7506 / February

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

May 7, 2003

The Honorable Danny Verdin
Senator, District No. 9
Post Office 142
Columbia, South Carolina 29202

Dear Senator Verdin:

You seek an opinion from this Office regarding a property transfer in Laurens County. By way of background, you state the following:

> I am seeking an advisory opinion regarding a property transfer in Laurens County. The Laurens County Council has proposed an ordinance to transfer property commonly referred to as "back alleys" to adjoining property owners. The particular property in question is located in the Wattsville Community and was formerly owned by JP Stevens Company. The company sold the property and the houses on them to company employees, and the back alleys were deeded to Laurens County. These alleys have always been separate and have never been part of the houses and lots.
>
> The county abandoned the property about 18 months ago. Presently, the county is proposing an ordinance to transfer ownership of the back alleys to the adjoining property owners. Provisions included in the ordinance provide access and egress to the utility provider and property owners along the alleys. The property cannot be fenced or secured to protect this portion of property. Presently, motor vehicles, four wheelers, and others use the back alleys. With no way to protect access to this portion of property, will the owner be liable for accidents and responsible for upkeep and additional taxes: County officials have stated there will be no increase in taxes due to the transfer. However, they will not include a clause in the ordinance verifying no tax increase.

You have asked the following questions:

1. Is this type of transfer legal?

2. Is this transfer binding if the people as a group or as an individual refuse to accept the forced property transfer?

Robert Yuhas

3. Who will be responsible for accident liability and property upkeep if the transfer is successful and legal?

Law / Analysis

We begin with the basic principle that it is generally recognized that a county ordinance, just like a state statute, is presumed to be valid as enacted unless or until a court declares it to be invalid. Op. S.C. Atty Gen., January 29, 1997, citing Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984). Only the courts, and not this Office, would possess the authority to declare such ordinance invalid. Therefore, any ordinance would have to be followed until a court sets it aside.

By S.C. Code Ann. § 4-9-30, which was enacted pursuant to Article VIII of the South Carolina Constitution (Home Rule amendment), counties are given broad powers to effectuate Home Rule. Among these powers is the authority given by § 4-9-30(2) to sell "or otherwise dispose of real and personal property ...." The authority of a county is, by the express terms of §§ 4-9-25 and 4-9-30, subject only to the limitations of the Constitution and general laws of the State.

With this background in mind, your specific question is whether the County could compel adjacent landowners to accept title to the particular property in question. You note in your letter that the county "abandoned" the property earlier. Of course, abandonment by the county of its property would require substantial proof and the issue of abandonment raises questions of fact which this Office may not resolve by an opinion. See, Op. S.C. Atty. Gen., December 12, 1983. Thus, for purposes of our analysis herein, we assume that the county is the title holder to the property in question.

At the outset, it is important to note that we are aware of no provision in the Constitution, statute or case law which would uphold the right of a county or any other governmental entity to "compel" the acceptance from it of property by a citizen or adjacent landowner. Counties, of course, possess, as do most other governmental entities, the power of eminent domain, which enables those entities to effectuate a "taking" of property for public use upon payment of just compensation. However, we are unaware of the existence of the "reverse" process whereby a county could require a "giving" under compulsion of legal process. Where a county or other governmental entity is a property owner, it acts in a proprietary capacity and may exercise its business powers much in the same manner as a private individual or corporation. Ruggles v. Padgett, 240 S.C. 494, 126 S.E.2d 553 (1962).

Typically, a gift or donation of property requires donative intent to transfer title to the property, as well as delivery by the donor and acceptance by the donee. Worrell v. Lathan, 324 S.C. 368, 478 S.E.2d 287 (Ct. App. 1996). As the Court of Appeals stressed in Worrell, "[a]cceptance by the donee of a gift inter vivos is generally held to be an essential element of a gift." 478 S.E.2d at 288. And our Supreme Court stated in John Deere Plow Co. of St. Louis v. L.D. Jennings, Ind.,

203 S.C. 426, 27 S.E.2d 571 (1943), that "[t]he legal title could not thus be placed back in the mortgagor without his consent. Even a gift requires the acceptance of the donee." (emphasis added).

However, formal acceptance by the grantee is not necessarily required with respect to a conveyance of real property by deed. In Branton v. Martin, 243 S.C. 90, 132 S.E.2d 285 (1963), the South Carolina Supreme Court referenced the common law rule regarding the necessity of acceptance of a conveyance as follows:

> [u]nder the common law a conveyance was effective 'although the transferee did not assent thereto or even know thereof, he always having, however, the right to 'disclaim,' that is, to repudiate the conveyance and thereby revest the title in the grantor. Such is the rule in England at the present day. And in spite of the constant assertion and reassertion by the courts in this country of the necessity of acceptance, it is difficult to avoid the conclusion that in a number of states, the rule in this regard is the same as in England, that no acceptance of the conveyance is necessary, though the grantee may, if he choose, dissent and disclaim.' Tiffany, Real Property, Sec. 1056.

132 S.E.2d at 288.

The Court further noted that "this court has never expressly held a conveyance to be invalid for want of acceptance by a non-dissenting grantee." Id. Further, the Branton Court referenced Larisey v. Larisey, 93 S.C. 450, 77 S.E.129 (1913) and Watson v. Cox, 117 S.C. 24, 108 S.E. 168 (1921) in expression of the following rule:

> [t]hus, Larisey expressly recognized that a presumption of acceptance arises from the beneficial character of a voluntary conveyance, even though the grantee has no knowledge of its execution or delivery. Watson held that delivery to the scrivener was a complete execution of the deeds, even though the grantees were ignorant of their terms. In Watson, and in many other decisions of this court, the principle to be applied in determining whether a deed has been executed was stated without reference to the necessity that the grantee intelligently assent. Under either view, the result is the same ....

Id. at 289.

There are also other applicable legal principles which are relevant to your inquiry.

Art. III § 31 of the State Constitution (1895 as amended) provides in pertinent part 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 land be sold to corporations, or associations, for a less price than that for which it can be sold to individuals.

Our Supreme Court has interpreted this constitutional provision in Haesloop v. City Council of Charleston, 123 S.C. 272, 278, 115 S.E. 596 (1922), noting that "manifestly, we think, the reference in this constitutional provision is to public lands belonging to and controlled by the State in its capacity as sovereign proprietor." And in McKinney v. City of Greenville, 262 S.C. 227, 242-3, 203 S.E.2d 680 (1974), the Court recognized that the Constitutional prohibition is not violated if the indirect benefits are deemed to be sufficient. The Court stated that

> ... a public body may properly consider indirect benefits resulting to the public in determining what is a fair and reasonable return for disposition of its properties without running afoul of the constitutional prohibition against donations. Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967); Bobo v. City of Spartanburg, 230 S.C. 396, 96 S.E.2d 67 (1956); State v. Broad River Power Company, 177 S.C. 240, 181 S.E. 41 (1935); Babb v. Green, 222 S.C. 534, 73 S.E.2d 699 (1952); O'Dowd v. Waters, 130 S.C. 232, 125 S.E. 644 (1924); Antonakas v. Anderson Chamber of Commerce, 130 S.C. 215, 126 S.E. 35 (1924); Haesloop v. City Council of Charleston, 123 S.C. 272, 115 S.E. 596 (1923); Chapman v. Greenville Chamber of Commerce, 127 S.C. 173, 120 S.E. 584 (1923). In State v. Board River Power Company, supra, the Court stated ...
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> > "These cases establish the rule that the indirect benefits expected to result from the improvement of the land granted, by way of the promotion of the public convenience, increase in the value of adjacent property, and taxes to be paid on the improvements themselves are sufficient to keep such

> a grant from amounting to a donation within the constitutional inhibition."

Moreover, in Op.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.

It is also recognized that "[t]he state has a duty to protect and maintain public land held in trust, not surrender the rights thereto and regulate its use." 73B C.J.S., Public Lands, § 178. The State "is authorized to permit private use of public trust lands [only] when the private use will improve the public trust or the private use will not substantially impair the remaining trust lands and waters." Id.

Further, as to the management and use by the State of public property generally, it is said that

> [t]he State does not have an unlimited right to property but may use it only for a public purpose ... .

> The extent and manner of use of the state property may be determined by a statute in the exercise of legislative power. Where a statute requires certain public lands to be used only for a specific public purpose, such land cannot be diverted to another inconsistent public use without explicit authorization.
>
> In the absence of statutory restrictions, the state generally may use land deeded to it in such manner as reasonable public necessity may require.

Id. at § 146.

In Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986), our Supreme Court stated that "[p]ublic purpose is not easily defined." The Court further commented that "[i]t is oftentimes stated that a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof." Nichols approved a four-part test first enunciated in Byrd v. County of Florence, 281 S.C. 402, 315 S.E.2d 804 (1984) for determining a public purpose:

> [t]he Court should first determine the ultimate goal or benefit to the public intended by the project. Second, the Court should analyze whether public or private parties will be the primary beneficiaries. Third, the speculative nature of the project must be considered.

In an Opinion dated July 6, 1984, we addressed the question of "whether the Town of Hampton may close two roads which have never been opened for use by the public and, if so, whether the property may be given to a nearby church and adjacent property owners." There we noted that a "municipal corporation holds and controls its streets in trust for the use and benefit of the general public ...". Bethel Methodist Episcopal Church v. City of Greenville, 211 S.C. 442, 45 S.E.2d 841 (1947). Additionally, we stated that

> ... as all property held by municipal corporations is held in a fiduciary capacity, a street can be closed only to serve a public purpose and not for the sole benefit of an abutting property owner. Haesloop v. City Council of Charleston, 123 S.C. 272, 115 S.E. 596 (1923); City of Rock Hill v. Cothran, 209 S.C. 357,

> 40 S.E.2d 239 (1946). However, the court in Cothran went on to say that the mere fact that the closure of the street was at the instigation of an abutting owner does not, of itself, invalidate the closure or constitute an abuse of discretion by the city council.

We further concluded that a number of factors should be considered "in determining whether the action is in the best interest of the public." Among these were:

1. Enlarging the public resources;
2. Increasing the industrial energies of the city;
3. Promoting the productive power of a greater number of the city's inhabitants; and
4. Eliminating hazards to pedestrian and vehicular traffic;
5. The use made of the street being closed;
6. Alternate routes of travel;
7. The location of markets, schools and churches;
8. The character and physical features of the land, etc.

See also, Op. S.C. Atty. Gen., February 10, 1997. Based upon the foregoing analysis, County Council must find that there is a public benefit in transferring this property, even if the adjacent landowners accept the property. The foregoing factors could be utilized by County Council in determining whether there is sufficient public purpose present to comply with the South Carolina Constitution.

Conclusion

Based upon the foregoing authorities, the proposed ordinance which you reference could encounter a number of serious legal difficulties. As stated at the outset, we know of no mechanism for a proceeding to have a "condemnation in reverse" thereby compelling landowners to accept property from the government. Specifically, if the proposed action by the County Council is viewed as a gift of the property to the adjacent landowners, there must be acceptance of such donation in order to be valid. You have indicated that the landowners do not wish to be given the property. Second, assuming the proposed action is viewed as an ordinary land transaction by deed rather than a gift, and thus acceptance by the adjacent landowners is not required in order for the grant to be made, still, the landowners would possess a reasonable opportunity to disclaim the grant. To our

knowledge, a person cannot ultimately be compelled to accept property he or she does not wish to have. While the law might presume the grant by the county valid, such transfer can still be renounced by the grantees.

Third, pursuant to Article III, § 31 of the Constitution, a county may not simply "give away" its property. There must be, at the very least, sufficient public benefit in return. Although the transaction does not necessarily have to be a "dollar for dollar" exchange, the benefit to the public must be tangible. Our opinions of July 6, 1984 and February 10, 1997, referenced above, set forth a number of factors which may be considered by a governmental entity in determining whether there is sufficient public benefit present in the donation of public property so that the Constitution is not violated. Your letter does not indicate what "public purpose," if any, the County could find in transferring this particular property to the adjacent landowners. If no public purpose exists, a taxpayer might well be able to bring an action contending that the Council's Ordinance constitutes a "donation" in contravention of Article III, § 31.

We caution that we are not aware of all the facts which County Council might be considering in the proposed action. As stated above, this Office cannot make factual determinations in an opinion. Moreover, as also referenced, any Ordinance adopted would be presumed valid and would remain in effect unless set aside by a court. Nevertheless, we are aware of no authority which could compel adjacent landowners to accept property from the County which they did not wish to own. Any ordinance attempting to do so would also have to comply with Article III, § 31 of the State Constitution by demonstrating a sufficient public purpose or public benefit in the proposed transaction.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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