Dual Office-Holding - Historic Preservation Board

Number: AGO 2016-15

Date: October 06, 2016

Subject:
Dual Office-Holding - Historic Preservation Board

Mr. William J. Gallo
4010 Northeast 30th Avenue
Lighthouse Point, Florida 33064

RE: DUAL OFFICE-HOLDING – COUNTIES – MUNICIPALITIES – PLANNING AND ZONING BOARDS – HISTORIC PRESERVATION BOARDS – individual may not simultaneously serve on the city's planning and zoning board and the county's historic preservation board as both involve exercise of the sovereign power. s. 5(a), Art. II, Fla. Const.

Dear Mr. Gallo:

You have been appointed to serve on the City of Lighthouse Point Planning and Zoning Board, as well as the Broward County Historic Preservation Board. In light of these appointments, you ask substantially the following question:

Does simultaneous service on the City of Lighthouse Point Planning and Zoning Board and the Broward County Historic Preservation Board violate the constitutional prohibition against dual office-holding?

In sum:

Simultaneous service on the City of Lighthouse Point Planning and Zoning Board and the Broward County Historic Preservation Board would violate the prohibition against dual office-holding in section 5(a), Article II, Florida Constitution.

Section 5(a), Article II, Florida Constitution, in pertinent part, provides:

"No person holding any office of emolument under any foreign government, or civil office of emolument under the United States or any other state, shall hold any office of honor or of emolument under the government of this state. No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers."

In addressing the question you have raised, it must be determined whether each of the positions you hold is an office for purposes of the dual office-holding prohibition. No definition is provided for the terms "office" and "officer" in the Constitution. Opinions of the Florida Supreme Court and

the Attorney General's Office, however, have focused upon the nature of the powers and duties of a particular position to determine whether it is an “office” or an “employment” which falls outside the scope of the prohibition. The Florida Supreme Court has stated:

“The term ‘office’ implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, while an “employment” does not comprehend a delegation of any part of the sovereign authority. The term ‘office’ embraces the idea of tenure, duration and duties in exercising some portion of the sovereign power, conferred or defined by law and not by contract. An employment does not authorize the exercise in one's own right of any sovereign power or any prescribed independent authority of a governmental nature; and this constitutes, perhaps, the most decisive difference between an employment and an office. . . .”[1]

In Attorney General Opinions 89-25 and 90-33, this office found that local planning and zoning commissions possessing the power to grant variances that are approved without review or that are final unless appealed to the county commission did not fall within the exception for advisory bodies. While statutory bodies possessing only advisory powers are excepted from the dual office-holding prohibition, section 5(a), Article II, Florida Constitution, does not recognize an exception for bodies whose powers are substantially advisory.[2]

Certain town committees that are given the authority to make factual determinations, review permit applications, issue permits, grant variances, or impose fines have been determined to be exercising sovereign powers and, therefore, were offices for purposes of the dual office-holding prohibition. However, where a committee or board merely makes non-binding recommendations and has not been delegated any power to make factual determinations or exercise any portion of sovereign power, there is no office subject to the constitutional prohibition.[3]

You have provided information regarding the powers and duties of both boards. Relative to the Lighthouse Point Planning and Zoning Board, the city’s code of ordinances provides that the board, among other things, grants temporary permits for nonconforming uses of lands and buildings with the city, hears and decides appeals of administrative decisions involving zoning regulations, hears and determines grants of variances, and reviews conditional use approval applications.[4] Given the discussion above regarding what constitutes an office, the power of the planning and zoning board to grant variances and to decide appeals would be characteristics of an office which would subject the position to the dual office-holding prohibition.

In relation to the county’s historic preservation board, the county code reflects the board’s duty to: make recommendations on historic resource designations; approve, approve with conditions, or deny certificates of appropriateness and certificates to dig; and carry out duties assigned by the county commission.[5] Of note, the code provides that “no building permits shall be issued for new construction, demolition, alteration, rehabilitation, signage, or any other physical modification of a historic resource, . . ., without the prior issuance of a certificate of appropriateness by the Broward County Historic Preservation Board[.]”[6] While the weight of the duties of the historic preservation board appear to be advisory in nature, its duties include the approval or denial of certificates of appropriateness which is an essential determination before issuance of a building permit for a historic resource.

As discussed above, there is no exception for bodies with substantially or predominately

advisory duties. In light of the historic board's authority to approve or deny certificates of appropriateness, there is the exercise of a sovereign power which would make a position on the board an office subject to the dual office-holding prohibition in section 5, Article II, Florida Constitution.

In sum, it is my opinion that simultaneous membership on the City of Lighthouse Point Planning and Zoning Board and the Broward County Historic Preservation Board would violate section 5(a), Article II, Florida Constitution, prohibiting dual office-holding.[7]

Sincerely,

Pam Bondi
Attorney General

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[1] *State ex rel. Holloway v. Sheats*, 83 So. 508, 509 (Fla. 1919). *And see State ex rel. Clyatt v. Hocker*, 22 So. 721 (Fla. 1897).

[2] *And see* Op. Att'y Gen. Fla. 73-47 (1973) (if a parks, planning and zoning commission was granted more than mere advisory powers, that fact would exclude commission members from the exemption in s. 5(a), Art. II, Fla. Const.). *Accord* Op. Att'y Gen. Fla. 69-62 (1969).

[3] *See* Ops Att'y Gen. Fla. 2013-22 and 2005-59.

[4] Section 42-281(c), Lighthouse Point Code of Ordinances.

[5] Section 5-530(b), Art. XVII, Declaration of legislative intent and purpose, Broward County Code of Ordinances.

[6] Section 5-531(a), Scope and exemptions, Broward County Code of Ordinances.

[7] *See In re Advisory Opinion to the Governor*, 79 So. 874 (Fla. 1918), in which the Court stated that when a person holding one office is appointed to and accepts another office, such acceptance vacates the person's right and status to the first office; and Ops. Att'y Gen. Fla. 94-40 (1994) and 77-63 (1977). *Cf. Holley v. Adams*, 238 So. 2d 401, 407 (Fla. 1970) ("The acceptance of an incompatible office by one already holding office operates as a resignation of the first.").