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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

October 17, 2000

Richard L. Pearce, Esquire
Staff Attorney
Post Office Box 1177
Aiken, South Carolina 29802

Re: Informal Opinion

Dear Mr. Pearce:

By your letter of October 12, 2000, you have asked whether a dual office holding situation would exist if an individual were to serve as a member of a local government planning commission while simultaneously holding a paid position with the local government's planning department. For the reasons set forth below, it is my opinion that such concurrent service would not violate the South Carolina Constitution's prohibition against dual office holding; however, it may be prudent to seek an opinion from the State Ethics Commission regarding the avoidance of possible conflicts of interest.

Article XVII, Section 1A of the South Carolina 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, a member of a lawfully and regularly organized fire department, constable, or a notary public. As concluded by Attorney General Daniel McLeod in an opinion dated April 26, 1977, "[t]o determine whether a position is an office or not depends upon a number of circumstances and is not subject to any precise formula." The South Carolina Supreme Court, though, has held that 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). "One 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." Id., 78 S.C. at 174. Other relevant considerations, as identified by the Court, are whether statutes, or other authority, establish the position, prescribe its tenure, duties or salary, or

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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 one who serves on a municipal planning commission would be considered an office holder for dual office holding purposes. *See, e.g., Ops. Att'y. Gen.* dated February 8, 1983 (City of Conway Planning Commission); April 5, 1990 (City of Florence Planning Commission); August 24, 1992 (City of Florence); June 26, 1978 (City of Rock Hill Planning Commission); March 29, 1982 (Town of Lexington); and others. *See also*, S.C. Code Ann. §5-23-420 (appointive members of municipal planning commissions shall hold no other municipal office except that one of the members may be a member of the board of adjustment); §6-7-360 ("No member of a planning commission may hold an elected public office in the municipality or county from which he is appointed. . ."); and §6-29-350(B) ("No member of a planning commission may hold an elected public office in the municipality or county from which appointed. . ."). Accordingly, I am of the opinion that a member of a local government planning commission would be considered an officer for dual office holding purposes. Thus, having determined that a planning commissioner is an office holder within the meaning of Art. XVII, Sec. 1A, it is necessary, then, to address whether employment with the planning department would likewise constitute an office.

In this regard, the following from Sanders v. Belue is helpful in distinguishing between a position of employment and an office:

Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employee.

Id., 78 S.C. at 174. According to the information you provided, the individual in question handles applications to appear before the planning commission, responds to citizen inquiries and assists in the preparation of reports presented to the commission. Reviewing the criteria usually present in an office, as discussed in the second paragraph of this letter, it appears that the individual's position constitutes employment rather than an office. Moreover, prior opinions of this Office that have addressed positions with similar duties have consistently held that the most important criterion, the actual exercise of a portion of the sovereign power of the State, appears to be lacking. *See, Ops. Att'y. Gen.* dated August 14, 1996 (Business Manager of the USC College of Education not an office); June 24, 1996 (Edgefield County

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Emergency Preparedness Director not an office); June 12, 1986 (DHEC Social Worker not an office). Therefore, based upon the reasoning and conclusions of these earlier rulings, it is my opinion that a member of a local government planning commission may hold employment with the local government's planning department without violating the South Carolina Constitution's prohibition against dual office holding.

In addition to dual office holding, the situation described in your opinion request raises one final concern. Although your letter did not state whether planning commissioners exercise supervision and control over planning department employees, it is possible that the present situation violates common law master-servant principles. The master-servant relationship is based on common law rather than statutory law and may be summarized as follows:

[A] conflict of interest exists where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other or to punish the other. Furthermore, a conflict of interest may be demonstrated by the power to regulate the compensation of the other, or to audit his accounts.

[I]t is not the performance, or the prospective right of performance, of inconsistent duties only that gives rise to incompatibility, but the acceptance of the functions and obligations growing out of the two offices.... The offices may be incompatible even though the conflict in the duties thereof arises on but rare occasions.... In any event, the applicability of the doctrine does not turn upon the integrity of the officeholder or his capacity to achieve impartiality. ...

67 C.J.S. Officers §27. Ops. Att'y. Gen. dated January 19, 1994, May 15, 1989 and May 21, 1984.

The South Carolina Supreme Court in McMahan v. Jones, 94 S.C. 362, 77 S.E.2d 1022 (1913), declared the employment of two commission members by the commission to be illegal. The court stated:

No man in the public service should be permitted to occupy the dual position of master and servant; for, as master, he would be under the

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temptation of exacting too little of himself, as servant; and, as servant, he would be inclined to demand too much of himself, as master. There would be constant conflict between self-interest and integrity. Should Richardson, as chairman of the commission, appoint the committee to investigate his own management of the infirmary, or check his accounts as treasurer? Should he be present, when his administration of the institution is being considered and discussed? Should he and Butler participate, when their own duties are being prescribed and their compensation fixed? It requires only a moment's reflection to see that the positions are utterly inconsistent, and ought not to be held by the same persons. Propriety, as well as public policy, forbids it.

Let me reiterate, the situation addressed in your opinion request may not involve a master-servant problem. However, without knowing the degree of supervision and control that planning commissioners have over planning department employees, I am unable to opine whether or not such a problem is present in your situation. Should this individual choose to maintain his dual status, at a minimum, I would advise seeking guidance from the State Ethics Commission regarding the avoidance of possible conflicts of interest. You may contact the Commission by writing to Mr. Herbert Hayden, Executive Director, State Ethics Commission, 5000 Thurmond Mall, Suite 250, Columbia, SC 29201.

This letter is an informal opinion. It has been written by the designated Deputy Attorney General and represents the opinion of the undersigned attorney as to the specific question asked. It has not, however, been personally reviewed by the Attorney General nor officially published in the manner of a formal opinion.

I trust this information is responsive to your inquiry and that you will not hesitate to contact me if I can be of additional assistance.

Sincerely yours,



Zeb C. Williams, III
Deputy Attorney General

ZCW/an