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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 8, 1996

Ms. Kathy Barnes
3132 Palomino Drive
Burton, South Carolina 29902

RE: Informal Opinion

Dear Ms. Barnes:

By your letter of April 3, 1996, to the Office of Attorney General Condon, you have sought an opinion as to whether you may concurrently be employed as the Revenue Collector for the Town of Hilton Head Island and also serve on Beaufort County Council without contravening the dual office holding provisions of the South Carolina Constitution. You have advised that you are offering for election to the Beaufort County Council, and you are concerned about any possible conflict in offering for election or in serving should you be elected to Council.

There is no state law which would prohibit your candidacy. You advise that your position with the Town does not involve federal funds, and so consideration of the federal Hatch Act is not required in this instance. You have already inquired as to applicable policies of the Town of Hilton Head Island, I understand; I am not in a position to know what if any policy there might be applicable. I am not aware of any potential conflict in your candidacy, based on these considerations.

If there should be a problem, it would arise if you should be elected to Council and serve on that body while maintaining your employment as the Town's Revenue Collector. I am of the opinion that dual office holding would result, as more fully described below.

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

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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 opined on numerous occasions that one who serves on a county council would be considered an office holder for dual office holding purposes. Enclosed please find copies of two opinions, representative of those numerous opinions, so concluding (December 7, 1994, and December 20, 1993). Because service on a county council would be considered an office, it must thus be determined whether your present position as Revenue Collector would be considered an office.

The position of Revenue Collector was created by action of the Town of Hilton Head Island. You are an employee of the Town and are compensated. Your tenure with the Town is "at will" employment. Your Job Description contains the following general statement of your job:

Under general supervision, performs specialized duties established to ensure the enforcement of the Town's Business License Ordinance covering all businesses operating within the town limits, the Beach Preservation Fee Ordinance covering accommodations under ninety days, and the Setoff Debt Program as it relates to the agreement with the Municipal Association of South Carolina. Reports to the Manager of Business License & Collections-Inspector/Auditor.

Specific duties and responsibilities include such essential job functions as initiating and processing the collection of all delinquent business license, beach preservation fee, and setoff debt accounts; preparing and sending out written delinquent notices; coordinating with the Accounting Division--EMS and the Municipal Court for the collection of delinquent accounts; issuing warrants on any delinquent business or individual as required and coordinating with magistrate's court for the prosecution of same; and performs many other functions related to revenue collection. I am of the opinion that such responsibilities involve an exercise of a portion of the sovereign power of the State, on behalf of the Town of Hilton Head Island. While some of the elements found in an office are lacking, I am of the opinion that the most important element, an exercise of some type of sovereign power, is present and would conclude that the Revenue Collector for the Town of Hilton Head Island would be considered an officer for dual office holding purposes.

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Based on the foregoing, I am of the opinion that if you were to be employed as the Revenue Collector for the Town of Hilton Head Island and at the same time serve as a member of Beaufort County Council, you would contravene the dual office holding prohibitions of the South Carolina Constitution.

That being the case, if a person holds one office (Revenue Collector, for example) on the date he or she assumes a second office (Beaufort County Council, for example), both offices falling within the provisions of Article XVII, Section 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).¹ 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 Stro. 92 (S.C. 1848); 67 C.J.S. Officers §276.

I trust that this has satisfactorily responded to your inquiry. Please advise if clarification or additional assistance should be necessary.

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

¹A 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. 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).

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With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Senior Assistant Attorney General

Enclosures