

# The State of South Carolina



## Office of the Attorney General

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January 8, 1991

The Honorable John C. Rama  
Member, House of Representatives  
503-B Blatt Building  
Columbia, South Carolina 29211

Dear Representative Rama:

On behalf of a constituent, you have requested the opinion of this Office as to whether a member of Charleston City Council could also sit on the Board of Adjustment. While your letter mentions S. C. Code Ann. §5-23-420 (1976), you refer specifically to the "Zoning Board" rather than a planning commission. Thus, the following opinion addresses the several issues which could arise if a member of a city council were also to serve on a (zoning) board of adjustment in the same municipality.

Article 1 of Title 5, Chapter 23 of the Code authorizes municipalities to take certain actions with respect to zoning. Among those actions authorized is the establishment of a Board of Adjustment pursuant to §5-23-70, which provides:

Such local legislative body may provide for the appointment of a board of adjustment and in the regulations and restrictions adopted pursuant to the authority of this article may provide that the board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained. The Board of Adjustment shall consist of not less than three nor more than seven members, a majority of which shall constitute a quorum, appointed for staggered terms of not less than three nor more than five years and until successors are appointed and qualify. Members may be removed from office for cause by the appointing authority upon written charges and after public hearing. Vacancies

The Honorable John C. Rama  
Page 2  
January 8, 1991

shall be filled for the unexpired term of any member whose term becomes vacant.

Dual office holding is one aspect which must be considered in responding to your inquiry. 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 repeatedly that members of a city council are public officers. See, for example, Ops. Atty. Gen. dated January 31, 1984. Likewise, this Office has advised that a member of a zoning board of adjustment would hold an office. See, for example, Ops. Atty. Gen. dated March 29, 1985 and February 20, 1985. Thus, one who would serve on both a city council and a board of adjustment would likely run afoul of the dual office holding prohibitions of the State Constitution.

Another problem arises in that public policy and most probably the common law master-servant principle would be violated if a city council with the power to appoint to another public body (here, a board of adjustment) were to appoint one or more of its members to the second public body. See Ops. Atty. Gen. dated January 31, 1985. The South Carolina Supreme Court stated in Bradley v. City Council of Greenville, 212 S.C. 389, 46 S.E.2d 291 (1948):

In the absence of constitutional or statutory provision it is ... "contrary to public policy to permit an officer having an appointing power to use such power as a means of conferring an office upon himself, or to permit an appointing body to appoint one of its own members."

Id., 212 S.C. at 397. The Code section authorizing city councils to establish boards of adjustment (§5-23-70) makes no provision for ex officio membership of council members on the board of adjustment. Because, as you describe the situation, it appears that council is appointing one or more of its own members to a second office,

The Honorable John C. Rama  
Page 3  
January 8, 1991

the court's reasoning in Bradley appears to be applicable to the situation you have described.

This Office addressed a similar situation with respect to members of City Council of the City of Folly Beach serving on the City's Board of Adjustment. In the opinion dated March 29, 1985 (copy enclosed), we advised:

Based on the prohibition against dual office holding of the State Constitution, common law master-servant principles, ethical considerations cited to [the requestor] by the Ethics Commission, and the public policy established by the South Carolina Supreme Court in Bradley v. City Council of Greenville, supra, it would be advisable that the Folly Beach City Council appoint, to serve on the board of adjustment, persons who are not presently members of City Council or persons who would not have some other conflict (dual office holding, master-servant, or ethical).

The same advice would be applicable to the City Council of Charleston's appointment process.

With kindest regards, I am

Sincerely,

*Patricia D. Petway*

Patricia D. Petway  
Assistant Attorney General

PDP/spp

Enclosure

REVIEWED AND APPROVED BY:

*Robert D. Cook*

Robert D. Cook  
Executive Assistant for Opinions