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April 11, 1985

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Dear Mr. Phillips:

By your letter to Attorney General Medlock dated January 8, 1985, you have asked for the opinion of this Office as to a proposed agreement between the City of Greenville and Greenville County concerning appointment powers over members of the Greenville (Downtown) Airport Commission. This Office has sought legal input in the form of memoranda from all of the concerned parties. It would appear that your question is answered by prior opinions of this Office which indicate that the City and the County may not, by contract, ordinance, or agreement, alter appointment procedures for members of the Greenville Airport Commission.

The proposed agreement is entitled "City-County Agreement, Airport Facility Management." The provision in question is part A, providing in pertinent part:

Mutual contractual exchange of voting interests for a four year term with options to renew such that the City and the County shall each defer to the preferences of each other in making appointments to the Donaldson Commission and the Downtown Airport Commission during the term of the agreement. Under the terms of this agreement, Mayor and City Council would defer to the preference of County Council in its appointments to the Donaldson Commission, and County Council would similarly defer to the preferences

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of Mayor and City Council in its appointments to the Downtown Airport Commission. The net effect will tend to place primary responsibility for Donaldson Center decisions with the County and Downtown Airport decisions with the City.

Before discussing the proposed agreement, some comments concerning the Greenville (Downtown) Airport Commission and its relationship to the City and County are in order.

GREENVILLE AIRPORT COMMISSION

The Greenville Airport Commission for the City and County of Greenville was created by Act No. 919, 1928 Acts and Joint Resolutions, as amended by Act No. 440 of 1929, Act No. 844 of 1954, and Act No. 1418 of 1974. The most recent act amended that portion of Act No. 919 pertaining to appointment of Commission members; that provision now reads:

Notwithstanding the provisions of Section 1, of those successors to the members currently serving, one each shall be appointed by the City Council of the City of Greenville and the County Council of Greenville County for an initial term of one year, and one each shall be likewise appointed for an initial term of two years.

The fifth member is to be selected by majority vote of the other four members. Clearly, the General Assembly contemplated action by both City and County Councils in appointing members; but what is not clear is whether the Commission is a municipal entity, a county entity, an entity of both, or a separate political subdivision and/or special purpose district.

This Office has advised previously by an opinion dated September 29, 1981, that neither the City Council nor the County Council was authorized under the Home Rule Act to alter or abolish such a commission, since the Commission was not an agency of the City or the County; rather, concluded the opinion, any alteration or abolition should be accomplished by a general act of the General Assembly.

Based upon the opinion referenced above, as well as statutes governing the Greenville Airport Commission, it would appear that the Commission was established to be an entity separate

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from the City and County, while at the same time serving both the City and the County. In short, while no authority of which we are aware characterizes the Commission as a special purpose district or political subdivision, for the reasons that follow, strong arguments can be made that the Commission is a separate political subdivision or special purpose district. Thus, statutes governing those entities must be considered together with the powers granted to cities and counties under the Home Rule Act.

The attributes of special purpose districts and political subdivisions were discussed in an Opinion of the Attorney General dated November 15, 1984, with several attachments, copies of which are enclosed. While the Greenville Airport Commission does not possess all of the attributes of a political subdivision or special purpose district, the opinion and authority cited therein stated that a lack of some attributes did not prevent an entity from being a political subdivision or special purpose district. A discussion of the various attributes of the Commission follows.

The purpose for which the Greenville Airport Commission was established is special, as opposed to general governmental purpose; operation of airports has been determined to be an appropriate purpose for special purpose districts. Kleckley v. Pulliam, 265 S.C. 177, 217 S.E.2d 217 (1975); Torgerson v. Craver, 267 S.C. 558, 230 S.E.2d 228 (1976). The fact that the Commission has been given certain corporate powers and duties is also significant; powers necessarily implied from those granted and also those specified in the Uniform Airports Act, Section 55-9-10 et seq., Code of Laws of South Carolina (1976), are also important considerations. The fact that the Commission was created by an act of the legislature rather than by action of the City or County Councils is also significant.

There are also certain fiscal considerations: whether the entity is empowered to issue revenue or general obligation bonds, levy tax assessments, and issue notes or bonds. This Office has been advised that the Commission is completely self-sufficient financially, that it operates entirely on revenues generated from Commission property and operations, and further that the Commission has never received any subsidy from either the City or the County. While the Commission is not empowered to levy taxes, it is apparent from the self-sufficient fiscal management of the Commission that a tax levy would be unnecessary. By Act No. 636, 1980 Acts and Joint Resolutions, the Commission was empowered to

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borrow money, issue negotiable bonds, notes and other evidences of indebtedness payable solely from the revenue derived from the operation of any revenue-producing facility under its jurisdiction and may mortgage or pledge any assets owned by the Commission in connection with such indebtedness. 1/

It appears that the Commission does possess many of the fiscal attributes frequently found in special purpose districts.

Considering all of the attributes discussed in the opinion of November 15, 1984, it would appear that while the Greenville Airport Commission does not possess all of those attributes, the Commission does possess a sufficient number of those factors to consider the Commission a special purpose district.

In addition, it would appear that the Commission may be considered a political subdivision, even though the General Assembly has not formally denominated it as such. While a specific geographic territory is not specifically prescribed by the legislature, it may be readily inferred that the boundaries served by the Commission would be coterminous with the boundaries of Greenville County. See also Section 55-9-30 of the Code; Gould v. Barton, 256 S.C. 175, 181 S.E.2d 662 (1971). As noted above, the Commission exercises no taxing power, but then, as also noted, no taxing power has ever been needed by the Commission. 2/ The Commission carries out a public function, as noted supra. The Commission governs itself virtually autonomously,

1/ The Act also provides that "[n]either the faith and credit of the State nor of the City or County of Greenville shall be pledged for the payment of any such obligations... ." Significantly, the General Assembly reaffirmed the fact that the Commission is an entity separate from the City and the County, that it in effect is independent.

2/ See especially Chicago Transit Authority v. Danaher, 40 Ill.App.3d 913, 353 N.E.2d 97 (1976) and Tygesen v. Magna Water Company, 119 Utah 274, 226 P.2d 127 (1950), as to lack of taxing power in a political subdivision.

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though members are appointed by City and County Council. 3/ Considering all factors frequently present in political subdivisions, it would appear that the Greenville Airport Commission could be considered a political subdivision, as well as a special purpose district, an entity separate from both the City and the County. 4/

HOME RULE CONSIDERATIONS

The Home Rule Act, Act No. 283 of 1975, does not appear to have devolved any powers as to special purpose districts upon municipalities. By Section 5-13-100 of the Code, a portion of the Home Rule Act, a city council may

by ordinance, create, change and abolish offices, departments or agencies of municipal government upon the recommendation of the [city] manager or may, in accordance with such recommendations, assign additional functions and duties to such offices.
[Emphasis added.]

3/ The General Assembly has the right to delegate appointment of officers which it creates to other entities or bodies. See Floyd v. Thornton, 220 S.C. 414, 68 S.E.2d 334 (1951).

4/ Reference was made to a modified agreement between the City and the County in an article in The Greenville News and Greenville Piedmont on Saturday, March 9, 1985, page 1A. While this Office has not seen the purported modified agreement, a quotation from the agreement appears to concede that the Commission is a separate political subdivision:

This agreement does not in any way affect the duties and responsibilities of the Greenville Airport Commission, which operates this facility. The commission shall continue to operate this as a self-supporting facility and no funds of the commission shall be transferred to any other political subdivision.

(Emphasis added.) Use of the term "other" would indicate that the Commission is also to be considered a political subdivision. See Black's Law Dictionary 492 (5th Ed. 1979).

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Because the prior opinion of this Office concludes that the Greenville Airport Commission is not an agency of the municipality, this statute probably could not be relied upon as authority for the City to alter the Commission by agreement or contract, since the same act could not be accomplished by ordinance. See Op. Atty. Gen. dated September 29, 1981.

Additionally, the provisions of the Home Rule Act would preclude the County from acting in this instance. Section 4-9-80 of the Code (1984 Cum.Supp.) pertains to the relationship between counties and special purpose districts; in part, that section provides:

The provisions of this chapter shall not be construed to devolve any additional powers upon county councils with regard to public service districts, special purpose districts, water and sewer authorities, or other political subdivisions by whatever name designated, ... and such political subdivisions shall continue to perform their statutory functions prescribed in laws creating such districts or authorities except as they may be modified by act of the General Assembly...; provided, however, notwithstanding any other provision of law, when any county council under existing law is authorized to appoint members to the governing body of a public or special service district ... within the county and such governing body by resolution directed to the council requests a change in the size or manner in which members of such governing body are selected, the council may by ordinance effect such changes... .5/

5/ An act of the General Assembly general in nature, rather than one specifically for the Commission, would be required to comply with the requirements of Section 4-9-80. See Article VIII, Section 7 of the State Constitution, interpreted by the South Carolina Supreme Court in Spartanburg Sanitary Sewer District v. City of Spartanburg, ___ S.C. ___, 321 S.E.2d 258 (1984); cf., Ops. Atty. Gen. dated September 29, 1981 and June 12, 1980.

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Because no additional powers or duties are devolved upon county councils as to special purpose districts and a procedure to change the size or manner of appointment of members of the governing body where a county council has been given the power of appointment has been specified, it would appear that the terms of Section 4-9-80 must be followed; since County Council could not directly effect such a change in appointment under Section 4-9-80, it is questionable that the same change could be indirectly effected by means of an agreement or contract.

In addition, Section 4-9-170 of the Code provides the following as to appointment powers of a county council with regard to special purpose districts in particular:

The council shall provide by ordinance for the appointment of all county boards, committees and commissions whose appointment is not provided for by the general law or the Constitution. Each council shall have such appointive powers with regard to existing boards and commissions as may be authorized by the General Assembly except as otherwise provided for by the general law and the Constitution, but this authority shall not extend to school districts, special purpose districts or other political subdivisions created by the General Assembly; provided, however, that beginning January 1, 1980, the council shall provide by ordinance for the appointment of all county boards, committees and commissions whose appointment is not provided for by the general law or the Constitution, but this authority shall not extend to school districts, special purpose districts or other political subdivisions created by the General Assembly.

(Emphasis added.) While the General Assembly has not given any general powers to county councils with respect to appointment powers over special purpose districts or other political subdivisions created by the General Assembly by Section 4-9-170, a county council would nevertheless be empowered to act at the request of the governing body of the district or subdivision by virtue of Section 4-9-80. Section 4-9-170 would not in our judgment, however, authorize County Council to delegate its appointment power over the Greenville Airport Commission by ordinance or by agreement or contract to City Council.

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As has been stated in prior opinions of this Office, the preferable method to effect changes or to abolish the Commission would be by general act of the General Assembly, to avoid constitutional difficulties with Article VIII, Section 7; or, if the Commission requests a change in size or manner of appointment of its members, County Council could act pursuant to the proviso in Section 4-9-30. Otherwise, the individual acts of City and County Councils, by ordinance or otherwise, would not appear to be statutorily authorized.

Even assuming that the Greenville Airport Commission is not a special purpose or public service district, prior opinions of this Office indicate that it is still doubtful whether City and County Councils may act to alter appointment provisions. This Office addressed, by an opinion dated June 12, 1980 (enclosed), whether the City and the County Councils of Florence had power to alter statutes creating the Florence City-County Airport Commission, stating:

The Florence County Council can enact such an ordinance because the provisions of [the Home Rule Act] have empowered it as of January 1, 1980, to enact ordinances in conflict with special laws; however, [we] know of no similar authority granted to cities. Moreover, while Article VIII, Section 13 of the South Carolina Constitution provides for the joint performance of functions, etc. between cities and counties, that provision, in [our] opinion, contemplates that the functions which can be performed jointly are those which can be performed singly as well. Inasmuch as the Florence City Council is not authorized to enact an ordinance in conflict with a special act, [we] do not believe that it can do so jointly with the County of Florence. ... 6/

6/ See Section 3 of Act No. 283, 1975 Acts and Joint Resolutions (the Home Rule Act), as to authority of counties to enact ordinances in conflict with special laws. Though this section is uncodified, it is nevertheless effective.

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The Florence City-County Airport Commission, created by Act No. 482 of 1973, is similar to the Greenville Airport Commission; if anything, its ties to both the City and the County of Florence are even more definitely specified than the statutes relating to the Greenville Airport Commission. See Sections 1, 2, 4, 5, 6, and 7 of the Act, specifying action or other involvement by both the City and the County of Florence. Because the 1980 opinion concluded that the City and County Councils could not act jointly to alter special legislation creating an airport commission, which had stronger statutory ties to both the City and County than even here, the same opinion would be readily applicable in the instance of the Greenville Airport Commission. Hence, based upon the 1980 opinion of this Office, the Home Rule Act and Article VIII, Section 13 would not appear to permit the City and County of Greenville to alter the Commission by ordinance, agreement, or otherwise. 7/

APPOINTMENT POWERS GENERALLY

General law concerning delegation of appointment powers is consistent with the foregoing conclusions. The law on this issue generally is that once the General Assembly has delegated appointment power to a body other than itself, additional delegation may not be made absent statutory authorization. Should such further delegation be made, and appointment be made by an authority not authorized to make the appointment, then such appointment is usually considered to be void. See, for example, 3 McQuillin, Municipal Corporations, § 12.70 et seq. and substantial authority cited therein; 63A Am.Jur.2d Public Officers and Employees § 95 ("such authority [to appoint] must

7/ It could perhaps be argued that because counties have the authority to alter the method of appointment and other attributes of preexisting county boards and commissions, see §§ 4-9-170, 4-9-30(6) and Section 3 of Act No. 283 of 1975, and since municipalities have certain authority in that area as well, see Section 5-13-100, a county and municipality would have the implied power jointly to alter a city-county agency. That conclusion was implicitly rejected in the 1980 and 1981 opinions, referenced above, each of which noted that a municipality did not possess the authority to alter a special act. Accordingly, the foregoing is presented as an argument, but only a court could adopt it.

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be exercised in conformity to the statute conferring it"); Ellis v. Rockefeller, 245 Ark. 53, 431 S.W.2d 848 (1968); People ex rel. Balcom v. Mosher, 163 N.Y. 32, 57 N.E. 88 (1900). We can locate no statute authorizing either a city council or a county council to further delegate that appointment power already delegated to those bodies by the General Assembly; this Office advises that, by application of general law, such further delegation could most likely result in invalid appointments.

McQuillin and other authorities distinguish between the actual delegation of appointment power granted by the legislature and the selection of an officer upon the recommendation of another body such as a business organization; the latter is a permissible act if it appears that the appointing body is actually exercising its discretion and is actually making the appointment, not merely following the wishes of the recommending body. As was stated in People ex rel. Balcom v. Mosher, supra, applying the general rules as to appointment,

The decision of this and other courts, state and federal, as to the meaning of the word "appointment," and what constitutes an appointment under the law, are to the effect that the choice of a person to fill an office constitutes the essence of the appointment; that the selection must be the discretionary act of the officer or board clothed with the power of appointment; that, while he or it may listen to the recommendation or advice of others, yet the selection must finally be his or its act, which has never been regarded or held to be ministerial. [Citations omitted.] Thus, it is seen that the authorities upon the subject ... all agree in the conclusion that the power of selection for a public office is and should be vested alone in the officers or boards authorized to appoint... .

57 N.E. at 90-91. Thus, while recommendations are permissible, the body vested with appointment power must make the final selection when appointing a public officer. See also, State ex rel. Riley v. Pechilis, 273 S.C. 628, 258 S.E.2d 433 (1979).

Finally, it must be noted that when parties (City and County Councils) enter into an agreement or contract, all state

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laws which relate to the subject of the agreement or contract become a part of the agreement or contract. Cf., Ayres v. Crowley, 205 S.C. 51, 30 S.E.2d 785 (1944); Geiger v. Ashley, 185 S.C. 71, 193 S.E.2d 192 (1937). Thus, the acts of the General Assembly relative to appointment procedures of Commission members must be considered a part of the proposed Agreement. An act of the General Assembly could not by agreement or contract be modified. See 17 C.J.S. Contracts § 201; cf., Grant v. Butt, 198 S.C. 298, 17 S.E.2d 689 (1942).

EMPLOYMENT OF COUNSEL BY THE COMMISSION

The City of Greenville has also asked this Office to address the employment of counsel by the Commission, noting that the City and the County both employ full-time attorneys who are available to serve the legal needs of the Commission. While the Commission serves both the City and the County, it is probably neither a city nor a county agency, as stated above. Furthermore, there may be instances, such as the present situation, in which the Commission determines that a conflict of interest exists between the Commission and either one or both of the councils. In those instances, an attorney employed by one of the councils obviously could not serve his employer's interest while also advising the Commission. For additional information and authority as to employing counsel, see Op. Atty. Gen. dated February 15, 1985, a copy of which is enclosed.

CONCLUSIONS

1. While the question is a close one, the Greenville Airport Commission can be considered a special purpose district or political subdivision; if so, neither the City nor the County of Greenville would have any authority to alter the structure of the Commission generally, though County Council has limited power under Section 4-9-80 of the Code. See also Op. Atty. Gen. dated September 29, 1981.

2. Even assuming that the Greenville Airport Commission is not a special purpose district or political subdivision and while the County has been granted power by the Home Rule Act to modify special laws by ordinance (particularly as to the method of appointment to county commissions), prior opinions of this Office indicate that the City has not been expressly granted similar power. Prior opinions of this Office also conclude that Article VIII, Section 13 would not be applicable in this instance. Accordingly, we can find no authority in the Home Rule Act for the City and County to modify the Commission by

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ordinance or otherwise even if the Commission is not a special purpose district or political subdivision. See Op. Atty. Gen. dated June 12, 1980.

3. There is no other provision of law which would permit the City or the County to delegate appointment power, once that power has been delegated by the General Assembly. Statutes providing for appointment power may not be modified by contract or agreement. Recommendations of other bodies may be sought prior to appointment, but the final discretionary act of appointment must be made by the body to whom the General Assembly delegated the appointment power.

The issues raised herein are novel and have not yet been considered by the courts of this State. While Greenville County Council may seek recommendations from Greenville City Council, it is doubtful that more may be done without authorization, by general law, from the General Assembly or until the courts give more guidance on these Home Rule issues.

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP:djg

Enclosures

REVIEWED AND APPROVED BY

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cc: Walter H. Parham, Esquire
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