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STATE of SOUTH CAROLINA

CHARLES MOLONY CONDON
ATTORNEY GENERAL

Office of the Attorney General
Columbia 29211
April 4, 1996

The Honorable Glenn F. McConnell
Senator, District No. 41
311 Gressette Building
Columbia, South Carolina 29202

The Honorable Lynn Seithel
Member, House of Representatives
306D Blatt Building
Columbia, South Carolina 29211

Dear Senator McConnell and Representative Seithel:

You are concerned about "a proposed transaction between the Medical University of South Carolina (MUSC) and Columbia/HCA in which some or all of the capital facilities and equipment of MUSC will either be sold or leased to Columbia/HCA ..." I am advised that by the terms of the proposed agreement, Columbia/HCA as tenant would "continuously operate substantially all of the Leased Premises throughout the Leased Term ...". Your specific concerns are as follows:

> [d]oes the lack of express authorization to convey or lease real estate in the corporate charter of MUSC, as well as the apparent legislative pattern of enacting legislation to authorize MUSC real estate transactions, mean that the express authorization of the General Assembly is required before MUSC may convey title to its real estate or enter into a long-term lease agreement? Furthermore, is the approval of the Joint Bond Review Committee or the State Budget and Control Board sufficient to authorize either a conveyance or long-term lease absent direct statutory authority?

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Request Letter

MUSC Statutory Authority

S.C. Code Ann. Sec. 59-123-20 provides as follows with respect to property at MUSC:

> [t]he State of South Carolina hereby expressly declares that it accepts the conveyance and transfer of the property, real and personal, of the Medical University of South Carolina and the State Treasurer may receive and securely hold such property, both real and personal, and execute the necessary papers and receipts therefor as soon as the trustees and faculty of the Medical University of South Carolina shall convey and transfer such property.

Section 59-123-30 confirms the charter of the Medical University and extends "all the rights and privileges granted heretofore by the original act of incorporation or by subsequent extension of its charter." Section 59-123-40 provides that "[t]he management and control of the university shall be vested in a board of trustees ... ." Section 59-123-60 bestows powers and authority upon the MUSC Board, among them to elect a president and "to make bylaws and regulations considered expedient for the management of its affairs and its own operations not inconsistent with the Constitution and laws of this State or of the United States." Pursuant to Section 59-123-90, the Board is given the power of eminent domain over property and is provided broad authority with respect to the issuance of revenue bonds. See, § 59-123-220, et seq. Section 59-123-10 provides that MUSC will "limit its program to those in the health area" and that any "new programs" will "first be approved by the Commission on Higher Education ... ." This same Section envisions no new organization of the structure of MUSC, providing that "no organizational changes in the operation and management of the institution shall be made as a result of the change in name." Clearly, these Sections strongly indicate that the General Assembly expects the MUSC Board, through its President, to manage and govern the institution.

Our Supreme Court has stated that "[t]he erection, maintenance and operation of hospitals by the State and its subdivisions has long been an approved and common activity." Bolt v. Cobb, 225 S.C. 408, 413, 82 S.E.2d 789 (1954). The MUSC Hospital was constructed pursuant to Act. No. 603 of 1946. This Act appropriated funds to the Medical College of South Carolina "for hospital and medical facilities". In addition, Act No. 889 of 1946 authorized counties which were required to furnish land in connection with the construction of new buildings for any State institution to issue bonds to pay the cost to such county of the land, together with the costs and expenses of its acquisition.

In Smith v. Robertson, 210 S.C. 99, 41 S.E.2d 631 (1947), our Supreme Court detailed the following account of the financing of the original Hospital facilities:

> [p]ursuant to this act the Board of Trustees of the Medical College acting through the Dean thereof, notified the County Board of Commissioners of Charleston County in writing of their plans to construct a teaching hospital, to be used in conjunction with the activities of the Medical College, and requested the County Board to make available to it, as a site for the same, a tract of land in the City of Charleston encompassed by Lucas Street on the west, Doughty Street on the north, Ashley Avenue on the east, and Mill Street on the south. In accordance with this request the County Board held a meeting on January 13, 1947, and duly adopted a resolution ... . This resolution provides for the issuance by Charleston County of $350,000 general obligation bonds as described in the bond act, the proceeds of which are to be used to acquire the site for the teaching hospital, and the bonds both principal and interest, are to be payable from a direct ad valorem tax upon all taxable property in the County of Charleston. The resolution, however, specifically stipulates that the bonds in question shall neither be advertised for sale nor issued until the Chairman of the teaching hospital, and the bonds both principal and interest, are to be payable from a direct ad valorem tax upon all taxable property in the County of Charleston. The resolution, however, specifically stipulates that the bonds in question shall neither be advertised for sale nor issued until the Chairman of the County Board shall receive from the Board of Trustees of the Medical College "a certificate, certifying that there is available to said Board the sum of not less than Four Million ($4,000,000.00) Dollars, and that said sum has been irrevocably allocated to the construction and equipment of a Teaching Hospital to be located on the site contemplated by this Resolution."

41 S.E.2d at 633.

Budget and Control Board Authority

A number of statutes are relevant to the authority of the Budget and Control Board with respect to the sale and lease of State property. Section 1-11-65, for example, provides:

> (A) All transactions involving real property, made for or by any governmental bodies, excluding political subdivisions of the State, must be approved by and recorded with the State Budget and Control Board ... . The board may exempt a governmental body from the provisions of the subsection.

In addition, other statutes and opinions of this Office also point to Board approval. In an opinion dated January 11, 1979, we advised that where ETV was the title holder of real property, any lease of that property should be with "the prior approval ... from the State Budget and Control Board." Further, in an opinion dated January 11, 1982, we opined that a State agency which leases publicly-owned real property to a private individual, partnership or corporation for improvements thereupon with a return to the agency at the end of the lease term "should be submitted to the Board for approval."

The question of the applicability of the Consolidated Procurement Code, Section 11-35-10 et seq. also must be assessed in conjunction with the Budget and Control Board's authority in this area. In an opinion dated April 2, 1982, we concluded that the Procurement Code was applicable to the situation where the Department of Mental Health proposed to enter into a lease with a mortician and the mortician would use State Hospital facilities to perform certain services for the State upon the death of a patient. Such services would "be of value equivalent to the fair rental value of the property." We concluded that the transaction "appears to come within the terms of the procurement code in that the State Hospital would be procuring the mortician's services for the rental value of the morgue." Pursuant to Sections 11-35-40 and 11-35-310 (8), we stated that "you should refer this proposal to the Division of General Services of the Budget and Control Board for its review ... ."

Likewise, in Opinion No. 84-8 (January 24, 1984), we deemed the Consolidated Procurement Code to govern the situation where Clemson leased its property to a private corporation which, in turn, would contract with a developer to construct the Thurmond Institute, as well as a continuing education center, performing arts auditorium, golf course, marina, hotel suites and townhouses. In our opinion, where Clemson was expending its

property and resources in order to allow the developer to make a profit, the Procurement Code was applicable. Following the same reasoning, we concluded that the State Procurement Code would govern a lease agreement "between a state agency and a private firm by which the state agency would obtain an energy utilization management system, and further where the lease would provide that the state agency would pay the firm no more than the amount of money which the state agency would save by using the system." Op. Atty. Gen., August 4, 1987.

Moreover, Section 11-35-1590, another provision of the Procurement Code, provides as follows:

> (1) ... The board [Budget and Control Board] is hereby designated as the single central broker for the leasing of real property for governmental bodies. No governmental body shall enter into any lease except in accordance with the provisions of this Section.

It would appear that this Section would also require any lease to be procured through the Budget and Control Board's procedures for the leases of state property. It is my understanding that the Budget and Control Board also interprets this provision to be applicable where, as here, a state agency leases its property to another. See. Letter of General Counsel, October 16, 1995 [interpreting Section 11-35-1590, stating that "leasing for governmental bodies is leasing on behalf of governmental bodies, either to or from."]. The interpretation of the agency charged with the administration of statutory provisions will be accorded the most respectful consideration and will not be overruled absent compelling reasons. Goodman v. City of Cola., 458 S.E.2d 531 (S.C. 1995). At least one circuit court has concurred in the Board's interpretation, concluding that "[i]t seems evident that it is the intent of legislature that § 11-35-1590 apply to any lease involving real property entered into by a governmental body. Braswell Services Group v. South Carolina State Budget and Control Board, No. 95-CP-10-4095 (Order of the Honorable Victor Rawl, 12/18/95).

Pursuant to § 11-35-1590, Budget and Control Board regulations have been promulgated and are also pertinent. R-19-445.2120 (B) requires approval of leases of State-owned property by the Division of General Services of the Board and provides as follows.

> B. Lease of State-owned Real Property.
> No governmental body shall contract with any commercial entity or other governmental body

> for the lease, rental, or use of State-owned real property whether it be titled in the name of the State of South Carolina or any governmental body, without approval of the Division of General Services, except as specified in Subsection C. Requests shall be directed to the Division of General Services, Real Property Management Section. The Division of General Services shall negotiate all leases of State-owned real property unless the governmental body has been certified by the Materials Management Office.
>
> C. The Budget and Control Board may exempt governmental bodies from leasing State owned and/or non-State owned real property through the leasing procedure herein required provided, however, that annual reports be filed with the Office of General Services, Real Property Management Section, prior to July 1 of each year. Annual reports shall contain copies of all existing leases of State-owned and non-State-owned real property. The Budget and Control Board may limit or withdraw any exemptions provided for in this Regulation.

Regulation 19-445.2121 "also governs leasing real property and provides that all State leases shall be one of the types specified." Letter of Board, supra. Subsection G (1) of this Regulation provides that "the Office of General Services may place any proposed lease transaction in this category if it involved complex issues or methodologies which warrant special handling." See, Op. Atty. Gen., Op. No. 92-32 (June 26, 1992) [citing R 19-445.2120, re approval by General Services].

Finally, we would note that Section 11-35-3820, the provision dealing with state surplus property provides:

> [e]xcept as provided in Sec. 11-35-1580 and Sec. 11-35-3830 and the regulations pursuant thereto, the sale of all state owned supplies, property or personal property not in actual public use shall be conducted and directed by the Division of General Services. Such sales shall be held at such

> places and in such manner as in the Judgment of the Division of General Services will be most advantageous to the State. Unless otherwise determined sales shall be by either public auction or competitive sealed bid to the highest bidder. Each governmental body shall inventory and report to the Division all surplus personal property not in actual public use held by that agency for sale.
>
> The Division of General Services shall deposit the proceeds from such sales, less expense of the sales, in the state general fund or as otherwise directed by regulation. This policy and procedure shall apply to all governmental bodies unless exempt by law. (emphasis added).

In Porter v. Hospital Corporation of America, 696 S.W.2d 793 (Ky. 1985), the Logan County Fiscal Court leased real estate and sold personalty as part of a transaction involving the lease and sale of the County hospital to Hospital Corporation of America. The County's administrative procedures required "surplus property no longer needed or serviceable" to be disposed of by sealed bids or public auction. The Court thus concluded that the County had not correctly disposed of the hospital property because this procedure was not used. Said the Court,

> [t]he code plainly contemplates "surplus" property to be property "no longer needed or serviceable." The hospital inventory and equipment appear to be property which was no longer needed by the County because the Fiscal Court had determined to remove itself from the operation of a hospital ... . Having prescribed the method by which such property is to be disposed of, the County must abide that method or adopt a new method. 694 S.W.2d 794-795.

Similarly, in an opinion dated March 17, 1983, we concluded that in order to allow the Medical University to sell equipment to "another institution outside the State on a direct sale basis", the surplus property statute must be followed. We stated:

> [u]nder Section 11-35-3820 and Regulation 19-445.2150 of the Consolidated Procurement Code the authority to handle such transactions is vested with the Division of General Services. The Division will handle the sale of the equipment upon your written request and return sale proceeds, less expense of sale

> to the Medical University of South Carolina if requested to do so, for the purchase of like items.

Accordingly, based upon the foregoing, certainly Budget and Control Board approval would be necessary prior to the implementation of this lease agreement. Moreover, the Consolidated Procurement Code would be applicable to this transaction as discussed above.

Notwithstanding any Budget and Control Board approval or approval by any other agency, however, there is the overriding question of MUSC's authority to enter into this transaction without express statutory authorization from the General Assembly. It is fundamental black letter law that the authority of a state agency created by statute "is limited to that granted by the legislature." Nucor Steel v. South Carolina Public Service Commission, 310 S.C. 539, 426 S.E.2d 319 (1992). An administrative agency "has only such powers as have been conferred by law and must act within the authority granted for that purpose." Bazzle v. Huff, 462 S.E.2d 273 (S.C. 1995).

A number of courts have reviewed the lease of hospital facilities to private corporations. In virtually every instance, there was clear and express statutory authority to lease or sell the hospital property and to allow the private entity to operate and manage the hospital. Otherwise, the transaction was found invalid. For example, in Campbellton-Graceville v. Elec. and Taxpayers, 490 So. 1320 (Fla. App. 1 Dist. 1986), the plaintiff, a nonprofit entity created by the Florida legislature to provide hospital care, sought to lease its facilities to the Health Care Management Corporation, a for-profit entity. The Court invalidated the lease, on the basis of an unlawful delegation of authority, a delegation inconsistent with its statutory enabling authority. Said the Court,

> [a]s a statutorily-created public entity to Campbellton-Graceville Hospital Corporation is possessed of only such authority as is thereby conferred ... . [T]he special act creating the Campbellton-Graceville Hospital Corporation expressly limits the corporate purpose and authority to "erecting, building, equipping, maintaining and operating" the hospital. A lease of hospital facilities and transfer of operational control effects a delegation of operating authority which the special act has expressly placed with the Campbellton-Graceville Hospital Corporation, and does not accord with the evident purpose of the act that such control be exercised by the created public nonprofit corporation. While financial constraints may impel the Campbellton-Graceville Hospital Corporation to seek a

> private lease agreement, the agreement in question may not be legally consummated without legislative amendment ... .

490 So.2d at 1321. (emphasis added). There, the Court deemed the lease a "transfer of operational control" and thus a "delegation of operator's authority" in contravention of the Hospital's enabling authority. Id.

In Abernathy v. City of Irvine, 355 S.W.2d 159 (Ky. 1962), the Court summarized the general law with respect to a governmental entity utilizing a private corporation to run its hospital by stating:

> [t]he statutes do not demand that a county or city maintain a hospital as a function of government; they merely require that if a hospital is maintained as a governmental institution it be controlled and managed by public officials.

355 S.W.2d at 161.

In Willis v. University Health Services, Inc., 993 F.3d 837 (11th Cir. 1993), a nurse was fired by a private corporation which operated University Hospital pursuant to a lease agreement with the Richmond County Hospital Authority, a public entity. Citing several cases, the Eleventh Circuit dismissed the nurse's § 1983 suit. The Court concluded that because of the lease agreement, there was no "state action" as required by federal law. Thus, the suit was dismissed.

Then, in National Medical Enterprises v. Sandrock, 324 S.E.2d 268 (N.C. Ct. App. 1985), the North Carolina Court of Appeals held that a lease to a private for-profit company to manage a county hospital rendered the hospital no longer "public" for purposes of a requirement in a deed that the hospital property revert to the grantor if the hospital property ceased to be a "public hospital". The Court reasoned that

> ... as used in the deed, the term "public hospital" appears intended to mean a hospital owned and operated by the County under the Municipal Hospital Facilities Act, revenues from which would inure to the county, and which could be leased to a nonprofit association but not a for-profit corporation.

324 S.E.2d at 273. In the judgment of the Court, the grantor did not intend by the use of the words "public hospital" to include a lease arrangement with a private, for-profit corporation.

Courts in many jurisdictions, including South Carolina, have examined specific lease arrangements between governmental hospitals and private entities closely to determine whether such are authorized and whether the terms of the specific statutes are being followed. Almost always, there is specific statutory authority in order for the lease to be valid. For example, in Bradfield v. Hospital Authority of Muscogee County, 176 S.E.2d 92, 99 (Ga. 1970), the Court stated:

> [u]nder the Hospital Authorities Law, this governmental obligation [to provide for the public health] can be discharged by the acquisition of existing hospital facilities, as is here proposed (as well as by the construction of completely new hospitals) and by the sale or lease of the hospital to others, as is also here proposed (as well as by the Hospital Authority's operation thereof). ... There is no apparent reason why a suitable private corporation could not properly operate the hospital, either as lessee or as owner, so as to likewise promote the public health functions of government. (emphasis added).

Likewise, in Richmond County Hospital v. Richmond Co., 336 S.E.2d 562 (Ga. 1985), the Court emphasized that the Georgia law authorized leases with private corporations so long as the authority "shall have retained sufficient control over any project so leased so as to ensure that the lessee will not in any event obtain more than a reasonable rate of return, if and when realized by such lessee, shall not contravene in any way the mandate set forth in Code Section 31-7-77 specifying that no authority shall operate or construct any project for profit." Again, in these instances, a specific statutory authorization was present.

The same principles of law -- that express statutory authority is a must -- guide the courts in analyzing lease arrangements involving the lease of university hospital facilities. In Queen v. W. Va. University Hospitals, 365 S.E.2d 375 (W.Va. 1987), the Court stressed the importance of the Legislature's role in authorizing the transfer of University Hospital facilities and concluded:

> [i]n summary, the Legislature, in West Virginia Code § 18-11C-1 et seq., has mandated the creation of WVUH to be

> organized as a nonstock, not-for-profit corporation ... for the stated purposes of (1) facilitating health sciences education and research, (2) providing patient care, including specialized services not widely available elsewhere in West Virginia, in the most efficient manner and at the lowest practicable cost, and (3) providing independence and flexibility of management and funding and assuring future economy of operation under changing conditions separating the business and service functions of the corporation's facilities from the educational functions, and providing that such facilities will be self-sufficient, removing the tax burden from the state. The corporation thus has statutorily specified purposes and directors, primarily public officers, who have fiduciary duties to the people of West Virginia. The propriety of this structure and these purposes is not contested and presumed correct. (emphasis added).

365 S.E.2d at 379. It is thus clear in Queen that the Legislature specifically authorized the transfer.

In Kromko v. Arizona Board of Regents, 149 Ariz. 319, 718 P.2d 478 (1986), the same type of specific statutory authority was evident. University of Arizona leased the University's hospital facilities to a nonprofit corporation. In concluding that such transaction whereby the University conveyed the hospital and leased the land underlying it to a nonprofit corporation was not an unconstitutional donation of state property to a private corporation, the Arizona Supreme Court (En Banc) stressed the fact that the transaction was authorized by statute. The statute presumed that if lease improvements were conveyed to the corporation, they were conveyed for their then fair market value. Rejecting the argument that public purpose was lacking, the Court stated:

> [i]n so arguing, however, petitioner again fails to consider the effect of A.R.S. § 15-637. That statute provides that the Board may lease real property owned by it to a non-profit corporation, as lessee for the purpose of operating a health care institution. In other words, our legislature, by providing for the type of transaction at issue, has statutorily recognized the public benefit of having a nonprofit corporation provide health care to the community. After carefully reviewing this statute, and the corresponding lease, we find that neither the

> letter nor the spirit of the constitutional provision has been violated. (emphasis added).

718 P.2d at 479. The Court further concluded that "it cannot be seriously contended that the existence of UMCC as a nonprofit hospital does not serve a public purpose." Id. Thus, there was no violation of the State Constitution proscribing the State from giving or loaning its credit of making any donation to a private corporation.

And in Bennett v. Bd. of Trustees For University of Northern Colorado, 804 P.2d 138 (Col. En Banc 1990), the Colorado Supreme Court examined the constitutionality of the Colorado Legislature's reorganization of the University's hospital into a private, nonprofit corporation. Tracing the history of the Legislature's authorization of reorganization, the Court described the chronology this way:

> [p]rior to the enactment of Section 23-21-401 to -410, the organization of the University Hospital was addressed in Sections 23-21-101 to -113, 9 C.R.S. (1988). The hospital was utilized for the health science education programs provided by the University of Colorado. § 23-21-104. Under Section 23-21-102(1), control of the hospital was vested in the Board of Regents (the Regents) of the University of Colorado, members of which were elected to office pursuant to section 1-4-204, 1B C.R.S. (1980). The Regents were empowered to "manage, control, and govern such hospitals" under regulations it prescribed, § 23-21-102 (1) and to provide for the operation of the hospitals "by any entity, public or private, profit or nonprofit" to administer the hospital adequately and efficiently, § 23-21-102 (3) (a).
>
> Although the former statute granted the Regents a great degree of flexibility regarding the type of entity they could establish to operate the hospital, the Regents' power to provide for any entity was limited in Section 23-21-102 (3) (C) which stated, "No such provision shall adversely affect the rights, benefits and privileges of any existing state personnel system employees of the University of Colorado nor deprive them of their status under the state personnel system ... ."

> The statute before us, consisting primarily of sections 23-21-401 to -410, was enacted in 1989 to enable the reorganization of University Hospital ... .

804 P.2d at 140. Clearly, the Colorado Legislature thought it necessary to specify in the earlier statute that the Trustees could provide for the operation of the hospitals "by any entity, public or private, profit or nonprofit" even though there was other language that the trustees were empowered to "manage, control and govern such hospitals". Moreover, the Legislature considered it necessary later to provide even more specific statutory authority in view of the language in the earlier statute regarding state personnel. Notwithstanding the legislative amendment, the Court found that the amendment excepting employees from the state personnel system conflicted with that State's constitutional provision regarding state personnel.

Likewise, in an Opinion issued by the Kentucky Attorney General, the question was posed as to whether "the Allen County Fiscal Court [could] employ a professional management firm to operate the Hospital". At that time the Hospital was operated by the Kentucky Fiscal Court. The Kentucky Attorney General reached the same conclusion as did we in our 1985 Opinion regarding private prisons. He stated:

> [a]s we said, if the agreement covering the employment of a management corporation does not leave the ultimate control of the hospital in the fiscal court, it would be illegal. However, in the day by day routine of the hospital, such corporation could operate within the scope of the administrative and ministerial implementation of the decisions, policies and directives of the fiscal court in the latter's retaining and exercising its overall and ultimate control of the county hospital. Thus inferior and administrative and ministerial functions can be delegated to such corporation. (emphasis added).

This analysis is virtually identical to that contained in our "private prison" opinion, Op. No. 85-81 (August 8, 1985), where we recognized that there must "exist statutory authority for an administrative officer or agency to subdelegate any portion of the authority which has been delegated to him by statute ... ." In that earlier opinion, we also distinguished between the delegation by the government of "'strictly governmental powers [which] cannot be conferred upon a corporation or individual" and the delegation by contract to a private corporation to perform duties'" in a purely administrative capacity. In short, we opined that a State could not simply "'turn over' to a private corporation the

operation of a prison facility without ample guidelines for such operation or a suitable reporting and monitoring system." The key was the maintenance of "supervision and control" by the State.

While the operation of a governmental hospital is far more a discretionary decision than whether or not the government must operate prisons, the analysis is basically the same. So long as the State chooses to operate a hospital, it must not delegate the control of such operation away. Clear statutory authorization from the General Assembly is necessary to lease Hospital facilities and the management of the Hospital to a private corporation.

Indeed, in Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (1976), our Supreme Court reviewed a lease proposal similar in concept to the one proposed here. McLeod Hospital, a private, non-profit, non-sectarian organization, proposed to operate a hospital on behalf of Florence. In Gilbert, the Court described the arrangement as follows:

> [f]or a number of years the Pee Dee region of South Carolina has been interested in procuring a new full service, acute care regional hospital and referral center. This common interest has brought together several units of government and a private eleemosynary hospital corporation in a cooperative effort to achieve this objective. The result of these joint endeavors is a proposed project to construct in the City of Florence a new 300 bed hospital at a cost of $28,441,861 to service the Pee Dee area of South Carolina.
>
> The principal instrument utilized in the plan providing for improved health care for this region of South Carolina is the McLeod Memorial Hospital, which is a non-sectarian and non-profit corporation ... . Although McLeod has been governed in the past by an unrestricted self-perpetuating Board of Trustees, it has adopted a resolution to amend its charter so as to provide that six of its seventeen trustees shall be designated as regional members, such members to be elected by the Board of Trustees from nominations submitted by Pee Dee [Regional Health Services District] ... .
>
> The City of Florence is committing itself to convey without consideration, by fee simple deed, a 30 acre tract of land in the City to Pee Dee, which is a body politic created by

> legislative enactment. This tract of land is to be the site of the proposed hospital. Pee Dee then proposes to McLeod the entire tract of land, with the improvements to be erected thereon, for a term of 50 years with an option to renew for an additional term of 50 years. The proposed hospital is to be entirely operated by McLeod and it is to receive all income generated from its operation, subject to numerous terms contained in the lease designed to protect the public interest and character of the institution. The lease agreement specifically designates the relationship between Pee Dee and McLeod as that of landlord and tenant.

267 S.C. 176-177.

The Court was impressed with the terms of the particular lease agreement before it. Specifically, the Gilbert Court noted that

> ... fee simple title to the land and the buildings is to remain in Pee Dee, subject to the terms of the lease. It is the expressed intention of the parties that the rent payable by McLeod to Pee Dee shall be so fixed as to net to Pee Dee a sum equal to all expenses incurred by it of whatsoever nature in connection with the ownership of the leased premises and the leasing of the same to the tenant.

267 S.C. at 177-178.

A principal contention in the case was that the lease agreement violated the State Constitution (now Article X, § 11) which forbids the pledging of the State's credit and prohibits the State from becoming "a joint owner of or stockholder in any company, association or corporation ... ." Citing its earlier cases of Bolt v. Cobb, supra, and Battle v. Wilcox, 128 S.C. 500, 122 S.E. 516 (1924), the Court recognized that in the Gilbert case, unlike in Bolt and Cobb, the parties "have executed a comprehensive lease arrangement which has been filed with the record before us." Id. at 181. The availability of the actual lease which would be put into effect enabled the Court "to determine whether constitutional purposes were being safeguarded in the ultimate use of the facility." Based upon its review of the lease, the Court found that there was no violation of the referenced Constitutional provisions:

> [w]e conclude that the lease agreement purports to and does retain to Pee Dee the status of landlord and grants to McLeod the status of tenant, and not "joint owners" as prohibited by § 6. [now § 11]. Throughout the lease run provisions to protect the interests of the landlord and in turn the public in the facilities, but we do not deem these protective measures of such import as to create a state of joint ownership in any constitutionally prohibited sense.

Id. at 181. Accord., Lazarus v. Bd. of Comrs. of Ham. Co., 217 N.E.2d 883, 887 (Ohio 1966) [clear intendment" of constitutional provision of joint owner or stockholder provision" is to interdict any joint venture in profit-making schemes whereby the State or a subdivision thereof is to be a joint venturer."]. The Court also concluded that the qualified right to sub-let various areas of the hospital did not destroy the Hospital's character as a "public building" and was, instead, "merely incidental" to the function of the Hospital, "to house and treat patients ... ." Id. at 182.

Like the cases referenced above from other jurisdictions, another important issue in Gilbert was whether the lease was within the statutory authority of Pee Dee Regional Health Services District. The Court noted that a 1976 Act specifically gave health service districts the authority "to enter into transactions of the type here proposed ... ". The enabling authority for Pee Dee authorized it to "lease land or any hospital facility to any public or private hospital." Pee Dee, held the Court, thus "is possessed of ample statutory authority under the 1976 Act to participate in the project ... ." Id. at 185 - 186. Therefore, except for the fact the Pee Dee's enabling legislation was special legislation, the Court found the lease constitutionally as well as statutorily authorized. Based upon its review of the lease, the Court was assured "that the constitutional purposes stated in the authorizing legislation would be preserved." Id. at 181.[1] Thus, Gilbert concluded that the District possessed the statutory authority to enter into the lease with the private hospital, that the lease provisions maintained sufficient supervision and control to avoid violation of the State Constitution and that there was thus no joint ownership with a private corporation in contravention of the State Constitution. See also, Johnson v. Piedmont Mun. Power Agency, 277 S.C. 345, 287 S.E.2d 476 (1982) [where public entity holds "naked title to property" operated by a private entity, no joint ownership, and cases cited therein]; McKinney v. City of Greenville, 262 S.C. 227 203 S.E.2d 680 (1974) [Court finds statutory authority to lease property to private corporation for development]; Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986)

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[1] The Hospital is not owned by a local health service district and thus Title 44, Chapter 7 of the Code is not applicable.

[research park does not constitute a pledging of State's credit, a joint venture with a private party, an unconstitutional "donation" of public property to a private corporation, and is for a public purpose, and numerous cases in support thereof cited therein].

Moreover, in Bolt v. Cobb, supra, there was clear statutory authority for Anderson County's providing "for the performance of a public, corporate function through the agency of the existing non-profit and non-sectarian hospital ... ." 225 S.C. at 415. To that end, the General Assembly specifically enacted Act. No. 390 of 1953 to issue bonds if approved by a county referendum and to "empower the County Board of Commissioners of Anderson County to make such hospital facilities available for use by the Anderson County Hospital Association."

Our Supreme Court has spoken in clear and no less uncertain terms regarding MUSC. In upholding the bond act authorizing the issuance of bonds for construction of the MUSC Hospital, the Court in Smith v. Robertson, supra, was careful to point out that it expected that MUSC trustees would maintain control of the management of the Hospital. The Court cautioned:

> [w]e do not overlook the suggestion that the title to the hospital will be in the State and the control thereof in the Trustees of the Medical College, a State institution; and that hence the County of Charleston has no assurance that the hospital will be maintained as contemplated, and continue so to be maintained, to the end that the county may receive the anticipated benefits. While it is true that there is no express contract between the State and the County of Charleston declared in the bond act under consideration we hold that to the extent needed to justify the joint project, the State holds title and exercises control on behalf of Charleston County, the latter being of course a component part of the State. In other words, there is a clearly implied obligation on the part of the State to operate the hospital as planned and continue so to do, or else make just compensation to the county. We cannot assume that such an obligation would be disregarded in any respect. (emphasis added).

Id. at 118. While it is true the Court was speaking specifically about the issuance of the original bonds nevertheless, the language in the opinion regarding MUSC's maintenance of control is particularly strong and persuasive.

Based upon the overall public purpose of the continued operation of the Medical University Hospital, it would not appear that either Art. X, § 11 or Art. III, § 31 (donation of State's lands) is being violated in this context. Our Court has held on numerous occasions that consideration to the State may take the form of indirect benefits. State v. Broad River Power Co., 177 S.C. 240, 181 S.E. 41 (1935); McKinney, supra; Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967). As we stated in the 1985 Opinion, referenced above, " ... a fair exchange by the state of value for value does not offend the prohibition as to a loan, pledge or gift of state credit.'" Id. at n.7. Moreover, in Gilbert v. Bath, the Court concluded that an arms-length lease between a governmental entity and a private corporation for the operation of a government hospital, where such lease adequately protects the public interest, does not violate Art. X, § 11.

In a nutshell, the real issue here, without a doubt, is the statutory authority of the Board of Trustees of MUSC to enter into this lease and permit Columbia/HCA to operate the Hospital. In an Opinion of the Florida Attorney General, AGO 080-18 (March 11, 1980), it was stated that the enabling statutes for a particular hospital district "clearly evidence a legislative intent that the Board of Commissioners of the Halifax Hospital District (now Halifax Hospital Medical Center) is the only body corporate authorized and empowered to operate and manage hospitals within the jurisdictional boundaries of the district." Continuing, the Florida Attorney General concluded that "[t]here are no express provisions ... which authorize any entity or corporate body, including a not for-profit corporation, other than the board of commissioners, to manage and operate hospital facilities within the subject district."

Likewise, with respect to MUSC, from the day MUSC was born as a public institution, the MUSC trustees have governed the administration of the University. From the time the Hospital was built, the trustees have run it. When new authority has been needed by the trustees to take a particular course of action, it has been a decision for the General Assembly whether or not to give it. In this instance, neither the corporate charter nor the statutory enactments authorize this type of transaction. See, Act No. 151, Part II, Section 25 of 1983 [approval by General Assembly to sell the President's home]; Act No. 615, 1971 [approval by the General Assembly to exchange property with the South Carolina Wildlife Resources Department]; Act. No. 47 of 1975 [eminent domain]; Act No. 481 of 1914 [convey land and buildings on Queen Street]; Act No. 667 of 1954 [exchange real property with the City of Charleston]; Act No. 63 of 1955 [recognizing that "a question has arisen as to the power of the Board of Trustees of the Medical College to undertake the necessary steps" to reconvey real property to the Medical Society of South Carolina].

In my judgement, the proposed lease arrangement and sale of equipment would represent an extraordinary, unprecedented and impermissible delegation of the State's authority by MUSC. As we stated in our 1985 private prison opinion, only a court can validate a particular lease agreement and thus the lease arrangement certainly should not be undertaken without a court validating it. The Medical University has been supported by the State's taxpayers as a state agency since 1913, and its Hospital, as a state institution, since 1946. During that period, the General Assembly has never authorized MUSC to lease its property or delegate its authority to manage and operate the Hospital. For that entire time, the General Assembly has required that MUSC trustees, not a private, for-profit corporation like Columbia/HCA, carry out the State's function of providing medical education and health care to the citizens of South Carolina.

The governing board of the Medical University is selected pursuant to enactment by the General Assembly. The overall policy of the Medical University, and the authority to carry it out, is provided by the General Assembly. Therefore, if the method of management of the Medical University is to be changed, both as a matter of policy and as a requirement of law, such change should come from the General Assembly.

CONCLUSION

A state agency, such as MUSC, derives its power solely from the statutes enacted by the Legislature. State officers, therefore, cannot with the stroke of a pen unilaterally turn over the operation of a state institution to a private corporation. They may not with the vote of a board delegate their legal authority or sell and lease away their responsibilities. As Attorney General of South Carolina, it is thus my opinion that the proposed lease arrangement cannot be undertaken unless and until the General Assembly clearly and definitively authorizes the transaction.

With kind regards, I am

Very truly yours,

Charles Molony Condon
Attorney General

CMC/ph