453 (2010).

In State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980), the Court provided some criteria to consider when determining if a position is an office:

Criteria to be considered . . . include 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.

While “we have advised on numerous occasions that one who serves as a soil and water conservation commissioner would hold an office for dual office holding purposes,”¹ we have not previously considered whether a Commissioner on the Richland County Conservation Commission holds a public office. The Richland County Conservation Commission (“Commission”) is created by ordinance. Richland County, S.C. Code of Ordinances § 2-332(h)(1) (2017). The Commission consists of eleven members who are appointed by a member of the Richland County Council (“County Council”) to represent their council district. Richland County, S.C. Code of Ordinances § 2-332(h)(2)(a) (2017). The term of a member of the Commission is coterminous with the term of the appointing council member. *Id.* If a vacancy occurs on County Council, the Commissioner appointed by the vacating County Council member shall complete his/her term. *Id.* Commissioners serve without pay but may be reimbursed for travel and other incidental expenses. Richland County, S.C. Code of Ordinances § 2-332(h)(2)(c) (2017).

The Commission prepares and submits annually to the County Council a plan for the protection of significant resources in the county. Richland County, S.C. Code of Ordinances § 2-332(h)(7)(a) (2017). The plan includes a list of resources which are recommended to the County Council for acquisition, lease, or development. *Id.* In the process of developing the plan, the Commission is authorized to identify, acquire, lease, maintain, preserve and develop county resources in conjunction with other agencies, entities, and individuals. Richland County, S.C. Code of Ordinances § 2-332(h)(7)(f) (2017).

¹ See Op. S.C. Atty. Gen., 2015 WL 3429144 (May 19, 2015).

County Council can adopt the list of significant resources submitted by the Commission, in whole or in part, and can add or delete resources. Richland County, S.C. Code of Ordinances § 2-332(h)(7)(d) (2017). Neither County Council nor the Commission can exercise the power of eminent domain to acquire property recommended for protection by the Commission. Richland County, S.C. Code of Ordinances § 2-332(h)(7)(c) (2017).

The Commission reviews applications for conservation easements and prepares a report for County Council. Richland County, S.C. Code of Ordinances § 2-332(h)(8)(a),(b) (2017). County Council decides if the conservation easement should be accepted or endorsed based on whether it furthers a significant public benefit. Richland County, S.C. Code of Ordinances § 2-332(h)(8)(c) (2017).

The Commission is required to adopt bylaws and rules of procedure regarding parliamentary procedure which are consistent with Robert's Rules of Order, South Carolina law, and the Richland County Code of Ordinances. Richland County, S.C. Code of Ordinances § 2-332(h)(3) (2017). The Commission must maintain records and minutes of its proceedings and meetings. Id.

The Richland County Conservation Commission Fund ("Fund") is established by ordinance to fund projects and activities of the Commission which have been approved by County Council. Richland County, S.C. Code of Ordinances § 2-332(h)(9)(a) (2017). The Fund consists of "all funds appropriated by the Richland County Council, all gifts of land, cash or other assets made to the county for the purposes and objectives stated herein, and all other grants or other public or private revenues or gifts, with interest thereon, for such purposes." Id. All property used for the Fund must be transferred to the county by the person owning title. Richland County, S.C. Code of Ordinances § 2-332(h)(9)(c) (2017). "All real property used, acquired or leased for commission purposes" must be "owned, purchased, leased, held, conveyed, or disposed of in the name of the county by the Richland County Council." Id.

In our opinion, members of the Commission do not hold an office for dual office holding purposes. Although the position meets much of the criteria for an office, the Commission does not appear to be exercising the sovereign power of the State. It performs administrative duties and acts in an advisory role to County Council. County Council decides if county resources are protected and if a conservation easement is accepted. County Council controls the Richland County Conservation Commission Fund. It must approve the major projects funded. It accepts gifts on behalf of the Fund. All property used for the Fund must be transferred to the county, and County Council owns, purchases, leases, holds, conveys, and disposes of the real property. Therefore, we believe that an individual can serve on the Richland County Conservation Commission and on the Richland Soil and Water Conservation District without violating the dual office holding prohibition of the South Carolina Constitution.

However, we must also consider whether a conflict of interest exists. We have previously stated regarding conflicts of interest:

As a general matter, all public officials are expected to act in the best interest of the public in the performance of their duties without any interference from conflicting or competing interest. Our Supreme Court has recognized that “every public officer is bound to perform the duties of his office honestly, faithfully and to the best of his ability, in a manner so as to be above suspicion of irregularity, and to act primarily for the benefit of the public.” O’Shields v. Caldwell, 207 S.C. 194, 35 S.E.2d 184 (1945). Public employees must be above reproach and avoid even the appearance of a conflict of interest in carrying out their duties. See Op. S.C. Atty. Gen. Dated July 25, 2002.

Op. S.C. Atty. Gen., 2003 WL 21043505 (April 3, 2003).

Section 48-9-1310 of the Soil and Water Conservation Districts Law² suggests that representing the interests of both a soil and water conservation district (“district”) and a county or municipality constitutes a conflict of interest. The statute permits the commissioners of a district to “invite the legislative body of any municipality or county located near the territory comprised within the district to designate a representative to advise and consult with the commissioners of the district on all questions of program and policy which may affect the property, water supply or other interests of such municipality or county.” S.C. Code Ann. § 48-9-1310 (1976 Code, as amended).

Section 48-9-1310 indicates that a district and a county or municipality have conflicting or competing interests and provides for their separate representation. Because of the likely conflict of interest, we do not believe that an individual should serve on both the Richland County Conservation Commission and the Richland Soil and Water Conservation District.³ Each must have its own commissioners to act in its best interests.

CONCLUSION

It is our opinion that it would not constitute dual office holding for an individual to serve on the Richland County Conservation Commission and on the Richland Soil and Water Conservation District. However, a conflict of interest most likely exists if an individual serves in both positions.

² S.C. Code Ann. § 48-9-10 et seq (1976 Code, as amended).

³ We are aware that Richland County provides county employees as staff for the Richland County Conservation Commission and the Richland Soil and Water Conservation District and that some of the staff are shared. This does not affect or change our opinion.

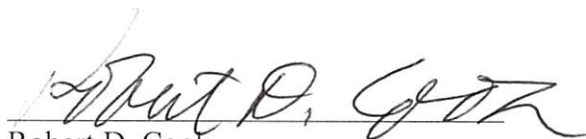
Tim McSwain
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Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General