ALAN WILSON
ATTORNEY GENERAL

October 3, 2012

The Honorable Bill Taylor
Representative, District 86
P.O. Box 2646
Aiken, South Carolina 29802

Dear Representative Taylor,

We received your letter requesting an opinion of this Office concerning dual office holding. Specifically, your question concerns Edward Giobbe's dual service as Vice Chairman of the South Carolina Retirement System Investment Commission ("RSIC") and as a member of the City of Aiken Planning and Zoning Commission.

Article XVII, § 1A of the South Carolina Constitution provides that "[n]o person may hold two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public." For a violation of this provision to occur, an individual must concurrently hold two public offices which have duties "involving an exercise of some part of the sovereign power" of the State. Sanders v. Belue, 78 S.C. 171, 174, 58 S.E.2d 762, 763 (1907). A public officer is "[o]ne who is charged by law with duties involving an exercise of some part of the sovereign power, either great or small, in the performance of which the public is concerned, and which are continuing, and not occasional intermittent, is a public officer." Id., 58 S.E.2d at 762-63. Other relevant considerations 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." State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980).

We have repeatedly opined that a member of a county or municipal planning or zoning commission holds an office for purposes of the prohibition against dual office holding. See Ops. S.C. Att'y Gen., 2011 WL 3346433 (July 19, 2011) (Marion County Planning Commission); 2007 WL 4284624 (Nov. 27, 2007) (City of Mauldin Planning Commission); 2007 WL 1651330 (May 2, 2007) (Springdale Planning Commission); 2003 WL 21790892 (July 28, 2003) (Town of Hollywood Planning and Zoning Commission); 1979 WL 42958 (April 24, 1979) (City of Anderson Planning and Zoning Commission). Thus, we must determine whether a member of the RSIC likewise holds an office.

The RISC was established by the General Assembly with the enactment of Act No. 153 of 2005. S.C. Code § 9-16-315, as amended, provides that the RSIC consists of seven members, five of whom are appointed as well as the State Treasurer and the Executive Director of the S.C. Public Employee Benefit Authority who serve ex officio. § 9-16-315(A) (Supp. 2012). While no oath is required, additional provisions in § 9-16-315 provide for members' terms, qualifications, and salary. § 9-16-315(C), (E),

(H)(2). Furthermore, the duties and authority of Commission members are generally set forth in various statutory sections found in Articles 1 and 3 of Chapter 16 of Title 9. In light of these considerations, we believe a court would find that membership on the RSIC constitutes an office for purposes of dual office holding.

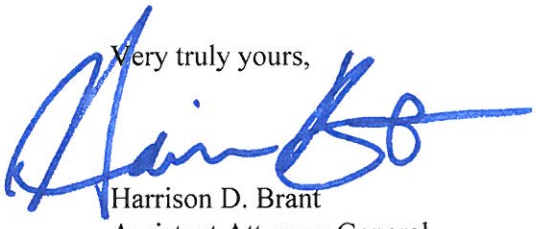
In addition, an individual's dual service as a member of the RSIC and a municipal zoning and planning commission is expressly prohibited by § 9-16-315(F) which states:

> Not including the State Treasurer, no person may be appointed or continue to serve who is an elected or appointed officer or employee of the State or any of its political subdivisions, including school districts.

Accordingly, it is the opinion of this Office that Article XVII, § 1A and § 9-16-315(F) are both contravened by one's simultaneous service as a member of the RSIC and a member of the City of Aiken Zoning and Planning Commission.

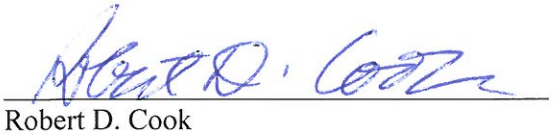
We further note that the legal consequences of holding both such offices depends on which office was assumed first. As we stated in a prior opinion, the law dictates that "when an officer accepts a second office, that person is deemed by law to have vacated the first office." Op. S.C. Att'y Gen., 2012 WL 4459271 (Sept. 13, 2012). However, with regards to the first office the person continues to serve as a *de facto* officer[1] until the vacancy is filled. Id. (citations omitted). Furthermore, "[a]s an officer *de facto*, any action taken as to the public or third parties would be as valid and effectual as those actions taken by an officer *de jure*[2] unless or until a court should declare those acts invalid or remove that person from office." Id. (citations omitted).

Very truly yours,



Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General

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[1] "A 'de facto officer' is one who has a presumptive or colorable right or title to an office, accompanied by possession or actual use of the office." 8 S.C. Jur. Public Officers and Public Employees § 4. As defined by our Supreme Court, "a de facto officer is one who is in possession of an office, in good faith, entered by right, claiming to be entitled thereto, and discharging its duties under color of authority." Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 151 (1935).

[2] "A 'de jure officer' is one who in all respects is regularly and legally appointed and qualified to hold a particular office and exercises the duties as his right." 8 S.C. Jur. Public Officers and Public Employees § 4.