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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

August 24, 2005

The Honorable Jane C. Singh
Chairman, Ellore Water System
Drawer 170
Ellore, South Carolina 29047-0170

Dear Ms. Singh:

In a letter to this office you indicated that you are an elected member of the Ellore Water System, a board of commissioners of public works. In such capacity, you have raised several questions regarding the authority and responsibilities of a board of commissioners of public works.

In responding to your questions, I would note that this office has issued numerous opinions regarding commissioners of public works and a review of such opinions is helpful in responding to your questions. However, consistent with an opinion of this office regarding the commissioners of public works system dated May 23, 1973, "...the law in this area is far from settled and has been the subject of heated litigation. Thus, it is impossible to reach absolutely definitive answers to your questions."

A prior opinion of this office dated September 26, 2002 provided background information on the Ellore Water Systems Board of Commissioners of Public Works ("the Board").¹ Such

¹The referenced 2002 opinion noted that in municipalities in which there are no boards of commissioners of public works, the powers and responsibilities of controlling the public works generally rests with the town council. See: S.C. Code Ann. § 5-31-230. Such provision lists the municipalities which do not have a board of commissioners of public works. However, Ellore is not included in such list inasmuch as it does have such a board. An opinion of this office dated September 8, 1969 indicated that any dissolution of a commission of public works could only be accomplished by statutory provision. See also Op. Atty. Gen. dated February 10, 1959 (legal step necessary to place commissioners of public works under the jurisdiction of the city council by dissolving the said commission can only be accomplished by legislation in the General Assembly

(continued...)

Ronald Yella

opinion states that:

The Town of Elloree's Board of Public Works was created by special election on October 29, 1924. Afterwards, the construction of a sewer system was authorized as an extension of the Waterworks System. Pursuant to then Section 59-364 of the Code of Laws of South Carolina 1962 (now S.C. Code Ann. § 6-21-40), by an Ordinance adopted by Council on June 15, 1964, the Waterworks System and the Sewer System were combined into a single system as the Water System of the Town of Elloree. The Commission operates pursuant to Title 5 Chapter 31 of the South Carolina Code of Laws as amended.²

S.C. Code Ann. §§ 5-31-210 et seq. provide for a commissioner of public works system in various municipalities in this State. A board of commissioners of public works derives its authority in part from Section 5-31-250, which states:

The board of commissioners of public works of any city or town may purchase, build or contract for building any waterworks or electric light plant authorized under Article 7 of this chapter and may operate them and shall have full control and management of them. It may supply and furnish water to citizens of the city or town and also electric, gas or other light and may require payment of such rates, tolls and charges as it may establish for the use of water and light.

An opinion of this office dated February 25, 1963 concluded that pursuant to the provision now codified as Section 5-31-250, a board of commissioners of public works "...has the authority to charge such rates and charges as they may establish. Of course, the authority to charge rates implies that the rates would be reasonable." As to a board's relationship to a city or town council, Section 5-31-260 states that "(n)o board of commissioners of public works may incur any indebtedness without the concurrence of the city or town council."

¹(...continued)
providing for such).

²That opinion dealt with the question of whether the Town Council can prohibit the Water Commission Board from instituting new water and sewer rates. The opinion concluded that the Board

...has the sole responsibility for determining the rates to be charged for its services and need not obtain the Town Council's approval or concurrence before setting rates...(Moreover)...the Town Council may not prohibit the Commission from instituting new water and sewer rates, nor may the Town Council authorize an agent to contract for lower rates than those set by the Commission for its services.

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An opinion of this office dated September 27, 1976 cited the provision now codified as Section 5-31-250 as indicating that a water commission is the municipal authority responsible for the full control and management of a municipal waterworks. This office has also consistently indicated in prior opinions that the commissioners of public works have all powers necessarily incident to the operation and management of a water works system. See Ops. Atty. Gen. dated September 26, 2002, May 23, 1973, October 23, 1961 and August 19, 1959. An opinion dated February 10, 1959 particularly determined that by the provisions of Section 5-31-250, commissioners of public works "...are vested with control and management of public utilities under their jurisdiction...This power is exclusive."

In Town of Myrtle Beach v. Suber, 225 S.C. 201, 81 S.E.2d 352 (1954), the Supreme Court stated that commissioners of public works had the independent authority to sell miscellaneous property no longer needed for the operation of the water works system. In that decision, the Court also stated that Section 5-31-250 "...conferred upon the commissioners of public works all powers necessarily incident to the operation and management of the water works and that the city council was not vested with any authority or power in the management thereof." 81 S.E.2d at 355. An opinion of this office dated July 16, 1966 citing Section 5-31-250 similarly concluded that "...full control and management of a municipal system is in a Board of Commissioners of Public Works." As stated by an opinion of this office dated May 5, 1966,

a Board of Commissioners of Public Works and the governing body of a municipality are separate and distinct bodies...(Furthermore)...that the Board of Commissioners is given the full control and management of the municipal waterworks system, including the power to fix rates and determine the fiscal policies in connection therewith...(A)...city council...has no authority or power in the management of a municipal waterworks.

An opinion of this office dated June 1, 1973 acknowledged that consistent with Section 5-31-260, a water works commission must have the concurrence of a city council before incurring indebtedness. That opinion was responsive to the question of whether a water works commission was authorized to mortgage a water works without the approval of the city council.

As to the relationship between a board of commissioners of public works and a municipality, a review of several decisions of the State Supreme Court is helpful. In City of Union v. Sartor, 91 S.C. 248, 74 S.E. 496, 497-498 (1912), the Court had been called upon to determine the legal status and powers of commissioners of public works and their relationship to a municipality and a city council. In that decision, the Court declared that

(t)he powers conferred upon the commissioners of public works were intended to make them a part of the municipal government...(Nevertheless)...the commissioners of public works...(are)...an independent corporation which is not under the supervision nor subject to the control of the city...but deriving its powers directly

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from the statute.

In its decision in Spartanburg v. Blalock, 223 S.C. 252, 75 S.E.2d 361, 364 (1953), the Court cited its decision in City of Union, supra and concluded

(1) that the city council is not the municipality, but merely an agency of the municipality, having no authority except that conferred by the statute, either expressly or by necessary implication; (2) that the city council is not expressly given any authority or power in the management of municipal waterworks, and no such authority can be implied because the General Assembly denied the city council such power by conferring it on the board of commissioners of public works; (3) that the board of commissioners is not in any sense a separate corporation but a mere municipal agency, through whose management and control the General Assembly has required that the municipality shall operate and manage its waterworks; (4) that the power conferred by the statute on the board of commissioners includes all powers necessarily incident to the operation and management of the waterworks, including the power to fix rates for the use of water, which must be reasonable and free from unfair discrimination; and (5) that the manifest purpose of the statutory requirement that the board of commissioners shall make a full statement monthly to the city council of receipts and disbursements was not only to provide a safeguard against official misconduct, but to enable the city council to scrutinize the account and object to excessive charges.

The Court further noted that "(u)nder the construction...in the Sartor case, it would seem clear that the full control and management of the waterworks system...including the power to fix rates and to generally determine the fiscal policies to be followed, was vested in the Board of Commissioners." 75 S.E.2d at 365. The Court also acknowledged that "...the power to fix rates, dispose of surplus revenue and otherwise control and direct the fiscal policies of...(a)...waterworks system...is vested in the Commissioners of Public Works...." 75 S.E.2d at 368.

An opinion of this office dated August 19, 1959 dealt with the question of whether a Board of Commissioners could take unilateral action to extend a water and sewer system beyond the corporate limits. That opinion concluded that

(a)s a general statement, ...(a)...town council has no control over the lawful activities of the board of commissioners...(Instead),...the board has all the powers necessarily incident to operation and management of the town water works system and is the proper body to perform under those powers...and to determine fiscal policies...While the board of commissioners of public works is an agency of the municipality...it is not an agency of the town council...Both the town council and the board of commissioners are officials of the town,...agencies of the town and not of each other, and should be cooperative agencies in constructing or expanding a water

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system...(Furthermore)...the board of commissioners is an agency of the municipality and are the proper officials for purposes within...(present Section 5-31-1910)...to enter into contracts for extension of the water system to contiguous areas beyond the corporate limits. The town council, however, is charged also with the responsibility of approving such extension in accordance with the best interests of the municipality, and no such contract should be entered into except upon approval of the town council.

Another opinion of this office dated June 14, 1968 similarly determined that a board of commissioners is "...not an independent or separate corporation, but merely an agency of the municipality with certain duties to perform without interference...."

As to the specific questions that you have raised, you first asked whether the Ellore Water Systems Board is a branch of the town or a separate entity. You also questioned the relationship between the elected commissioners of public works and the elected officials of the town particularly questioning where do the elected commissioners stand as to the organizational makeup of the town. In Simmons v. City of Charleston, 181 S.C. 353, 187 S.E. 545, 546 (1936), the Supreme Court recognized that a commission of public works "...is but an agency of the city or town...." As noted, the prior opinion of this office dated August 19, 1959 had concluded that the commissioners of public works are "agents of the municipality". That opinion also stated that

(w)hile the board of commissioners of public works is an agency of the municipality...it is not an agency of the town council...(It may be stated that both the Town Council and the Board of Commissioners are officials of the Town..., agencies of the town and not of each other, and should be cooperative agencies in constructing or expanding a water works system....

See also Hyams v. Carroll, 146 S.C. 470, 144 S.E. 153, 154 (1928) ("the board of commissioners of public works are but agents of the municipality").

An opinion of this office dated June 14, 1968 citing Spartanburg v. Blalock, supra, stated that "...it is difficult to see how the commissioners can be a separate public agency when that decision specifically holds that they are a municipal agency." An opinion of this office dated May 5, 1966 determined that "...a Board of Commissioners of Public Works and the governing body of a municipality are separate and distinct bodies; that the Board of Commissioners is given the full control and management of the municipal waterworks system, including the power to fix rates and determine the fiscal policies in connection therewith; that a city council...has no authority or power in the management of a municipal waterworks."

As to your questions, consistent with the referenced prior opinions of this office and the referenced court decisions, in my opinion, inasmuch as the board of commissioners is a separate municipal agency, it should be considered to be a branch of the town, not a totally separate entity.

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As to the relationship between the board and the council, as noted in the prior opinions referenced above, the council is given no authority as to the management of municipal water works as that responsibility is solely that of the board of commissioners. As set forth by Section 5-31-250, a board of commissioners of public works "...may purchase, build or contract for building...(a waterworks system)...and shall have full control and management of them." As further noted in Spartanburg v. Blalock, supra, a commission for public works is authorized to fix rates, dispose of surplus revenue and control and direct the waterworks system fiscal policies.

You next questioned who owns the infrastructure of the water system. You acknowledged that the commission for public works must have the town's permission before incurring debt but noted that the commission for public works makes the payments on any debt using funds generated by its customers and maintains all infrastructure of the system. Again, as noted, Section 5-31-250 provides that a board of commissioners of public works "may purchase, build or contract for building" waterworks and "may operate them and shall have full control and management of them." No reference, however, is made to the commissioners of public works "owning" the waterworks system.

In my opinion, consistent with the answer set forth to question one indicating that the board of commissioners is a municipal agency, the board itself would not "own" the infrastructure of any water system. Indeed, an opinion of this office dated January 23, 1968 noted that "...the real owner of a waterworks system operated and managed by a commission of public works is the city...." Therefore, in my opinion, the municipality should be considered the "owner" of the municipality's water system administered by the board of commissioners, a separate municipal agency.

You also asked whether the commission for public works is legally obligated to be a source of revenue for the town. You further questioned whether the town may refuse permission for the commission for public works to incur debt if the commission will not contribute money to the town's coffers. The previously referenced opinion of this office dated May 23, 1973 determined that a city could not acquire the funds of a water works commission without the commission's approval or an act of the General Assembly. That opinion commented that "it therefore follows that the funds of the Commission could not be acquired without approval...(of the Commission)...since...(the provision now codified as Section 5-31-250)...vests the board of commissioners of public works with 'the full control and management' of the fiscal affairs of the water works system." In City of Spartanburg, supra, the Court recognized the authority of the Commission of Public Works to "...dispose of surplus revenue and otherwise control and direct the fiscal policies of the waterworks system." 75 S.E.2d at 368. That decision also recognized that nothing prohibits the Commissioners of Public Works "...from maintaining other accounts or establishing on their books a surplus revenue." Ibid.

Consistent with such, in my opinion, the revenues generated by a water works system are under the control and management of the commissioners of public works. However, while under such control and management, in my opinion, they still remain municipal funds and any surplus

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funds, beyond the needs of the commission of public works, could be construed a revenue source for the town. Indeed, an opinion of this office dated January 23, 1968 determined that "(e)xcess revenues from operation of...(a waterworks)...system...may, in the opinion of this office, be used for any legal municipal purposes...."

You next asked whether the Ellore Water System has the authority to sign contracts or similar agreements that pertain to the operation of the water system of the town. The prior opinion of this office dated August 19, 1959 referenced the provisions of the statute now codified as Section 5-31-250 in concluding that the board of commissioners may contract on their own authority. Again, that statute provides that "(t)he board of commissioners of public works of any city or town may purchase, build or contract for building any waterworks...and may operate them and shall have full control and management of them." As referenced in decision in City of Spartanburg, supra citing City of Union v. Sartor, "...the city council is not expressly given any authority or power in the management of municipal waterworks...." 75 S.E.2d at 364. In my opinion, therefore, the Ellore Water System has the authority to sign contracts or agreements pertaining to that water system. However, as noted, the referenced 1959 opinion further held that

As to the question of whether the board of commissioners may take unilateral action to extend the water and sewer system beyond the corporate limits,...the board of commissioners is an agency of the municipality and is the proper official for purposes of...(S.C. Code Ann. § 5-31-1910 which authorizes cities and towns to furnish water beyond city limits)...to enter into contracts for extension of the water system to contiguous areas beyond the corporate limits. The town council, however, is charged also with the responsibility of approving such an extension in accordance with the best interests of the municipality, and no such contract should be entered into except upon approval of the town council.

In your next question you asked whether if property is purchased with commission for public works funds (funds generated by customers of the commission for public works), should the property be in the name of the commission or the town. You indicated that the mayor and council are insisting that all property be in the town's name, even property paid for by the commission. As noted above, in the previously referenced opinion of this office dated January 23, 1968 it was determined that the real owner of a waterworks system operated and managed by a commission of public works is the city inasmuch as the commission is a mere agency of the city. As a result, in my opinion, the property should be in the name of the municipality.

In your final question you asked if the commissioners for public works receives financial compensation, who should make that payment. A prior opinion of this office dated April 7, 1997 referenced that

The only statutory provision relative to payment of salary to commissioners of public works is apparently Section 5-31-220 which contains provisions for commissions of

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public works in cities of 50,000 or more inhabitants. That section provides in pertinent part, "(i)n such cities such commissioners of public works shall serve without compensation." In an opinion dated April 21, 1976, this office concluded that a city could not provide salaries to a commission of public works established under Section 5-31-220. However, because the population...(of the city at issue in the opinion)...is less than 50,000 inhabitants, this Section 5-31-220 would not be applicable....A well established rule of statutory construction is "expressio unius est exclusio alterius" which means that "the enumeration of particular things excludes the idea of something else not mentioned."...Applying this rule of statutory construction to the statutes relative to the compensation of commissioners of public works, the fact that commissioners of public works in cities of 50,000 or more inhabitants are statutorily prohibited from receiving compensation implies that commissioners in cities of less than 50,000 inhabitants are allowed to be compensated.

That opinion determined that a commission for public works would not be prohibited from establishing the salaries of its members. See also: Op. Atty. Gen. dated April 3, 1990 ("...the Town of Mount Pleasant Commissioners of Public Works may establish a salary for themselves or increase such salary."). As to your specific question regarding who makes the payment of any compensation to the commissioners of public works, inasmuch as the commission is a municipal agency, it is my opinion that any compensation should come from the municipality.

If there are any questions, please advise.

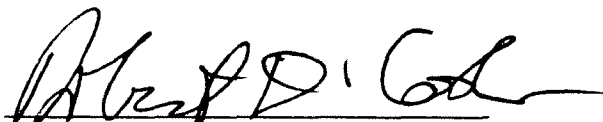
Sincerely,



Charles H. Richardson

Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



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