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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

April 24, 2003

The Honorable L. Hoke Parris
Chairman, Cherokee County Council
210 North Limestone Street
Gaffney, South Carolina 29340

Re: Supplemental Water Source for Cherokee County

Dear Mr. Parris:

You have requested an opinion from this Office concerning the authority of Cherokee County to acquire a supplemental water source for the County. By way of background, you indicate that

The County of Cherokee has an interest in acquiring and operating an auxiliary water supply for our county. We have identified a potential new source of water that engineering reports indicate has the capacity of supplying up to 5 million gpd. ...

The new source is an abandoned quarry site which presently contains 1 billion 600 million gallons of excellent water and, according to our studies has a recharge rate of up to 5 million gpd. ...

When we [County Council] review the governing statutes that cover the ownership and operation of water and sewer systems we find ... section 44-55-1410 [which provides that] the counties can operate water and sewer facilities. We further determined that under an Attorney General's opinion, as stipulated in the South Carolina Constitution, the effected users must vote to approve a **sewer service** (emphasis yours). Reference Op. Atty. Gen. No. 78-127 ... [There is] ..., however, no mention of a **water service** (emphasis yours).

The County of Cherokee has no intention of operating a sewer service. We desire only to acquire, operate and introduce water into the existing water service grid, subject, of course, to DHEC approval.

Given this background, you ask for an opinion concerning Cherokee County Council's authority to take action to "... acquire this site, and offer to our county's existing customers this auxiliary water

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source and to do so through the establishment of an operating department of the County without the expense of an election.”

By way of follow-up to your letter, I have had telephone conversations with Robert Farris, who is aiding County Council in this matter, and Ben Clary, County Administrator for Cherokee. From these conversations, it is my understanding that the water for Cherokee County is currently provided by the Gaffney Board of Public Works [the Board]. The Board draws water from the Broad River into a reservoir for distribution to County residents. This reservoir is the only existing water source for the County. The Board provides water to the City of Gaffney and the Town of Blacksburg. The Board also wholesales water to the various other public service districts that serve the County. Through the plan referenced in your letter, County Council intends to purchase the quarry site, build a water treatment plant and connect it to the existing water service grid which provides water to the Town of Blacksburg. Council also intends to have the County own and operate the water treatment plant and wholesale water to the existing public service districts currently serving the County.

Your question raises a number of issues for this Office to address: (1) may the County operate the water service/facility as described; (2) may the County acquire or purchase the piece of property on which the quarry is situated; (3) may the County operate the water service/facility through the establishment of an operating department; and (4) is an election or referendum required prior to the County acquiring the water source and operating the service/facility.

LAW/ANALYSIS

Issues 1,2 & 3

As you point out, S.C. Code Ann. §44-55-1410 permits a county to operate water and sewer facilities. Specifically, Section 44-55-1410(A) provides that “[t]he governing body of each county of the State is authorized to acquire, construct, improve, enlarge, operate and maintain, within such county, facilities to provide water for industrial and private use and facilities for the collection, treatment and disposition of sewage, including industrial waste.” Further, there is constitutional authority for a county government to acquire and operate public utility systems, including water systems. Article VIII, Section 16 of the South Carolina Constitution provides in part that

Any county or consolidated political subdivision created under this Constitution may, upon a majority vote of the electors voting on the question in such county or consolidated political subdivision, acquire by initial construction or purchase and may operate water, sewer, transportation or other public utility systems and plants other than gas and electric...

Moreover, as this Office has stated in a previous opinion, a “... county has considerable powers in the area of water control quality.” See Op. S.C. Atty. Gen., dated January 18, 1979. S.C. Code Ann. §4-9-30(5) gives the governing body of a county the power to make “... appropriations for general public works, including roads, drainage, street lighting, and other public works; water treatment and

distribution... ." Pursuant to Article VIII, Section 13, of the South Carolina Constitution, counties can agree with municipalities or other political subdivisions for the joint administration of any function or the exercise of powers. Additionally, Section 44-55-1410(D) states that "[e]very county governing body is authorized to enter into contracts in connection with the providing of water or sewer services, or both, and facilities with persons, private corporations, municipal corporations, public bodies, public agencies, special purpose districts, the State of South Carolina or any agencies thereof, and with the United States Government or any agencies thereof."

Finally, with reference to Cherokee County's ability to acquire the quarry and establish an operating department to run the operation, the Constitutional provisions referenced above and Sections 4-9-30 and 44-55-1410 provide the requisite authority for the County to accomplish these tasks. S.C. Code Ann. §4-9-30(2) provides that a county governing body has the power "to acquire real property by purchase... ." Further, Section 4-9-30(6) gives the County the power "to establish such agencies, departments, boards, commissions and positions in the county as may be necessary and proper to provide services of local concern for public purposes... ." Section 44-55-1410(E) states that the "county governing body is authorized to establish such departments, boards, commissions, and positions in the county as may be necessary or appropriate to provide water or sewer facilities, or both"

Accordingly, based on the foregoing, it appears as though Cherokee County possesses the requisite power and authority to operate the water service system/facility described above, acquire the quarry site and establish an operating department to oversee the provision of this auxiliary water source to the County's existing customers.

Issue 4

The question of whether Cherokee County can put its plan into place without having an election or referendum on the matter presents a more difficult problem. As cited above, Article VIII, Section 16 of the South Carolina Constitution grants counties the authority to acquire and operate public utility systems, including water systems. Article VIII, Section 16 also provides, however, that this authority is to be exercised "... upon a majority vote of the electors voting on the question in such county... ."

The Constitution represents the word and the will of the people of South Carolina. "The Constitution emanates from the people themselves, in whom reside under the form of our government all the rights of sovereignty... ." Lucas v. City of Florence et al., 87 S.E. 996, 103 S.C. 169 (1916). "In construing the Constitution, we must remain faithful to the language used and approved by the voters." See Op. S.C. Atty. Gen., dated March 25, 2002. The intent of the framers and the people who adopted the Constitution is paramount. Neel v. Shealy, 261 S.C. 266, 199 S.E.2d 542 (1973). Moreover, the particular words used in the Constitution should be given their plain and ordinary meaning. Johnson v. Collins Entertainment, 333 S.C. 96, 508 S.E.2d 575 (1998). Interpretation of the Constitution is guided by the "ordinary and popular meaning of the words used...." Abbeville Co. Sch. Dist. v. State, 335 S.C. 58, 67, 515 S.E.2d 535, 539-40 (1999) (internal citation omitted). The Court must give clear and unambiguous terms their plain and ordinary

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meaning without resorting to subtle or forced construction either to limit or expand the provision's operation. J.K. Construction, Inc., supra. See also Op. S.C. Atty. Gen., dated January 7, 2003.

While I can find no direct authority from our Court on the issue of constitutional provisions requiring a referendum prior to government action, courts in other states have addressed the issue. For example, in Husebye v. Jaeger, 534 N.W.2d 811 (1995), the Supreme Court of North Dakota stated that "referendum provisions of the constitution must be liberally construed, and any doubt should be resolved in favor of exercise of this right by the people." In The Town of Whitehall v. Preece, 956 P.2d 743 (1998), the Supreme Court of Montana expressed the principal that "... referendum powers [contained in the constitution] must be broadly construed to maintain maximum power in the people." Further, with reference to constitutional referendum requirements, the Supreme Court of Colorado stated that "[s]uch a reservation of power in the people must be liberally construed in favor of the right of the people to exercise it." See Berzen v. City of Boulder, 525 P.2d 416 (1974).

Applying the plain language of Article VIII, Section 16, it appears as though the people intended that an election be held prior to a county acquiring and/or operating a water system or plant. In a previous opinion of this Office, which you have cited in your request, it was recognized that Article I, Section 23, of the South Carolina Constitution states, "the provisions of the Constitution shall be taken, deemed and construed to be mandatory." See Op. S.C. Atty. Gen., dated June 26, 1978 (78-127). Given this provision and the requirements of Article VIII, Section 16, we opined that "... the authorization for counties to acquire and operate sewer systems found in Section 44-55-1410 ... must be subject to the requirements or restrictions of ..." a referendum vote. Id. While this opinion specifically related to the operation of a sewer system, the language of Article VIII, Section 16 and other opinions of this Office indicate that the referendum requirement is also applicable to the initial acquisition of a water system or water plant. See Op. S.C. Atty. Gen., dated January 16, 1989 (initial involvement by a county in providing water and sewer services must be handled in accordance with Article VIII, Section 16 of the State Constitution).

This Office has in past opinions determined that certain involvement by counties or municipalities in the development of water and sewer systems does not require a referendum prior to governmental action. In an opinion dated December 1, 1987 (87-96) we stated that a municipality would not have to hold a referendum prior to entering into a Community Development Block Grant agreement with the Office of the Governor to obtain funds to be loaned to a special purpose district or a private water company, or before entering into an agreement to loan those funds to such an entity to construct a water utility system. This opinion was based on the fact that "... the municipality would have no involvement whatsoever in the business of providing water service ... [i]t would simply be lending money to another entity for that purpose ... the municipality [would] not pledge or expend any of its own funds incident to this transaction ... [i]t is simply serving as a conduit of funds." Id. In an opinion dated January 18, 1979, we opined that a county would not be required to conduct a referendum in order to act as the applicant agency for federal grants and loans to construct wastewater facilities, and then to transfer such funds to the respective agencies for use in constructing such facilities. We maintained this opinion "so long as the county does not acquire or operate any water or sewer utilities."

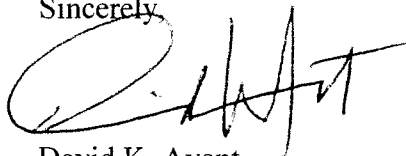
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It appears as though the situations addressed in our opinions of December 1, 1987 and January 18, 1979 are distinguishable from the plan of Cherokee County in this matter. Cherokee County intends to acquire the water source, construct, own and operate a water treatment plant, and then provide water to various existing public service districts. The County also intends to establish an operating department to oversee and ostensibly regulate this service. Given the principals of constitutional interpretation and construction expressed above, it is my opinion that a referendum would be required prior to Cherokee County implementing its plan accessing this auxiliary water source. Any doubt as to this requirement should be resolved in favor of holding a referendum.

CONCLUSION

Cherokee County possesses the requisite power and authority to operate the water service system/facility described above, acquire the quarry site and establish an operating department to oversee the provision of this auxiliary water source to the County's existing customers. Article VIII, Section 16 requires that a referendum or election be held prior to the County exercising this authority.

Sincerely,



David K. Avant
Assistant Attorney General

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