



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON  
ATTORNEY GENERAL

February 10, 2000

The Honorable Jim McGee  
Member, House of Representatives  
420-A Blatt Building  
Columbia, SC 29211

Dear Representative McGee:

You state that you have been contacted by constituents concerning questions about the application of Proviso 9.35 of the 1998-99 Appropriations Act.

Specifically, the questions that you are asking this Office to render an opinion on are the following:

1. Does a reasonable interpretation of the language of Provision 9.35 permit DHEC to authorize a nursing home facility to add additional beds without DHEC's issuance of CON?
2. Does Proviso 9.35 constitute special legislation violation of Article III, Section 34 of the South Carolina Constitution because Heritage Home of Florence was the only nursing home that benefitted by the passage of Proviso 9.35 in that DHEC issued a license for an additional 44 beds without having to obtain a CON?

Proviso 9.35 of the 1998-99 Appropriations Act states as follows:

(DHEC Allocation Patient Days) The Department will allocate additional Medicaid patient days authorized above the previous fiscal year's level as provided in Proviso 9.18 based on a percentage of the additional requested Medicaid patient days and a percentage of the need indicated by the Community Long Term Care waiting list. Notwithstanding any other provision of law, of the additional patient days authorized above the previous year's level as provided in

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Proviso 9.18, the Department may approve in priority order (1) additional Medicaid nursing home patient days to those nursing homes currently holding a Medicaid nursing home permit; (2) Medicaid nursing home patient days to those nursing homes that are currently licensed, but do not participate in the Medicaid program; and (3) Medicaid nursing home patient days to those nursing homes that have been approved under the Certificate of Need program and are under construction with a valid construction contract.

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. City of Myrtle Beach v. Juel P. Corp., et al., \_\_\_\_ S.C. \_\_\_\_, 522 S.E.2d 153 (1999), citing Joint Legislative Comm. v. Huff, et al., 320 S.C. 241, 464 S.E.2d 324 (1995); additionally, also see, Glover by Cauthen v. Suitt Constr. Co., 318 S.C. 465, 458 S.E.2d 535 (1995).

The Court in City of Myrtle Beach, supra, further stated that "[a]ll rules of statutory construction are subservient to the one that legislative intent must prevail if it reasonably can be discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." (citing Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994)). The determination of legislative intent is a matter of law. Charleston County Parkes & Recreation Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995); Id., 326 S.C. at 560, 486 S.E.2d at 494.

Additionally, you have provided as information to this Office correspondence dated September 30, 1998, from Commissioner Douglas E. Bryant, DHEC, to Senator Hugh K. Leatherman, Sr., and correspondence dated April 7, 1999, from Senator Leatherman to Commissioner Bryant that address their conclusions as to the legislative intent of Proviso 9.35, which is that that provision would allow for the expansion of nursing home beds without requiring a Certificate of Need. As you are aware, Mr. Bryant is the Commissioner for the Department of Health and Environmental Control which would enforce Proviso 9.35, and Senator Leatherman is a member of the Senate Budget Subcommittee which approved the proviso.

From a review of the plain language of Proviso 9.35, it appears that proviso pertains only to the allocation of additional medicaid patient days, and does not provide for additional nursing home beds. It is our understanding from review of the applicable statutes that a Certificate of Need as mandated by the State Certification of Need and Health Facilities Licensure Act would be required for additional nursing home beds. See S.C. Code §44-7-110, et seq.

As addressed above, while the interpretations of Proviso 9.35 seem suspect, this Office has emphasized on many occasions that "construction of a statute by the agency charged with executing

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it is entitled to the most respectful consideration [by the courts] and should not be overruled absent cogent reasons." Op. Atty. Gen., October 20, 1997, quoting Logan v. Leatherman, 290 S.C. 400, 351 S.E.2d 146, 148 (1986). The courts have stated that it is not necessary that the administrative agency's construction be the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. Ill. Commerce Comm. v. Interstate Commerce Commission, 749 F.2d 825 (D.C. Cir. 1984). Moreover, the agency interpretation which might render a statute constitutional is given particular deference. cf. Henderson v. Evans, 268 S.C. 127, 232 S.E.2d 331 (1977). Typically, so long as an administrative agency's interpretation of a statutory provision was reasonable, this Office would defer to it.

The interpretation rendered in DHEC's correspondence dated September 30, 1998, and the Senate Subcommittee's correspondence dated April 7, 1999, appears to be unreasonable based upon the plain language of the proviso. While subsequent accounts of legislative intent by legislators are generally deemed irrelevant, see Tallevast v. Kaminski, et al, 146 S.C. 225, 143 S.E. 796 (1928), the agency will likely argue in court that its interpretation is supported by this correspondence. Therefore, a declaratory judgment action is an option to be considered to determine whether the construction of this proviso and its referenced interpretations are correct.

With kind regards, I am

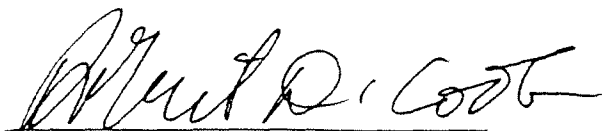
Very truly yours,



C. Haward Jones, Jr.  
Senior Assistant Attorney General

CHJJr/rho

REVIEWED AND APPROVED:



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Assistant Deputy Attorney General