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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

April 9, 2004

Mr. Don Barclay
Town of Dillon Board of Architectural Review
329 Lee Circle
Dillon, South Carolina 29536

Dear Mr. Barclay:

You have requested an advisory opinion from this Office concerning dual office holding. You have indicated that you currently serve as a member of the Town of Dillon Board of Architectural Review. You further indicate that you have been recently appointed by your state representative, the Honorable Jackie Hayes, to serve on the Marion-Dillon County Disabilities and Special Needs Board, and the appointment is very important and of special interest to you since you have a daughter with disabilities. You inquire as to whether simultaneously holding membership on these two boards would contravene the provisions on dual office holding in the South Carolina Constitution. We conclude that such simultaneous holding of the two positions would constitute dual office holding.

Law/Analysis

Article XVII, Section 1A of the State Constitution provides that "no person may hold two offices of honor or profit at the same time ..." with exceptions specified for an officer in the militia, member of a lawfully and regularly organized fire department, constable, or notary public. 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 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). Furthermore, "[O]ne who merely performs the duties required of him under an express contract or otherwise, though such persons themselves be public officers, and though the employment be in or about a public work or business, is a mere employee." Sanders, supra, 78 S.C. at 174.

This Office has advised on at least one prior occasion that a member of a local architectural review board holds an office for dual office holding purposes. Op. S.C. Atty. Gen. dated May 13, 2002 (City of Bennettsville Board of Architectural Review). Local boards of architectural review

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are authorized pursuant to Section 6-29-870 of the South Carolina Code of Laws. Subsection (A) states that a local government "may provide for appointment of a board of architectural review or similar body." Subsection (B) establishes the membership of boards and provides for appointment and removal of members. Subsection (C) states that "none of the members [of such boards] may hold any other public office or position in the municipality or county. Subsection (D) of Section 6-29-870 authorizes the chairman of an architectural review board to administer oaths "and compel the attendance of witnesses by subpoena." Decisions are appealed to the board "where there is an alleged error in any order, requirement, determination or decision." S.C. Code Ann. §6-29-880. Based on these statutory provisions, it appears that the Town of Dillon Board of Architectural Review serves a quasi-judicial function and that a member of the Board is likely an officer for dual office holding purposes. Therefore, the question turns to whether a member of the Marion-Dillon County Disabilities and Special Needs Board would likewise be considered an office holder.

We have also consistently concluded that one who would serve on a county or multi-county board of disabilities and special needs, or as it was previously called a county board of mental retardation, would be considered an office holder. Ops. S.C. Atty. Gen. dated January 10, 1995 (Newberry County Disabilities and Special Needs Board of Directors); April 5, 1995 (Disabilities Board of Charleston County); September 10, 1993 (Richland/Lexington Board of Disabilities and Special Needs); April 10, 1989 (Chester County Mental Retardation Board). We are not aware of any factor that would lead to a contrary conclusion for a member of the Marion/Dillon Board of Disabilities and Special Needs.

Based upon the foregoing authorities, we advise that membership on either a board of architectural review or a board of disabilities and special needs would constitute the holding of an office for purposes of dual office holding. The constitutional provisions prohibiting dual office holding would therefore be contravened if you were to simultaneously serve as a member of the Town of Dillon Board of Architectural Review and Marion/Dillon Board of Disabilities and Special Needs.

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 automatically creates a vacancy in that first office. However, the individual may continue to perform the duties of the previously held office as a de facto officer, rather than de jure, until a successor is duly selected to complete his term of office (or to assume his duties if the term of service is indefinite). See Walker v. Harris, 170 S.C. 242 (1933); Dove v. Kirkland, 92 S.C. 313 (1912); State v. Coleman, 54 S.C. 282 (1898); State v. Buttz, 9 S.C. 156 (1877). Furthermore, actions taken by a de facto officer in relation to the public or third parties will be as valid and effectual as those of a de jure officer unless or until a court should declare such

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acts void or remove the individual from office. See, for examples, State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1976); State ex rel. McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967); Kittman v. Ayer, 3 Stob. 92 (S.C. 1848).

Very truly yours,



Robert D. Cook

Assistant Deputy Attorney General

RDC/an