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HENRY MCMASTER
ATTORNEY GENERAL

October 9, 2006

The Honorable Alan D. Clemmons
Member, House of Representatives
518-A Blatt Building
Columbia, South Carolina 29211

Dear Representative Clemmons:

We received your letter requesting an opinion of this Office on behalf of one of your constituents, Robert Graham concerning the Town of Briarcliffe Acres'(the "Town's") proposed sewer collection system. You enclosed a letter written by Mr. Graham to Attorney General Henry McMaster. In this letter, Mr. Graham states:

> This letter is to request your official opinion regarding a sewer system that is in the process of design and about to go out to bid for a selected area of the Town of Briarcliffe Acres (TBA). We believe the Town Council is deliberately circumventing South Carolina State Constitutional law by not first instituting the required referendum(s) as well as other regulations.
>
> The TBA seems to be of the opinion that since the money to install this system is coming from a select group of people it will serve, it is a private system and therefore does not need to comply with state laws. On the other hand we feel that this is a municipal project and does have to comply with all applicable state and local laws regulating installation of a sewer system. The project in question is known as "Town of Briarcliffe Acres sewer collection system," January 2006.

Mr. Graham also enclosed several maps indicating the affected area and where it will tie into the City of Myrtle Beach's existing public system, which he believes indicates "the new system is an extension of an existing public system and therefore requiring compliance with State and local laws."

Furthermore, Mr. Graham provided us with the following enumerated list of information:

Request Letter

1. The TBA has entered into a formal binding contract with the engineering firm of Robert Bellemy of Myrtle Beach and this contract was signed by the Mayor and approved by the town council.

2. The TBA has established an official sewer committee to direct this project.

3. The TBA has issued official check to this engineering firm in excess of $9,000 (partial payment) drawn from town funds and signed by a town official.

4. This system is to be on town property, (except that portion located on private property with one exception) and when completed, turned over to the City of Myrtle Beach by the TBA for maintenance and operation.

5. All correspondence concerning this project has been prepared at town expense, on town stationary, and signed by an official of TBA.

6. We believe that if this were a private project the TBA would not be directly involved in the actual planning of the project but would only issue necessary permits, supervise the installation of the system, and review the plans to insure and protect the interest of the TBA.

7. In a face to face meeting with officials of the City of Myrtle Beach we were told that this was a public system and all their negotiations, concerning this sewer project were with officials of the TBA.

8. At the expense of TBA, the town attorney is in the process of obtaining the necessary easements on private property to install this system.

9. The TBA has not developed, enacted, or published a sewer usage ordinance, pertaining to the installation of a sewer system within the community.

10. Until very recently, and only after community pressure, has there been public notification of meetings on the sewer system as required by state law.

As you posed the issue presented by Mr. Graham: "the question is whether, under the facts stated, the sewer collection system proposed by the town is a 'public system,' which would require a majority approval by referendum, and if so would that referendum involve just those to be served,

the entire town, or the population of all those affected (i.e., the city of Myrtle Beach and the town of Briarcliffe Acres)?"

**Law/Analysis**

Article VIII, section 16 of the South Carolina Constitution (1976) provides, in pertinent part:

> Any incorporated municipality may, upon a majority vote of the electors of such political subdivision who shall vote on the question, acquire by initial construction or purchase and may operate gas, water, sewer, electric, transportation or other public utility systems and plants.

Section 5-31-610 of the South Carolina Code (2004) also addresses a municipality's authority to construct a sewerage system. This provision allows a municipality to "[c]ontract for the erection of plants for waterworks, sewerage or lighting purposes, one or all, for the use of such cities and towns, and the inhabitants thereof. . . ." S.C. Code Ann. § 5-31-610. However, section 5-31-620 of the South Carolina Code (2004), like article VIII, section 16 of the South Carolina Constitution, sets forth a referendum requirement before the municipality may take action with regard to the construction of a sewer system.

The above constitutional and statutory provisions clarify that in order for a municipality to purchase, construct, operate, or contract for the erection of a sewer system, it first must gain the favorable vote of a majority of the municipality's electors. Although this requirement is clear, whether or not these provisions are applicable to the proposed sewer system described in Mr. Graham's letter is yet another question. As you stated in your request letter, the question is whether or not the Town is acquiring the proposed system.

A court has yet to address this issue of what constitutes an acquisition of a sewer system triggering the constitutional and statutory referendum requirement. However, in two prior opinions of this Office, we considered whether the transfer of funds by a political subdivision to a private entity or to a special tax district triggers the referendum requirement pursuant to article VIII, section 16 of the South Carolina Constitution. Ops. S.C. Atty. Gen., August 8, 2003; December 1, 1987. In our 1987 opinion, we addressed whether a municipality is subject to the constitutional referendum requirement by receiving Community Development Block Grant funds from the Governor and then lending such funds to a special purpose district or a private water company. Op. S.C. Atty. Gen., December 1, 1987. In that opinion we determined "the municipality is not acquiring or operating the water utility system; instead it proposes to receive and lend funds by means of which some other entity will own and operate the system." Id. We noted: "the municipality here would have no involvement whatsoever in the business of providing water service. It would simply be lending money to another entity for that purpose. It is our further understanding that the municipality will not pledge or expend any of its own funds incident to this transaction. It is simply serving as a conduit of funds." Id.

In our 2003 opinion, we addressed whether a county may loan county funds to a special tax district or a special purpose district without triggering the constitutional referendum requirement. Op. S.C. Atty. Gen., August 8, 2003. Citing to a prior opinion, we interpreted the language contained in article VIII, section 16. We noted, "[t]o 'acquire' means to come into ownership . . . "[t]o 'operate' means to manage or conduct." Id. (internal quotations omitted). Relying on our 1987 opinion, we surmised, "if the referendum provision of Article VIII, Section 16 is not implicated by the giving of money received through grants to a special purpose or other quasi-public body involved in providing water services, then the mere appropriation of money to such a body cannot be said to trigger the requirement either." Id. Nevertheless, we added:

> If through appropriating money, a county council is attempting to exercise some degree of power and control over the operations of another public or quasi-public body regarding public utility services then a referendum should be held. Further, if a county council is to come into ownership of some portion of public utility facilities or plants through the appropriation of money, then a referendum should be held. However, the mere appropriation of money to a public or quasi-public body that provides water services does not appear to trigger the requirement.

Id.

In several prior opinions, we considered the general, but related, question of whether a private entity is an alter ego of the State or one of its political subdivisions. We noted that such a question is factual in nature and ultimately must be determined by a court. See Ops. S.C. Atty. Gen., August 21, 1998; December 3, 1996; September 6, 1996. We, however, attempted to provide guidance as to what a court may consider in making this determination. In our December 3, 1996 opinion, we commented that "the acts of a separate corporation do not generally constitute the acts of the State . . ." Op. S.C. Atty. Gen., December 3, 1996. Moreover, we noted: "The courts do not find liability on behalf of the State or a political subdivision unless it is concluded that the State is, in reality, in control of the acts and decisions of the corporation. This has generally not been found unless the state or a governmental agency is required to approve the major corporate decisions or is funding the corporation in large part." Id.

Certainly, particular facts provided in Mr. Graham's letter suggest the Town is undertaking to acquire the proposed sewer system by construction. In Mr. Graham's letter, he states Town officials are signatories on contracts with an engineering firm, the Town issued an official check for payment to the engineering firm, communications regarding the project were on town stationary, Mr. Graham understands that negotiations with the City of Myrtle Beach have been conducted by Town officials, and the Town's attorney is involved in the process and in obtaining necessary easements. This information may be construed as indicating the Town is involved in the establishment and construction of the proposed sewerage system. See Johnson v. Piedmont Mun. Power Agency, 277 S.C. 345, 360, 287 S.E.2d 476, 484 (1982) (Littlejohn, J., dissenting) (stating the Piedmont Municipal Power Agency, a joint agency consisting of twelve municipalities seeking to combine

resources to purchase and operate an electric utility, "is no more than an instrumentality of the municipalities. It is a sort of alter ego created for the purpose of doing indirectly that which the Constitution forbids municipalities to do directly.").

However, in speaking with the Town's attorney and the chairman of the Town's Sewer Committee, we received information indicating the establishment and construction of the sewer system is being conducted not by the Town, but rather by a group of citizens forming the Sewer Committee. We were informed the Town's council did not form this committee, but the Town sanctioned the committee. The committee consists of a group of citizens who will benefit from the proposed sewer system, each of whom contributed money to accomplish the construction of the needed infrastructure for the system. The head of the committee and the Town's attorney assured us that the Town has not expended any of its own funds related to proposed sewer system. The money pooled by the potential beneficiaries of the proposed sewer system was deposited in an account held by the Town and expenses related to the proposed sewer system are paid with Town checks out of this account. In addition, it is our understanding that the Sewer Committee, not the Town's council, makes all decisions related to the proposed sewer system, including decisions regarding the expenditure of the funds held by the Town. Based upon these facts, a court could read article VIII, section 16 literally and conclude that the Town will not "acquire" the sewer system. See Paris Mountain Water Co. v. City of Greenville, 105 S.C. 180, 89 S.E. 669 (1916) (literally interpreting the term "purchase" in an earlier version of the Constitution not to include condemnation).

Thus, given the information obtained from Mr. Graham, the Town's attorney, and a representative of the Sewer Committee, the issue of whether the Town or the private citizen group is acquiring a sewer system is far from clear and necessitates resolution by a court. The fact that the Sewer Committee is making all decisions with regard to the proposed sewer system without the supervision of the Town indicates the Town's involvement in the acquisition of the system is limited and purely administrative. Furthermore, the fact that only the Sewer Committee, and not the Town, is funding the project further indicates the Town is not acquiring the system. On the other hand, because the Town is a party to the contracts, issued checks related to the project, and possibly acted as a representative for the project, these facts indicate the Town is acquiring the sewer system. Furthermore, although we are of the understanding that once constructed, the City of Myrtle Beach will become the operator of the sewer system, we are unclear as to who will own the infrastructure during its construction and afterwards.

In determining who is acquiring the sewer system, one must consider all of these facts and circumstances. As we noted on numerous occasions, this Office does not have the ability to determine or investigate facts. Op. S.C. Atty. Gen., June 27, 2006 (stating because the Attorney General does not have the authority of a court, he cannot investigate and determine factual issues). Such determinations must be left to the courts who can subpoena witnesses and documents, as well as subject witnesses testifying under oath to cross examination. Id. Accordingly, we are without jurisdiction to sort through the facts presented by the parties concerned with this matter and must defer to the courts for resolution. Nevertheless, presuming a court finds the Town is acquiring the sewer system, Mr. Graham is correct in his assessment that the Town must comply with state

constitutional and statutory law, which includes holding a referendum prior to the Town acting on the proposed system. Contrarily, if a court determines the private citizen group is acquiring the proposed sewer system, rather than the Town, the referendum requirement is inapplicable.

Next, we address your concern with regard to whether the City of Myrtle Beach is also required to hold a referendum in order operate and service the new system. As our Supreme Court recently stated, once the electorate of a political subdivision approves a referendum, it may expand its system without further authorization from the electors. Cornelius v. Oconee County, --- S.E.2d ----, 2006 WL 2051031 (2006) (dealing with a county's expansion of its sewer system) (citing Johnson v. Piedmont Mun. Power Agency, 277 S.C. 345, 287 S.E.2d 476 (1982) (concerning a municipality's decision to expand its electrical system)). However, that Court warned: "We hold that a county seeking to expand a utility cannot ignore the express terms of the Article VIII, § 16 referendum that initially authorized the county to own and operate the utility." Id. Thus, unless the referendum passed by the electorate of the City of Myrtle Beach restricts such an expansion of its operations, we do not believe the City of Myrtle Beach is required to hold a referendum in order to maintain and operate sewer service to residents of the Town.

**Conclusion**

If the Town is undertaking to acquire the proposed sewer system, we agree with Mr. Graham's assessment that the Town must comply with constitutional and statutory referendum requirements. However, whether or not the Town is undertaking to acquire the proposed sewer system is not clear. Such a determination involves the ascertainment of all factual issues, which is beyond the scope of an opinion of this Office. Additionally, because the issues raised in your letter are novel and we do not have the benefit of guidance from our courts, we believe these issues are best resolved by a court. With regard to whether the City of Myrtle Beach is required to conduct a referendum in order to maintain and operate the proposed sewer system, we believe it does not, presuming this extension of services by the City of Myrtle Beach is within the scope of its authority under the referendum establishing its sewer system.

Very truly yours,

Cydney M. Milling

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General