

The State of South Carolina



Office of the Attorney General

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December 7, 1994

Ms. Evelyn Causey
131 Causey Street
Myrtle Beach, South Carolina 29577

Dear Ms. Causey:

You have advised that you are currently serving as a public member of the South Carolina Real Estate Appraisers Board. You are considering offering for election for a soon-to-be-vacant seat on Horry County Council. You have asked how your possible election to council would affect your state appointment. By telephone, we discussed the probability that dual office holding would occur.

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 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).

This Office has advised on numerous occasions that a member of a county council would hold an office for dual office holding purposes. See, for examples, Ops. Att'y Gen. dated December 20, 1993 (enclosed); December 11, 1990; March 19, 1990; and numerous other opinions. Thus, it must be decided whether a member of the South Carolina Real Estate Appraisers Board would also hold an office.

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The South Carolina Real Estate Appraisers Board (hereinafter referred to as "Board") is established pursuant to S.C. Code Ann. § 40-60-10 et seq. (1993 Cum. Supp.),¹ specifically § 40-60-50. The Board is to consist of seven members, qualifications of whom are specified: all must be state residents and each must meet some other qualifications (one representing the public, one licensed real estate broker who is not a real estate appraiser, someone engaged in mortgage lending, and four real estate appraisers who meet the specifications of § 40-60-50). The term of board members is three years and until their successors qualify and are appointed. Members are entitled to per diem, subsistence, and mileage as is provided by law for state boards, committees, and commissions. No oath is required by these statutes. But see Art. VI, § 5 of the state Constitution. Duties of Board members are specified in §§ 40-60-50, 40-60-60, 40-60-90, 40-60-120, 40-60-140, 40-60-160, 40-60-170, 40-60-210, and other statutes. These duties include examination of candidates for licensure, licensure generally, investigation and discipline of licensees (including subpoena powers), holding hearings, promulgation of regulations, issuance of cease and desist orders, and more. Clearly, these powers or duties involve an exercise of a portion of the sovereign power of the State.

Considering all of the foregoing, it is the opinion of this Office that a member of the South Carolina Real Estate Appraisers Board would be considered an office holder for dual office holding purposes. If a member of the Board were to serve concurrently on a county council, a dual office holding situation would most probably occur.

If a person holds one office (Board, for example) on the date he/she assumes a second office (county council, for example), both offices falling within the provisions of Article XVII, § 1A of the state Constitution, that person is deemed to have vacated the office first held. However, the person 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).²

¹ Some of the statutes in § 40-60-10 et seq. were amended by the provisions of Act No. 385, 1994 Acts and Joint Resolutions.

² A de jure officer is "one who is in all respects legally appointed and qualified to exercise the office." 63 Am.Jur.2d Public Officers and Employees § 495. A de facto officer is "one who is in possession of an office, in good faith, entered by right, claiming to be entitled thereto, and discharging its duties under color of authority." Heyward v.
(continued...)

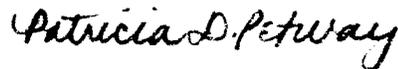
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Moreover, actions taken by a de facto officer in relation to the public or third parties will be considered as valid and effectual as those of a de jure officer unless or until a court would declare such acts void or remove the de facto officer from office. See, as 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 Strob. 92 (S.C. 1848); 67 C.J.S. Officers § 276.

We trust that this has sufficiently responded to your inquiry. If you need clarification or additional assistance, please advise.

With kindest regards, I am

Sincerely,



Patricia D. Petway
Assistant Attorney General

PDP/an
Enclosure

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions

²(...continued)

Long, 178 S.C. 351, 183 S.E. 145, 151 (1936); see also Smith v. City Council of Charleston, 198 S.C. 313, 17 S.E.2d 860 (1942) and Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952).