Dual Office-Holding -- Municipal Boards

Number: AGO 2014-03

Date: May 01, 2014

Subject:
Dual Office-Holding -- Municipal Boards

Ms. Maggie Mooney-Portale
Persson & Cohen, P.A.
6853 Energy Court
Lakewood Ranch, Florida 34240

RE: DUAL OFFICE-HOLDING – MUNICIPALITIES – PLANNING BOARD – ZONING BOARD – whether one appointed municipal board can hear matters delegated to another appointed municipal board when the first municipal board is unable to timely fulfill its duties. Art. II, s. 5(a), Fla. Const.

Dear Ms. Mooney-Portale:

As town attorney for the Town of Longboat Key and on behalf of the town council, you have asked substantially the following question:

In light of Article II, section 5(a), Florida Constitution, the dual office-holding prohibition, can one appointed municipal board hear matters delegated to another appointed municipal board as an alternative when the first municipal board is unable to timely fulfill its duties?

In sum:

The Town of Longboat Key would be precluded by Florida's constitutional dual office-holding prohibition from appointing the members of the city's planning board to serve concurrently as the city's zoning board, however, the city could provide legislatively that the city's planning board shall also perform *ex officio* the duties of the zoning board. Such an *ex officio* designation imposing the duties of one office on another office would not violate the provisions of Article II, section 5(a), Florida Constitution.

According to information you have supplied to this office, the Charter of the Town of Longboat Key provides that the town commission shall establish permanent boards by ordinance. The permanent boards of the town are designated by the charter to be the Planning and Zoning Board (the planning board), the Zoning Board of Adjustment (the board of adjustment) and the Code Enforcement Board. The duties and responsibilities of each of these boards are established by ordinance.

You advise that due to the seasonal residency of several members of the Zoning Board of Adjustment, it is often difficult for the zoning board to establish a quorum to do official business. This results in what appears to be serious delays in performing the duties of the board, *i.e.*, to

review and approve or deny requests for variances. In one instance, applications for variances were received by the town in May and a quorum could not be reached until the Zoning Board of Adjustment's October meeting. The board is charged by ordinance with meeting within 30 days after receipt of a matter requiring board action.

As a potential solution to the problem presented by the seasonal absence of members of the zoning board, the town commission is considering adopting an ordinance that would delegate the powers and duties of the zoning board to the town's Planning and Zoning Board for any matter which the zoning board is unable to timely address. Like the zoning board, the planning board is established in the town charter and its members are appointed by the town commission.

While the duties and responsibilities of these two boards appear to be similar, a review of the Longboat Key Code of Ordinances provides "[a] person appointed to this board (the zoning board) may not serve concurrently on any of the following town boards: Code enforcement board, ethics commission or planning and zoning board (or zoning board of adjustment)" in the ordinance creating the Planning and Zoning Board.[1] Thus, the Code of Ordinances contains a prohibition against members of either of these boards serving concurrently on the other.

This office cannot review and provide legal opinions on the language of local legislation as we are statutorily limited to reviewing and providing opinions on the Florida Statutes and the Florida Constitution.[2] Thus, your question is presented and will be addressed in terms of whether Florida's constitutional dual office-holding prohibition would preclude members of the planning board serving concurrently on the board of adjustment. The Town Attorney may wish to review the duties and responsibilities of each of these boards to determine whether the common law rule of incompatibility is implicated.

Article II, section 5(a) of the Florida Constitution, provides in pertinent part:

"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."

This provision prohibits a person from simultaneously serving in more than one "office" under the governments of the state, counties, or municipalities. This office has concluded that the constitutional prohibition applies to both elected and appointed offices.[3] While the Constitution does not define the term "office," the courts have stated that the term "implies a delegation of a portion of the sovereign power . . . [and] 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."[4]

These two positions, that of a member of the planning board and a member of the zoning board, are quasi-judicial and exercise the sovereign power[5] according to information supplied to this office. Both serve terms of office and the town ordinances prohibit an elected official or employee of the town from serving on either board. Thus, the holding of two separate offices by an individual serving concurrently on both boards would violate the provisions of Article II, section

5(a), Florida Constitution.

It has long been a settled rule in this state, however, that, assuming a particular officeholder is subject to the constitutional dual office-holding prohibition, a legislative designation of that officer to perform *ex officio* the function of another or additional office is not a holding of two offices at the same time in violation of the Constitution, provided the duties imposed are consistent with those being exercised.[6] Rather, the newly assigned duties are viewed as an addition to the existing duties of the officer.[7]

For example, in ,[8] the Florida Supreme Court determined that the chairman of the State Road Department could serve as an *ex officio* member of the State Planning Board. The Court pointed out, however, that while additional duties may be validly imposed by the Legislature on a state office *ex officio*, a legislative attempt to authorize the Governor to appoint a state official to another separate and distinct office would be ineffectual under the constitutional dual office-holding prohibition. Thus, there is a distinction between a statute or code provision imposing an *ex officio* position on the holder of another office and one authorizing the appointment of one officeholder to another distinct office.

This office has also recognized that when *ex officio* duties are imposed, Article II, section 5(a), Florida Constitution, is not violated. For example, in Attorney General Opinion 81-72, this office stated that a city council, as the legislative body of a municipality, could impose by ordinance the *ex officio* duties of the office of the city manager on the office of the city clerk. Similarly, this office in Attorney General Opinion 91-48 concluded that while the city commission could not appoint the city manager to simultaneously serve as the city clerk, the charter could impose the duties of the clerk as additional *ex officio* duties on the office of the city manager. Attorney General Opinion 93-42 concluded that a municipality could legislatively merge the offices of fire chief and community redevelopment director into one office and have the one officer perform ex officio duties of the other office.[9]

As mentioned above, a distinction has been drawn between a statute imposing an *ex officio* position on the holder of another office and one authorizing the appointment of one officeholder to another distinct and separate office. For example, the Florida Supreme Court has pointed out while additional duties may validly be imposed by the Legislature on a state officer *ex officio*, a legislative attempt to authorize the Governor to appoint a state official to another separate and distinct office would be ineffectual under the constitutional dual office-holding prohibition.[10] The Charter of the Town of Longboat Key establishes the Zoning Board of Adjustment and the Planning and Zoning Board as separate and distinct permanent entities and an attempt by the town to authorize simultaneous service on these two boards would appear to be questionable in the absence of an *ex officio* designation.

The information you have provided to this office suggests that the Town of Longboat Key is considering designating the members of the city's planning board to serve concurrently as the city's zoning board. Thus, the city contemplates adopting an ordinance which imposes such additional duties on the members of the planning board by virtue of their membership on that board.[11] Accordingly, the imposition and designation of such additional or *ex officio* duties on the members of the city's planning board would not violate the constitutional prohibition against dual office-holding contained in Article II, section 5(a), Florida Constitution.

I cannot advise you, however, of any instance in which this office or the courts have considered the sporadic *ex officio* delegation of duties resulting from the inability of an officer to timely perform his or her duties. It would appear that the town may be dealing with instances of misfeasance or vacancy in office[12] which could be addressed under the terms of those ordinances or statutes.

Sincerely,

Pam Bondi
Attorney General

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[1] *See* ss. 33.20(A) and 158.026(A)(1), Longboat Key, Florida, Code of Ordinances.

[2] *See* s. 16.01(3), Fla. Stat., and Department of Legal Affairs Statement Concerning Attorney General Opinions available at www.myfloridalegal.com / Legal Resources / AG Opinions / Frequently Asked Questions.

[3] *See, e.g.,* Op. Att'y Gen. Fla. 80-97 (1980).

[4] *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).

[5] For discussions of the nature of these "offices," *see* Ops. Att'y Gen. Fla. 06-13 (2006) (simultaneous service as member of city board of adjustment, a quasi-judicial body, and city planning and zoning board, exercising powers of sovereign, constitutes prohibited dual office-holding); 85-21 (1985) (board of adjustment is an office); 86-105 (1986) (municipal building board of appeals is an office); 05-59 (2005) (town committees given authority to make factual determinations, review permit applications, issue permits, grant variances, or impose fines exercise sovereign powers [and are] offices for purposes of dual office-holding prohibition. *But see* Op. Att'y Gen. Fla. 13-22 (2013) (member of Ft. Pierce planning board is not an officer for purposes of dual office-holding prohibition).

[6] *See State v. Florida State Turnpike Authority*, 80 So. 2d 337, 338 (Fla. 1955); *State ex rel. Gibbs v. Gordon*, 189 So. 437 (Fla. 1939); *City of Riviera Beach v. Palm Beach County Solid Waste Authority*, 502 So. 2d 1335 (Fla. 4th DCA 1987) (special act authorizing county commissioners to sit as members of county solid waste authority does not violate Art. II, s. 5[a], Fla. Const.); *City of Orlando v. State Department of Insurance*, 528 So. 2d 468 (Fla. 1st DCA 1988) (where the statutes had been amended to authorize municipal officials to serve on the board of trustees of municipal police and firefighters' pensions trust funds, such provision did not violate the constitutional dual office-holding prohibition).

[7] *See* Webster's Third New International Dictionary, *Ex officio*, p. 797 (unabridged ed. 1981) ("ex officio" means "by virtue or because of an office").

[8] 1 So. 2d 636 (Fla. 1941).

[9] *And see* Ops. Att'y Gen. Fla. 80-97 (1980) (membership of elected municipal officer on metropolitan planning organization as prescribed by statute does not violate Art. II, s. 5[a], Fla. Const.); 94-66 (1994) (designation by county ordinance that county commissioners would perform the functions of the board of adjustment appeared to be an *ex officio* designation and did not violate the dual office-holding prohibition); 94-98 (1994) (imposition of additional duties on the mayor or other city council members under the city code to serve on the board of trustees of the police officers' and firefighters' pension trust fund would not violate Art. II, s. 5[a], Fla. Const); and 00-72 (2000) (legislative designation that a representative from county government, the school district, the sheriff's office, the circuit court, and the county children's board serve on a Community Alliance constituted an *ex officio* designation of officers from the enumerated governmental entities). *Cf.* Op. Att'y Gen. Fla. 90-45 (1990), in which this office concluded that a member of the civil service board could not be appointed to the board of trustees of the general pension trust board since there was no *ex officio* designation imposing the duties of one office on the other.

[10] *Advisory Opinion to Governor*, 1 So. 2d 636 (Fla. 1941). *And see* Ops. Att'y Gen. Fla. 76-92 (1976) (the action of a city council which did not abolish the office of town marshal, but merely authorized the mayor to perform the duties of that office would probably violate the dual office-holding prohibition) and 70-46 (1970) (it was doubtful that a city commissioner could also be a municipal judge where the charter created the office of municipal judge as a separate and distinct office; while the charter authorized the city commission to appoint one of its own members as municipal judge, it did not designate that office as an *ex officio* office to be performed by the city commissioner).

[11] *See* Op. Att'y Gen. Fla. 94-66 (1994) (designation by ordinance of board of county commissioners to perform functions of board of adjustment is *ex officio* designation and thus would not violate dual office-holding prohibition).

[12] *See* s. 33.20(B), Longboat Key, Florida, Code of Ordinances, which provides that "[a]ny member who fails to attend three consecutive scheduled and called regular meetings shall automatically forfeit his appointment, and the town commission shall promptly fill the vacancy. Vacancies shall be filled by appointment for unexpired terms only" and s. 158.026(A)(2), Longboat Key, Florida, Code of Ordinances, providing similar language for the zoning board. *And see* s. 158.026(B), *id.*, requiring the board of adjustment to establish its own rules and regulations for the operation of the board.