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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

June 8, 2000

Mr. Jack E. Stahl
Post Office Box 60815
North Charleston, SC 29419

Dear Mr. Stahl:

By your letter of June 3, 2000 you have asked whether a dual office holding situation would exist if you were to serve simultaneously as a member of the Berkeley County Zoning Appeals Board and as a member of the Hanahan Municipal Election Commission. For the reasons set forth below, it is my opinion that concurrent service in these positions would violate the South Carolina Constitution's prohibition against dual office holding.

Article XVII, Section 1A of the South Carolina 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, 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." 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 concluded on numerous occasions that members of zoning appeals boards are officers. *See, e.g.*, Ops. Atty. Gen. dated March 16, 1999 (City of North Myrtle

Beach Zoning Appeals Board); January 27, 1976 (Georgetown County Zoning Appeals Board); and May 2, 1977 (City of Greenville Zoning Appeals Board). Therefore, having determined that service on a zoning appeals board is an office within the meaning of Art. XVII, Sec. 1A, it is necessary, then, to address whether membership on a municipal election commission would likewise constitute an office. Once again, reference to this Office's earlier opinions are instructive. We have previously advised that members of county and municipal election commissions would be considered office holders for dual office holding purposes. *See, e.g.*, Ops. Atty. Gen. dated February 23, 1995 (City of Bishopville Election Commission); September 12, 1990 (Florence County Election Commission); and July 24, 1980 (City of Greenville Election Commission). Therefore, it is my opinion that a member of the Berkeley County Zoning Appeals Board could not simultaneously serve on the Hanahan Municipal Election Commission without contravening the dual office holding prohibitions of the State Constitution.

As I mentioned during our recent conversation, when a dual office holding 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. Thus, the law operates automatically to create a vacancy in that first office. However, the individual may continue to perform the duties of the previously held office as a de facto officer,[1] 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). See Walker v. Harris, 170 S.C. 242 (1933); Dove v. Kirkland, 92 S.C. 313 (1912); State v. Coleman, 54 S.C. 282 (1898); State v. Buttz, 9 S.C. 156 (1877). Furthermore, actions taken by a de facto officer in relation to the public or third parties will be as valid and effectual as those of a de jure officer unless or until a court should declare such acts void or remove the individual from office. See, for examples, State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223

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[1]A de jure officer is "one who is in all respects legally appointed and qualified to exercise the office." 63 Am.Jur.2d Public Officers and Employees §495. 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 (1936); see also Smith v. City Council of Charleston, 198 S.C. 313, 17 S.E.2d 860 (1942) and Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952).

S.E.2d 166 (1976); State ex rel. McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967); Kittman v. Ayer, 3 Strob. 92 (S.C. 1848).

I trust this information is responsive to your inquiry and that you will not hesitate to contact me if I can be of additional assistance.

Sincerely yours,

Zeb Williams

Zeb C. Williams, III
Deputy Attorney General

ZCW/an

cc: D. Mark Stokes, Esq.
Berkeley County Attorney