You ask whether § 3.09 of the charter for the Town of Pulaski prohibits a town employee from continuing such employment while serving as a member of the town council and, if so, whether any provision of state law supersedes § 3.09. You also ask whether § 3.09 violates either the state constitution or the federal constitution.

The charter for the Town of Pulaski¹ ("Town charter") provides:

§ 3.09. Prohibitions.-A. Holding other office. Except as otherwise authorized by law, a member of council or the mayor shall not be eligible during his tenure of office as such member, or for one year thereafter, to any compensated town employment. If appointed by the council to a board or commission, he may be compensated as a member.²

Section 3.09 applies "[e]xcept as otherwise authorized by law."³ No state statute or other provision of the Town charter expressly "authorizes" a town employee to serve simultaneously on the town council. Accordingly, I interpret § 3.09 as applying in accordance with its terms to prohibit the simultaneous holding of town employment and council membership, and to require a compensated
town employee to terminate his employment before taking office as a member of the town council.

It is my opinion that Article VII, § 2 of the Constitution of Virginia (1971)\(^4\) authorizes the General Assembly to enact a charter provision prohibiting town employees from serving on a town council.\(^5\) While the General Assembly may not by special act permit a town council member to hold an office prohibited by Article VII, § 6,\(^6\) there is no restriction on the power of the General Assembly under Article VII, § 2 to enact charter provisions that go beyond the prohibition in Article VII, § 6.

It is also my opinion that § 3.09 of the Town charter does not violate Article II, § 5 by establishing a qualification for holding office prohibited by that section. Article II, § 5 provides that, except as otherwise provided in the Constitution, the only qualification to hold any office of the Commonwealth or its governmental units shall be residency in the Commonwealth for one year and qualification to vote for the office. Article II, § 5(c) qualifies this right to hold public office by providing that "nothing in this Constitution shall limit the power of the General Assembly to prevent conflict of interests, dual officeholding, or other incompatible activities by elective or appointive officials of the Commonwealth or of any political subdivision." Section 3.09 of the Town charter represents an exercise by the General Assembly of its power to prevent incompatible activities encompassed within the language of Article II, § 5(c).\(^7\)

It is further my opinion that § 3.09 of the Town charter is not superseded by the State and Local Government Conflict of Interests Act\(^8\) (the "Act"). Section 2.1639.1 of the Code of Virginia provides that the Act supersedes "all general and special acts and charter provisions which purport to deal with matters covered" by the Act. The Act does not deal with matters related to dual officeholding or to incompatibility of offices or positions\(^9\) and, thus, does not supersede charter provisions dealing with such matters.

While no state statute or constitutional provision supersedes § 3.09 of the Town charter, provisions similar to § 3.09 have been challenged as violating equal protection or First Amendment rights guaranteed under the federal constitution.\(^10\) The equal protection argument asserts that such restrictions create a class consisting of government employees that are treated less favorably than others. The First Amendment argument asserts that such restrictions infringe on the right to associate for political purposes by denying government employees access to the ballot. An additional First Amendment argument is that the restrictions affect the electorate by limiting the field of candidates.
The analysis of constitutional challenges to restrictions similar to § 3.09 involves numerous issues. Moreover, the courts' review of the constitutionality of such provisions is highly fact-specific, and any challenge to § 3.09 will depend on the facts presented in a particular case. My analysis of any potential challenge to § 3.09 must, therefore, be general in nature.

The Supreme Court of the United States has upheld the constitutionality of restrictions imposed on public officers and on the political activities of government employees, including restrictions on becoming candidates for public office. In *Clements v. Fashing*, the Court upheld a state constitutional provision prohibiting certain officers from seeking other offices during the term for which they were elected. In *CSC v. Letter Carriers* and *Broadrick v. Oklahoma*, the Supreme Court of the United States upheld regulations and statutes requiring dismissal of civil servants who become political candidates. In these two cases, the Court recognized the government interest in prohibiting its personnel from engaging in the clearly partisan activities deemed offensive to efficiency in the workplace, including becoming a partisan candidate for an elective office.

Other courts have considered state and local restrictions prohibiting persons elected to or running for public office from holding any other position as a government officer or government employee. The restrictions range from relatively minor to harsh, and the degree of the restriction appears frequently to influence the standard of review to which the court subjects the restrictions.

Regardless of the standard of review, the primary interests presented as support for such restrictions are the elimination of incompatibility of positions or interests and the avoidance of the appearance of impropriety in the operation of government. The restrictions avoid the risk of divided loyalties and the danger that the duties of town employees and town officials will be compromised by conflicting interests. By removing these possibilities, the restrictions promote confidence and trust in public officials and in public employees. While the legislative body could limit the restrictions to instances in which incompatibility actually exists, a rational basis standard does not require this type of line drawing when it is reasonable to assume that more opportunities for conflict arise when a town council member is an employee of the town. Moreover, while conflict of interests laws may eliminate any actual conflict, these laws operate to deny council access to its full membership in making decisions. If a council frequently is required to make decisions involving public employment and employee relations, this denial of full access can significantly impact the council's ability to conduct its business.
While it is not possible to predict how a court would resolve a constitutional challenge to § 3.09 of the Town charter and the outcome would depend on the particular facts of the case, it appears that the majority of the courts apply a rational basis test to determine the validity of the restriction. The weight of authority suggests that, under this standard, restrictions enacted to prevent incompatibility of interests of members of the town council or the appearance of impropriety in having town council members also being compensated as town employees would likely survive constitutional challenge.

In assessing § 3.09 of the Town charter, I am guided by the doctrine that "a statute is not to be declared unconstitutional unless the court [considering it] is driven to that conclusion." Following this doctrine, it has been a long-standing practice of Virginia's Attorneys General to refrain from declaring a statute unconstitutional unless its unconstitutionality is clear beyond a reasonable doubt. Therefore, it is my opinion that, subject to the constitutional uncertainty that exists in any restrictions on access to public office, § 3.09 of the Town charter establishes a valid and binding requirement on persons elected to the office of town council. A town employee who is elected to the town council will be ineligible during his term in office and for one year thereafter for any compensated town employment.


2Id. at 55.

3Id.

4Article VII, § 2 authorizes "[t]he General Assembly [to] provide by special act for the organization, government, and powers of any county, city, town, or regional government."


6Article VII, § 6 and its statutory components, §§ 15.150.5 and 15.1800 of the Code of Virginia, prohibit members of a governing body, during their term of office, from holding any office filled by the governing body, subject to certain

7See Op. Va. Att'y Gen.: 1993 at 44, 47 (Article II, § 5 prohibits charter amendment making only current council members or candidates for council eligible to be candidates in separate election for mayor); 1992 at 34, 36 (General Assembly may adopt statute prohibiting its members from serving simultaneously on local governing bodies); 1986-1987 at 36, 38 (charter may require council member to resign before running for mayor).

8Sections 2.1639.1 to 2.1639.24.


11See supra Clements v. Fashing cite. In Clements v. Fashing, the United States Supreme Court utilized the rational basis test traditionally applied in equal protection challenges. A court's determination of the standard of review to apply will often depend on whether the restriction will survive challenge. The cases considering restrictions on government employees seeking or holding public office, however, are not altogether consistent in the standard of review applied. If the court applies a rational basis standard, the restriction will be upheld unless there is no reasonable ground for imposing the restriction. If the court applies a strict scrutiny standard, the restriction will be upheld only if the government can establish a compelling state interest for imposing the restriction and can show that the restriction is narrowly tailored to achieve that
interest. In adopting the rational basis test in *Clements v. Fashing*, the Court stated that equal protection challenges are subject to a stricter standard only if the challenged statute burdens a suspect class or a fundamental right. 457 U.S. at 963. The Court does not recognize candidacy as a fundamental right. *Bullock v. Carter*, 405 U.S. 134, 142–43 (1972). The Court explained, however, that traditional equal protection principles may give way to a heightened standard, even absent a fundamental right, if the nature of the affected interest and the extent of the burden placed on candidates are significant. *Clements v. Fashing*, 457 U.S. at 965.

12 The constitutional provision operated to prohibit an elected officeholder from resigning before the end of his term to become a candidate for another office. *Clements v. Fashing*, 457 U.S. at 960. A justice of the peace who wished to run for the state legislature challenged the restriction. The state interests rationally related to the restriction were preserving the integrity of the office of justice of the peace by preventing abuse of discretion or neglect of duties and discouraging the justices from vacating their terms of office. *Id.* at 966–68.

13 See *CSC v. Letter Carriers* and *Broadrick v. Oklahoma* cites, supra note 10.

14 The restrictions in both *CSC v. Letter Carriers* and *Broadrick v. Oklahoma* were confined to partisan activities. See cases cited supra note 10. The Hatch Act, which was challenged in *CSC v. Letter Carriers*, prohibits federal employees from participating as independent candidates in partisan elections. See 5 U.S.C.A. § 7323(a)(3) (Supp. Pamphlet 1996); see also 413 U.S. at 55051. In *Broadrick v. Oklahoma*, the Court noted that, despite the broad language of the state statute prohibiting state employees from becoming candidates for any paid political office, both the state personnel board and the Oklahoma Attorney General had interpreted the statute as prohibiting only clearly partisan political activity. 413 U.S. at 617. The reach of § 3.09 of the Town charter in this sense is broader than the statutes challenged in *CSC* and *Broadrick*, and the grounds for upholding those statutes may not be persuasive in a challenge to § 3.09.

15 See supra note 10.

16 For example, the Rhode Island statute at issue in *In re Advisory from the Governor* prohibited state elected officials from seeking or accepting employment with any other state agency while holding state office and for one year after leaving state office, but excepted from the prohibition employment held at the time of the official's election. 633 A.2d at 667. The court upheld the restriction under a rational basis standard and also questioned whether its prior application of strict scrutiny in *Cummings v. Godin* was correct in light of *Clements v. Fashing*. 633 A.2d at 669. The court noted, however, that the state
statute did not reach the harshness of the restriction invalidated in *Cummings v. Godin*. 633 A.2d at 670. In *Cummings v. Godin*, the court invalidated as overbroad a charter provision prohibiting city employees from holding any elective office, regardless of whether there was any actual incompatibility between the two positions. 119 R.I. at 342, 377 A.2d at 1079. The court in *Cummings v. Godin* also considered "pivotal" that the restriction, unlike those considered by the Supreme Court in *Brodrick* and *Letter Carriers*, applied to nonpartisan political activities. 119 R.I. at 340, 377 A.2d at 1078-79. I am aware of no case considering restrictions identical to those imposed by § 3.09 of the Town charter. The restriction is more harsh than some in that it applies to nonpartisan as well as partisan elections and encompasses all town employees.

17 I note that while the Pulaski town manager has general day-to-day supervision over the town employees under §§ 4.02 and 5.02 of the Town charter (1986 Va. Acts, *supra* note 1, at 58, 59), §§ 5.02 and 5.03 grant the town council significant authority and control over the management of the town personnel (*id.* at 59).

18 Courts often comment on the problems created in the government workplace when a town employee who serves on the town council becomes his own employer or obtains control over his supervisor. An additional problem is the possible perception of the public that a council member has used his influence to obtain advantages for public employees in general, thus granting such employees an unfair bargaining tool. Moreover, a town employee who serves on council may be subject to a variety of pressures since the council may be the ultimate authority controlling the purse strings and may even have the power to abolish departments or positions.


22 You ask whether the town has an affirmative duty to discharge the employee. It is my view that the responsibility for compliance with § 3.09 is on the elected council member, and not on the department or agency that employs the member.