



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

May 28, 2002

A. G. Solomons, Jr., Esquire
Hampton County Attorney
P. O. Box 969
Estill, South Carolina 29918

Dear Mr. Solomons

You note that "pursuant to 4-10-300 et seq. S.C. Code of Laws, as amended, Hampton County is seeking to conduct a referendum on the issue of whether to establish a \$.01 sales tax for capital projects in the County." You state that "§ 4-10-320 requires that a commission be created to 'consider proposals for funding capital projects within the county area' and also to formulate the question which shall appear on the ballot for the referendum. § 4-10-320(a) and (b)(1) set forth that the governing body of the county 'shall appoint three members of the commission.'"

You state that "the question for consideration is whether elected officials may be appointed by the governing body of the county to serve on the commission." Specifically, your concern is whether the County Auditor and/or a mayor of a municipality within the county may be appointed to the § 4-10-320 by the governing body of the County. Without violating the prohibition against dual office holding proscribed in Article XVII, Section 1A of the South Carolina Constitution or a conflict of interest issue.

Law / Analysis

Article XVII, § 1A of the South Carolina Constitution provides that "... no person shall hold two offices of honor or profit at the same time." For this provision to be contravened, a person concurrently must hold two 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 both the positions of mayor as well as auditor are considered offices for dual office holding purposes. See, Op. Atty. Gen., dated September 21, 1989 and opinions cited therein (for position of mayor). See, Op. Atty. Gen., June 21, 1993; March 31, 1980 (for position of County Auditor). Thus, the question is whether a member of

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the Capital Project Sales Tax Commission constitutes an office for dual office holding purposes. This Office has apparently never considered this question.

The Capital Project Sales Tax Commission was created by Act No. 138 of 1997 and is part of the Capital Project Sales Tax Act, codified at § 4-10-300 et seq. Section 4-10-310 provides that

[s]ubject to the requirements of this article, the county governing body may impose a one percent sales and use tax by ordinance, subject to a referendum, within the county area for a specific purpose or purposes and for a limited amount of time to collect a limited amount of money.

Pursuant to § 4-10-320, the county governing body is authorized to create the Capital Projects Sales Tax Commission, consisting of six members. Three members of the Commission are appointed by the governing body of the County and three members appointed by the municipalities in the county.

The powers granted to the Commission are specified in § 4-10-320(C). Pursuant thereto, the Commission

... must consider proposals for funding capital projects within the county area. The commission then formulates the referendum question that is to appear on the ballot pursuant to Section 4-10-330(D).

Section 4-10-330(A) (1) specifies the various purposes for which the extra one cent sales tax may be authorized by county ordinance. Such ordinance is to contain the ballot question formulated by the Capital Project Sales Tax Commission pursuant to § 4-10-320(C). Various requirements are imposed upon county council for specification in the ordinance, including the maximum time for the project, the maximum cost, and "any other condition precedent, as determined by the commission" for the imposition of the extra one percent sales tax. Upon receipt of the ordinance, the county election commission "must conduct a referendum on the question of imposing the sales and use tax in the area of the county that is to be subject to the tax." If the referendum is favorable, the sales and use tax is imposed the first of May following the date of the referendum.

In my opinion, a member of the Capital Project Sales Tax Commission would hold an office for dual office holding purposes. It must be noted that the Commission is a creature of statute. In addition, § 4-10-320 speaks of an "appointment" to the Commission, as well as the manner of "filling" a "vacancy" on the Commission. These are both indicia of a public office.

Moreover, it appears that the Commission exercises a portion of the sovereign power of the State. Section 4-10-320(C) places the responsibility of "consider[ing] proposals for funding capital projects within the county area" in the Commission's hands. The ballot question for the referendum is then formulated by the Commission. The Ordinance adopted by county council for placing the referendum before the voters must contain "the ballot question formulated by the commission." In

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essence, it is the Commission which decides what project to fund with the sales and use tax, provided the voters approve. In addition, § 4-10-330(4) authorizes the Commission to determine "any condition precedent ... to the imposition of the sales and use tax" Accordingly, such broad spending power and discretion bestowed upon the Commission is, in my judgment, an exercise of the sovereign power.

In conclusion, it is our opinion that serving simultaneously as county auditor or mayor and on the Capital Project Sales Tax Commission would constitute dual office holding in violation of Art. XVII, § 1A of the South Carolina Constitution.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an