



ALAN WILSON  
ATTORNEY GENERAL

March 31, 2022

The Honorable Garry R. Smith, Chairman  
Greenville County Legislative Delegation  
P.O. Box 142  
Columbia, SC 29202

The Honorable Mike Burns, Chairman  
Committee on Municipal Affairs,  
Medical Affairs and Special Service Districts  
P.O. Box 142  
Columbia, SC 29202

Dear Chairman Smith and Chairman Burns:

You seek an update to our Opinion of September 28, 2015 regarding the Greenville Health Authority (GHA) and its power to delegate functions to a private corporation. In that earlier opinion, we concluded that “. . . the use of a private entity by a public body [such as GHA] to assist it in carrying out its duties [is] . . . not unlawful so long as the public body or entity maintained sufficient supervision and control so as not to constitute an unlawful delegation to a private corporation.” (emphasis added). In your most recent request, seeking this update, you note the following:

[i]t has come to my attention that the Greenville Health Authority [GHA] considers its sole role in the current operations of what started out as the Greenville Hospital under 1947 Act 432 to be the oversight as the landlord in its lease with PRISMA Health, and the administration of grant funds.

It has further come to my attention that PRISMA Health, not GHA, has not only established its own police force on the hospital campus, but also exclusively hires and trains its officers as well. In addition, I am told that PRISMA Health established a mental health clinic, and then an emergency room in northern Greenville County without any discussions whatsoever with its landlord and public entity, GHA. A review of the GHA meeting agendas and minutes seems to support their noninvolvement in any of these actions by PRISMA Health. In another concerning unfolding of events, it appears that PRISMA Health tried to use a 1997 certificate of public advantage [i.e. CON] to buy Providence Hospitals and Kershaw Health, an asset of LifePoint Health, which appears to operate for-profit. Links to this information are enclosed as well. A judge had to stop them. No documents have been provided that show any GHA involvement in overseeing, or approving, this attempt by PRISMA Health.

Thus, in your opinion, there has been “a lack of proper supervision and control of PRISMA Health” by GHA. Accordingly, you ask the following questions:

1. What do you see as constituting proper supervision and control by a public entity, of a private, non-profit, or for-profit entity, it has entered into a contract with to assist with the public entity's operations and responsibilities?
2. Who is responsible for ensuring that a public entity is meeting its constitutional and statutory responsibilities?
3. Who is responsible for investigating, and then reporting, any illegal delegation of authority by a public entity to a private concern?
4. What are the repercussions, penalties, liabilities, or other results of an illegal delegation of public authority and public assets to a private entity?

#### Law/Analysis

#### Our 2015 Opinion Summarized

In our Opinion of September 28, 2015, we relied heavily upon an earlier opinion, dated August 8, 1985 (1985 WL 166051), which concluded that the use of a private entity by a public body (there, the Department of Corrections) to assist it in carrying out its duties, was not unauthorized so long as the public body or entity maintained sufficient supervision and control so as not to constitute an unlawful delegation to a private corporation. We emphasized that the validity of any such delegation, or whether the delegation becomes unlawful for insufficient supervision and control, ultimately depends upon all the facts and circumstances, which this Office cannot adjudge in a legal opinion. Thus, our 2015 opinion, with numerous citations of authorities relative to GHA, concluded:

[o]ur same advice given in the 1985 opinion regarding whether or not the Department of Corrections might contract with a private corporation to manage and administer prison facilities is also applicable here. There, we concluded that such an agreement was not necessarily prohibited by law, but that the “devil was in the details.” We advised that, the State would necessarily need to maintain adequate supervision and control through the contract or lease so as not to constitute an unlawful delegation of authority. Each situation necessarily depended upon the particular facts and circumstances.

We further cautioned as follows:

[h]owever, again, GHS would necessarily need to be careful to maintain the requisite supervision, and control required by the Constitution and statutes which govern it. As we noted in 1985, “considerable care should be taken in the drafting or preparation . . . [of any lease or agreement] to avoid potential constitutional or statutory problems.”

The Honorable Garry R. Smith  
The Honorable Mike Burns  
Page 3  
March 31, 2022

We stand by that advice and reiterate it again today. Your specific questions are elaborated upon below.

**Case Law Regarding Unlawful Delegation to a Private Corporation**

Our Supreme Court has addressed the issue of unlawful delegation to a private entity in previous cases. For example, in G. Curtis Martin Investment Trust v. Clay, et al., 274 S.C. 608, 266 S.E.2d 82 (1980), the Court concluded that a sewer district (North Charleston) possessed no authority to enter into an agreement reserving to an individual – the former principal owner of a privately owned sewer system transferred to the district – the power to approve or disapprove the connection to the system any project other than a single family dwelling or small commercial establishment. That contract was challenged on the basis of unlawful delegation to a private entity.

The South Carolina Supreme Court agreed that there was an unlawful delegation in that particular instance. According to the Clay Court,

[t]he circuit judge found the delegation of power to Bonner unlawful and against public policy. We agree. In addition, he ruled that the agreement as a whole stands, with only the offending provision to fall. The District was ordered to perform all acts necessary to grant Martin the sewer service requested. This is not proper. The order should have required the District to act upon the merits of the application according to the authority delegated to it. [citations omitted].

The situation in this case is intolerable. Here, the corporate political entity has given a private party the power to arbitrarily approve or disapprove potential users of a system belonging to the corporate political entity. The abdication by the commissioners of their statutory and constitutional responsibility to act for the public welfare to a private party who has no duty to give the public welfare any deliberation was improper. The police power of a corporate political entity cannot be exercised for private purposes or for the benefit of particular individuals or classes. Willis v. Town of Woodruff, 200 S.C. 266, 20 S.E.2d 699 ( 1942).

The North Charleston Sewer District as a corporate political entity is clothed with police power. Act 1768 creating the District, though it does authorize discretionary contracting, does not allow the District to delegate away those powers and responsibilities which give life to it as a body politic. A municipal corporation or other corporate political entity created by state law, to which police power has been delegated, may not divest itself of such power by contract or otherwise. Sammons v. City of Beaufort, 225 S.C. 490, 83 S.E.2d 153 (1954). The commissioners, but not the private party, must act upon the application in accordance with the authority conferred upon them by Act 1768.

274 S.C. at 611-13, 266 S.E.2d at 84-85. (emphasis added).

The Honorable Garry R. Smith  
The Honorable Mike Burns  
Page 4  
March 31, 2022

Further, in Green v. City of Rock Hill, 149 S.C. 234, 147 S.E. 346, 359 (1929), our Supreme Court refuted a claim of unlawful delegation to a private company to manage and operate the waterworks of the City of Rock Hill:

[a]nother contention of petitioners is that the "contract contemplates and involves an unlawful delegation to a private corporation of the fiduciary and discretionary powers of the city council in the control and management of a governmental department of said city." The authority delegated to the company under the contract is the authority to control, manage, and operate the waterworks plant and equipment for the merely physical or mechanical purpose of delivering to the city a fixed quantity of water. It is, in essence, the same kind or character of authority as is conferred on any servant or agent employed by a municipality to maintain and operate any part of a city's physical plant or mechanical equipment. No authority whatever is conferred on the company to distribute, or control in any manner whatever, the supply of water delivered to the city from the company's mechanical control and operation of the physical plant and equipment; on the contrary, such authority is expressly withheld. It would therefore seem to be sufficiently apparent, without discussion, that there is no unlawful delegation of the fiduciary and discretionary powers of the municipality with respect to control and management of the governmental department of the city.

Another similar contention of petitioners is that the contract "contemplates and involves the unlawful delegation to certain trustees named of the right, on the order of a certain private corporation named, to operate [ expend?] and disburse public funds belonging to the city of Rock Hill." The provision of the contract, in substance, is that the money necessary to construct and complete the additional water supply system shall be deposited with two Rock Hill banks, as cotrustees, to be dedicated solely to the purposes of the agreement, and to be paid out by such trustees, from time to time, to the persons entitled thereto for the actual cost of construction, upon certificates of engineers, whose services for such purpose are retained and paid for by the city.

(emphasis added). Thus, the Green Court focused upon there being no "unlawful delegation of the fiduciary and discretionary powers of the municipality with respect to control and management of the governmental department of the city." In short, the City's "governmental powers had not been surrendered.

And, in West Anderson Water Dist. v. City of Anderson, 417 S.C. 496, 790 S.E.2d 204 (Ct. App. 2016), the South Carolina Court of Appeals addressed the question of whether the water district's delegation of power under an agreement with the City of Anderson to provide water service to a facility within the District's historical service area substantially compromised the District's primary function and thus was an invalid delegation of power. The Court of Appeals concluded that, based upon the fact and circumstances before the Court, an unlawful delegation had not occurred.

Heavily relied upon by the Court of Appeals in West Anderson was the Supreme Court's decision in City of Beaufort v. Beaufort – Jasper Cty. Water and Sewer Authority, 325 S.C. 174, 480 S.E.2d 728 (1997). According to the Court of Appeals in City of Beaufort,

[t]he [Supreme] court affirmed the circuit court's ruling that the Contested Clauses constituted an unlawful delegation of governmental power "both because the Contested Clauses bind future governing boards and, more importantly, because they give away too much power in themselves." Id. at 182, 480 S.E.2d at 732-33 (emphasis added).

We infer from this language an additional hurdle for the proponent of a long-term governmental contract-the proponent must show not only that enabling legislation clearly authorized the contract to bind successor boards but also that any delegation of authority in the contract does not relinquish too much power. As to what constitutes too much power, footnote 4 in the Beaufort opinion is instructive: "We do not speak to more minor delegations of power, but simply find that where the central, primary function of a special purpose district is substantially compromised by a contract, the delegation of power may be invalid or unlawful." Id. at 180 n.4, 480 S.E.2d at 732 n.4 (second emphasis added).

Here, the circuit court distinguished Beaufort from the present case by characterizing the scope of the District's consent to the City's provision of water to the Michelin site as "circumscribed." The circuit court correctly noted the territorial map attached to the Water Sale and Purchase Agreement demonstrated that the Michelin site comprised "only a small part of the District's service area." Based on this analysis, the circuit court concluded the District's consent was a "minor delegation of governmental authority" and did not "'substantially compromise' its discretion or ability to function." Id. at 180 n.4, 480 S.E.2d at 732 n.4. We agree.

The City also distinguishes Beaufort from the present case. The City argues that in Beaufort, the supreme court was concerned with the Authority's delegation to the City and the Town of the power to decide when the Authority was allowed to "provide water to anyone in its own service area." Id. at 182, 480 S.E.2d at 732. The City contends that in the present case, the District's discretion was not impaired because the District exercised its power to decide who would provide water to the Michelin site for the limited term of the Water Sale and Purchase Agreement by consenting to the City's service to the site. We agree.

The District compares the disputed contractual provision in the present case to a contract provision invalidated by the circuit court in G. Curtis Martin Investment Trust v. Clay, 274 S.C. 608, 266 S.E.2d 82 (1980). In Clay, our supreme court upheld the circuit court's invalidation of a provision granting a private individual the right to approve "large uses" of a sewer system that had been previously sold by that individual to the North Charleston Sewer District. Id. at 610-13, 266 S.E.2d at 83-85. This veto power was to last "until such time as the District connect[ ed] the system with the District's main line." Id. at 610, 266 S.E.2d at 84. The court stated the

district commissioners' "abdication ... of their statutory and constitutional responsibility to act for the public welfare to a private party who ha[d] no duty to give the public welfare any deliberation was improper." Id. at 612, 266 S.E.2d at 84-85. The court further stated, "The police power of a corporate political entity cannot be exercised for private purposes or for the benefit of particular individuals or classes." Id. at 612,266 S.E.2d at 85.

The Clay court held the commissioners themselves were required to act on applications for connection to their system rather than allowing the private individual to do so:

Act 1768 creating the District, though it does authorize discretionary contracting, does not allow the District to delegate away those powers and responsibilities which give life to it as a body politic. A municipal corporation or other corporate political entity created by state law, to which police power has been delegated, may not divest itself of such power by contract or otherwise.

Id. Clay is distinguishable from the present case because here, the District has not delegated its decision-making authority to a private person or entity, or even another public entity, but rather it has delegated the function of providing water and sewer service to the Michelin site to the City for a limited period of time.

Based on the foregoing, we affirm the circuit court's conclusion that the District's consent did not substantially compromise its discretion or ability to function.

417 S.C. at 511-513, 790 S.E.2d at 212-213. (emphasis added).

Thus, the question, according to the foregoing South Carolina decisions, is whether the public entity— in this case GHA – has relinquished “too much power.” In City of Beaufort, the Court emphasized that this issue does not concern “more minor delegations of power,” but, instead, it is whether the “central, primary function” of the special purpose district is, “substantially compromised by a contract” which renders the “delegation of power” as “invalid or unlawful.” 325 S.C. at 180, n. 4, 480 S.E.2d at 732, n. 4. This is the same basic analysis as employed by the Supreme Court in Green. Again, such a legal criteria is, at bottom, dependent upon all the facts and circumstances. However, the governing board of GHA, as well as the legislative delegation and, ultimately, the General Assembly, must steadfastly keep in mind that the “central, primary function” of GHA cannot be “substantially compromised” by contract or lease. Statutes may only be repealed by the General Assembly, not by leases or agreements.

#### **Statutory Authority of GHA**

As was noted in our 2015 Opinion, Greenville Hospital was created by Act No. 432 of 1947. Moreover, as we further elaborated, “Act No. 105 of 2013 renamed the Greenville

Hospital System to GHS (Greenville Hospital System to GHS (Greenville Hospital Systems)” and “Section 2 of Act 105 sets forth the revised powers and duties of GHS as follows”:

Section 2. the Greenville Health System is authorized and empowered to do all things necessary or convenient for the establishment and maintenance of adequate health care facilities for the communities it serves and, without limiting in any way the generality of the foregoing, is empowered to:

- (1) adopt and use a corporate seal;
- (2) amend its name as determined by the board of trustees after receiving input from the Greenville County Legislative Delegation;
- (3) adopt bylaws, rules, and regulations for the conduct of its business and expenditure of its funds, as it may deem advisable, including establishing committees of the board of trustees, which may include community and professional representatives.
- (4) operate the hospital conveyed to it by the City of Greenville, and such other hospitals, health care facilities, clinics, programs, and service as it may lease, acquire, construct, or develop;
- (5) acquire by gift, purchase, or otherwise, all kinds and descriptions of real and personal property;
- (6) accept gifts, grants, donations, devises, and bequests;
- (7) enlarge and improve any facility that it may acquire or construct;
- (8) adequately staff and equip any health care facility that it may operate;
- (9) provide and operate outpatient departments and services;
- (10) establish and operate clinics deemed necessary by the board of trustees to the health of the residents of Greenville County and the communities served;
- (11) provide teaching and instruction programs and schools for physicians, nurses, allied health professionals, pharmacists, case workers, administrators, and other persons;
- (12) employ personnel as may be necessary for its efficient operation;
- (13) establish and promulgate rates for the use of its services and facilities;

- (14) provide regulations concerning the use of its facilities and access to its programs and services, including rules governing the conduct of physicians, nurses, technicians, allied health professionals, social workers, and others while on duty or practicing their profession in its facilities and patients and visitors using its services and facilities; the determination of whether patients presented to the health system for treatment are subject for charity; and to fix compensation to be paid by patients and others utilizing its services;
- (15) provide free or discounted services for residents of the county and the communities it serves;
- (16) contract directly or in conjunction with insurers, employers, and individuals for the provision of health care services on a population risk or episodic basis and to expend the proceeds derived from these activities to support its programs and services;
- (17) determine the fiscal year upon which its affairs must be conducted;
- (18) expend any funds received in any manner, and the proceeds derived from issuance of bonds, to defray any costs incident to establishing, constructing, equipping, and maintaining its facilities and services;
- (19) apply to the federal government and state agencies and any other governmental agencies, industries, and philanthropic programs for a grant of monies to aid in providing any health care facility or program, conducting research, and providing health care services;
- (20) dispose of any property, real or personal, that it may possess;
- (21) conduct periodic investigations into hospital, medical, and health conditions and needs in Greenville County and the communities it serves;
- (22) exercise the power of eminent domain, in the manner provided by the general laws of the State of South Carolina for procedure by any county, municipality, or authority created by or organized under the laws of this State or by the Department of Transportation or by railroad corporations;
- (23) borrow money from banking or other lending institutions in such amounts and on such terms as the board may determine is for the best interest to the board for the operation of the hospital or for the acquisition of real or personal property or to enlarge or improve any hospital facilities and to secure such loan or loans by pledge of revenues;



- (24) enter into affiliation, cooperation, territorial management, joint operation, and other similar agreements with other providers for the:
  - (a) sharing, dividing, allocating, or exclusive furnishing of services, referral of patients, management of facilities, and other similar activities; or
  - (b) reducing or eliminating duplicative services in a market in order to improve quality or reduce cost; and
- (25) exercise all powers now or hereafter granted to regional health service districts pursuant to Articles 15 and 16, Chapter 7, Title 44, Code of Laws of South Carolina, 1976.

By Act 274 of 2018, the General Assembly ratified and confirmed the actions of the Greenville Health System “in entering into the amended Master Affiliation Agreement and the Lease Contribution Agreement.” Act 274 of 2018 also changed the name of the Greenville Health System to the “Greenville Health Authority.” Further, the Legislature made certain findings, which we quote, as follows:

[w]hereas, by passage of Act 432 in 1947, the General Assembly provided for the operation and maintenance of adequate hospital facilities for the residents of Greenville County by the establishment of the Greenville General Hospital Board of Trustees, now known as the Greenville Health System and upon passage of this act, as the Greenville Health Authority; and

Whereas, the powers conferred upon the Greenville Health System include the power to operate hospitals and other health care facilities, acquire and dispose of real and personal property, enter into affiliation and other similar agreements, and to exercise the powers granted to regional health service districts; and

Whereas, since the establishment of the Greenville Health System, the provision of health care services has changed drastically and the Greenville Health System has developed into an integrated multi-hospital and multi-county delivery system, including an academic medical center and an affiliation with an employed multi-county physician network; and

Whereas, to facilitate the improvement of health care in its service area and to respond to the changing demands and environment for providing health care services, the Greenville Health System provided for the establishment of two nonprofit entities, the Strategic Coordinating Organization, whose purpose is to, among other things, provide strategic direction for the entire integrated health system with centralized corporate, support, and compliance services, and the Upstate Affiliate Organization, whose purpose is to, among other things, provide

hospital and health care services in the Greenville Health System service area;  
and

Whereas, the decision to establish the two nonprofit entities did not include input from the Greenville Delegation, Greenville County Council, or the citizens of Greenville County through an advisory referendum; and

Whereas, the decision not to seek an affirmative vote by the Greenville Delegation, Greenville City Council, or the citizens of Greenville County by an advisory referendum created the appearance of uncertainty as to the legitimacy of the reorganization's effectiveness and authority; and

Whereas, subsequent to the establishment of the Upstate Affiliate Organization and Strategic Coordinating Organization the three entities entered into a Master Affiliation Agreement, dated as of March 9, 2016, for the purpose of establishing a system designed to develop, through their own efforts and the participation of other entities in the future, an extensive integrated health care delivery system; and

Whereas, in furtherance of the affiliation goals and objectives, the shared vision, shared governance and foundation principals, and shared commitments, all as set forth in the Master Affiliation Agreement, the Greenville Health System, and the Upstate Affiliate Organization entered into a Lease and Contribution Agreement, dated March 9, 2016, for the purpose of leasing Greenville Health System assets to the Upstate Affiliate Organization in exchange for the Upstate Affiliate Organization's assumptions of Greenville Health System's obligation to operate facilities and provide health care services; and

Whereas, the Master Affiliation has been amended to address many concerns expressed by the members of the Greenville Delegation, Greenville City Council and the citizens of Greenville County through their elected officials.

Further, on March 31, 2021, the General Assembly adopted S. 722, a Concurrent Resolution. This Resolution was designed to “reiterate the General Assembly’s well-founded expectation that the Greenville Health Authority Board of Trustees shall conscientiously and proactively supervise the lessee’s compliance with all of its duties and responsibilities enumerated in the Master Affiliation Agreement and the Lease and Contribution Agreement ratified by the General Assembly in Act 274 of 2018.”

Finally, the decision in Sloan v. Grville. Hosp. System, 388 S.C. 152, 694 S.E.2d 532 (2010) is instructive. There, our Supreme Court concluded that the GHS (now GHA) is a special purpose district “established to provide medical services to all the residents of Greenville County, where the existing city hospital was found to be insufficient to meet the increasing demand for services.” 388 S.C. at 163, 694 S.E.2d at 538. Such broad powers conveyed by the

The Honorable Garry R. Smith  
The Honorable Mike Burns  
Page 11  
March 31, 2022

General Assembly to the GHA Board are fundamental to the provision of medical care, and these core powers cannot be abdicated by contract.

### **Your Specific Questions**

We now turn to your specific questions. First, and most basically, you ask “what do you see as constituting proper supervision and control by a public entity, of a private non-profit, or for-profit entity, in which the public entity has entered into a contract to assist with the public entity’s operations and responsibilities?” In our view, at a minimum, it would be the responsibility of the GHA governing board, as well as that ultimately of the General Assembly, to ensure that “the central primary function” of GHA – that of providing medical care to the area through its hospital system – is not “substantially compromised.”

As one court has put it, “. . . a public body [such as GHA] may delegate the performance of administrative functions to a private entity if it retains ultimate control over administration so that it may safeguard the public interest.” Int’l. Longshoremen’s and Warehousemen’s Union v. Los Angeles Export Terminal, Inc., 69 Cal. App. 287, 297-98, 81 Cal. Repr. 456, 463 (1999). In this regard, one decision found an unlawful delegation where “the district is powerless to respond to the public interest and is effectively a mere funding mechanism for the non-profit corporation.” Palm Beach Health Care Dist. v. Everglades Mem’l. Hosp., Inc., 658 So.2d 577, 580 (Fla. Dist. Ct. App. 1995). And, as South Carolina Circuit Judge Roger Young wrote in City of Goose Creek v. S.C. Pub. Service Auth., CA# 2020-CP-08-00821 (S.C. 2020), “[f]or purposes of determining the validity of a contract requiring or involving a particular action by a municipality, the test for whether the action is governmental or proprietary should be ‘whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired.’” Id. at 19 (quoting Piedmont Pub. Serv. Dist. v. Cowart, 319 S.C. 124, 136, 459 S.E.2d 876, 881 (Ct. App. 1995)).

Moreover, in Op. S.C. Att’y Gen., 1999 WL 1425995 (December 14, 1999), we stated the following:

[a]s a general matter, it is well established that a state or political subdivision may properly maintain supervision and control through the use of a contract. More specifically, a private corporation ‘may be employed to carry a law into effect.’ 16 C.J.S. Constitutional Law, § 137. As stated in Amer. Soc. P.C.A v. City of N.Y., 199 N.Y.S. 728, 738 (1933),

[w]hile it is true that strictly governmental powers cannot be conferred upon a corporation or individual . . . still it has been held by a long line of decisions that such corporations may function in a purely administrative capacity or manner.

The Honorable Garry R. Smith  
The Honorable Mike Burns  
Page 12  
March 31, 2022

Although ‘an administrative body cannot delegate quasi-judicial functions, it can delegate the performance of administrative and ministerial duties. . . .’ (citation omitted).

Thus, we concluded, in that opinion, that “. . . it would appear that the distinction between a lawful and an unlawful delegation . . . inevitably would rest upon whether or not the delegation consists of duties ministerial and administrative. . . .”

It goes without saying that an opinion of this Office cannot determine whether a particular delegation of power, pursuant to contract, “crosses the line” into illegality. In short, we cannot say from afar whether a particular duty is administrative or ministerial, on one hand, or quasi-judicial, on the other. Such must be ensured by the GHA Board. That is the Board’s responsibility and the reason the General Assembly created it.

We emphasize that the GHA Board retains all of its statutory powers enumerated in the Acts referenced above. Thus, the Board, in exercising those statutory powers, may insist upon as much oversight and supervision as is deemed necessary to safeguard the public interest and to avoid abdication of its statutory powers. While we certainly are not suggesting that the Board engage in “micromanagement” of day to day operations of GHA which clearly fall within the category of “administration,” or that any existing lease terms be breached or impaired, certainly the GHA Board retains today the very same broad statutory powers and authority that it has always had. The Board may, and indeed must, supervise the performance of duties by the private corporation. As we emphasized in 2015, the line is one between the performance of ministerial or administrative duties to assist the Board and the abdication of the Board’s powers.

In short, the GHA Board is not a “rubber stamp”, but it certainly may delegate to a private entity duties which do not impair core functions and responsibilities. As we stressed in our 2015 opinion, unless the statutes governing the GHA are amended or repealed, these core functions of GHA cannot be relinquished by contract. It will be up to the GHA governing board to ensure that the public interest is safeguarded and an opinion of this Office may only reiterate what we have said previously. This guidance is well summarized by the Supreme Court’s counsel in Clay, supra:

[t]he North Charleston Sewer District as a corporate political entity is clothed with police power. Act 1768 creating the District, though it does authorize discretionary contracting, does not allow the District to delegate away those powers and responsibilities which give life to it as a body politic. A municipal corporation or other corporate political entity created by state law, to which police power has been delegated, may not divest itself of such power by contract or otherwise. . . . The commissioners, but not the private party, must act upon the application in accordance with the authority conferred upon them by Act 1768.

The Honorable Garry R. Smith  
The Honorable Mike Burns  
Page 13  
March 31, 2022

274 S.C. at 612-13, 266 S.E.2d at 85. The State's "police power" has for its object "the promotion of the public health, safety and welfare." Buchanan v. Warley, 245 U.S. 60, 74 (1917). The Clay Court made clear that the political subdivision may not "delegate away those powers and responsibilities which give life to it as a body politic." These are the "core" functions which make it a political subdivision, including the police power.

Furthermore, as the supreme legislative authority, the General Assembly of course retains the power to require instances of specific approval by the GHA Board by legislation. GHA and its predecessors was created by the Legislature and, consistent with constitutional requirements, the General Assembly remains free to alter those statutes, or to require additional oversight as it sees fit.

Your remaining questions are all similar to each other and follow naturally from what has already been said.. You ask "[w]ho is responsible for ensuring that a public entity is meeting its constitutional and statutory responsibilities?" Further, you wish to know "[w]ho is responsible for investigating, and then reporting, any illegal delegation of authority by a public entity to a private concern?" Finally, you inquire as to "[w]hat are the repercussions, penalties, liabilities, or other results of an illegal delegation of public authority and public assets to a private entity?"

### CONCLUSION

We reiterate our 2015 opinion herein. The basic question presented there, as well as here, is whether the GHA Board has relinquished "too much power" to a private corporation. City of Beaufort, supra. The Board is responsible for carrying out its statutory duties, as assigned by the General Assembly (and referred to herein) and must do so. As we stressed in the 2015 Opinion, the Board thus cannot relinquish "too much power" and thereby abdicate its duties, regardless of any existing lease. It cannot "delegate away those powers and responsibilities which give life to it as a body politic." Clay, supra. However, at the same time, as the Supreme Court held in Green, the delegation to a private company of the control, management and operation of a facility or facilities is not necessarily an unlawful delegation of authority. Management or performing administrative duties is not nearly the same as abdication of core functions. The specific facts will always be controlling.

As we have previously recognized, "[i]n general administrative officers and bodies cannot alienate, surrender or abridge their powers and duties, and then cannot legally confer on their employees or others authority and functions which under the law may be exercised only by them or other officers or tribunals." Op. S.C. Att'y Gen., 2005 WL 1609300 (June 21, 2005) (quoting 73 C.J.S. Public Administrative Law and Procedure 356). On the other hand, "government agencies may delegate to assistants as long as the agency does not abdicate its power and responsibility' and reserves for itself, the right to make the final decision." Id. at 375. It is up to the GHA governing board to determine whether or not this line has been crossed. This Office, in an opinion, cannot make that determination for the Board. We cannot, in other words,


The Honorable Garry R. Smith  
The Honorable Mike Burns  
Page 14  
March 31, 2022

ascertain whether or not there has been an unlawful delegation of authority by the GHA Board to a private corporation. All we may do is set forth the governing law, as we have attempted to do herein, as well as in our 2015 opinion. The Board must make the ultimate decision and must fulfill its statutory duties, as set forth by the General Assembly. As our Supreme Court has recognized in O'Shields v. Caldwell, 207 S.C. 194, 216, 35 S.E.2d 184, 193 (1945), among the obligations of public officers is “to perform the duties of their office honestly, faithfully and to the best of their ability . . . and to use reasonable skill and diligence . . . and to the best of his [or her] ability, in such manner as to be above suspicion of irregularities, and to act primarily for the benefit of the public.”

Thus, it is a matter not only for the Board, but for the legislative delegation, and ultimately the General Assembly, to ensure that the Board has not gone too far in delegating its powers and statutory duties. Such is an additional proper check. As our Supreme Court has stated in another context, “[t]he degree of oversight and reporting requirements are policy decisions which lie in the province of the legislature.” Domains NewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce, 423 S.C. 295, 305, 814 S.E.2d 513, 519 (2018).

Finally, of course, any person with legal standing may bring an action to challenge in court any alleged unlawful delegation. The remedy sought may be to set aside the lease or contract.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert D. Cook", with a long horizontal flourish extending to the right.

Robert D. Cook  
Solicitor General