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August 24, 1992

Patricia Singleton-Parr, City Attorney
City of Florence
Drawer AA, City-County Complex
Florence, South Carolina 29501-3456

Dear Ms. Singleton-Parr:

You ask whether an individual employed by the City of Florence Housing Authority may serve on the City of Florence Planning Commission without violating the constitutional prohibitions against dual office holding. You have provided the position description for the Housing Authority position and a copy of Florence Code Section 16-4 relative to the Planning Commission.

Pursuant to Article XVII Section 1A of the South Carolina Constitution, "...no person may hold two Offices of honor or profit at the same time ... (except) an officer in the militia, member of a lawfully and regularly organized fire department, constable or a notary public." A public officer has been defined as

one who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent ...

Sanders v. Belue, 78 S.C. 171, 58 S.E. 762, 763 (1907). Other relevant indicia include whether statutes or other authority establish the position, prescribe its duties, tenure, salary, and bond or require oath or qualifications. State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980).

Ms. Singleton-Parr
Page 2
August 24, 1992

This Office has previously opined that a member of the City of Florence Planning Commission would hold an office for dual office holding purposes. See Op. Atty. Gen. dated April 5, 1990. Also, the City of Florence Planning Commission, pursuant to S.C. Code Ann. § 6-7-340 and city ordinance Section 16-1, possesses the power to accomplish a comprehensive development plan for the city, including recommendations for zoning ordinances, maps, and map revisions, regulations for the subdivision of land, and capital programs based upon the comprehensive plan and necessary capital improvements. S.C. Code Ann. Section 6-7-360 provides that "... (n)o member of a planning commission may hold an elected public office in the municipality or county from which he is appointed."

The nominee for the City of Florence Planning Commission presently holds the position of Resident Opportunity Center Coordinator for the City of Florence Housing Authority. You state that the City of Florence Housing Authority was created pursuant to S.C. Code Ann. § 31-3-310 et seq. and that the Mayor makes the appointments to the Housing Authority Commission. See S.C. Code Ann. Section 31-3-340. S.C. Code Ann. § 31-3-380 provides that

... The (local housing authority) commissioners shall ... select and appoint such officers and employees ... as they may require for the performance of their duties and shall prescribe the duties and compensation of each officer and employee.

With regard to local housing authority commissions, S.C. Code Ann. § 31-3-340 provides that "... (n)o commissioner of an authority may be an officer or an employee for the city for which the authority is created." Also, S.C. Code Ann. § 31-3-360 provides that "(n)o commissioner or employee of an authority shall acquire any interest, direct or indirect, in any contract or proposed contract for materials or services to be furnished or used in connection with any project." You also state that you could locate no local ordinance, regulation or other legislative enactment regarding the City of Florence Housing Authority or the position of Resident Opportunity Center Coordinator. Therefore, other than the general statute which authorizes the Planning Commission to select employees, it appears no statute creates the position of Resident Opportunity Center Coordinator or provides for its duties, qualifications, compensation or oath.

Ms. Singleton-Parr
Page 3
August 24, 1992

However, you did provide the position description from the Housing Authority for the position. The position functions specified in the position description include coordinating housing authority resident services and activities as well as obtaining assistance for resident services and activities from community agencies. The duties include working with organizations concerned with Housing Authority residents, providing advice and assistance to Housing Authority staff on problems confronting low-income families, coordinating activities with public and private agencies, developing and distributing to residents newsletters and bulletins as well as notices on available services, assisting in the establishment and coordination of resident organizations or programs and securing funds for social services delivery.

You state that the nominee also works on a regular basis with the staff of the City of Florence Planning Commission. You advise that the Planning Commission assisted the individual in developing a grant request and will be working on the grant project with the Housing Authority. You do not state the source of the grant. You also do not describe what the relationship will be between the two in accomplishing the grant objectives or what the grant goals are.

The position of Resident Opportunity Center Coordinator of the City of Florence Housing Authority appears to have been created by the City of Florence Housing Authority Commission pursuant to the authority provided in Section 31-3-380 rather than by a statute or other legislative act. It also appears that the nominee reports to the Assistant Executive Director of the Housing Authority and that the Housing Authority, rather than a legislative act, established the duties, responsibilities and qualifications for the position. No oath or bond appears to be required and the nominee occupies the position at the will of the Authority rather than for a specific tenure. The nominee also receives a salary. A review of the above factors in light of those required for finding an office leads me to conclude that the individual is likely an employee and not an office-holder.

However, it is possible that a conflict of interest situation may arise if the nominee, in the discharge of employment duties, is responsible for preparing grant applications to and working under the direction or supervision of the Planning Commission in the administration of grants.

Ms. Singleton-Parr
Page 4
August 24, 1992

[A] conflict of interest exists where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other or to punish the other. Furthermore, a conflict of interest may be demonstrated by the power to regulate the compensation of the other... .

* * *

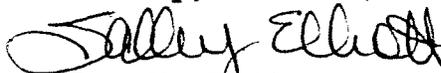
The offices may be incompatible even though the conflict in the duties thereof arises on but rare occasions... . In any event, the applicability of the doctrine does not turn upon the integrity of the officeholder or his capacity to achieve impartiality... . 67 C.J.S. Officers § 27. See also Op. Atty. Gen. dated March 3, 1978.

Op. Atty. Gen. dated June 25, 1986.

As the information was not provided to us for consideration, it will be necessary for you to review the specifics of the relationship between the nominee and the Planning Commission to determine whether the legal principles cited above are applicable.

I hope that I have sufficiently responded to your inquiry. If not, please advise.

Sincerely,



Salley W. Elliott
Assistant Attorney General

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REVIEWED AND APPROVED BY:


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