Dual Office-holding -- City Planning Board

Number: AGO 2013-22

Date: September 26, 2013

Subject:
Dual Office-holding -- City Planning Board

Mr. Steven M. Weaver, Sr.
1615 Thumbpoint Drive
Fort Pierce, Florida 34949

RE: MUNICIPAL PLANNING BOARD – REGIONAL PLANNING COUNCIL – DUAL OFFICE-HOLDING – OFFICERS – whether city planning board member is "officer" for purposes of dual office-holding prohibition. ss. 163.3164 and 163.3174, Fla. Stat.; "Local Government Comprehensive Planning Act of 1975;" "Community Planning Act."

Dear Mr. Weaver:

As a member of the Fort Pierce Planning Board recently appointed to the Treasure Coast Regional Planning Council, you have asked for my opinion on substantially the following question:

Is a member of the Fort Pierce Planning Board an officer for purposes of Article II, section 5(a), Florida Constitution, Florida's dual office-holding prohibition?

In sum:

A member of the Fort Pierce Planning Board is not an officer for purposes of Florida's dual office-holding prohibition.

According to your letter, you have been serving as a member of the Fort Pierce Planning Board. Recently, you were appointed to the Treasure Coast Regional Planning Council. You are aware of Attorney General Opinion 2001-28 in which this office concluded that Regional Planning Council members are officers for purposes of Florida's dual office-holding prohibition[1] and thus, your question is whether a member of the Fort Pierce Planning Board is an officer for dual office-holding purposes.

Your letter also indicated that you are aware of the Florida Supreme Court decision which set forth the general rule that "[t]he acceptance of an incompatible office by one already holding office operates as a resignation of the first."[2] Under the rationale of that decision, the action of an officer accepting another office in violation of the dual office-holding prohibition may create a vacancy in the first office.

Florida's dual office-holding prohibition, found in Article II, section 5(a), Florida Constitution, provides that:

"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."

While there is no definition provided for the terms "office" and "officer," opinions of the Florida Supreme Court and the Attorney General's Office have focused on the nature of the powers and duties of a particular position to determine whether it is an "office" or an "employment" that would fall outside the scope of the prohibition. As 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. . . ."[3]

This office has considered whether a member of a municipal planning board may be an officer subject to the dual office-holding prohibition. In Attorney General Opinion 2006-13, it was noted that Article II, section 5(a), Florida Constitution, contains an exception to the dual office-holding prohibition for service on statutory bodies having only advisory powers. This exception has been the subject of a number of Attorney General Opinions.

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. As those opinions point out, only those statutory bodies possessing advisory powers are excepted; Article II, section 5(a), Florida Constitution, does not provide for or recognize an exception for statutory bodies whose powers are substantially or predominately advisory.[4]

Similarly, in Attorney General Opinion 2005-59, it was noted that "town committees that are given the authority to make factual determinations, review permit applications, issue permits, grant variances, or impose fines exercise sovereign powers [are] offices for purposes of the dual officeholding prohibition." However, where a committee or board merely makes non-binding recommendations and has not otherwise been delegated any powers to make factual determinations or exercise any portion of the municipality's sovereign power, there would not appear to be an office subject to the constitutional prohibition against dual office-holding.

The city planning board for the municipality of Fort Pierce is a 10-member body appointed by the city commission.[5] The members of the city commission and the city manager are designated *ex officio* members of the city planning board.[6] Members of the board serve a two-year term of office.[7]

Section 2-223 of the Fort Pierce, Florida, Code of Ordinances, sets forth the powers and duties of the board which include the following:

"(4) *Disposal of city property*. No real property shall be leased by or disposed of by the city until proposal for the leasing or disposition of the same is submitted to the board for its *recommendation*, provided, however, the city commission shall have authority to overrule the disapproval of the board on any such proposal.
(5) *Official city map*. Draft an official map of the city with the assistance of the director of public works.
(6) *Neighborhoods*. Make and adopt plans for the improvement and development of neighborhoods.

* * *

(8) *Budget*. Submit annually to the city manager, not less than ninety (90) days prior to the beginning of the budget year, a list of *recommended* capital improvements which the board considers necessary or desirable to be constructed during the next ensuing three-year period and establish a priority of such *recommended* improvements for such period of time.
(9) *Recommend public buildings and lands*. *Recommend* the erection and use of a building or the use of premises in any zoning district when found to be necessary for the public health, convenience, safety or welfare for the following purposes: A public utility; any municipal purpose; community center; cemetery; golf course; educational, philanthropic, charitable or religious use; public or private school (except child nurseries and kindergartens); public or private parks or playgrounds.

* * *

(11) *Annexation*. Review applications for voluntary annexation to city and make *recommendation* to city commission. (e.s.)

These code provisions would suggest that the city planning board makes recommendations to the city commission and functions as an advisory body, making recommendations for final approval by the city commission.[8] This is the case particularly when these code provisions are read together with Article II, section 2-223(10), Fort Pierce Code of Ordinances, which provides that "[a]ll *recommendations* from the planning board, for either approval or disapproval *of any measure, petition, plan, program or proposal of any nature*, shall be by a majority of the members serving on said board." (e.s.) As provisions with a related purpose, these sections of the Fort Pierce Code of Ordinances should be read *in pari materia*, that is, together, to achieve a consistent and harmonious whole.[9]

Thus, the Fort Pierce city planning board appears to be merely a "statutory body having only advisory powers" rather than having been delegated the power to exercise a portion of the municipality's sovereign power.[10]

Further, section 2-224 of the code of ordinances designates the city planning board as "the local planning agency for purposes of the Local Government Comprehensive Planning Act of 1975."[11] Section 163.3161, Florida Statutes, the definitional section of the act, provides that

the "[l]ocal planning agency" is "the agency designated to prepare the comprehensive plan or plan amendments required by this act."[12]

Pursuant to the Community Planning Act, section 163.3164 *et seq.*, "adopted comprehensive plans shall have the legal status set out in the act and . . . no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act."[13] As provided in section 163.3174(4), Florida Statutes, a local land planning agency has general responsibility for the conduct of the comprehensive planning program and, more specifically, the local planning agency shall:

"(a) Be the agency responsible for the preparation of the comprehensive plan or plan amendment and shall *make recommendations* to the governing body regarding the adoption or amendment of such plan. During the preparation of the plan or plan amendment and prior to any recommendation to the governing body, the local planning agency shall hold at least one public hearing, with public notice, on the proposed plan or plan amendment. The governing body in cooperation with the local planning agency may designate any agency, committee, department, or person to prepare the comprehensive plan or plan amendment, but *final recommendation of the adoption of such plan or plan amendment to the governing body shall be the responsibility of the local planning agency*.
(b) Monitor and oversee the effectiveness and status of the comprehensive plan and *recommend* to the governing body such changes in the comprehensive plan as may from time to time be required, including the periodic evaluation and appraisal of the comprehensive plan required by s. 163.3191.
(c) Review proposed land development regulations, land development codes, or amendments thereto, and *make recommendations* to the governing body as to the consistency of the proposal with the adopted comprehensive plan, or element or portion thereof, when the local planning agency is serving as the land development regulation commission or the local government requires review by both the local planning agency and the land development regulation commission.
(d) Perform any other functions, duties, and responsibilities assigned to it by the governing body or by general or special law." (e.s)

This office has determined, based on the powers and duties assigned to the particular planning commissions established pursuant to Part II, Chapter 163, Florida Statutes, that those commissions which possessed only those powers contemplated by that part were "statutory bod[ies] having only advisory powers" for purposes of Article II, section 5(a), Florida Constitution, and thus, fell within the exception to dual office-holding. Where a planning council had not only the authority to act in an advisory role to the county commission regarding preparation and amendment of the county's land use plan, but also to take final action concerning consistency reviews of land use plans and in adopting and amending the trafficway plan, this office concluded that the planning council was more than merely an advisory body and did not fall within the exception for advisory bodies in the dual office-holding prohibition.[14]

The information you have provided to this office suggests that the city planning board, acting as the local planning agency, prepares periodic reports on the comprehensive plan which are sent to the city commission. The city commission may adopt any such report as submitted or may make changes or modifications to the report before adoption. Adoption of the report by the city

commission amends the comprehensive plan or element or portion thereof.[15] Based on the powers and duties of the land planning agency, it appears from the duties and responsibilities assigned to the local land planning agency by the city code that members of the city planning board, acting as the local land planning agency, are acting in an information-gathering and advisory role and would fall within the exception for advisory bodies in Article II, section 5(a), Florida Constitution.

Thus, it is my opinion that a member of the Fort Pierce Planning Board is not an officer for purposes of Article II, section 5(a), Florida Constitution, Florida's dual office-holding prohibition.

Sincerely,

Pam Bondi
Attorney General

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[1] *Cf. Orange County v. Gillespie*, 239 So. 2d 132 (Fla. 4th DCA 1970), *cert. denied*, 239 So. 2d 825 (Fla. 1970), in which the court held that regional planning council members were officers within the meaning of the resign-to-run law, which, at that time, applied only to state, county, or municipal offices; it would appear that the court considered such councils to be acting on behalf of the state in implementing state policies regarding growth management.

[2] *See Holley v. Adams*, 238 So. 2d 401, 407 (Fla. 1970); *Gryzik v. State*, 380 So. 2d 1102 (Fla. 1st DCA 1980).

[3] *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).

[4] *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).

[5] Article XII, sec. 2-221, Fort Pierce, Florida, Code of Ordinances.

[6] *Id.* A long recognized rule in this state is that a legislative designation of an officer to perform *ex officio* the function of another office does not constitute holding two offices at the same time, provided the duties imposed are consistent with those being exercised. *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 1355 (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); *and see, e.g.,* Ops. Att'y Gen. Fla. 13-08 (2013), 12-28 (2012), and 07-43

(2007).

[7] *Id.*

[8] *See* Art. II, sec. 14(31), Fort Pierce, Florida, Code of Ordinances, providing that the official city map must be adopted and approved by the city commission, and Art. II, sec. 2-223(10), *id.*, which provides that "[a]ll *recommendations* from the planning board, for either approval or disapproval of any measure, petition, plan, program or proposal of any nature, shall be by a majority of the members serving on said board." (e.s.)

[9] *Cf. Ideal Farms Drainage District et al. v. Certain Lands*, 19 So. 2d 234 (Fla. 1944); *Forsythe v. Longboat Key Beach Erosion Control District*, 604 So. 2d 452 (Fla. 1992) (all parts of a statute must be read together in order to achieve a consistent whole); *State ex rel. Ashby v. Haddock*, 140 So. 2d 631 (Fla. 1st DCA 1962).

[10] *See* Op. Att'y Gen. Fla. 94-88 (1994); *and see* Op. Att'y Gen. Fla. 89-25 (1989) (county planning and zoning commission, possessing authority to grant variances without review by county commission, constitutes an office for purposes of dual office-holding); 90-33 (1990) (membership on a planning commission which hears appeals and makes decisions which are final unless appealed to the county commission is not a statutory body possessing only advisory powers).

[11] The Local Government Comprehensive Planning Act of 1975, Ch. 75-257, Laws of Fla., is currently designated the "Community Planning Act." *See* s. 163.3161(1), Fla. Stat.

[12] Section 163.3164(30), Fla. Stat.

[13] Section 163.3161(6), Fla. Stat.

[14] *See* Ops. Att'y Gen. Fla. 99-16 (1996); 94-88 (1994); *and see* Ops. Att'y Gen. Fla. 89-25 (1989) (county planning and zoning commission, possessing authority to grant variances without review by county commission, constitutes an office for purposes of dual office-holding); 90-33 (1990) (membership on a planning commission which hears appeals and makes decisions which are final unless appealed to the county commission is not a statutory body possessing only advisory powers).

[15] Article XII, sec. 2-224, Fort Pierce, Florida, Code of Ordinances.