ALAN WILSON
ATTORNEY GENERAL

January 12, 2012

Miles Loadholt, Esquire
Blackville Town Attorney
80 Virginia Avenue
Barnwell, South Carolina 29812

Dear Mr. Loadholt:

You state that you represent the Town of Blackville and that you request an opinion on behalf of the Town concerning certain property. By way of background, you advise that

> On May 3, 1971 the Town of Blackville conveyed 2 parcels of land to Jefferson Davis Academy, Inc., a small private school located in Blackville, S.C. (copy of Deed attached).
>
> The deed container a "reverter clause" which is set out as follows "It is specifically understood and agreed between the grantor and grantee herein that this property is being conveyed with the express limitation that in the event said property herein conveyed is ever used for any purposes other than for school purposes that the title to said property shall revert to the Town of Blackville".
>
> The property is used for athletic fields at Jefferson Davis Academy.
>
> Representatives of Jefferson Davis Academy have approached the Town of Blackville requesting that they Town release or convey the reverter provision in the deed. I am sure the ultimate decision will be made by the Blackville City Council; however, I am concerned about the Town releasing this reverter provision without adequate consideration.
>
> Any guidance you can give the Town of Blackville about the consideration necessary to release this reverter provision would be appreciated.

Law / Analysis

We agree with your analysis. Over the years, this Office has consistently advised that Art. III, § 31 of the South Carolina Constitution prohibits the State or its agencies from donating its lands to private corporations. Art. III, § 31 provides as follows:

> [l]ands belonging to or under the control of the State shall never be donated directly or indirectly, to private corporations or individuals, or to railroad companies. Nor shall such lands be sold to corporations, or associations, for a less price than that for which it can be sold to individuals.

In *Op. S.C. Atty. Gen.*, Op. No. 89-137 (November 27, 1989), we quoted with approval from an Opinion issued August 27, 1985, wherein we stated:

> ... Article III, Sec. 31 provides that "lands belonging to or under the control of the state shall never be donated, directly or indirectly, to private corporations or individuals ... ." While our Court has clearly stated that neither this provision nor the Due Process Clause in themselves require public bidding or a maximum price for the sale of property, *Elliott v. McNair*, 250 S.C. 75, 156 S.E.2d 421 (1967), it is also clear that the consideration from such a sale must be of "reasonably equivalent value ..." or "adequately equivalent ... ." *Haesloop v. Charleston*, 123 S.C. 272, 283, 285, 115 S.E. 596 (1923). In determining "what is a fair and reasonable return for disposition of its properties", a public body "may properly consider indirect benefits resulting to the public ...". *McKinney v. City of Greenville*, 262 S.C. 227, 242, 203 S.E.2d 680 (1974). But such benefits must not be "of too incidental or secondary a character ... ." *Haesloop, supra.* In short, when public officials sell the state's land, they are acting in a fiduciary relationship with the public and thus held to the "standard of diligence and prudence that [persons] ... of ordinary intelligence in such matters employ in their own like affairs." *Haesloop,* 123 S.C. at 284.

See also, *State v. Broad River Power Co.*, 177 S.C. 240, 181 S.E. 41 (1935) [indirect benefits may be considered]; *Chapman v. Greenville Chamber of Commerce*, 127 S.C. 173, 120 S.E. 584 (1923). In *Op. S.C. Atty. Gen,*. May 7, 2003, we advised that "... a county may not simply 'give away' its property. There must be, at the very least, sufficient public benefit in return." *See also*, *Op. S.C. Atty. Gen.*, May 30, 2008 ["If public property is transferred to a private entity, some consideration of reasonably equivalent value must be received."]. While our Supreme Court has held that Art. III, § 31 is inapplicable to political subdivisions, see *Haesloop,, supra*, the Court has clearly recognized that public officials at the local level act in a fiduciary capacity with respect to the subdivision's property. Accordingly, local officials may not transfer municipal property to a private use, but must receive "in return some consideration of reasonably equivalent value ... ." *Haesloop*, 123 S.C. at 282-283, 115 S.E. 596.

The question thus becomes whether the foregoing authority is applicable to the possibility of reverter held by the Town of Blackville. Our Supreme Court discussed extensively a fee simple determinable with the possibility of reverter in *South Carolina Dept. of Parks, Recreation, and Tourism v. Brookgreen Gardens*, 309 S.C. 388, 424 S.E.2d 465 (1992) [hereinafter "PRT"]. There, the Department of Parks, Recreation and Tourism had become successor to the Forestry Department for the operation of Brookgreen Gardens as a State Park for the benefit of the public through a fifty year lease. The original deeds, although ambiguous, appeared to create the possibility of reverter if the land was used for any purpose other than as specified in the original charter for Brookgreen. (Maintenance of land in its natural state).

In an original jurisdiction action to clarify the interest granted to Brookgreen, the Court in *PRT* framed the issue as follows: "... what type of estate was originally granted to Brookgreen, and what is the future interest which follows the original grant?" 309 S.C. at 391. Resolving the ambiguity, the Court concluded that the language that "said premises shall immediately revert to the grantor or their heirs" should the property not be used for its intended purposes, created a possibility of reverter,

accompanying a fee simple determinable. The Court went on to describe a possibility of reverter as follows:

> [t]he characterization of the estate simplifies the rest of the analysis. A possibility of reverter has been held in South Carolina as non-transferable by will to a non heir, or by inter vivos alienation to a third party; however, it may be released to the party holding the fee simple determinable. *Purvis* [*v. McElveen*, 234 S.C. 94, 106 S.E.2d 913 (1959)] at 94, 106 S.E.2d 913; See also *County of Abbeville v. Knox*, 267 S.C. 38, 225 S.E.2d 863 (1976). Because Anna Hyatt Huffington was the sole heir of Archer M. Huntington, any possibility of reverter rights would belong to her upon the death of Archer M. Huntington. In June 1960, Anna Hyatt Huntington executed and delivered a Deed of Real Estate and Release which acted to release her possibility of reverter to Brookgreen Gardens. As the fee simple determinable holder, the release serves to eliminate the condition on the fee simple determinable estate, rendering the possessory interest a fee simple absolute. 28 Am.Jur.2d, *Estates*, Sec. 185, p. 326; *Purvis* at 99, 106 S.E.2d at 916; *Burnett v. Snoddy*, 199 S.C. 399, 19 S.E.2d 904 (1942). Judge Baker arrived at this same conclusion in 1960, and today it is still correct.

309 S.C. at 392-3, 424 S.E.2d at 467. In Purvis, *supra* our Supreme Court refused to abandon the common law rule that a possibility of reverter is "inalienable *inter vivos*" even though such rule has been "criticized as being contrary to the modern idea of freedom of alienation." 234 S.C. at 101, 106 S.E.2d at 917.

The question then becomes whether or not there is any ascertainable value regarding the possibility of reverter which the City of Blackville currently retains to avoid a "donation" of that property? If a possibility of reverter is "inalienable inter vivos," may it even be donated? In other words, would the Town be "donating" lands if it did not receive adequate consideration for the transfer of the possibility of reverter to the Academy?

General law recognizes that "a possibility of reverter has no ascertainable value when the event upon which the possessory estate in fee simple defeasible will end is not likely to occur in the near future." 28 Am.Jur. *Estates*, § 189. See also, 29A C.J.S. Eminent Domain, § 235 [compensation as result of condemnation of property where there is a determinable fee with possibility of reverter "is to be paid to the owner of the defeasible fee without any allocation or apportionment to the holder of the possibility of reverter or right of reentry, on the ground that such interest is so remote and speculative as to be without present value."]. Moreover, in the ancient South Carolina case of *Hull v. Hull*, 3 Rich. Eq. 65, 1850 WL 2781 (1850), the decision of Circuit Chancellor Dargan is published along with that of the Court of Appeals of Equity. Circuit Chancellor Dargan made the following comments regarding a reverter:

> [t]his reverter is not considered in law as an estate. It is too remote and too contingent to be valued. There is no appreciable interest left in the donor. I do not know by what process, or mode of calculation, we could estimate the value of a possibility of reverter to the testator.

While this analysis by the Circuit Chancellor appears to be consistent with many other authorities concluding that no value can be given to a possibility of reverter, we note that the South Carolina Court of Appeals of Equity did not address this issue.

Notwithstanding these authorities, the Supreme Court of Texas has rejected the argument that a possibility of reverter is valueless. In *Leeco Gas and Oil Co. v. County of Nueces*, 736 S.W.2d 629, 631 (1987) the Supreme Court of Texas, applying the Texas Constitution, which provides that no property shall be taken for public use "without adequate compensation being made, unless by the consent of such person ..." concluded that ten dollars as compensation to the owner of the reversionary interest with respect to a "multi-million dollar piece of property is not adequate as a matter of law." 736 S.W.2d at 631. The Court cited the general rule from the *Restatement of Property* that "a mere possibility of reverter has no ascertainable value when the event upon which the possessory estate in fee simple defeasible is to end is not probable within a reasonably short period of time." *Id.* at 630-631, citing *Restatement of Property*, § 53, comment 6 (1936). However, in the Texas Court's view, to "allow a governmental entity, as grantee in a gift deed, to condemn the grantor's reversionary interest by paying only nominal damages would have a negative impact on gifts of real property to charities and governmental entities." *Id.* at 631. Thus, the Court held that "when a governmental entity is the grantee in a gift deed in which the grantor retains a reversionary interest, if that same governmental entity condemns the reversionary interest, it must pay as compensation the amount by which the value of the unrestricted fee exceeds the value of the restricted fee." *Id.* at 631-632.

Of course, the situation at hand is factually different, as in the case presented by you, the reversionary interest is retained by the governmental entity. Moreover, this instance is not one involving condemnation. However, the Texas decision recognizes that a possibility of reverter is not necessarily valueless or of only nominal worth.

Also instructive is the decision of the Minnesota Supreme Court in *State of Minn. v. Ind. School Dist. No. 31*, 123 N.W.2d 121 (Minn. 1963). There, the Court acknowledged that the general rule as reflected in the *Restatement* is that a possibility of reverter interest which is the object of condemnation is "too remote and contingent" to be the "subject of an estimate of damages by a jury." 123 N.W.2d at 92. However, the Court recognized that "[i]n some situations the possibility of reverter may have more than nominal value." *Id.* at 96. According to the Supreme Court of Minnesota,

> [t]he measure of damages for the taking of the totality of the estates or interests in the land affected by condemnation proceedings is the fair and reasonable market value of such land and, in arriving at this judgment, consideration may be given to that use of the realty involved for which it is best adapted. ... It is entirely possible that the use to which a fee simple determinable must be limited to avoid reversion is its highest and best use within the meaning of this rule. And in such event, allowance of nominal damages for the extinguishment of the possibility of reverter would be reasonable if there is no likelihood that the use to which the land is restricted will be discontinued by the owner of the fee simple determinable. It is possible, however, that an owner of the totality of the estates or interests in the real estate could make practical use of it for purposes which could give to it a reasonable market value higher than that possible when devoted to the restricted uses specified in the deed of conveyance creating the determinable fee. In such event, the award in condemnation will reflect this additional increment of value since, as stated, the

> amount allowed is the market value of the realty when devoted to its best practicable use. In this situation, as well as in the case where the restricted use is about to be abandoned, the owner of the possibility of reverter will be entitled to substantial damages. Under ordinary circumstances the relative value of the fee simple defeasible and the possibility of reverter can best [be] determined by a jury basing its judgment upon the opinion of experts proceeding from the factual foundation that applies in the particular case. Opinions as to the value of the fee simple determinable rendered in such instance will depend in part on the likelihood of continued use of the realty by the owner of the fee simple defeasible for the purpose specified in the instrument of conveyance and in part on the reasonable market value of the real estate, as improved, for the purposes to which it is devoted. If this value is Equal to or greater than the market value of the realty if used for other practicable purposes, the owner of the fee simple determinable is entitled to the full amount of the award less some nominal amount-1 percent of the sum awarded, for example-to be allocated to the owner of the possibility of reverter. If the value so fixed, in cases where abandonment of the use is imminent or where the realty would have a greater market value if devoted to some other practicable purpose, is Less than the totality of the value, the owner of the possibility of reverter shall be entitled to a proportion of the condemnation award expressed by a fraction the denominator of which is the market value of the realty when devoted to its best practicable use and the numerator of which is the difference between such value and the value of the realty applied to the uses to which it is restricted by the terms of the deed for such period of time as such use is reasonably to be anticipated. ...

Id. at 96-97. *See also*, *State v. Platte Valley Pub. Power & Irr. Dist.*, 23 N.W.2d 300 (Neb. 1946) ["... if it should be established that the reverter has a substantial determinative value, then that value should be excluded in determining the amount of the State's recovery."].

Thus, courts are divided with respect to the valuation of a possibility of reverter.

Conclusion

Article III, § 31, of the South Carolina Constitution prohibits the donation of the lands of the State or its agencies. Such provision requires that the State or its agencies receive adequate consideration for such properties. While this provision is inapplicable to political subdivisions, our Supreme Court has recognized that municipal officials act in a fiduciary capacity, must treat municipal property accordingly, and thus the requirement of adequate consideration is applicable with respect to the transfer of municipal property.

The issue you raise is novel, however, as our courts do not appear to have addressed the question of the applicability of this requirement to the retention by a municipality of the interest of a possibility of reverter . We have found no case which applies this rule of law where property has been conveyed to a private entity, such as, in this instance, the Jefferson Davis Academy, and title would revert to the grantor (here, the Town of Blackville) if the property ceases to be used for any purpose other than as specified in the conveyance (here, school purposes).

The general rule is that the holding of a possibility of reverter interest is so contingent and remote that such interest possesses only a nominal value unless the contingency is to occur within a short period of time. However, some courts in other jurisdictions reject this broad rule, choosing instead to examine the issue of valuation of a possibility of reverter on a case-by-case basis with an eye toward whether the property conveyed might possess a market value substantially higher if used for a purpose other than that specified by the grantor. Whether a court would require adequate consideration for the conveyance of such contingent interest is thus uncertain, based upon the existing case law, particularly the case law in South Carolina which concludes that a possibility of reverter is inalienable to a third party.

Nevertheless, we are of the opinion that, notwithstanding the common law rule, South Carolina law requires that the lands of a municipality not be "donated," and that instead adequate consideration be received therefor. We are thus of the opinion that the reversionary interest which the Town of Blackville retains may not simply be "donated" to the Academy. The Town must receive "adequate" consideration in return for the surrender of the right to reverter which it now holds. What is "adequate" will undoubtedly vary from case to case.

The consideration which the Town should receive (substantial or nominal) and whether direct or indirect, cannot be determined in this Opinion because such is a factual matter beyond the scope of an opinion. See, *Op. S.C. Atty. Gen.*, December 12, 1983. Ultimately, it will be necessary for Town Council to make a determination, through factual findings, as to what is "adequate." We would suggest that, in order to avoid legal concerns, the Town employ one or more of the factors enumerated in the decisions discussed herein in determining what is adequate consideration. As noted above, courts usually value the reversionary interest as nominal unless there are special circumstances involved. Such special circumstances may include a determination that the "highest and best use" of the property originally conveyed something other than the use intended, or that the property conveyed possesses a "special interest" to the grantor. See, *State v. Cooper*, 131 A2d 756, 763 (N.J. 1957). This would, of course, be a matter for the Town to determine, employing findings to serve as a basis for such determination. We suggest, again, that the Town err on the side of protection of the forgoing legal requirements of adequate consideration.

Sincerely,

Robert D. Cook
Deputy Attorney General

RDC/an