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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

March 18, 2003

The Honorable Michael A. Pitts
Member, House of Representatives
327A Blatt Building
Columbia, South Carolina 29211

Dear Representative Pitts:

You have asked that this Office render an opinion regarding the recent ruling by the Honorable James Johnson in the case of Owings v. Hodges, 2002-CP-24-1136. In that Order, Judge Johnson concluded that the Greenwood Metropolitan District is a special purpose district, created by Act No. 441of 1959, and that service on the Commission which governs the District is not a state office. Accordingly, Judge Johnson found that the Defendant, former Governor Hodges, possessed no authority to "remove" the plaintiff, Mr. Owings, from the Commission. In addition, the Order concluded that, pursuant to Act No. 680 of 1973, the Governor is authorized "to appoint three of the six members of the Commission upon the recommendation of the Greenwood County Legislative Delegation." Inasmuch as Plaintiff had been appointed by the Governor upon the recommendation of the Greenwood County Council," Judge Johnson declared his seat on the Commission vacant.

You now wish to know whether, based upon Judge Johnson's Order, "it is up to the Greenwood Delegation at this time to recommend to the Governor another appointment." We conclude that it is now incumbent upon the Legislative Delegation to make its recommendation to the Governor.

Law / Analysis

Of course, this Office cannot through the issuance of an opinion alter, modify or supersede a judicial order. Clearly, a court order must be followed unless and until judicially modified or set aside on appeal. The constitutional principle of separation of powers (see Article I, § 8, S.C. Constitution, 1895 as amended) requires that, at most, the Office of Attorney General may advise public officials as to a particular Order's meaning as well as the steps required to be taken pursuant thereto.

Here, Judge Johnson ruled that Mr. Owings was not appointed in accordance with existing law. In the Court's view, "[t]he Plaintiff has never been recommended by the Legislative Delegation as required by law." Thus, the Circuit Court declared his seat on the Commission vacant. We are advised that no appeal was taken from Judge Johnson's order.

Judge Johnson's order construed Act No. 680 of 1973, which amended Act Nos. 441 of 1959. Act No. 680 of 1973 provided that the governing commission of the Greenwood Metropolitan District is to consist of six members, three of whom shall be appointed by the Governor upon the recommendation of the Legislative Delegation. In addition, the three commissioners of public works of the City of Greenwood are designated by Act No. 680 as ex officio members of the Greenwood Metropolitan District's commission.

In 2000, by Act No. 450 of 2000, the General Assembly attempted to amend Act No. 680 of 1973 and 441 of 1959 in order to change the method of selection of the three commissioners who were appointed by the Governor upon recommendation of the Legislative Delegation. Act No. 450 expanded the Commission to seven members, three to be elected by the voters of the District, one to be appointed by County Council and the remaining three to be the members of the board of public works for the City of Greenwood to serve ex officio. This Act received preclearance by the Department of Justice.

However, shortly after Act No. 450 of 2000 went into effect, the Honorable Wyatt Saunders signed a consent order declaring the 2000 Act unconstitutional. Judge Saunders deemed Act No. 450 to be "special legislation" and thus "null, void, and without effect." The Court further concluded that

> ... injunctive relief is necessary to prevent irreparable injury to the District. The irreparable injury to the District that would occur in the absence of injunctive relief is that any action taken by the District composed of Commissioners selected to according to an unconstitutional procedure could be questioned by those seeking to have acts of the District invalidated. This is particularly a problem in regard to decisions involving the making of contracts and the issuance of bonds. The uncertainty created by questions concerning the validity of any District action in this regard has the potential to disrupt the operations of the District. Injunctions are normally an accepted form of relief available when the constitutionality of a legislative act and the enforcement of its provisions are challenged. See, Injunctions, 42 Am.Jur.2d § 177; State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279 (1975); Chester Cty. Hosp. & Nursing Ctr. v. Martin, 281 S.C. 25, 27 (1984).

The unconstitutionality and enjoining of Act No. 450 of 2000 was consented to by the attorney for the Metropolitan District, which as plaintiff brought the suit, as well as by the attorney for Greenwood County Council, the Greenwood Election Commission and the County of Greenwood.

In view of the fact that neither Act No. 441 of 1959 nor Act No. 680 of 1973 have been constitutionally challenged nor the pertinent parts of those Acts effectively repealed by the General Assembly, those laws remain in full force and effect and are controlling in this instance. Inasmuch

as Judge Johnson's order, referenced above, declares the appointment of Mr. Owings by Greenwood County Council to be invalid and his seat on the Metropolitan Commission to be vacant, such position now may be filled. Act No. 680 of 1973, which is controlling pursuant to the order of Judge Saunders, requires that the position be filled by appointment of the Governor upon the recommendation of the Greenwood Legislative Delegation. Judge Johnson's Order so concludes as well. Accordingly, it is our opinion that the Delegation is now empowered to make its recommendation and the Governor authorized to make the appointment.

While this addresses your questions, I would add a note of caution. Act No. 450 of 2000, while unconstitutional on other grounds, may well have been enacted in an effort to comply with Article X, § 5 of the South Carolina Constitution. This provision mandates that there be no taxation without representation. In Weaver v. Recreation Dist., 328 S.C. 83, 452 S.E.2d 79 (1997), the South Carolina Supreme Court concluded that a local act which delegated the taxing power to appointed members of the Richland Recreation Commission violated Article X, § 5. The Court, however, cognizant of "the disruptive effect" of its holding, delayed implementation of its ruling for two years "in order to give the General Assembly an opportunity to address this problem." 328 S.C., at 87-88. The General Assembly responded by enacting Act No. 397 of 1998, codified at § 6-11-271 et seq.

Act No. 397 provides a mechanism for conversion of the method of selection of special purpose district governing board members from appointed to elected through a referendum of the voters. See, § 6-11-350 et seq. In addition, the Act sets forth the means for compliance with Article X, § 5 if the selection method remains unchanged. See, § 6-4-271 (requires approval of county council for any millage rate increases).

An effort was made to conduct a referendum to change the method of selection of the Greenwood Metropolitan Board from appointed to elected. However, the attempted composition was deemed not to comply with Act 397 of 1998 by an opinion of this Office dated August 16, 2002. The opinion concluded that the intent of the Legislature in enacting Act 397of 1998 was that "the entire governing body ... be included in the referendum question ... ." We noted that "[i]f Sections 6-11-350 et seq. are intended to correct the constitutional infirmities addressed in Weaver, it seems necessary that the Section's application be to the entire governing board." However, the Ballot Question proposed that only three members be elected directly from the District, while the three elected members of the board of public works of the City of Greenwood remained unchanged. We advised that "[t]o read the Sections as allowing only half the members of the board of a special purpose district to be elected [through the referendum] ... would appear to defeat the intention of the Legislature."

Of course, Act No. 397 of 1998 does not require a special purpose district to change the method of selection of its members from appointed to elected by the referendum contemplated in § 6-11-350 et seq. However, Article X, § 5 as construed by the Supreme Court in Weaver does mandate that there be no taxation without representation. Accordingly, the Constitution directs that if the governing board of a special purpose district such as the Greenwood Metropolitan board

remains appointed, the provisions of § 6-11-271 must be followed in terms of any taxation imposed by the District.[1]

Conclusion

In conclusion, it is our opinion that pursuant to Judge Johnson's order, an appointment should be made to fill the vacancy on the Commission by the Governor upon the recommendation of the Greenwood Legislative Delegation. Thus, the Delegation should proceed to make its recommendation to fill the vacancy declared by Judge Johnson in his recent ruling. In addition, since it seems likely that the Commission will remain in part an appointed body in the foreseeable future, we would caution that the "no taxation without representation" requirement mandated by Article X, § 5 of the South Carolina Constitution, as enunciated in Weaver, and implemented in § 6-11-271 et seq., must be followed.[2]

Sincerely,

Robert D. Cook
Assistant Deputy Attorney General

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[1] Act No. 441 of 1959 requires a referendum of District voters to be held for any bond issuances by the District.

[2] In view of the constitutional problems associated with enacting a local law to address this matter, see, Judge Saunders' ruling, it is unclear how the Metropolitan Board may be converted to a completely elected board. At present, the Board arguably has half of its members appointed and half elected. Even though the three members who constitute the board of public works of the City of Greenwood are not technically elected to the Metropolitan Board, but to the board of Public Works, they do serve on the Metropolitan Board ex officio. Some courts deem such ex officio membership on one body in which the members are elected to another body by a different constituency still to be "elected" members, at least for purposes of the "one person, one vote" requirement of the Equal Protection Clause. See, Morris v. Board of Estimate, 707 F.2d 686 (2d Cir. 1983); Bianchi v. Griffing, 343 F.2d 457 (2d Cir. 1968); Rosenthal v. Bd. of Ed., 497 F.2d 726, (2nd Cir. 1974). See also, Board of Estimate v. Morris, 489 U.S. 688 (1989), Even so, the election of only half of these members from this smaller constituency may well not satisfy Weaver's requirements. Thus, short of all six members of the Metropolitan Board being elected from the District at-large pursuant to § 6-11-350 et seq., the requirements of § 6-11-271 should be followed.