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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

November 20, 2001

Ms. Alzena Robinson
Member, Bamberg County Development Board
38 Ness Drive
Bamberg, South Carolina 29003

RE: Informal Opinion

Dear Ms. Robinson:

By your letter of October 30, 2001, you have requested an opinion of our Office concerning amendments to the enabling ordinance of the Bamberg County Development Board. You write: "Two members of Bamberg County Council should be at large members with voting power instead of ex officio members. The question is conflict of interest or violation of the law." You also inform us that the ex officio members currently do not have voting power.

When a public official serves simultaneously on two boards or public bodies, dual office holding questions inevitably arise. 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, member of a lawfully and regularly organized fire department, constable, or a notary public. For this provision to be contravened, a person concurrently must hold two public 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).

However, while the constitution prohibits dual office holding, such prohibition does not generally apply when one of the offices is held ex officio. The phrase ex officio is defined as "[f]rom office; by virtue of the office" or "[f]rom office; by virtue of office; officially. A term applied to an authority derived from official character merely, not expressly conferred upon the individual, but rather annexed to the official position." Lobrano v. Police Jury of Parish of Plaquemines, 150 La. 14, 90 So. 423 (1921). In Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E.2d 88 (1947), the South Carolina Supreme Court commented extensively on ex officio memberships :

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The rule here enforced with respect to double or dual office holding in violation of the constitution is not applicable to those officers upon whom other duties relating to their respective offices are placed by law. A common example is ex officio membership upon a board or commission of the unit of government which the officer serves in his official capacity, and the functions of the board or commission are related to the duties of the office. Ex officio means "by virtue of his office." ... Similar observation may be made with respect to ex officio membership upon a governing board, commission or the like of an agency or institution in which the unit of government of the office has only a part or joint ownership or management. In mind as an example is an airport operated by two or more units of government. A governing board of it might be properly created by appointment ex officio of officers of the separate governmental units whose duties of their respective officers have reasonable relation to their functions ex officio. . . .

Ashmore, 211 S.C. at 92.

Thus, the Supreme Court of South Carolina, as well as prior opinions of this Office, have concluded that membership on a public body in an ex officio capacity should not be considered office holding for purposes of the State Constitution's prohibition against dual office holding. See OPS. ATTY. GEN. July 18, 2001; Jan. 7, 1999. Therefore, a Bamberg County Council member who also serves on the Bamberg County Development Board would not violate the dual office holding provision of the Constitution.

You have also asked whether a conflict of interest exists in this situation. From our reading of the enabling ordinance that created the Development Board, County Council always intended that the Board be comprised of numerous public officials who serve on other bodies. For example, mayors of incorporated political subdivisions in the county, members of the Legislative Delegation, and a County Council member all currently serve as ex officio members of the Development Board. The interests of the Development Board and the interests of the other bodies, such as County Council, are interrelated by design. Because the Development Board and the County Council are not intended to operate wholly independent of each other, no impermissible conflict of interest exists when a Council member serves on the Board ex officio.

As a practical matter, I recommend amending the enabling ordinance to indicate that the two members of the County Council serving as ex officio members of the Development Board clearly have voting power. On some political bodies, ex officio members have voting power and on other bodies these members cannot vote. As stated above, a person who serves "ex officio," merely serves by virtue of his office on another board. For purposes of clarity, the voting power of the ex officio member should be delineated in the ordinance.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney

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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 nor officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,



Susannah Cole
Assistant Attorney General