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The State of South Carolina



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January 18, 1991

The Honorable Thomas L. Moore
Senator, District 25
Post Office Box 684
Clearwater, South Carolina 29822

Dear Senator Moore:

By your letter of December 18, 1990, you have asked whether an individual might serve simultaneously as a county council member and as a congressional gubernatorial appointee from the Third Congressional District to the Residential Home Builders Commission. Your particular concern is whether such service would be considered dual office holding.

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 opined on numerous occasions that a member of a county council would hold an office for dual office holding purposes. For examples, see Ops. Atty. Gen. dated March 19, 1990 (copy enclosed); July 18, 1989; and May 15, 1989, as representative of the numerous opinions.

The Residential Home Builders Commission is established and governed by S. C. Code Ann. § 40-59-20 et seq. (1986). The Commission is to be composed of seven persons who have been residents of this State for at least five years. Two members are to be consumers not engaged in the building of residential homes; four members must have been actively engaged in residential home building for at least

five years prior to their date of appointment; and one member must have been engaged in residential specialty contracting for at least five years prior to the date of appointment. Members are appointed, one from each congressional district and one from the state at large, by the Governor, with advice and consent of the Senate. Members are to serve terms of four years and until their successors are appointed and qualify. An oath is required by members prior to their assumption of duties. Compensation of members is provided for in § 40-59-30. Powers and duties of commission members are specified in § 40-59-40 et seq.

The duties exercised by Commission members include licensure and examination for licensure of residential home builders in §40-59-80; revocation, suspension, or restriction of licenses by § 40-50-90 (1990 Cum.Supp.); promulgation of reasonable regulations pursuant to § 40-50-120; and application to the court of common pleas in its own name to enjoin violations of Chapter 59 of Title 40, by § 40-50-130, among other duties. Section 40-50-90 in particular imposes quasi-judicial responsibilities on the Commission through its members. These duties clearly 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 one who serves on the Residential Home Builders Commission would hold an office for dual office holding purposes. Thus, an individual serving on that Commission would most likely run afoul of the dual office holding prohibitions of the State Constitution if he were to serve simultaneously on a county council.

If one person holds one office (Residential Home Builders Commission, for example) on the date he assumes a second office (county council, for example), both offices falling with the provisions of Article XVII, § 1A of the Constitution, he is deemed to have vacated the former office. However, that person may continue to perform the duties of the previously held office as a de facto officer, rather than a 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/ Any acts done as

1/ 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. 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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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 officer from office. See, for example, 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.

With kindest regards, I am

Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

PDP/sp

Enclosure

REVIEWED AND APPROVED BY:
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