



ALAN WILSON
ATTORNEY GENERAL

April 29, 2014

James F. Walsh, Jr., Esq.
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Dear Mr. Walsh:

This Office received your request for an opinion regarding whether the position of an individual on both the Orangeburg County Planning Commission and the City of Orangeburg Aviation Commission would constitute dual office holding.

LAW/ANALYSIS:

The South Carolina Constitution provides that “no person may hold two offices of honor or profit at the same time. This limitation does not apply to officers in the militia, notaries public, members of lawfully and regularly organized fire departments, constables, or delegates to a constitutional convention.” S.C. Const. art. XVII § 1A.

The South Carolina Supreme Court explains that an “office” for dual office holding purposes is:

“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, is a public officer.” *Sanders v. Belue*, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). “In considering whether a particular position is an office in the constitutional sense, it must be demonstrated that “[t]he power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public.” *Willis v. Aiken County*, 203 S.C. 96, 103 26 S.E.2d 313, 316 (1943). “The powers conferred and the duties to be discharged with regard to a public office must be defined, directly or impliedly, by the legislature or through legislative authority...” 63C Am Jur.2d Public Officers and Employees § 5 (2009).

Segars-Andrews v. Judicial Merit Selection Commission, 387 S.C. 109, 691 S.E.2d 453 (2010). “Other relevant considerations [as to whether a position is a public office] include: ‘whether the position was created by the legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond, and oath are prescribed or required; whether the one occupying the position is a representative of the sovereign; among others.’” See *Op. S.C. Atty. Gen.*, June 17, 2013 (2013 WL 3243063) (quoting *State v. Crenshaw*, 274 S.C. 475, 478, 266 S.E.2d 61,62 (1980)).

An individual who serves on a planning commission is a public officer. In a prior opinion, we stated:

This Office has also consistently opined a position on a planning commission is an “office of honor or profit” for dual office holding purposes. As this Office stated in a previous opinion:

Title 6, Chapter 29, Article 1 of the South Carolina Code of Laws of 1976 governs the creation of local planning commissions. S.C. Code § 6-29-320 states that the “county council of each county may create a county planning commission.” The powers, qualifications and duties of a local planning commission, as described in Article 1 makes it clear that members exercise some degree of sovereign power of the state, meaning that membership on the Planning Commission constitutes an office within the definition of the Sanders and Crenshaw cases, supra. See S.C. Code § § 6-29-340 -6-29-380. On numerous occasions, this Office opined that a **member of a county or municipal planning commission holds an office for purposes of dual office holding**. See Ops. S.C. Atty. Gen., November 27, 2007 (City of Mauldin Planning Commission); May 9, 2007 (Spartanburg Planning Commission); December 1, 2006 (Myrtle Beach Planning Commission); April 10, 2006 (Town of Bluffton Planning Commission); May 8, 2001 (Horry County Planning Commission); August 3, 2000 (Charleston County Planning Commission) (emphasis added).

Op. S.C. Atty. Gen., December 12, 2013 (2013 WL 6831111) (quoting Op. S.C. Atty. Gen., 2011 WL 3346433 (July 19, 2011)).

The issue is whether an individual who is a member of the City of Orangeburg Aviation Commission is a public officer for dual office holding purposes. Section 2-10.4 of the Orangeburg Municipal Code creates the Aviation Commission and provides its duties. The ordinance states as follows:

- a. There is hereby created, formed and established the Orangeburg aviation commission.
- b. The powers and duties of the commission shall be exercised and performed by a commission, which shall consist of seven (7) individuals appointed by the city council of the City of Orangeburg. Each member of the commission shall be a qualified elector of the County of Orangeburg at the time of appointment and during incumbency.
- c. The term of all members shall be for a period of four (4) years, but of the initial appointments, two (2) shall be for one (1) year, two shall be for two (2) years, and two (2) shall be for three (3) years. Those members

presently serving on the existing aviation commission shall continue to serve until respective terms expire.

- d. The commission shall elect a chairman, a vice-chairman, a secretary, and such other officers it deems necessary. The commission shall meet upon the call of its chairman, but not less frequently than one time in each three (3) calendar month period.
- e. The commission shall advise city council on all matters and things necessary or convenient for the establishment, maintenance and operation of adequate facilities for aviation and the accommodation of aerial travel as authorized under the statutory laws of the State of South Carolina. The commission shall have no power to create any indebtedness or obligation against the City of Orangeburg without the written consent of city council.
- f. *Reserved.*
- g. The commission shall at all times keep full and accurate account of its actings and goings and of its receipts and expenditures. At least once annually, a complete report of the affairs of the commission shall be made to the Orangeburg city council.
- h. The commission in the conduct of its affairs shall do so by a majority vote.
- i. No obligation of the commission shall ever constitute and indebtedness of the City of Orangeburg within the meaning of any state constitutional provision or statutory limitation and shall never constitute nor give rise to a pecuniary liability or charge against the general credit or taxing power of the city.
- j. This section replaces and is in lieu of any enabling legislation or statutes heretofore creating the aviation commission.

City of Orangeburg Municipal Code § 2-10.4

Although the City of Orangeburg Aviation Commission is created by ordinance and the duties and term limits and qualifications for appointment of members are provided for in the ordinance, members of the Commission are not exercising part of the sovereign power of the State. They are serving in an advisory capacity only as shown by the fact that they are merely advising the city council on “the establishment, maintenance and operation of adequate facilities for aviation and the accommodation of aerial travel.” Also, they ca not “create any indebtedness or obligation against the City of Orangeburg without the written consent of city council” and their obligations do not constitute an “indebtedness of the City of

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Orangeburg. . . and shall never constitute nor give rise to a pecuniary liability or charge against the general credit or taxing power of the city.”

In a prior opinion, we determined:

This Office has concluded on numerous occasions that members of advisory bodies are not considered office holders. *See, e.g.*, Ops. Atty. Gen. dated May 9, 1989 (Indigent Care Advisory Board); May 15, 1989 (Work Support Advisory Council); and October 12, 1990 (Beaufort County Aviation Board).

Op. S.C. Atty. Gen., March 30, 2000 (2000 WL 655477). Therefore, a member of the City of Orangeburg Aviation Commission does not hold an office of honor or profit for dual office holding purposes.

Your concern is that Section 55-9-80 of the South Carolina Code may confer air rights, including the acquisition of same through condemnation upon the City of Orangeburg Aviation Commission. Section 55-9-80 is part of the South Carolina Airports Act and it provides:

When necessary in order to provide unobstructed airspace for the landing and taking off of aircraft utilizing airports acquired or maintained under the provisions of this chapter, the division and the counties, municipalities, and other subdivisions, including duly constituted airport commissions and special purpose districts of this State may acquire air rights, including aviation easements, over private property necessary to ensure safe approaches to the landing areas of the airports, and for the purpose of establishing and protecting airports and runways. These air rights may be acquired by grant, purchase, lease, or condemnation pursuant to the provisions of the Eminent Domain Procedure Act (Chapter 2, Title 28).

S.C. Code Ann. § 55-9-80 (1976 Code, as amended).

Our South Carolina Supreme Court has determined that you must look to the plain meaning of the statute when interpreting it. The Court held:

“Statutory construction must begin with the language of the statute.” *Kofa v. U.S. Immigration & Naturalization Serv.*, 60 F.3d 1084, 1088 (4th Cir.1995). “In interpreting statutory language, words are generally given their common and ordinary meaning.” *Nat’l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 288 (4th Cir.1998). Where the language of the statute is unambiguous, the Court’s inquiry is over, and the statute must be applied according to its plain meaning. *Hall v. McCoy*, 89 F.Supp.2d 742, 745 (W.D.Va.2000).

Jennings v. Jennings, 401 S.C. 1, 736 S.E.2d 242 (2012).

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Section 55-9-80 is clear that “the division and the counties, municipalities, and other subdivisions, including duly constituted airport commissions and special purpose districts of this State may acquire air rights. . . .” (emphasis added). Looking at the plain meaning of the statute, an airport commission would have to be a political subdivision in order to acquire air rights. The pertinent case appears to be Willis Construction Co., Inc. v. Sumter Airport Commission, 308 S.C. 505, 419 S.E.2d 240 (Ct. App. 1992). In Sumter Airport Commission, the Court stated that “[a] political subdivision is a division or subdivision of the State invested with governmental functions” (quoting Jackson v. Breeland, 103 S.C. 184, 88 S.E. 128 (1916)). The Court held that the Sumter Airport Commission was not a “political subdivision of the State” since “the Act creating the Sumter Airport Commission does not invest it with governmental functions, such as the ability to raise revenue or the power of eminent domain.” Since the enabling ordinance of the City of Orangeburg Aviation Commission does not grant it governmental functions, it is not a political subdivision and therefore can not acquire air rights.

CONCLUSION

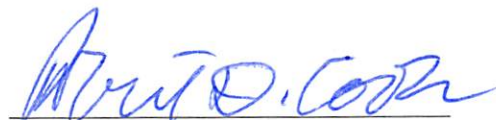
In conclusion, this Office believes that a Court would determine that an individual could serve on both the Orangeburg County Planning Commission and the City of Orangeburg Aviation Commission without violating the dual office holding provision of the State Constitution.

Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General