

January 17, 2008

The Honorable Kent M. Williams
Senator, District No. 30
602 Gressette Building
Post Office Box 142
Columbia, SC 29202

Dear Senator Williams:

We understand from your letter of December 21, 2007, that you wish to obtain an opinion of this Office concerning your constituent who is currently serving as a member of Bennettsville City Council and has been offered the position of Town Manager in Kingstree. You stated that he has six months to obtain residency in the city limits of Kingstree. In your letter, you raised two questions concerning residency and dual office holding.

First, you asked “if he can maintain a residency in both municipalities, staying 3 to 4 days each week at each residence.” You maintain that “[t]his would be similar to owning a second home elsewhere in the state, like a beach or lake house.” Secondly, you inquire “whether or not he can continue serving on the City Council in Bennettsville, while serving as the Town Manager in Kingstree until he obtains the six month residency requirement in Kingstree or if he must resign from the City Council in Bennettsville before then.”

Our office has also received an opinion request from the City Attorney of Bennettsville, Mr. Greg Ohanesian, raising the same issues you mentioned in your letter. In this opinion, we will address the issues raised in both letters. We will first address the issue of dual office holding, and then we will examine the issue of residency.

Law/ Analysis

I. Dual Office Holding

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 must hold concurrently 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).

Moreover, when one person holding one office of trust or profit is elected or appointed to another such office, and qualifies in the latter capacity, he thereby vacates the first office to which he was elected or appointed, and lawfully holds the second office. Op. S.C. Atty. Gen., Aug. 27, 2003, citing Walker v. Harris, 170 S.C. 242, 170 S.E. 270 (1933). Even though the first office is vacated as a matter of law, the person remains in a de facto capacity in the first position, such that all of his or her acts are valid as to third parties.

On numerous occasions, we have opined that a position on a city or town council constitutes an office for purposes of dual office holding. See, e.g., Ops. S.C. Atty. Gen., May 9, 2006; May 21, 2004; June 27, 1997. Thus, in order to determine whether holding a position on Bennettsville City Council and accepting a position as Kingstree Town Manager would violate the dual office holding prohibition, we must also determine whether a position as town manager constitutes an office.

We have previously commented on the position of city manager in the context of dual office holding. In Op. S.C. Atty. Gen., January 4, 1985, after examining the factors described in Crenshaw, we concluded that the position of city manager “most probably would be considered...an office for dual office holding purposes....”

It is our understanding that the Town of Kingstree has adopted the council-manager form of government. S.C. Code Section 5-13-10 et seq. describes and sets forth the manager’s powers and duties concerning this form. As we noted in our 1985 opinion, “The position of the city manager is created by Section 5-13-50, with responsibilities of the manager specified by Section 5-13-90. While there are several references to ‘employment’ of a manager, Section 5-13-90, inter alia, mandates that ‘[t]he manager shall be the chief executive officer and head of the administrative branch of the municipal government.’ Tenure, qualifications, and salary are mentioned by Section 5-13-70 and 5-13-50, though specific terms and salary amounts are left to the discretion of city council.” Op. S.C. Atty. Gen., January 4, 1985. In addition to the foregoing factors, we noted that Section 5-13-90 specifically refers to the manager as an officer. We concluded that the city manager most probably would be considered to hold an office for dual office holding purposes. Thus, it is our opinion that concurrently serving in these two positions would violate the dual office holding provision of the South Carolina Constitution.

II. Residency

Article XVII, Section 1 of the State Constitution provides that “[n]o person shall be elected or appointed to any office in this State unless he possess the qualifications of an elector” Our Supreme Court has stated that where a residency requirement has not been specified by the

legislature, such may necessarily implied, to prevent circumvention of the Constitution. Op. S.C. Atty. Gen., March 28, 2006, citing McLure v. McElroy, 211 S.C. 106, 44 S.E.2d 101 (1947), overruled on other grounds by Weaver v. Recreation District, 328 S.C. 83, 492 S.E.2d 79 (1997). In Op. S.C. Atty. Gen., May 7, 1991, we opined as follows:

To be qualified as an elector, one must meet the requirements specified in § 7-5-120, S.C. Code Ann. (1990 Cum.Supp.); one of those requirements is that the individual be “a resident in the county and in the polling precinct in which the elector offers to vote.” Merely owning property within the district without residing therein would not be sufficient to qualify one as an elector of that district. Where one is domiciled or resides is a mixed question of fact and law and turns on the individual's intent, Clarke v. McCown, 107 S.C. 209, 92 S.E. 479 (1917); residence or domicile and not ownership of property is the operative question, however.

In Op. S.C. Atty. Gen., October 18, 1993, we stated:

[t]his Office has previously advised that an individual serving on Colleton County Council, who moved from the district from which he was elected to council, would no longer be qualified to serve on Colleton County Council. Op. Atty. Gen. dated August 27, 1985; see also Ops. Atty. Gen. dated October 4, 1984; October 4, 1968; March 8, 1978; February 17, 1956; and December 16, 1970 as to the same or substantially similar issues, to the effect that public officers vacate or forfeit their offices at the time they ceased to be a resident of the affected district or political subdivision.

Moreover, S.C. Code Section 5-13-50, the provision dealing with employment and qualifications of a manager, states that a manager “need not be a resident of the municipality or state at the time of his employment and may reside outside the municipality while in office only with the approval of the council.”

Therefore, it appears that the requirement we understand to be in effect in Kingstree— that residency be obtained within six months— is consistent with the constitutional and statutory residency requirements for electors. A person may have but one residence. Op. S.C. Atty. Gen., September 14, 1995. Residency is a mixed question of law and fact. Only a court, not this Office, may make a factual determination as to whether an individual is a resident of Kingstree or Bennettsville. See Op. S.C. Atty. Gen., March 28, 2006. If, in fact, the individual's residence is no longer in Bennettsville, that person would no longer be qualified to serve on the Bennettsville City Council.

Conclusion

As we have previously opined, a position on a city council constitutes an office for dual office holding purposes. We have also previously concluded that a city manager would probably be considered to hold an office for dual office holding purposes. Therefore, it is our opinion that

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simultaneously holding the position of Bennettsville City Council member and Town Manager of Kingstree would probably violate the prohibition against dual office holding. In addition, the Town of Kingstree's requirement that residency be established within six months is consistent with constitutional and statutory residency requirements. An individual may have but one residence. If indeed the person in question, while serving on Bennettsville City Council, is no longer a resident of Bennettsville— a question of fact which we may not address in this opinion, Op. S.C. Atty. Gen., December 12, 1983, such would present an additional reason why the member may forfeit that office.

Sincerely,

Henry McMaster
Attorney General

By: Elizabeth H. Smith
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General