

1982 S.C. Op. Atty. Gen. 31 (S.C.A.G.), 1982 S.C. Op. Atty. Gen. No. 82-26, 1982 WL 154996

Office of the Attorney General

State of South Carolina

Opinion No. 82-26

April 20, 1982

***1 SUBJECT: Members of the Legislature Serving on Executive Bodies, Separation of Powers Doctrine, [Article I, Section 8, Constitution of the State of South Carolina](#).**

The provision of [§ 48–39–40 of the Code of Laws of South Carolina](#), 1976, as amended, which provides that members of the Legislature shall serve as *ex officio* members of the South Carolina Coastal Council violates the Separation of Powers Doctrine, [Article I, Section 8, of the Constitution of the State of South Carolina](#).

TO: Ben Campbell
Director of Research
Senate Fish, Game & Forestry Committee

QUESTION:

Does [§ 48–39–40, Code of Laws of South Carolina](#), 1976, as amended, which provides that two Senators, one to be appointed by the President of the Senate, and one to be appointed by the Senate Fish, Game & Forestry Commission; and two member of the House of Representatives to be appointed by the Speaker of the House, shall serve *ex officio* on the South Carolina Coastal Council, violate the Separation of Powers Doctrine, [Article I, Section 8, Constitution of the State of South Carolina](#).

STATUTES AND CASES:

[§ 48–39–40, Code of Laws of South Carolina](#), 1976, as amended;

[§ 48–39–50, Code of Laws of South Carolina](#), 1976, as amended;

[Article I, Section 8, Constitution of the State of South Carolina](#);

[State of South Carolina, ex rel. Daniel R. McLeod, Attorney General v. James B. Edwards, et al.](#), 269 S.C. 75, 236 S.E.2d 406 (1977);

[Ashmore v. Greater Greenville Sewer District](#), 211 S.C. 77, 44 S.E.2d 88

DISCUSSION:

[Section 48–39–40](#) sets forth that the following legislative members shall serve as *ex officio* members of the South Carolina Coastal Council: ‘two State Senators, one to be appointed by the President of the Senate and one to be elected by the Senate Fish, Game & Forestry Committee; and two members of the House of Representatives to be appointed by the Speaker of the House.’

An inquiry has been made as to whether or not the above stated provision of [§ 48–39–40](#) violates the Separation of Powers Doctrine found in [Article I, Section 8, Constitution of the State of South Carolina](#).

[Article I, Section 8](#), sets forth:

In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

It is clear that the South Carolina Coastal Council is an executive body within the meaning of our Constitution. The Council is established to administer the provisions of the Coastal Council Act. See [§ 48–39–50 of the Code of Laws of South Carolina, 1976](#), as amended.

Our Supreme Court addressed the separation of powers issue in the case of [McLeod v. James B. Edwards, et al.](#), 269 S.C. 75, 236 S.E.2d 406 (1977). In the [Edwards](#) case, the constitutionality of the Act creating the Budget & Control Board was challenged because two members of the Legislature, the Chairman of the Senate Finance Committee, and the Chairman of the House, Ways & Means Committee, were designated by the Act as members of the Budget & Control Board, which deals primarily with the fiscal affairs of the State.

*2 The Supreme Court held that the Act did not violate the Separation of Powers Doctrine because the legislative members designated to sit on the Board were in a minority position on the Board and therefore this was not an attempt by the Legislature to usurp the executive functions of the Budget & Control Board, but rather an effort by the Legislature to make available to this executive body the expertise of the Chairmen of the finance committees of the two branches of the Legislature. The Court reasoned that there was a relationship between the Legislators' particular functions as members of the Legislature and their *ex officio* role on the executive body. Designating the chairman of the two finance committees as *ex officio* members of the Budget & Control Board provided needed financial expertise to this executive body. The Supreme Court held that this sharing of expertise, being a cooperative effort on the part of the Legislature to assist the executive branch in its undertaking, was not a violation of the Separation of Powers Doctrine.

The Supreme Court uses the nexus between the Legislator's particular role in the General Assembly and his function as an *ex officio* member of an executive body to distinguish the [Edwards](#) case *supra*, from [Ashmore v. Greater Greenville Sewer District](#), 211 S.C. 77, 44 S.E.2d 88 (1947). In the [Ashmore](#) case, an Act of the General Assembly creating an executive body to issue bonds and administer the building and operation of a public auditorium within the Greater Greenville Sewer District was challenged as unconstitutional because members of the Greenville County delegation (members of the Legislature) were to serve on this executive board. The Court in [Ashmore](#) held that members of the Legislature cannot undertake both to pass laws and execute them, therefore Legislators serving on this executive board violated the Separation of Powers Doctrine.

As pointed out above, the [Ashmore](#) case has been distinguished by the [Edwards](#) case. The Court has held that there will be no violation of the separation of powers doctrine where it can be shown that the legislative members serving on the executive board carry with them some expertise by virtue of their role in the General Assembly which will better enable the executive body to carry out its designated activity.

Pursuant to [§ 48–39–40](#), any Legislator regardless of his particular role in the General Assembly may be appointed to the South Carolina Coastal Council. Only the one Senator to be elected by the Senate Fish, Game & Forestry Committee could conceivably carry to the South Carolina Coastal Council special expertise incidental to his legislative duties (presumably as a member of the Senate Fish, Game & Forestry Committee) which would better enable the South Carolina Coastal Council to carry out its designated functions.

Therefore, the provisions of [§ 48–39–40](#) do not meet the cooperative effort test as established in [McLeod v. Edwards](#) and therefore violate the Separation of Powers Doctrine set forth in [Article I, Section 8, Constitution of the State of South Carolina](#). Respectfully submitted,

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