2879 Library

The State of South Carolina

Office of the Attorney General

Opinion No. 8780
Pg 204

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3970

September 14, 1987

Ernest J. Nauful, Jr., Esquire
Post Office Box 2285
Columbia, South Carolina 29202

Dear Mr. Nauful:

By your letter of July 21, 1987, you have advised that an effort is underway to create a Lexington County Health Services District by ordinance of Lexington County Council pursuant to Section 44-7-2010 et seq., Code of Laws of South Carolina (1976, as revised). You have asked this Office to address the following question concerning the proposed creation:

> Can a Health Services District created pursuant to Sections 44-7-2010 through 44-7-2130 and thereafter incorporated pursuant to Sections 44-7-2150 through 44-7-2157 of the South Carolina Code of Laws (1976, as amended), then create, incorporate and own such for-profit and/or not-for-profit subsidiary corporations as the District may deem necessary to enable it to accomplish its corporate purposes?

To adequately respond to your inquiry, we must first examine the nature of the entity to be created and then applicable constitutional and statutory provisions.

Status of Health Services District

Formation of a health services district by a county or group of contiguous counties and any municipalities located within their boundaries is authorized by Section 44-7-2010 et seq., Code of Laws of South Carolina (1976, as revised). The enactment creating the district is directed by Section 44-7-2010 to declare the district to be a body politic and corporate within

the counties and municipalities so designated. Membership on a board of directors is provided for in Sections 44-7-2020 and 44-7-2030 of the Code. Powers and duties of the board are provided for in Sections 44-7-2060, -2070, -2080, -2100, and other sections and include such powers as operation of health care facilities, eminent domain, employment of personnel, borrowing money, issuing bonds, and others. Properties owned by a district are exempt from taxation by the State or one of the State's political subdivisions. By Section 44-7-2130, a district is deemed an agency of the county for the purposes of operating health care facilities and receipt of any special public health taxes levied by the authorizing subdivisions.

Incorporation of a health services district as a public corporation is provided for by Section 44-7-2150 et seq. of the Code. Certain additional powers are conferred by Section 44-7-2157 of the Code upon districts which so incorporate. The district's specific lack of authority to levy taxes is provided therein.

At the very least, the entity described by your letter would be a "public hospital corporation." Section 44-7-2115 defines that term as

> any public authority, corporation, or association or entity organized on a local or regional basis by or with the consent of any county ... and having the power to own or operate any health care facilities, including without limitation, any public corporation or authority heretofore or hereafter organized under the provisions of this article [Section 44-7-2010 et seq.].

It would appear that the health services district would also be considered a political subdivision of the State of South Carolina. As stated in Arkansas State Highway Commission v. Clayton, 266 Ark. 712, 292 S.W.2d 77 (1956), political subdivisions

> embrace a certain territory and its inhabitants, organized for the public advantage and not in the interest of particular or classes; that their chief design is the exercise of governmental functions; and that to the electors residing within each is to some extent committed the power of local government, to be wielded either mediately

> or immediately within their territory for the peculiar benefit of the people there residing.

292 S.W.2d at 79. Other attributes include the power to levy taxes and make appropriations, Dugas v. Beauregard, 155 Conn. 256, 236 A.2d 87 (1967); and the powers to sue and be sued, enter into contracts, exercise eminent domain, incur indebtedness, and issue bonds, among others. Hauth v. Southeastern Tidewater Opportunity Project, Inc., 420 F.Supp. 171 (E. D. Va. 1976). See also State ex rel. Maisano v. Mitchell 155 Conn. 256, 231 A.2s 539 (1967); Commander v. Board of Commissioners of Buras Levee District, 202 La. 325, 11 So.2d 605 (1942); McClanahan v. Cochise College, 25 Ariz. App. 13, 540 P.2d 744 (1975). See also Johnson v. Piedmont Municipal Power Agency, 277 S.C. 345, 287 S.E.2d 476 (1982).

The territory to be embraced would be that coterminous with the county or counties (and municipalities) creating the district. Gould v. Barton, 256 S.C. 175, 181 S.E.2d 662 (1971). The purpose of organizing the district is to provide health services, clearly for the public advantage; provision of such services is recognized as a governmental or public function. Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (1976); Bolt v. Cobb, 225 S.C. 408, 82 S.E.2d 789 (1954). Various powers of government have been granted to the district's board of directors, including the power to enter into various contracts, to exercise eminent domain, to incur indebtedness, and to issue bonds. Lack of taxing power is not critical in the determination of the existence of a political subdivision. Op. Atty. Gen. No. 85-36, fn. 2. Due to the similarity of the structure and formation of a health services district to the structure and formation of a joint municipal power agency, declared by our Supreme Court in Johnson v. Piedmont Municipal Power Agency, supra, to be a political subdivision, a health services district would most likely be considered to be a political subdivision, as well.

Constitutional Considerations

In Article X, Section 11 of the Constitution of the State of South Carolina the following prohibition is found: "Neither the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association, or corporation." Construing the constitutional provision according to its plain, literal, and ordinary meaning as must be done in the absence of ambiguity, Henderson v. Evans, 268 S.C. 127, 232 S.E.2d 331 (1977), a political subdivision is ordinarily

precluded from being a stockholder in a corporation. Cf., Ops. Atty. Gen. dated April 1, 1980 and June 2, 1982; Annot., 152 A.L.R. 495. Because non-profit corporations do not issue stock, this constitutional provision would not prevent a health services district from having a non-profit corporate subsidiary. The question of owning a for-profit subsidiary requires more consideration, however. 1/

Statutory Considerations

In Section 35 of Part II, Act No. 512 of 1984, the General Assembly made specific findings with respect to health services districts:

> (1) That publicly-owned hospitals and other health care facilities furnish a substantial part of the indigent, reduced rate care, and other health care services furnished to residents of the State by hospitals and other health care facilities generally;
>
> (2) That as a result of current significant physical and budgetary limitations and restrictions, the State and its various counties and municipalities are no longer able to provide, from taxes and other general fund monies, all the revenues and funds necessary to operate these publicly-owned hospitals and other health care facilities in an adequate and efficient manner; and
>
> (3) That in order to enable these publicly-owned hospitals and other health care facilities to continue to operate adequately and efficiently, it is necessary that the entities and agencies operating them have the same powers with respect to health care facilities as are now vested in various not-for-profit or proprietary hospitals or health care authorities and corporations, and have the ability to provide a

---

1/ For purposes of this opinion, it is assumed that the public corporation would hold one hundred percent (100%) of the shares of any for-profit subsidiary corporation which it would create.

> corporate structure somewhat more flexible than those now provided for in existing laws relating to public hospital and health care facilities.
>
> It is therefore the intent of the General Assembly by passage of this act to promote the public health of the people of the State:
>
> (a) by authorizing the several counties and municipalities in the State to form public corporations whose corporate purpose is to acquire, own, and operate health care facilities as that term is defined in this act; and
>
> (b) by permitting with the consent of the counties or municipalities (or both) authorizing their formation, existing public health corporations to reincorporate. To that end, this act invests each public corporation so organized or reincorporated with all powers that may be necessary to enable it to accomplish its corporate purposes.

Thus, the General Assembly has attempted to provide more flexibility in the corporate structures of health services districts and hospitals incorporated pursuant to Section 44-7-2130 et seq. of the Code. Further, the General Assembly has established a specific corporate purpose "to acquire, own, and operate health care facilities," 2/ and has vested in each corporation "all powers that may be necessary to enable it to accomplish its corporate purpose." Id.

2/ The term "health care facilities" includes "hospital facilities" as defined by Section 44-7-1430(d) of the Code. See Section 35C, Part II, Act No. 512 of 1984. Section 44-7-1430 provides:

> (d) "Hospital facilities" means any one or more buildings, structures, additions, extensions, improvements, or other facilities, whether or not located on the

Continued - Page 6

In addition, Section 44-7-2080 of the Code stresses the public nature of the operations and expenditures of hospitals and health services districts:

> All revenues derived by the district from the operation of any revenue-producing facility other than revenues which may be required to discharge covenants made by it

---

2/ Continued from Page 5

> same or contiguous site or sites (and including existing facilities), machinery, equipment, furnishings, or other real or personal property suitable for health care or medical care; and includes, without limitation, general hospitals, chronic diseases, maternity, mental, tuberculosis, and other specialized hospitals; facilities for emergency care, intensive care, and self-care; clinics and outpatient facilities; clinical, pathological, and other laboratories, hospital research facilities; extended care facilities; skilled nursing home facilities; nursing home facilities; retirement home facilities; laundries; residences and training facilities for nurses, interns, physicians, and other staff members; food preparation and food service facilities; administration buildings, central service, and other administrative facilities; communication, computer, and other electronic facilities; firefighting facilities; pharmaceutical and recreational facilities; storage space, x-ray, laser, radiotherapy, and other apparatus and equipment; dispensaries; utilities; vehicular parking lots and garages; office facilities for hospital staff members and physicians; and including, without limiting any of the foregoing, any other health and hospital facilities customarily under the jurisdiction of or provided by hospitals, or any combination of the foregoing, with all necessary, convenient, or related interests in land, machinery, appartus [sic], appliances, equipment, furnishings, appurtenances, site preparation, landscaping, and physical amenities.

> in issuing bonds, notes, or other obligations as authorized herein shall be held, disposed of, or expended by the board for purposes germane to the functions and purposes of the district. Any expenditure permitted by the provisions of this act pursuant to § 44-7-2157 to be made by or on behalf of a district is considered an expenditure of operating and maintaining public hospitals and public facilities for a public purpose and no expenditure permitted by this act or any other provisions of law may be considered to be a lending of credit or a granting of public money or a thing of value or an aid of any individual, association, or corporation within the meaning of any constitution or statutory provision.

The last sentence in particular is important in the analysis of applicability of the constitutional provision.

Finally, again it may be noted that in the definition of "public hospital corporation," the power to "own or operate any health care facilities, including without limitation, any public corporation or authority heretofore or hereafter organized..." (Emphasis added) is included. Authority to own a public corporation appears to have been specifically granted; the lack of limitation within the statute must be noted.

Analysis

In researching this question, it became apparent that a number of states have similar constitutional prohibitions against pledging the credit of the State or one of its political subdivisions for the benefit of essentially private purposes and further prohibiting the ownership of stock by the State or one of its political subdivisions. Several cases explaining these prohibitions and the reasons therefor are collected in Annot., 152 A.L.R. 495. The history of such prohibitions is well-expressed in Brautigam v. White, 64 So.2d 781 (Fla. 1953); in explaining Florida's prohibitions, the court stated:

> [T]he purpose of this amendment was to prohibit counties, cities, townships or other incorporated districts of the State from becoming stockholders in or loaning their credit to, any corporation, association, institution or individual.

> Such a practice had become prevalent as a result of the passage of [various Florida laws], encouraging a liberal system of internal improvement by which Boards of County Commissioners of certain counties were authorized to subscribe for and hold certain corporate stock. The practice was also encouraged by the Act of 1853, under which the Florida Atlantic and Gulf Central Railroad Company was incorporated and every County through which it ran was authorized to subscribe for its stock with approval of the voters, and to issue its bonds for payment of said subscription. The result of the civil war and the collapse of the State's economy thereafter made payment of these bonds very burdensome. Hence the addition of Section 10, Article IX to the Constitution to counter debauching the State's credit and the reckless speculation resulting therefrom.

Id., 64 So.2d at 784. The relationship of such prohibitions to ownership of stock in railroad companies and other private corporations by political subdivisions is also discussed at length in Annot., 152 A.L.R. 495.

Not all ownership of stock is deemed to be prohibited by political subdivisions in other states which have similar prohibitions. In Williams v. Turrentine, 266 So.2d 81 (Fla. Ct. App. 1972), the court repeatedly emphasized that public funds must be used for public purposes and cautioned against the financing of private enterprises: "The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional system. Experience has shown that such encroachments will lead inevitably to the ultimate destruction of the private enterprise system." Id., 266 So.2d at 85, quoting from State v. Town of North Miami, 50 So.2d 779 (1952). The court also stated that "unless the exercise of a municipal power is primarily for a public or municipal purpose, a municipality's private commercial venture for profit is invalid." 266 So.2d at 83 (emphasis in original). The court continued:

> It should be recognized that whenever a city undertakes to operate a public hospital, a waterworks system, an electric plant, a

> parking system, a garbage or sewage collection system, the municipality is in reality engaged in competition with private business. The constitution does not prohibit a municipal corporation from owning or operating a system because it is in competition with private business. What the constitution does prohibit is a municipal undertaking in partnership with private enterprise where the object of such undertaking is a private gain and profit by a private individual or corporation - the use of the municipal power for primarily a private purpose.

266 So.2d at 86. In the case of a health services district and a hospital corporation, the public purpose is clear and has been emphasized by statute; no private individual or corporation will gain or profit from the use of public funds. No private purpose will thereby be served.

Other considerations as to applicability of similar constitutional restrictions in other states include the element of speculation; in Brautigam v. White, supra, the lack of an element of speculation in the proposed transaction was persuasive. Prevention of diversion of tax funds is also important; in City of Louisville Municipal Housing Commission v. Public Housing Administration, 261 S.W.2d 286 (Ky. Ct. App. 1953), the court noted with respect to a housing commission becoming a member of a mutual insurance company by virtue of purchasing insurance:

> The purpose behind [the constitutional prohibitions against stock ownership by the Commonwealth and local governments] was to prevent local and state tax revenues from being diverted from normal governmental channels. This purpose will not be thwarted by the proposed action of the Housing Commission. None of the revenues of the Housing Commission is derived from local or state funds, and it has no authority to assess, levy or collect taxes in any form.3/

3/ The Housing Commission was deemed to be a hybrid creation, perhaps an agency of the Commonwealth of Kentucky, but

Continued - Page 10

261 S.W.2d at 288. Indeed, such constitutional prohibitions have not precluded purchasing insurance from mutual insurance companies, whereby the political subdivision becomes a part "owner" of the company. Lawrence v. Schellstede, 348 P.2d 1078 (Okla. 1960); Louisville Board of Insurance Agents v. Jefferson County Board of Education, 309 S.W.2d 40 (Ky. Ct. App. 1958). Such a prohibition has been held not to prevent a political subdivision from becoming a tenant in common of real property with a private person. Miles v. City of Eugene, 451 P.2d 59 (Or. 1969).

Due to the recognition of the public purpose inherent in the creation and incorporation of a health services district and the fact that a district is deemed to be "an agency of the county" by Section 44-7-2130 for purposes of operating a hospital, it appears that tax revenues are not being diverted from normal governmental channels and are being spent for public purposes. While the district or corporation is denied the power to levy taxes by Section 44-7-2157 of the Code, Section 44-7-2130 specifically authorizes districts to receive proceeds from any special hospital tax levied by the political subdivision(s) authorizing creation of the district. We further note that the private enterprise system would not be benefitted by the contemplated arrangements.

Based on the foregoing, we conclude that a situation in which a health services district incorporated as permitted by Section 44-7-2150 et seq. of the Code were to own one hundred percent (100%) of the stock of a for-profit corporation would most probably not run afoul of Article X, Section 11 of the State Constitution. In addition, dicta in Johnson v. Piedmont Municipal Power Agency, supra, appears to support this conclusion. Id., 277 S.C. at 355.

Conclusion

It is the opinion of this Office that the General Assembly,

3/ Continued from Page 9

not an incorporated district (i.e., political subdivision) or the Commonwealth itself. In South Carolina, health services districts and hospital corporations created thereunder are specifically declared to be county agencies, see Section 44-7-2130 of the Code, and certain fiscal considerations in the City of Louisville decision may thus not be applicable here.

in promoting "the public health of the people of the State," intended to provide a more flexible corporate structure for health services districts created pursuant to Section 44-7-2010 et seq. of the Code and incorporated pursuant to Section 44-7-2150 et seq. of the Code and to permit the creation of not-for-profit and for-profit subsidiary corporations, such subsidiary corporations having been deemed necessary to carry out the purposes of health care delivery to the public.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/rhm

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions