ALAN WILSON
ATTORNEY GENERAL

September 28, 2015

The Honorable Mike Fair
Senator, District No. 6
P.O. Box 14632
Greenville, SC 29610

Dear Senator Fair:

You have requested our opinion regarding the validity of a restructuring by the Greenville Health Systems (GHS). We have reviewed the recent Resolution adopted by the GHS Board concerning such reorganization. You pose the following questions:

1. Does the current statute governing GHS allow for the transfer of GHS assets newly purchased or otherwise to a foundation that has no accountability to the Greenville Legislative Delegation?

2. Does their intent on purchasing other hospitals and clinics have geographical constraints in the law or does the Resolution authorize them to move forward on purchases without regard to the physical location? May they purchase any and all no matter where the facility or institution is domiciled?

Law/Analysis

GHS (formerly Greenville Hospital) was created by Act No. 432 of 1947. The 1947 Act established the Greenville General Hospital Board of Trustees and set forth the numerous powers and duties of the Board. In 1966, the General Assembly amended the legislation, changing the name to the Greenville Hospital Systems Board of Trustees. See Act No. 3247 of 1966.

Act No. 105 of 2013 renamed the Greenville Hospital System to GHS. 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.

An opinion of this Office, Op. S.C. Att'y Gen., 1985 WL 166051 (August 8, 1985) is highly instructive with respect to your questions. There, we addressed the question of whether the State Constitution and statutes precluded "a private corporation from participating in the management of a State correctional facility through a contract with the Board of Corrections." In that opinion, we concluded:

> [i]n summary, while the issue you have presented is novel in this State and only a court can conclusively resolve it, this Office is able to find no constitutional provision or statute absolutely prohibiting the Board of Corrections from contracting with a private corporation to assist in the operation of a prison facility. This conclusion is consistent with the Board's statutory authority to designate as a place of confinement any available, suitable and appropriate institution or facility, whether maintained by the Board of Corrections or otherwise. . . . If the State chooses to enter into such a contract, however, the State must maintain adequate supervision and control by virtue of such contract. Thus, considerable care should be taken in the drafting and preparation of such contract to avoid potential constitutional and statutory problems. The validity of any specific contract is, in large measure, dependent upon the particular duties delegated to the corporation and the degree of control which the State maintains over it. Moreover, since the

> issues considered here are novel, it may well be for the Board of Corrections to develop the posture of a case or controversy whereby a court could, by a declaratory judgment action, review any proposed plan of operation.

In other words, our 1985 opinion concluded that the use of a private entity by a public body 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. The validity of any such delegation ultimately depended upon all the facts and circumstances, which this Office cannot adjudge in a legal opinion.

In our 1985 opinion, we specifically addressed authorities relating to the delegation of powers by a public hospital to a private corporation. We stated:

> . . . [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.
>
> While 'an administrative body cannot delegate quasi judicial functions, it can delegate the performance of administrative and ministerial duties. . . .' Krug v. Lincoln Nat. Life Ins. Co., 245 F.2d 848, 853 (5th Cir. 1957); see also, 73 C.J.S. Public Adm. Law and Procedure, § 53; McQuillin, Municipal Corporations, § 29.08, n. 6. This is consistent with the law in South Carolina. See, Green v. City of Rock Hill, 149 S.C. 234, 270, 147 S.E. 346 (1929) (contract between a city and private company for the control, management and operation of a waterworks plant is valid).
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> This law has been applied to analogous situations such as the administration of hospitals. In Robinson v. City of Phil., 400 Pa. 80, 161 A.2d 1 (1950), for example, the Supreme Court of Pennsylvania upheld a contractual agreement between a municipality and two private universities relating to the operation, management and control of the city's general hospital. Reviewing the contract in detail, the Court concluded:
>
> > It will suffice us to say that our study of the contract convinces us that neither the City of Philadelphia nor the Board of Trustees of Philadelphia's General Hospital has unlawfully delegated their powers in and by the above mentioned contract.
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> 161 A.2d at 4. In Government and Civic Emp. Etc. v. Cook Co. School of Nursing, 350 Ill. App. 274, 112 N.E.2d 736 (1953), the Court upheld a contract between a county and a nonprofit corporation which required the corporation to 'furnish, direct and perform the nursing services required for

> the proper care and nursing of all patients, in the County Hospital. . . .' 112 N.E.2d at 737. And in Bolt v. Cobb, 225 S.C. 408, 415, 82 S.E.2d 789 (1954), our own Supreme Court upheld a contract between a county and a private entity for the performance of a public corporate function, i.e. medical services in the form of a hospital.

Bolt v. Cobb is especially instructive here. In Bolt, the Court addressed the authority of Anderson County to issue $1,000,000 in general obligation bonds to construct a hospital facility to be leased to the Anderson County Hospital Association, a private eleemosynary, corporation. The City of Anderson granted the land for the new hospital without cost, and the facility was to be leased to the private corporation without any requirement of rent. The lease between the County and the private corporation were to be consummated on terms mutually satisfactory to meet the public interest.

The Supreme Court upheld the transaction in Bolt, concluding that the State Constitution was not violated. According to the Court,

> . . . Anderson County is providing for the performance of a public, corporate function through the agency of the existing non-profit and non-sectarian hospital, whose room facilities have become inadequate to meet the present need for more beds. It is common knowledge that there are other counties in the State which are without public-owned and operated hospitals and they and other publicly-owned and operated hospitals and they aid other existing hospitals, in one form or another, in order to procure hospitalization for their needy sick.

225 S.C. at 415, 82 S.E.2d at 793.

Bolt v. Cobb was reaffirmed by the Supreme Court in Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (1976). Gilbert involved an original jurisdiction action, initiated by a taxpayer, "to determine the validity of a commitment made by the County of Florence to the Pee Dee Regional Health Services District (Pee Dee) to grant it $1,000,000 to be expended in the construction of a new regional hospital to be leased to McLeod Memorial Hospital (McLeod)." 267 S.C. at 176, 227 S.E.2d at 179. The Court there emphasized that "[t]here is no question that McLeod is a private eleemosynary corporation. . . ."

Certain conditions in the lease agreement were crucial in the Court's upholding of the arrangement in Gilbert. According to the Court,

> . . . [t]hese provisions require McLeod to maintain a policy of having its facilities available to the public in general without restriction to any particular class of persons or patients. It is required to maintain an emergency room, and Medicare and Medicaid patients as well as county sponsored welfare

> patients must be accepted. The lease contains a detailed listing of services and facilities that McLeod will be required to maintain some of the specified services and facilities undertaken by McLeod not being presently available in the Pee Dee area. The institution must maintain accreditation with approved hospital accreditation agencies and it must periodically file copies of its financial reports with Pee Dee and with the City of Florence.

267 S.C. at 179, 227 S.E.2d at 180.

Referencing its decisions in Bolt v. Cobb, supra, and Battle v. Willcox, 128 S.C. 500, 122 S.E. 516 (1924), the Gilbert Court upheld the transaction in toto against a number of constitutional attacks. With respect to the argument that the arrangement between Pee Dee and McLeod made them "joint owners" in violation of Art. X, § 6 [now Art. X, § 11], the Court concluded that the

> . . . lease arrangement purports to and does retain Pee Dee the status of landlord and grants to McLeod the status of tenant, and not 'joint owners' as prohibited by § 6. Throughout the lease run provisions to protect the interests of the landlord and in turn the public in the facilities, but we do no deem these protective measures of such import as to create a state of joint ownership in any constitutionally prohibited sense.

267 S.C. at 181, 227 S.E.2d at 182.

According to the Court in Gilbert, the lease before it permitted the Court, "to determine whether constitutional purposes were being safeguarded in the ultimate use of the facility." Thus the Court was "guided by the Bolt and Battle cases . . . to the conclusion that the proposed grant by Florence County to Pee Dee [was] . . . clearly within the County's corporate purposes for which the expenditure of tax funds is authorized. . . ." In short, the lease was sufficiently specific that the arrangement did not constitute an unconstitutional "joint ownership" or a delegation of the powers and duties of a public hospital to a private corporation.

Other South Carolina cases are instructive as well. In Taylor v. Richland Memorial Hospital, 329 S.C. 47, 495 S.E.2d 431 (1997), our Supreme Court upheld the "agreement creating BR Health System, Inc. (System) as a new non-governmental, non-profit corporation which will take over and operate the hospital facilities" of both Richland and Memorial Hospital (public) and Baptist Healthcare System of South Carolina (private). In that case, the facts were as follows:

> Richland Memorial and Baptist will convey substantially all of their operating assets to the System. Richland Memorial, Baptist and Richland County will leave to the System all lands and buildings involved in hospital operations, and Richland County will quitclaim to the System any personal property

> owned by Richland County and used to operate Richland Memorial. The System will pay rent under the leases, assume all financial and other obligations of Richland memorial and Baptist, and assume Richland County's obligations for indigent health care. Richland County Council approved the agreement by Ordinance No. 044-96 H.R.

329 S.C. at 48, 495 S.E.2d at 432.

In Taylor, the Court rejected the argument that the arrangement constituted a violation of Art. X, § 11 of the State Constitution as a joint venture between a governmental entity and a private corporation. The Taylor Court said this:

> Article X, § 11 prohibits governmental entities from becoming either 1) a joint owner of or 2) a stockholder in a private company, association or corporation.... Not every joint endeavor between a public entity and private business is constitutionally prohibited. See Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (1976); Chapman v. Greenville Chamber of Commerce, 127 S.C. 173, 120 S.E. 584 (1923). We have approved arrangements where governmental entities leased assets to private entities without finding a violation of the joint ownership clause. Johnson v. Piedmont Mun. Power Agency, 277 S.C. 345, 287 S.E.2d 476 (1982); Gilbert v. Bath, supra; Chapman, supra.

Id. Taylor went on to say that the "alliance does not create a risk that any losses will be shifted to the public." Moreover, according to the Court, "[t]he real property lease agreement between the System, Richland County, and Richland Memorial to be executed at closing describes the relationship as that of landlord and tenant." Id.

Turning now to the case at hand, we note that we have examined the GHS Board's Resolution, adopted on September 8, 2015. Such Resolution states in part:

> [w]hereas, the GHS Board of Trustees has determined the powers granted in Act 432 enables it to participate in such a system through a leasing of its facilities to a not for profit entity to be formed which will be part of a larger, newly created system that provides the strategic direction of the system. The GHS Board of Trustees recognizes that by lending the process and embracing the need to adapt, they will be fulfilling their responsibility to the communities they currently serve. Any such arrangement will include a clear, contractual obligation on the new system to provide the services and meet the responsibilities set forth in Act 432; a means for the GHS Board of Trustees to monitor the status of health in Greenville County and the Upstate and the needs of the community; a process by which GHS can input to the System; dispute resolution mechanisms to resolve questions; and, if necessary,

> remedies available for GHS to cure the problem for the benefit of the community it serves.

The Resolution then resolves that the Board of Trustees finds "in order to fulfill [its] . . . responsibility vested in it by the State of South Caroline in Act 432, as amended. . ." that

> a) GHS participate in the creation and operation of a new system which will provide strategic management services for Greenville based operations and other communities which become part of the system;
>
> b) GHS lease its facilities and operations to a newly created entity which will be affiliated with the system and will contractually assume responsibility to operate and deliver services consistent with the mandates of Act 432;
>
> c) GHS continue as a governmental entity overseeing compliance with the lease and other transfer agreements on behalf of the Greenville and upstate community; and
>
> d) In developing the yet to be prepared governance and organizational documents for the new system, the affiliates who are part of the system, and the lease and other agreements with GHS: (1) the structure will be guided by the organizational and system foundation principals attached; and (ii) sufficient rights and authorities, with dispute resolution mechanisms, will need to be included to insure that the GHS obligations owed to the community are being met and meaningful mechanisms for GHS as lessor and as founder of the system are included.

Resolution at 4 (3a through 3d).

We note also that, pursuant to Act No. 105 of 2013, § 2 (25) the GHS Board may "exercise all powers now or hereinafter granted to regional health service districts pursuant to Articles 15 and 16, Chapter 7, Title 44, Code of Laws of South Carolina, 1976." Section 44-7-2157(1) (which is part of Article 16 of Title 44, Chapter 7), authorizes a health service district to, "lease or otherwise make available any health care facilities or other of its properties and assets under terms and conditions as the board considers appropriate. . . ." Subsection (4) of § 44-7-2157 enables the District to "contract for the operation of any department, section, equipment or holdings of the district and to enter into those contracts which in its judgment, are in the best interest of the district. . . ."

In addition, it is significant that it was the Pee Dee Health Services District which was part of the transaction upheld by the Court in Gilbert v. Bath, supra. The Court in Gilbert noted that the District actively participated "in the planning of the project here proposed." The Court recognized that what is now part of Chapter 44, Title 7, Articles 15 and 16" is State-wide in its

application and because effect upon its approval by the Governor on March 2, 1976. It authorizes any County or group of Counties in this State to form a health services district by enactment of the governing bodies of the Counties involved." The powers of those Districts, including those referenced above, were also bestowed upon the GHS Board.

Conclusion

Our 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.

In this instance, we note that our Supreme Court has upheld several hospital transactions such as the plan now being contemplated by GHS. As the Court noted in Bolt v. Cobb, supra, a hospital or hospital system may provide "for the performance of a public, corporate function through the agency" of a non-profit corporation. Moreover, particularly with respect to GHS, as our Supreme Court noted in 1988, GHS possesses the power to do "'all things necessary or convenient for the establishment and maintenance of adequate hospital facilities in Greenville County.'" Provence v. Greenville Hospital System Board of Trustees, et al., Op. No. 88-MO-163 (1988) (unpublished opinion). In Provence, the Court held that the "[c]reation of Greenville Health Corporation does not violate the statute or public policy." Given the broad powers of the GHS Board contained in the enabling statutes, and the Supreme Court's recognition of such powers in Provence, we find that there is no absolute prohibition for the Board's "leasing of its facilities to a not for profit entity to be formed which will be part of a larger, newly created system that provides the strategic direction for the system." (Resolution of September 8, 2015).

However, again, GHS would necessarily need to be careful to maintain the requisite supervision and control required under the Constitution and the 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 determination of supervision and control cannot be determined without all the facts and circumstances involved in any proposal being present. The South Carolina cases, discussed herein, provide a good guidepost as to whether any particular transaction is legal or illegal.

At this point, it is difficult, if not virtually impossible to say whether any specific proposal by the GHS Board would be authorized or consistent with the Constitution. Moreover, as we recently noted, "this Office cannot in an opinion determine how a particular set of facts apply to the law in a particular instance." Op. S.C. Att'y Gen., 2013 WL 6924890 (December 23, 2013). Thus, judicial review of a specific proposal would ensure that the Constitution and enabling statutes are being followed.

With respect to any questions concerning the role of the Legislative Delegation in this matter, we note that Act No. 105 of 2013 requires that members of the GHS Board "must be appointed by the Greenville County Legislative Delegation. . . ." Thus, as we recently stated in another similar context, "[t]he Legislative Delegation, in our view, possesses the appointment authority, but not the supervision . . . authority. . . ." See Op. S.C. Att'y Gen., 2012 WL 6061812 (November 26, 2012). See also Knotts v. S.C. Dept. of Natural Resources, 348 S.C. 1, 558 S.E.2d 511 (2002). In addition, of course, the Delegation would play a major role in any amendment or modification of the statutes relating to the GHS Board.

Regarding any questions as to whether GHS is confined to a specific geographic location, we note that § 3(B) of Act No. 105 of 2013 provides a procedure for GHS serving other counties by way of a petition process. The GHS Board is then empowered to determine whether "such need exists" and provide such facilities. Moreover, the Act states in § 2 that GHS is authorized to do all things "necessary or convenient" to establish and maintain adequate health care facilities "for the communities it serves," thereby not confining GHS facilities to a particular location. Section 2(10) empowers the Board to provide for the "health of the residents of Greenville County and the communities served," clearly contemplating service beyond Greenville County. Finally, § 44-7-78 empowers an entity that operates a healthcare facility to "operate facilities, programs, and services in any location. . . ."

Indeed, it is the power to serve communities beyond Greenville County which removes Act. No. 105 of 2013 (any subsequent acts) from the prohibitions in Art. VIII, § 7 of the Constitution, ("Home Rule") forbidding the General Assembly from enacting a law for a specific county. See Kleckley v. Pulliam, 265 S.C. 177, 217 S.E.2d 217, 222 (1975) [upholding statute creating the Richland-Lexington Airport Commission, noting that "The important principle is that if the subject matter of the legislation is not peculiar to the political subdivision dealt with by the applicable constitutional provision, the existing plenary power of the General Assembly continues."]; Op. S.C. Att'y Gen., 1983 WL 181873 (May 4, 1983) [bill relating to a special purpose district likely constitutional because "the district was created to serve a multi-county area."]; Op. S.C. Att'y Gen., 1982 WL 189442 (September 24, 1982) ["Multi-county agencies are not affected or eliminated when the General Assembly chooses to establish them."].

In summary, only a court action would ensure that any specific proposal by GHS complies with the Constitution and statutes. We believe that our response herein addresses all of your questions.

Sincerely,

Robert D. Cook
Solicitor General