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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

December 5, 1997

The Honorable Glenn F. McConnell
Senator, District No. 41
27 Bainbridge Drive
Charleston, South Carolina 29407

Re: Informal Opinion

Dear Senator McConnell:

Your recent opinion request has been forwarded to me for reply. You have asked whether the dual office holding prohibitions of the State Constitution would be violated if an individual were to simultaneously serve as a duly elected Commissioner of the South Carolina Department of Transportation and as a member of the State Transportation Infrastructure Bank Board.

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 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 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).

One who would serve as a Commissioner of the Department of Transportation would be considered an office holder for dual office holding purposes. See Ops. Atty. Gen. dated May 4, 1993, February 21, 1990 and March 27, 1984.

Request Letter

As to the position of member of the board of directors of the Transportation Infrastructure Bank, the General Assembly enacted the South Carolina Infrastructure Bank Act pursuant to Act No. 148 of 1997 (The Act is codified as Section 11-43-110 et seq. of the South Carolina Code of Laws). This Act, among other things, creates the Transportation Infrastructure Bank, a body corporate and politic and an instrumentality of the State. The Bank receives funding from a variety of sources, including appropriations from the General Assembly, proceeds from the issuance of bonds, and loans from the Department of Transportation. The Bank is governed by a seven member board of directors. The majority of the numerous powers of the Bank are found in Section 11-43-150(A). A sampling of the powers listed in Section 11-43-150(A) are as follows:

- (2) ... the right of the board to select qualifying projects and to provide loans and other financial assistance;
- (3) sue and be sued in its own name;
- (5) make loans to qualified borrowers to finance the eligible costs of qualified projects and to acquire, hold, and sell loan obligations at prices and in a manner as the board determines advisable;
- (6) provide qualified borrowers with other financial assistance necessary to defray costs of a qualified project;
- (7) enter into contracts, arrangements, and agreements with qualified borrowers and other persons and execute and deliver all financing agreements and other instruments necessary or convenient to the exercise of the powers granted in this chapter;
- (8) enter into agreements with a department, agency, or instrumentality of the United States or of this State or another state for the purpose of planning and providing for the financing of qualified projects;
- (10) acquire by purchase, lease, donation, or other lawful means and sell, convey, pledge, lease, exchange, transfer, and dispose of all or any part of its properties and assets of every kind and character or any interest in it to further the public purpose of the bank;
- (14) borrow money through the issuance of bonds and other forms of indebtedness as provided in this chapter;

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As evidenced by the powers listed above, a member of the board of directors of the Bank exercises a portion of the sovereign powers of the State. Therefore, in my opinion, a member of the board of directors of the Bank would be considered an office holder for dual office holding purposes.¹ Accordingly, if an individual were to simultaneously serve as a Commissioner of the Department of Transportation and a member of the board of directors of the Bank, the dual office prohibitions of the State Constitution would be violated.

When a dual office situation occurs, the law operates automatically to "cure" the problem. If an individual holds one office on the date he assumes a second office, assuming both offices fall within the purview of Article XVII, Section 1A of the Constitution (or one of the other applicable constitutional prohibitions against dual office holding), he is deemed by law to have vacated the first office held. Op. Atty. Gen. dated July 13, 1995. Thus, the law operates automatically to create a vacancy in the first office. However, the individual may continue to perform the duties of the previously held office as a de facto officer, rather than de jure, until a successor is duly selected to complete his term of office (or to assume his duties if the term of service is indefinite). Id.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I remain

Very truly yours,



Paul M. Koch
Assistant Attorney General

¹ I note that several members of the board of directors serve in an ex officio capacity. Ex officio service is not considered to be within the purview of dual office holding. Op. Atty. Gen. dated March 22, 1995.