Dual office holding, homeowners association

Number: INFORMAL

Date: March 12, 2007

Ms. Patricia J. Burke
Town Clerk
Town of Palm Shores
5030 Paul Hurtt Lane
Palm Shores, Florida 32940-7200

Dear Ms. Burke:

This is in response to your request for assistance in determining whether a board member of a homeowners association may also sit on the town's planning and zoning board or town council, when the approval of building plans by the association will be reviewed by the board or council. You also ask whether dual membership on the board of the homeowners association and the town board or council creates a conflict when voting on matters that may come before the association board and the town board or council.

You state that there are two homeowners associations in the Town of Palm Shores that act as the governing bodies for their respective subdivisions. All building plans for construction in a subdivision are initially approved by the homeowners association, then forwarded to the town planning and zoning board, the local planning agency, and the town council for final approval.[1] Currently, the president of one of the homeowners associations sits on the town's planning and zoning board. The treasurer and a member of one of the association's board of directors are newly elected to the town council.

Initially, I would note that questions of conflict of interests should be addressed to the Florida Commission on Ethics.[2] Moreover, absent a request from a majority of the members of the town council, this office may not offer a formal opinion; rather, the following informal comments are provided. It is assumed that you are concerned about the dual officeholding prohibition in Article II, section 5(a), State Constitution, which 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." (e.s.)

This constitutional provision prohibits a person from simultaneously holding more than one "office" under the government of the state, counties and municipalities. The prohibition applies to both elected and appointed offices.[3] While the term "office" is not defined by the Florida Constitution for purposes of the dual officeholding prohibition, The Supreme Court of Florida 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 . . . . 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."[4]

Thus, in order to have an office, for purposes of the dual officeholding prohibition, there would have to be a delegation of a portion of the sovereign power by law "and not by contract." While the restrictive covenants of a development may contain a provision that all building plans be reviewed and approved by an architectural review board for approval, such covenants are not "by law" and could not operate to delegate a portion of the town's sovereign authority.[5]

I would note that in Attorney General Opinion 99-53, this office concluded that an architectural review committee of a homeowners' association was subject to the Government in the Sunshine Law and the Public Records Law where that committee, pursuant to county ordinance, was required to review and approve applications for county building permits. Application of the Government in the Sunshine Law and the Public Records Law, however, is broader than the constitutional dual officeholding prohibition in that the open government laws extend to private organizations acting on behalf of a governmental entity.[6] Thus, while a neighborhood association may be subject to the Government in the Sunshine Law and the Public Records Law, such responsibility does not by itself make the officers of the organization public officers for purposes of the dual officeholding prohibition in section 5(a), Article II, of the Florida Constitution.

I trust that these informal comments will be of assistance to you in resolving the issues you have raised. Should a majority of the members of the town's council wish to request an opinion of this office, we would be happy to consider such a request.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] Section 25, Palm Shores Estates, Inc., Declaration of Restrictions, Limitations, Conditions and Agreements, November 8, 1988, stating: "Prior written approval of the Architectural Control Committee of property owners association shall be obtained prior to the obtaining of a building permit from any governmental authority."

[2] *See* s. 112.322(3)(a), Fla. Stat., stating:

"Every public officer, candidate for public office, or public employee, when in doubt about the applicability and interpretation of this part or s. 8, Art. II of the State Constitution to himself or herself in a particular context, may submit in writing the facts of the situation to the Commission on Ethics with a request for an advisory opinion to establish the standard of public duty. . . ."

[3] *See* Ops. Att'y Gen. Fla. 69-2 (1969) and 80-97 (1980).

[4] *See State ex rel. Holloway v. Sheats*, 83 So. 508, 509 (Fla. 1919).

[5] A review of the Code of Ordinances, Town of Palm Shores, Florida, codified through Ord. No. 2000-03, enacted May 23, 2000, does not indicate that the permitting process has been delegated to the homeowners association, nor is there any Florida Statute recognizing that private entities, such as homeowners associations, possess sovereign powers.

[6] *See Stanfield v. Salvation Army,* 695 So. 2d 501, 503 (Fla. 5th DCA 1997) (private corporation taking over the county's role as the provider of probation services subject to Chapter 119, Fla. Stat.).