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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER  
ATTORNEY GENERAL

July 28, 2003

The Honorable Gerald Schuster  
Mayor, Town of Hollywood  
Post Office Box 519  
Hollywood, South Carolina 29449

Dear Dr. Schuster:

You have requested an advisory opinion from this Office concerning the state constitutional prohibition on dual office holding. You have indicated that an individual who is currently employed by the Charleston City Police Department has recently been asked to serve on the Town of Hollywood Planning and Zoning Commission. You also have indicated that this same individual relinquished his seat as City Councilman in 2002 when the dual positions were found to be in conflict. You have inquired as to whether his appointment to the Town Planning and Zoning Commission would raise a dual office holding problem.

Law/Analysis

Article XVII, Section 1A of the South Carolina Constitution states that "no person may hold two offices of honor or profit at the same time ...," with exceptions specified for an officer in the militia, a member of a lawfully and regularly organized fire department, constable, or a notary public. As concluded by Attorney General Daniel McLeod in an opinion dated April 26, 1977, "[t]o determine whether a position is an office or not depends upon a number of circumstances and is not subject to any precise formula." The South Carolina Supreme Court, though, has held that for this provision to be contravened, a person concurrently must hold two 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). "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. Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employee." Id., 78 S.C. at 174. Other relevant considerations, as identified by the Court, are whether statutes or other 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).

This Office has advised on numerous occasions that a member of a municipal or county planning and zoning commission would generally be considered an officer for dual office holding purposes. See, as representative of those numerous opinions, Ops. S.C. Atty. Gen. dated October 16, 1995 (Gaffney Zoning and Planning Commission); August 24, 1992 and April 5, 1990 (both Florence Planning Commission); April 24, 1979 (Anderson Planning and Zoning Commission). Therefore, the question becomes whether an City of Charleston police officer would likewise be considered an office for dual office holding purposes.

The South Carolina Supreme Court recently held that a municipal police officer is an office holder for purposes of the prohibition against dual office holding. Richardson v. Town of Mount Pleasant, 566 S.E.2d 523, 350 S.C. 291 (2002). In Richardson, the majority concluded that a municipal police officer is not a constable<sup>1</sup>, so as to be exempt from the constitutional provision forbidding an individual from holding two offices of honor or profit at same time, and thus, an officer could not simultaneously hold offices of county councilman and police officer.

We have also advised on numerous occasions that a municipal police officer would be deemed to hold an office for dual office holding purposes. See, as representative of those numerous opinions, Ops. S.C. Atty. Gen. dated July 31, 2000; June 12, 1995; February 4, 1994; November 2, 1994. Other opinions have also further concluded that an police officer who serves only in a part-time, reserve capacity would also be deemed an office holder for dual office holding purposes. Ops. S.C. Atty. Gen. dated December 27, 2002; June 5, 1979; April 14, 1993. Based on the foregoing authorities, we advise that an individual who simultaneously is both a member of the Hollywood Planning and Zoning Commission and a officer with the Charleston City Police Department would create a dual office holding situation.

We have consistently been of the opinion that when a dual office holding situation occurs, the law operates to automatically "cure" the problem. See Op. S.C. Atty. Gen., dated July 31, 2000. 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), that person is deemed by law to have vacated the first office. However, the individual may continue to perform the duties of the previously held office as a de facto officer until a successor is duly selected to assume the duties or complete the term of office. While the actions taken by a de facto officer are generally held to be valid with regard to third parties, there is no question that such officer is acting under color of law rather than with full de jure status which he would possess if there had been no dual office holding. Furthermore, there exists general authority that the protections afforded a de facto officer will not be deemed to continue indefinitely, particularly when the public is chargeable with notice that the officer's status has been reduced to one of de facto rather than de jure. Op. S.C. Atty. Gen. dated May 7, 1998.

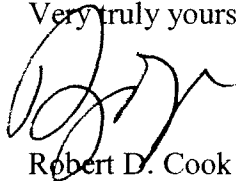
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<sup>1</sup> See "constable exception" to the prohibition on dual office holding. S.C. Const. Art. VI, Section 3.

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Applying this concept to the situation presented by you, it appears the individual held the office of police officer before he became a member of the planning and zoning commission. Therefore, the law would deem that person to have vacated his position as police officer if he assumes a position with the Hollywood Planning and Zoning Commission. He would, however, continue to serve as a police officer in a de facto capacity until a successor is found. This de facto capacity does carry with it some risk. While a de facto officer's actions are generally held to be valid with regard to third parties, it is possible that a court might find that the actions of a de facto officer are invalid. In this instance, an officer charged with enforcing the criminal laws of this State may be performing those duties in a de facto, rather than de jure capacity. Accordingly, we advise that the wisest course of action in this case would be for the police officer to avoid a situation where his or her law enforcement actions could be called into question.

Very truly yours,

A handwritten signature in black ink, appearing to read 'R. D. Cook', written over the typed name.

Robert D. Cook  
Assistant Deputy Attorney General