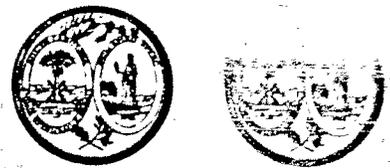


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The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK T. TRAVIS MEDLOCK
ATTORNEY GENERAL ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING RT. C DENNIS BUILDING
POST OFFICE BOX 11549 POST OFFICE BOX 11549
COLUMBIA, S.C. 29211 COLUMBIA, S.C. 29211
TELEPHONE 803-758-3970 TELEPHONE 803-758-3970

March 29, 1985

Ms. Frances Wilborn
Member, Folly Beach City Council
Post Office Box 674
Folly Beach, South Carolina 29439

Dear Ms. Wilborn:

Gary Baker, Executive Director of the State Ethics Commission, has referred your letter of March 22, 1985, to the Office of the Attorney General, since this Office, and not the Ethics Commission, responds to inquiries about dual office holding. I am sorry that you found my letter of March 20, 1985 to be ambiguous. I will try to clarify the points in that letter. I must add that ordinarily this Office does not undertake an opinion for a single member of a city or county council, but I have discussed this matter with the attorney for the City of Folly Beach to comply with the policy of this Office.

Article XVII, § 1A of the South Carolina Constitution provides that "... no person shall hold two offices of honor or profit at the same time." 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 265 S.E.2d 61 (1980).

As I stated in my letter of March 20, 1985, a member of a city council is a public officer, as is a member of a city's board of adjustment. This Office has repeatedly advised that both of the positions about which

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you inquired are public officers, as shown by the opinions enclosed with the letter of March 20, 1985. Thus, one who would serve as a member of a city council and on the board of adjustment would most probably violate the dual office holding prohibition of the State Constitution.

The other problem inherent in your inquiry is that a public policy and most probably the common law master-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) appoints one or more of its own members to the second public body. I refer you to the Opinion dated January 31, 1985, which was enclosed with my first letter, as well as the opinions from the Ethics Commission. 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."

212 S.C. at 397. The Code section authorizing city councils to establish boards of adjustment (Section 5-23-70) was quoted in the letter of March 20; it must be noted that the statute makes no provision for ex officio membership of council members on the board of adjustment. Because, as you describe the situation, it would appear that council is appointing its own members to a second office, the court's reasoning in Bradley would appear to be applicable to the situation you have described.

Based on the prohibition against dual office holding of the State Constitution, common law master-servant principles, ethical considerations cited to you 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 the City Council or persons who would not have some other conflict (dual office holding, master-servant, or ethical).

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I hope that this letter has sufficiently clarified my letter of March 20, 1985. Please advise this Office if you need additional assistance or clarification with this matter. The attorney for the City of Folly Beach can also give you excellent guidance in this matter.

Sincerely, Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

Robert D. Cook
Robert D. Cook
Executive Assistant for Opinions

cc: Gary Baker, Executive Director
State Ethics Commission

The Honorable Richard L. Beck
Mayor, City of Folly Beach