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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

October 11, 1996

The Honorable J. Verne Smith
Senator, District No. 5
Box 528
Greer, South Carolina 29651

Dear Senator Smith:

You have sought an opinion concerning the applicability of S.C. Code Ann. Sec. 4-9-82 to the proposed merger of the Greenville, Spartanburg and Anderson Hospitals into a new entity, the AGS System. As I understand it, the three hospitals will lease their real property to AGS [a non-profit corporation] for at least 50 years and up to ninety years at a rent of $1 per year. It is also proposed to transfer all other assets to the AGS System in return for its assumption of liabilities and obligations to provide medical care to the citizenry they serve.

LAW/ANALYSIS

S.C. Code Ann. Sec. 4-9-82 was enacted as Act No. 93 of 1987. Such Section provides as follows:

> [t]he governing body of any public service district is authorized to transfer its assets and properties for the delivery of clinical medical services to another political subdivision or an appropriate health care provider located within the district upon assumption by the transferee of the responsibilities of the district for the delivery of clinical medical services as set forth in the legislation creating the public service district. The transfer is not completed until the question of the transfer

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Request Letter

> has been submitted to and approved by a favorable referendum vote of a majority of the qualified electors of the district voting in the referendum. Any public service district which transfers its assets and properties as provided in this section may dissolve the public service district upon the completion of the transfer and upon the assumption or other appropriate disposition by the transferee of all of the responsibilities and obligations of the public service district. The referendum vote may be conducted either as a special referendum within the district for this specific purpose or at the same time as a general election. (emphasis added).

Following the submission of your opinion request to us, we have been advised that the Section 4-9-82 question you raise has been made the subject of litigation. In Edmund L. Potter and Wendell G. Cantrell v. AGS System, et al., CA # 96-CP-04-1262, the Complaint in that case was recently amended to allege that action taken by GHS and SRMC "to transfer all or substantially all ... assets to AGS is ultra vires ... because [GHS and SRMC have] not complied with the referendum provisions of South Carolina Code Section 4-9-82."

As we have consistently recognized for many, many years, "[t]his Office ... should not attempt to supersede or intervene in any pending litigation or pending administrative proceeding." Principles of separation of powers dictate that we defer to the judicial authority which presently has the matter before it. At least as long ago as October 14, 1971, we recognized that "[i]t is the practice of this Office to refrain from rendering an opinion on any matter which is pending litigation." In that Opinion, it was explained that the purpose of this policy is to allow the "orderly process of law to take its course without interference." While arguments may well be made in such action regarding whether or not there exists a "case or controversy", such is a matter for the Court, not this Office, to determine.

Thus, because of the pending litigation, we must adhere to the longstanding policy of this Office and respectfully decline to issue an opinion regarding the applicability of Section 4-9-82 to this situation.

In addition, you reference Section 4-9-30(16) of the Home Rule Act and urge that County Council may not call for a referendum even pursuant to that statute. It is my understanding that this issue is not before the Court in the aforementioned litigation.

The Home Rule Act, codified at Section 4-9-30(16) gives Council the express authority "to conduct advisory referenda." You argue that, notwithstanding this authority, "the state legislation establishing the Greenville Hospital System Board of Trustees created the Board of Trustees as an independent political subdivision 'free from the control of the corporate authorities of the City or County ...', and thus, notwithstanding Section 4-9-30(16), Greenville County Council would not have "authority to call for a referendum on this issue or to have any involvement in the governance of the Greenville Hospital System." I agree with you that Act No. 432 of 1947 clearly establishes the Greenville Hospital System's independence from both the City and County. However, I must respectfully disagree that County Council has no authority to put this question to a vote of the citizens of Greenville County.

First, Section 4-9-30(16) itself makes no attempt to distinguish between a referendum on a matter over which county council has jurisdiction and control and one which it does not. Moreover, Art. VIII, § 17 of the South Carolina Constitution mandates that

> [t]he provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

Further, when there is any doubt as to how a statute is to be interpreted and how that interpretation is to be applied in a given instance, it is the policy of this Office to construe such doubt in favor of the people's right to vote.

We have repeatedly read Section 4-9-30(16) as bestowing broad authority upon County Council to conduct a referendum. For example, in an Opinion, dated September 3, 1985, we noted that County Council was not prohibited from conducting an advisory referendum to ascertain the public's views regarding the expansion of the service area of a water or sewer district. We stated therein:

> [i]t should be noted that by Section 4-9-30(16), a county council is empowered to "conduct advisory referenda." Thus, while referenda would not be required prior to expansion of the service areas of water or sewer districts by a county council, council is certainly not prohibited from conducting such a referendum to ascertain the desires of the electors in

> the proposed service area in addition to holding the required public hearing.

In another Opinion, Op. Atty. Gen. Op. No. 89-143 (December 21, 1989), we referenced Section 4-9-30(16) and opined that "[i]f Laurens County Council wished to hold an advisory referendum on issues relative to land use or zoning, such would be permissible." And in an Opinion of August 18, 1986, we stated that "Richland County Council certainly may authorize the people of the county to express themselves, either for or against, in an advisory referendum on the general question of obscenity or what is patently offensive to the community." Another opinion, dated August 27, 1982 observed that Greenville County Council had chosen to conduct an advisory referendum as to the location of the Greenville Coliseum and that such advisory referendum was authorized. Yet another opinion opined that, pursuant to its Home Rule authority, under Section 4-9-30(16), that

> [w]ith respect to the holding of an advisory referendum to determine the wishes of a person to be voted upon by the electorate in Bamberg County, it is my opinion that such an advisory procedure can be conducted under the provisions of the Home Rule Act, which authorizes counties to conduct referenda.

Finally, in Op. No. 78-23 (February 7, 1978), former Attorney General McLeod opined as to the propriety of conducting advisory referenda concerning the then-pending Equal Right Amendment. While Attorney General McLeod stressed that the referendum could not be binding for purposes of amending the federal Constitution, he further noted that

> [s]tate law, in my opinion, will permit the conduct of advisory referenda. I have previously advised municipalities and counties that advisory referenda may not be conducted. These opinions were issued in 1970, and since that date, the statutes have been amended to specifically authorize such advisory procedures. (emphasis added).

Even if Section 4-9-30(16) is construed as limited to matters over which the county has jurisdiction, Council could conduct a referendum with respect to this matter, notwithstanding the fact that Act No. 432 of 1947 expressly states GHS is to remain "free from the control of the corporate authorities of the City of County." Section 4-9-30(5) of the Home Rule Act makes "hospital and medical care", an express corporate purpose of the county. In an Opinion dated May 23, 1980, we concluded that a county's

appropriation to a hospital district was a valid county purpose. In Bolt v. Cobb, 225 S.C. 408, 82 S.E.2d 789, the Supreme Court held that hospital and medical care is a county purpose and a valid public purpose. Moreover, Section 44-7-2010 et seq. authorizes a county or combination of counties to create a health services district with the specific authority to "[b]uild, maintain and equip and operate regional health care facilities or any other hospital or health care facility ... ." The fact that the power to operate GHS is expressly committed to a governing body other than the county, does not mean, in my judgment, that it would not be within the corporate purpose of the county to determine the views of the county's citizens as to the transfer of GHS to a non-profit entity such as AGS.

Moreover, the Resolution of County Council states that "the taxpayers of Greenville County have funded the operation and development of the Greenville Hospital System over many years with millions of taxpayer dollars ... ." To conclude that the citizens and taxpayers of Greenville County could not vote in a referendum regarding the proposed merger would, in my judgment, be inconsistent with the Home Rule statute.

The case of Gamrin v. Mayor and Council of the City of Englewood, 185 A.2d 55 (N.J. 1962) is instructive. The question in that case was whether the City of Englewood, New Jersey could conduct an advisory referendum upon the transferring of certain elementary school grades into a single school for such grades. The relevant statute was narrower than our own Section 4-9-30(16) in that such advisory referenda must relate to a "question or policy pertaining to the government or municipal affairs [of the municipality]." The Court recognized in holding the advisory referendum proper that "[t]here can be no argument that the desirability of student transfers between schools and any method for accomplishing the same are policy matters exclusively within the board of education province." 185 A.2d at 56. However, concluded the Court, "the fact that only board of education initiative can effect such action does not necessarily mean that the governmental body has no proper concern in the area." Id. The Court considered the fact that the municipal government had a general interest in the fiscal affairs of the school district. Therefore, the "responsibility for taking a fiscal position subsists with the municipality no matter how the issue originates." Concluded the Court,

> [t]he courts should favor every effort by those charged with the responsibility of government to canvass the sentiment of the electorate where public policy is concerned. In the context of the Englewood situation the governing body should be free to invoke the statute. It is true that the municipal officials cannot properly act to bring about any transfer of students between schools. But if such action should eventuate

> at the hands of constituted authority, the governing body will be left with implementation responsibilities sufficient to warrant its right presently to be concerned.

See also, Smith v. Robertson, 210 S.C. 99, 41 S.E.2d 631 (1947)[Charleston County has corporate interest in issuing bonds for contribution to building of MUSC Hospital, even though County has no authority over MUSC governance].

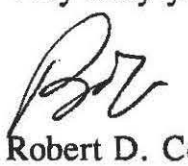
CONCLUSION

In conclusion, with respect to the proposed merger, the issue of whether Section 4-9-82 requires a referendum is presently pending before a court. Accordingly, we must defer to a judicial resolution of that issue in accordance with the longstanding policy of this Office, based upon the constitutional requirement of separation of powers.

Notwithstanding the Section 4-9-82 issue, however, is the question of the referendum in Greenville County which is scheduled for a vote next month in the general election. Greenville County's power to conduct an advisory referendum, pursuant to Section 4-9-30(16), is not before the Court at present. Thus, regardless of the outcome in the pending case of whether Section 4-9-82 requires a referendum, certainly Greenville County has the authority to put the question to an advisory vote, pursuant to its Home Rule powers.

With kind regards, I am

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/ph