ALAN WILSON
ATTORNEY GENERAL

April 23, 2018

The Honorable John R. McCravy III, Member
South Carolina House of Representatives
District No. 13
420 A Blatt Building
Columbia, SC 29201

Dear Representative McCravy:

You have inquired as to the constitutional authority of the General Assembly with respect to S.1116 which is currently pending in the General Assembly. You seek an expedited response because S.1116 "likely may be debated next week on the House floor." By way of background, you state the following:

> [t]he bill attempts to retroactively "ratify" conduct of the Greenville Hospital Board of Trustees, who formed separate non-profit organizations in an effort to partner/purchase with various private medical providers and then entered into a master agreement and a lease and contribution agreement.
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> [These] underlying issues are currently the subject of litigation (SC Public Invest Foundation, et. al. vs. Greenville Health System et. al., 2016-CP-23-0518). My concerns include 1) whether a bill can properly retroactively ratify conduct of persons/entities and 2) whether a bill can decide current litigation on behalf of a party to a lawsuit in violation of separation of powers.

Your request for an immediate response regarding Greenville Health System's ("GHS") agreements does not allow us to research your question thoroughly and provide the kind of in-depth analysis that our opinions typically attempt to provide. All that we can do in such a short time frame is to provide the following authorities, for your assistance. Please note also that any analysis which we provide herein is only with respect to the governing law and does not speak to the wisdom of or endorse any actions of GHS. Indeed, in an earlier opinion, Op. S.C. Att'y Gen., 2015 WL 5896030 (September 28, 2015), we advised with respect to this matter that "only a court action would ensure that any specific proposal by GHS complies with the Constitution and statutes." We believe that advice was sound then and is sound today. We stand by that earlier opinion.

Law/Analysis

The concern addressed in the 2015 opinion was the delegation of authority by the GHS Board to private entities. We stated that "[g]iven the broad powers of the GHS Board contained in the enabling statutes, and the Supreme Court's recognition of such powers . . . , 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 a strategic direction for the system." We noted therein, however, that it was critical for GHS "to maintain the requisite supervision and control required under the Constitution and statutes which govern it." Thus, we advised that "judicial review of a specific proposal would ensure that the Constitution and enabling statutes are being followed."

S.1116, by its title, seeks to "ratify the Greenville Health System in entering into the amended master affiliation agreement and the lease and contribution agreement." It is apparent from the text of the Bill that the legislation seeks to settle the pending litigation. We presume that is the purpose, at least. Thus, it is generally held that the legislature may retroactively ratify agreements or agency action and such ratification during the pendency of litigation does not violate separation of powers.

In 10A McQuillin Mun. Corp. § 29.115 (3d ed.) it is stated:

> [t]he general proposition is established that, provided it had the power to authorize the making of the contract in the first instance . . ., the legislature of the state has the power to legalize or ratify an ultra vires contract entered into by a municipal corporation for a public purpose, and when thus ratified the contract will be valid and binding. . . . In a word, the legislature may validate a contract made by a municipal corporation, being in excess of the corporation's powers when made, if the contract is one that the legislature may have originally authorized. . . .

McQuillin provides as an example the case where "the municipality went beyond its authority by redelegating legislative spending power, the legislature may ratify the contract. . . ." Further, the "ratification may be considered retroactive and thus date from the time the contract was first entered into. . . ." Exceptions to the rule are as follows: "[a] curative act purporting to validate municipal contracts may be deemed invalid and ineffectual on constitutional grounds where it offends due process, interferes with vested rights, or attempts to surrender the police power of the statute, where it is a special as distinguished from a general law, or where it attempts to confer the taxing power of a municipality upon persons constitutionally prohibited from exercising it. . . ." Id.

Other authorities are in accord with the general rule stated above. See e.g. Zaber v. City of Dubuque, 789 N.W.2d 634 (Iowa 2010) [retroactive ratification of city's unlawfully collected cable television franchise fees did not violate due process]. And, in Hodge v. Levi, 80 S.C. 518, 615 S.E. 1009 (1908), our Supreme Court upheld a curative act which validated a school district's bond election. The Act "validated, ratified and confirmed . . . notwithstanding any

irregularities that may have occurred in the ordering or holding of said election, otherwise . . ." as well as the bonds issued.

The question raised in the Hodge case was whether the curative act constituted "special legislation" in violation of Art. III, § 34 of the South Carolina Constitution. The Hodge Court held that it did not. According to the Court,

> "[t]he pivotal point in a healing or validating statute is that it must be confined to acts which the Legislature could previously have authorized." State v. Whitesides, 30 S.C. 579, 9 S.E. 661, 3 L.R.A. 777; State v. Neely, 30 S.C. 587, 9 S.E. 664, 3 L.R.A. 672. "Although necessarily retroactive, curative acts are not, for that reason, invalid; for the general rule is that the Legislature can validate any act which it might originally have authorized." 26 Enc. of Law. 698, 699. "A retrospective statute, curing defects in legal proceedings, where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on unconstitutional grounds, unless expressly forbidden. Of this class are the statutes to cure irregularities in the assessment of property for taxation, and the levy of taxes thereon; irregularities in the organization or election of corporations; irregularities in the votes or other action by municipal corporations, or the like, where a statutory power has failed of due and regular execution, through the carelessness of officers, or other cause; irregular proceedings in courts, etc. The rule applicable to cases of this description is substantially the following: If the thing wanting or which failed to be done, and which constitutes the defect in the proceedings, is something, the necessity for which the Legislature might have dispensed with by prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act which the Legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." Cooley's Con. Lim. 456, 457.

61 S.E. at 1009-1010. In the Court's view, the curative statute was not a "special law," but instead a "special provision in a general statute" authorized by Art. III, § 34. Id.

Moreover, with respect to your question regarding separation of powers, we refer you to the case of Port of Seattle v. Pollution Control Hearings Bd., 90 P.3d 659 (Wash. 2004), as an example of a decision which rejected any argument that legislation seeking to alter pending litigation (as opposed to a final judgment) did not violate separation of powers. There, the Court stated:

> [h]owever, the legislature may pass a law that directly impacts a case pending in Washington courts. Haberman v. Wash. Pub. Power Supply Sys., 109 Wash.2d 107, 143-44, 744 P.2d 1032, 750 P.2d 254 (1987). In Haberman, this court evaluated a retroactive amendment adding a scienter requirement to the civil liability provision to the relevant statute in that case. Id at 137. The Haberman Court held that "[a] statute prescribing new rules to be applied to pending litigation is generally constitutional [and] does not violate the separation of powers clause." Id. at 143. Because the retroactive amendment did not "impede upon the court's right and duty to apply new law to the facts of this case," "dictate how the court should decide the factual issue" or "affect a final judgment," but instead constituted a "facially neutral law for the

> court to apply to the facts before it" it did not violate the separation of powers. Id. at 144.

90 P.3d at 688.

Further, a decision of our own Supreme Court is in accord. In Bynum v. Barron, 227 S.C. 339, 348-50, 88 S.E.2d 67, 71-72 (1955), the Court stated as follows:

> [q]uestion 8, which is the last for consideration, is: Was the enactment of Section 16-A of the Act of 1954 an invalid encroachment by the legislative branch upon the judicial branch? This has reference to the fact that the statute undertook to settle pending litigation by payment of the stated funds to the treasurer who should thereby be foreclosed of further claim against the county on account of tax executions issued by him. On its face the settlement appears to be fair and fully justified by the facts found by the legislature, by which the court is bound in this case, as seen above. It assumed the unconstitutionality of the retroactive feature of the provisions of the preceding supply acts and required the treasurer to forego claim to earned but uncollected execution fees to offset those unconstitutionally collected in the past. It appears to have been in good faith and presumably upon accurate information.
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> The old case of McLaughlin v. County Commissioners, 7 S.C. 375, is conclusively in point. There the legislature had by special act directed the levy of a county property tax and payment of the proceeds by the county treasurer in settlement of claims against the county which were held by plaintiff. The taxes were levied and collected but payment was refused by the county authorities upon the ground that an action at law thereabout was pending, the result of which they claimed the right to await, and contended that the legislative enactment was an unconstitutional exercise of a judicial function. The then constitutional provision was substantially the same as Section 14 of Art, I of the present Constitution of 1895, which prescribes the separation of the legislative, executive and judicial powers of the government and prohibits the exercise of the function of one of said departments by the others. The court upheld the act and ordered mandamus requiring the payment of the proceeds of the taxes pursuant to the terms of it. The public was likened to a private debtor in the right to offer a settlement of a pending claim, regardless of pendency of litigation, and it was held that the legislative branch is vested with such power which it may exercise with respect to the obligation of a county, and the court said: 'The fact that such an Act may have the effect to fix upon the county an indebtedness not fairly resulting from the law of the contract does not in itself make the Act an exercise of judicial function.' Distinction was found in the fact that judicial action assumes to bind the contending parties who are before the court, whereas a legislative act assumes to bind only one of them — there and here the county. Accordingly in this instance, McCarter may have refused the settlement, but he chose to accept it.

Finally, we must advise that S.1116 becomes law, it would, like any other Act, be entitled to a presumption of constitutionality. As we have consistently advised,

> . . . if enacted, the legislation in question would be entitled to a strong presumption of validity. As we recently stated in an opinion of this Office dated May 2, 2005,
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> > any statute enacted by the General Assembly carries with it a heavy presumption of constitutionality. As we have often stated, any act of the General Assembly is presumed valid as enacted unless and until a court declares it invalid. Our Supreme Court has often recognized that the powers of the General Assembly are plenary, unlike those of the federal Congress whose powers are enumerated. State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional. An act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939).
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> > Moreover, only a court and not this Office, may strike down an act of the General Assembly as inequitable or unconstitutional. While this Office may comment upon what we deem an apparent constitutional defect, we may not declare the Act void. Put another way, a duly enacted statute "must continue to be followed until a court declares otherwise." Op. S.C. Atty. Gen., June 11, 1997.

Op. S.C. Att'y Gen., 2006 WL 269605 (January 12, 2006).

Conclusion

Based upon our research, and given the time frame of your request, we advise that S.1116 likely would be upheld by a court as constitutional. As the authorities referenced above indicate, the Legislature may generally retroactively ratify an agreement made by a subordinate agency. Such may be done without a violation of separation of powers, even though there is litigation pending. Ratification is usually done retroactively to "cure" any previous defect which may have existed. In this instance, it appears to us that the purpose of S.1116 is to settle pending litigation, which is a well-recognized purpose. See Bynum, supra [". . . the statute undertook to settle pending litigation. . . ."].

We caution again, however, that we have not had the opportunity to analyze your questions thoroughly. As we advised in the earlier Opinion, "[t]he determination of supervision and control cannot be determined without all the facts and circumstances being present." We further recommended in the previous Opinion that the agreements be submitted to a court for review. As stated above, we stand by that earlier opinion.

Again, our advice herein is based solely on the law and we, of course, express no opinion as to the wisdom or policy of S.1116.

Sincerely,

Robert D. Cook
Solicitor General

cc: The Honorable Mike Burns
The Honorable Dwight Loftis
The Honorable Bill Chumley
The Honorable Gary R. Smith