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The State of South Carolina

Office of the Attorney General

Opinion No. 88-81
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October 14, 1988

The Honorable Larry A. Martin
Member, House of Representatives
Post Office Box 247
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The Honorable B. L. Hendricks, Jr.
Member, House of Representatives
Post Office Box 612
Easley, South Carolina 29640

Gentlemen:

By your letter of September 25, 1988, you have advised that an entity known as the Pickens County Water and Sewer Authority was created by ordinance of Pickens County Council following a favorable referendum held pursuant to Article VIII, Section 16 of the Constitution of the State of South Carolina. You have asked that we examine the ordinance, referendum question, and local laws adopted previously by the General Assembly, and advise on the following matters:

1. What impact does the reference to an act of the General Assembly adopted in 1973 within the referendum question have upon the validity of the referendum?

2. If a problem exists with the referendum, to what extent is the lawful operation of the Pickens County Water and Sewer Authority impaired?

3. Was the referendum question properly phrased?

Background

In 1971, the General Assembly adopted Act No. 240 to create the Pickens County Water Authority. In 1973, subsequent to the adoption of Article VIII, Section 7 of the State Constitution,1/ the General Assembly by Act No. 757 repealed Act No. 240 of 1971 and in its stead created the Pickens County Water and Sewer Authority. By an opinion of this Office dated February 11, 1981, the Honorable Karen L. Henderson opined that a serious question existed as to the validity of the authority created by the 1973 act, since it was enacted after March 7, 1973; she continued:

> Nevertheless, any authorized actions which its governing body has taken or will take prior to a successful court challenge to its constitutionality would be deemed valid as the actions of a de facto body. See generally, State, ex rel. McLeod v. Court of Probate of Colleton County, et al., 223 S.E.2d 166 (1975).

The opinion continued with measures which Pickens County Council could or could not undertake to establish county-wide water and sewer services. Among those measures was the holding of a referendum pursuant to Article VIII, Section 16 to re-enact the provisions of Act No. 757 of 1973. The opinion concluded:

> In any event, whatever method Pickens County selects to provide water service, it cannot create an autonomous body to provide for the service. Instead, any commission or other governing body can operate only as an agent of Pickens County.

Article VIII, Section 16 of the State Constitution provides in relevant part:

> Any county ... may, upon a majority vote of the electors voting on the question in such county ..., acquire by initial construction or purchase and may operate water, sewer, ... or other public utility systems and plants ... .

1/ Article VIII, Section 7 prohibits the adoption of a law for a specific county, effective March 7, 1973.

The referendum held in Pickens County on November 2, 1982, submitted the following question to the voters of Pickens County:

> Shall the Council of the County of Pickens, South Carolina, establish a Water and Sewer Authority having all the powers and duties provided in and by Act No. 757 of the 1973 Acts of the General Assembly of South Carolina and such other powers and duties as Pickens County Council may by ordinance provide?

The official result, according to the ordinance adopted to implement the referendum was 4,924 votes in favor of creating a water and sewer authority and 4,451 votes in opposition to the question.

An ordinance was adopted by Pickens County Council to implement the referendum result; third reading was held on October 1, 1984. The ordinance recited the history of the attempts to establish such an authority in Pickens County, the constitutional infirmity of the 1973 legislation, and the desire of Pickens County Council to create "a non-autonomous Water and Sewer Authority to be operated as an agency of Pickens County ... ." A governing body was established, as were service areas; powers and duties were detailed at great length.

With this background in mind, your several questions will be addressed.

Format of Referendum Question

It has been acknowledged by both Pickens County Council, in its 1984 ordinance, and by this Office, in its opinion of February 11, 1981, that the 1973 act of the General Assembly is most probably constitutionally infirm. Undoubtedly, if challenged in court, the act would be declared violative of Article VIII, Section 7.2/ Murphree v. Mottel, 267 S.C. 80, 226 S.E.2d 36 (1976) (1973 act creating the Aiken County Public Service Authority, adopted in 1973

2/ This Office continues to advise that any act of the General Assembly is presumed to be constitutional in all respects. We generally resolve all doubts of constitutionality in favor of constitutionality in commenting upon such acts. While this Office does comment on constitutional issues, only the courts may actually declare an act unconstitutional. Thus, until such time as a court actually declares Act No. 757 of 1973 unconstitutional, the presumption of constitutionality must apply.

following the adoption of Article VIII, Section 7, invalidated as violative of that constitutional prohibition). Thus, the impact of the reference to the 1973 act is one issue which must be examined.

The reference to an unconstitutional, or potentially unconstitutional, act in a later legislative enactment or, as here, in a referendum question, may or may not be fatal. The validity of the referendum itself should not be confused with the construction or intent of the referendum. Unconstitutional acts may be read in pari materia with valid acts to determine questions of intent or construction. Miller v. Lockett, 98 Ill. 2d 478, 457 N.E.2d 14 (1983); City Transp. Co., Inc. v. Pharr, 209 S.W.2d 15 (Tenn. 1948); cf., Sales v. Barber Asphalt Pav. Co., 166 Mo. 671, 66 S.W. 979 (1902). Thus, the 1973 act could be used to interpret the referendum and Pickens County Council's intent.

However, the 1973 act attempted to confer many powers and duties on the Pickens County Water and Sewer Authority thus created, some of which powers and duties should be exercised by Pickens County Council and could not be conferred on an agency which it attempted to create. (One primary example is the power of eminent domain.) Reference to the 1973 act appears to confer such powers on the new non-autonomous agency being created pursuant to the referendum. To compound the problem, having referenced the 1973 act in the referendum question, Pickens County Council made a number of powers and duties subject to the approval of council. Thus, the reference to the 1973 act was not an entirely accurate statement of the powers and duties of the entity to be created.

Finally, it may be noted that the language of the referendum question does not follow or in any way track the language of Article VIII, Section 16 of the Constitution. While there is no requirement that the language of the constitutional provision be followed, such would have been preferable and certainly would have removed all doubt as to the exact nature of the undertaking of Pickens County Council. The referendum determined the voters' wishes with respect to establishing a water and sewer authority; the Constitution authorizes a county to acquire (by construction or purchase) and operate public utility systems such as those providing water and sewer services. When read with the 1973 act and the 1984 ordinance, actual intent of council becomes more clear. Due to the problems discussed above, it might be a good idea to seek a judicial determination on all issues relating to the validity of the referendum.

Status of the Present Authority

Apparently, since the adoption of the ordinance by Pickens County Council, the governing body of the Authority as established

by section 3 of the ordinance has been carrying out its powers and duties as referenced in the ordinance, ostensibly as the non-autonomous Pickens County Water and Sewer Authority. To our knowledge, no challenge has been made to the validity of any actions undertaken by the Authority's governing body. Because potential problems may have been identified with respect to the referendum question, you have inquired as to the status of the agency (or, actually of its governing body).

As noted in the opinion of February 11, 1981, with respect to the governing body of the Authority as created by Act No. 757 of 1973, the members of the governing body would be considered at least de facto officers;3/ as further noted, unless and until a court should declare otherwise, their actions as de facto officers would be considered valid. See also State ex rel. McLeod v. West, 249 S.C. 243, 223 S.E.2d 892 (1967); Kittman v. Ayer, 3 Strob. 92 (S.C. 1848); 67 C.J.S. Officers § 276. See also Ops. Atty. Gen. dated February 19, 1986 (members of "Abbeville County Fire Protection Commission" were de facto officers); October 18, 1976 (members of Goose Creek Board of Adjustment were de facto officers); September 26, 1975 (de facto municipal corporation due to voided municipal annexation); January 22, 1970 (de facto corporation); March 15, 1973 (de facto school district); February 20, 1963 (de facto town council members).

As has been stated with respect to de facto corporations, de facto entities appear to generally have all rights, powers, duties, and liabilities that a de jure entity would possess. 18A Am.Jur.2d Corporations § 242. Unless and until a court should declare otherwise, the governing body could generally continue its operations, though the risk that a court could curtail its operations must be considered. To clarify the status of the Authority and its members, perhaps a declaratory judgment action should be considered. Another favorable referendum under Article VIII, Section 16, with the question more carefully following the language of the constitutional provision, and an enabling ordinance would also clarify the status of the Authority and its governing body and remove whatever risks may be inherent in operating in a de facto capacity.

3/ A de facto officer is "one who is in possession of an office, in good faith, entered by right, claiming to be entitled thereto, and discharging its duties under color of authority." Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 151 (1936); see also Smith v. City Council of Charleston, 198 S.C. 313, 17 S.E.2d 860 (1942) and Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952).

In conclusion, the following advice is offered as to the issues you have raised:

1. The reference in the referendum question to a potentially unconstitutional act of the General Assembly may or may not be fatal. The validity of the referendum itself, as opposed to use of the 1973 act to merely interpret the intent of the referendum and Pickens County Council, must be determined. That the 1984 ordinance departs from the 1973 act in many respects is troublesome, and that the exact powers and duties that were conveyed to the Authority are not completely identical in both legislative acts is a further complication. A declaratory judgment action may be advisable to resolve these potential problems.

2. While Article VIII, Section 16 of the State Constitution does not specify a particular format for a referendum question to be decided thereunder, it would be preferable to closely follow the language of the constitutional provision to remove any doubt as to the exact nature of the undertaking of Pickens County Council.

3. The current members of the governing body of the Pickens County Water and Sewer Authority would be de facto officers. Unless and until a court should declare otherwise, their actions would be valid. The Authority could continue to operate, but the de facto operation is not without risks. It might be preferable to hold another referendum or seek a declaratory judgment to clarify the status of the Authority and remove the risks inherent in de facto operation.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

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