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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

September 25, 1998

George L. Schroeder, Director
Legislative Audit Council
400 Gervais Street
Columbia, South Carolina 29201

Re: **Informal Opinion**

Dear Mr. Schroeder:

You note that the Legislative Audit Council is currently conducting a review of the State's management of real property. By way of background, you indicate the following:

> [a]s part of that review, we are examining the issue of titling state-owned property. When state agencies purchase land, a title showing ownership must be issued. We have identified two ways this land is titled. The first is to title land in the name of the State of South Carolina or some variation. The second way is to title land in the name of the purchasing agency. It appears that much of state-owned property is titled to the individual purchasing agencies. During the course of fieldwork in this area, legal questions have arisen regarding the following issues:
>
> 1. Does the Budget and Control Board have the statutory authority to require state agencies, universities or colleges to title real property acquisitions in the name of the State of South Carolina, or, is there any legal prohibition to such a requirement?

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Request Letter

2. Can state-owned property currently titled in the name of an agency, university, or college be retroactively titled in the name of the State either by legislative action or by authority of the Budget and Control Board?

Law / Analysis

A number of statutory provisions relate to the authority of the Budget and Control Board with respect to State property. S.C. Code Ann. Sec. 1-11-65, for example, provides that

> (A) All transactions involving real property, made for or by any governmental bodies, excluding political subdivisions of the State, must be approved by and recorded with the State Budget and Control Board. Upon approval of the transaction by the Budget and Control Board, there must be recorded simultaneously with the deed, a certificate of acceptance, which acknowledges the board's approval of the transaction. The county recording authority cannot accept for recording any deed not accompanied by a certificate of acceptance. The board may exempt a governmental body from the provisions of this subsection.
>
> (B) All state agencies, departments, and institutions authorized by law to accept gifts of tangible personal property shall have executed by its governing body an acknowledgment of acceptance prior to transfer of the tangible personal property to the agency, department, or institution.

Section 1-11-70 makes "[a]ll vacant lands and lands purchased by the former land commissioners of the State ... subject to the directions of the State Budget and Control Board." The Board is authorized, pursuant to § 1-11-80 to "grant easements and rights of way" for public utilities on vacant State lands. See also, § 1-11-90 [Board authorized to grant rights of way over State marshlands for roads or power or pipe lines]; 1-11-100 [Board may authorize by resolution the execution of instruments conveying rights of way or easements over marshlands or vacant lands].

Section 1-11-110 further provides that

(1) The State Budget and Control Board is authorized to acquire real property, including any estate or interest therein, for, and in the name of, the State of South Carolina by gift, purchase, condemnation or otherwise.

(2) The State Budget and Control Board shall make use of the provisions of the Eminent Domain Procedure Act (Chapter 2 of Title 28) if it is necessary to acquire real property by condemnation. The actions must be maintained by and in the name of the Board ....

Prior opinions of this Office stress the need for Budget and Control Board approval of agency real property transactions. In an opinion of January 11, 1979, we advised that where ETV was the title holder of real property, any lease of that property should be with the "the prior approval ... from the State Budget and Control Board." Further, in an opinion dated January 11, 1982, we opined that a state agency which leases publicly-owned real property to a private individual, partnership or corporation for improvements thereupon with a return to the agency at the end of the lease term "should be submitted to the Board for approval."

In Op. Atty. Gen., Op. No. 84-8 (January 24, 1984), we considered the impact of the Consolidated Procurement Code, § 11-35-10 et seq. upon real property transactions involving the State. We found that the Procurement Code governed the situation where Clemson leased its property to a private corporation which, in turn, would contract with a developer to construct the Thurmond Institute, as well as a continuing education center, performing arts auditorium, golf course, marina, hotel suites and townhouses. In our opinion, when Clemson was expending its property and resources in order to allow the developer to make a profit, the Procurement Code was applicable. Following the same reasoning we concluded that the State Procurement Code would govern a lease agreement "between the state agency and a private firm by which the state agency would obtain an energy utilization management system, and further where the lease would provide that the state agency would pay the firm no more than the amount of money which the state agency would save by using the system." Op. Atty. Gen., August 4, 1987.

Moreover, § 1-11-55 (2) [formerly 11-35-1590], provides as follows:

(1) ... the Budget and Control Board is hereby designated as the single central broker for the leasing of real property for governmental bodies. No governmental body shall enter any lease except in accordance with the provisions of this Section.

It would appear that this Section would also require any lease to be procured through the Budget and Control Board's procedures for the lease of state property. It is our understanding that the Budget and Control Board also interprets this provision to be applicable where, as here, a state agency leases its property to another. See, Letter of General Counsel, October 16, 1995 [interpreting Section 11-35-1590, stating that "leasing for governmental bodies is leasing on behalf of governmental bodies, either to or from."] The interpretation of the agency charged with the administration of statutory provision will be accorded the most respectful consideration and will not be overruled absent compelling reasons. Goodman v. City of Cola., 458 S.E.2d 531 (S.C. 1995). At least one circuit court has concurred in the Board's interpretation, concluding that "[i]t seems evident that it is the intent of the legislature that §11-35-1590 apply to any lease involving real property entered into by a governmental body. Braswell Services Group v. S.C. State Budget and Control Board, No. 95-CP-10-4095 (Order of the Honorable Victor Rawl, 12/18/95). See also, R-19-445.2120 (B) [requires approval of leases of State-owned property by the Division of General Services of the Budget and Control Board.]

While the foregoing statutory provisions relate to state property generally, and necessitate the approval of the Budget and Control Board in a variety of situations where the State acquires real property, at the same time, there are numerous provisions of the Code which separately authorize individual state agencies to acquire property in their own names. At least a partial listing of these provisions includes the following statutes: § 31-13-190 (14) [South Carolina State Housing, Finance and Development Authority given power to "[a]quire title to and sell real property where necessary to accomplish the purposes and intent of this Chapter ...."]; § 49-27-60 [Lake Wylie Marine Commission, power to obtain real property]; § 57-5-320 [Dept. of Highways and Public Transportation, power to "acquire an easement or fee simple title to real property by gift, purchase, condemnation or otherwise as may be necessary, in the judgment of the department, for the construction, maintenance, improvement or safe operation in this State ...."]; § 59-117-40 (4) [University of South Carolina given authority "to hold, to purchase and to lease real estates and personal property for corporate purposes ...."] § 59-125-70 [Winthrop Trustees may "... own, purchase, sell and convey property, both real, personal and mixed ...."]; § 54-3-140 [S.C. Ports Authority "[m]ay rent, lease, buy, own, acquire, mortgage and dispose of such property, real or personal, as the Authority may deem proper to carry out the purposes and provisions of this chapter ...."]; § 55-11-10 (6) [Clemson University trustees may "[a]cquire property, real and personal, or any interest in it, by gift, purchase, condemnation, devise lease or otherwise, as may be required in the development and operation of a public airport"]; § 59-130-30 [College of Charleston board of trustees given authority "to hold, to purchase, and to lease real estate and personal property for corporate purposes"]; § 59-135-30 (4) [Lander, same]; § 59-133-30 (4) [Francis Marion, same]; §

59-136-130 (4) [Coastal Carolina University, same]; § 60-15-70 [S.C. Arts Commission, power to "purchase and own property"].

Thus, the first question for consideration is whether the Budget and Control Board possesses the authority to direct an agency to take title in the name of the State rather than its own name, and whether there is any legal prohibition upon the Board from making such a requirement?

A number of principles of statutory construction are relevant to this inquiry. First and foremost, the elementary and cardinal rule of statutory construction is to ascertain and effectuate the actual intent of the General Assembly. Horn v. Davis Elec. Constructors, Inc., 415 S.E.2d 634 (1992). A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers. Caughman v. Cola. Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). Words used must be given their plain and ordinary meaning. Smith v. Eagle Const. Co., 282 S.C. 140, 318 S.E.2d 8 (1984).

Moreover, the courts will presume that the Legislature intended by its action to accomplish something and not to do a futile thing. State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964). Separate statutes relating to the same subject must be construed together and full effect given to each. Cola. Gaslight Co. v. Mobley, 139 S.C. 107, 137 S.E. 211 (1927). It is proper to consider legislation dealing with the same subject in construing a statute. Fidelity and Cas. Ins. Co. of N.Y. v. Nationwide Ins. Co., 278 S.C. 332, 295 S.E.2d 783 (1982). The express mention of one specific procedure implies the omission of all others. See, Pa. Nat. Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984).

Applying these principles of statutory construction, it is my opinion that the Budget and Control Board probably does not possess the authority to direct every agency of state government to take title in the name of the State, particularly where that agency possesses the express statutory power to take title in the agency's name. It is fundamental black letter law that the authority of a state agency "is limited to that granted by the legislature." Nucor Steel v. S.C. Public Serv. Comm., 310 S.C. 539, 426 S.E.2d 319 (1992). An administrative agency "has only such powers as have been conferred by law and must act within the authority granted for that purpose." Bazzle v. Huff, 462 S.E.2d 273 (S.C. 1995). An administrative agency cannot, of course, change or alter the statute conferring authority upon it. Fisher v. J.H. Sheridan Co., 182 S.C. 316, 189 S.E. 356 (1937).

Generally speaking, the statutes, referenced above, bestow upon the Budget and Control Board the authority to "approve" or to give "approval" to an agency's acquisition

of real property. In its plain and ordinary meaning, the word "approve" simply means "to confirm"; "to ratify"; "to sanction"; "to pronounce good"; "to think or judge well of." In other words, the authority to "approve" typically is thought of as ratifying or approving another's decision rather than directing or making the decision for oneself. Because an administrative agency such as the Budget and Control Board cannot replace the General Assembly as a lawmaking authority, nor supersede statutes which specifically authorize another agency to take title in its own name, it is very doubtful, in my opinion, that the Board could direct another state agency to place the title in the name of the State in those situations, at least. Generally speaking, when title to real property has been directed to be placed in the name of the State, such has been accomplished by legislative enactment. See, e.g. § 44-31-510 [in transferring State Park Health Center to DHEC, "(t)he title to all real property is hereby vested in the State of South Carolina, to be administered by the State Budget and Control Board."]; § 59-101-20 ["(t)he State is authorized to acquire all property of the College of Charleston, real personal, or mixed, and to operate the college as a state-supported institution of higher learning]; § 59-101-30 [State is authorized to acquire "all that property known as Lander College, real, personal, and mixed from the Lander Foundation ...."].

On the other hand, this Office has concluded on several occasions that where a state agency possesses no statutory authority to hold title to real property in its own name, such may be taken by the Budget and Control Board in the name of the State of South Carolina pursuant to existing statutes. In an Opinion, dated February 11, 1964, we advised that the Advisory Committee for Technical Training" does not have the power to hold title to real property ...." However, we stated that

> ... this situation was taken care of long ago by empowering our Budget and Control Board to acquire surplus property from the Federal Government for the use of State institutions, boards and agencies as will be seen by reference to Section 1-354 of the Code [now § 1-11-40] ....
>
> In our opinion, the Budget and Control Board has full power to acquire from your department [HEW] in the name of the State of South Carolina, for the use of the Advisory Committee for Technical Training, the particular piece of property in which you are interested. We feel that any deed made by your department should be to the State of South Carolina for the use and purposes of the Advisory Committee for Technical Training, its successors and assigns.

And in another Opinion of June 16, 1974, we addressed the question of whether the South Carolina Commission for the Blind" is authorized to purchase real property ...." In response, we concluded:

> The Commission lacks the statutory authority, both in its own act (Act No. 958 of 1966) and in the statutes relating to State agencies in general, to purchase real property in its own name. This lack of legal capacity would extend to an option to purchase so as to bind neither party. Few state agencies do have this power as it is vested in specific statutory language, or in a general grant of power to act as a corporate body.
>
> Therefore, any property that would be purchased for the Commission would be in the name of the State, and this must be accomplished through the Budget and Control Board of the Division of General Services.

Thus, it appears there may be a legal distinction between the authority of the Budget and Control Board in this regard, where an agency possesses no power to hold title to real property in its own name, and where the agency's enabling authority specifies that it may hold title in that agency's name. A court could well delineate between the Budget and Control Board's authority to override specific agency enabling statutes and the power of the Board, pursuant to its general authority in the area of real property to step in where an agency does not possess such express power. The General Assembly certainly has not indicated an overriding State policy in this area, and appears to have simply dealt with the issue on a case-by-case basis. There is, in other words, no specific statute which would enable the Board to direct each and every agency of State government to take title of real property in the name of the State. It is well recognized that "[t]he power of the State with respect to its property rights is vested in the legislature and the legislature alone can exercise the power necessary to the enjoyment and protection of those rights, by the enactment of statutes for that purpose. Thus, any acquisition of property must be of a manner and kind permitted by the authorizing statutes, and, where the State has not given its consent to the acquisition of property in a particular way, it is not entitled thus to acquire it." 81A C.J.S. States, § 145, pp. 590-501. Accordingly, in order to accomplish this with certainty, legislative clarification would be necessary.

Your second question is whether the General Assembly could enact legislation which retroactively accomplishes the goal of placing all such state agency titles in the name of the State of South Carolina rather than in separate state agencies.

The Constitution of the State of South Carolina is viewed as a limitation upon legislative power, rather than a grant of such power. Smith v. Robertson, 210 S.C. 99, 41 S.E.2d 631 (1947). Of course, in considering the constitutionality of legislation which is enacted by the General Assembly, we must presume that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act of the General Assembly unconstitutional.

The question of whether retroactive statutes or statutes which operate retroactively violate the State Constitution has been addressed in previous opinions of this Office. In an Opinion dated July 13, 1989, we stated the following:

> [s]tatutes generally must be construed prospectively, rather than retroactively, absent specific provision or clear legislative intent to the contrary unless the statute is remedial or procedural in nature. Bartley v. Bartley Logging Co., 293 S.C. 88, 359 S.E.2d 55 (1987). Accord Sutherland Stat. Constr. § 41.04 (4th ed. 1986) § 41.04 (4th ed. 1986) ("Retrospective operation is not favored by the courts, however, and a law will not be construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application. [Footnote omitted.]"). According to Bartley, supra, a "remedial" statute that may be retroactively applied, even without specific provision or clear legislative intent, refers to procedure, rather than the right to collect some particular amount. A statute is "remedial" and may be retroactively applied when it creates new remedies for existing rights or enlarges the rights of persons under disability, unless it violates a contractual obligation, creates a new right, or divests a vested right. Hooks v. Southern Bell Telephone & Telegraph Co., 291 S.C. 41, 351 S.E.2d 900 (Ct.App.1986).
>
> In dealing with the problem of retroactivity, it is extremely difficult to establish definite criteria upon which court decisions can be foretold. A statute must not act unreasonably upon the rights of those to whom it applies.

> What is reasonable and what is unreasonable is difficult to state in advance of actual decisions. "... the method to be pursued is not the unerring pursuit of a fixed legal principle to an inevitable conclusion. Rather it is the method of intelligently balancing and discriminating between reasons for and against." It is misleading to use the terms "retrospective" and "retroactive," as has sometimes been done, to mean that the act is unconstitutional. The question of validity rests on further subtle judgments concerning the fairness of applying the new statute. Even where a constitution explicitly and unqualifiedly prohibits the enactment of retrospective statutes, the courts usually strike down only those statutes whose retroactivity results in measurable unfairness. Statutes will not be applied retroactively even where there is no constitutional impediment against it unless it appears by fair implication from the language used that it was the intention of the legislature to make it applicable to both past and future transactions. Particular cases are decided on their specific facts, in light of established principles. Aside from the suspicion with which all retroactive operation is regarded, the standards of judgment for determining the fairness of retroactive laws are not significantly different from those which apply under constitutional limitations which affect all legislation. [Footnotes omitted.]
>
> Sutherland Stat. Constr. § 41.05 (4th ed. 1986).

The South Carolina case, Dunham v. Davis, 229 S.C. 29, 91 S.E.2d 716 (1956) is also instructive. There, the Court recognized the general rule applicable in this area:

> [w]e recognize the oft-cited general rule, which appellant pleads here, that the legislature, by a curative or validating statute which is necessarily retrospective in character and retroactive in effect, can validate any act which it might originally have authorized, Green v. City of Rock Hill, 149 S.C. 234, 147 S.E. 346, but this rule is subject to the constitutional limitation before mentioned.
>
> "Where no vested rights are impaired, a defective tax deed may be validated by a subsequent statute, but an act

> validating a tax title of the state where it was void before impairs vested private rights and is void". 16 C.J.S., Constitutional Law, § 226(f), p. 652.
>
> "The power of the legislature when not otherwise restricted by special constitutional limitation to enact curative legislation remedying tax titles invalidated or subject to be invalidated by reason of defects and irregularities in tax sale proceedings prior to [or] subsequent to the tax sale depends in general upon whether the defects sought to be cured are jurisdictional defects, or merely irregularities in failing to comply with directory matters. ... It may not, however, by way merely of curative legislation, cut off all rights to attack a tax deed or tax title for failure to comply with requirements of a jurisdictional nature constituting essential prerequisites to the validity of the title or deed". 51 Am.Jur., Taxation, p. 935, Section 1075.

One case, of which we are aware, involves an attack upon the constitutionality of a statute which sought to transfer all property owned by state entities to be the state itself. In Trustees of Worcester State Hospital v. Governor, 395 Mass. 377, 480 N.E.2d 291 (1985), the Worcester State Hospital challenged a Massachusetts statute which provided as follows

> [t]itle to real property held in the name of a state agency, or the board of trustees of a facility of a state agency, shall be transferred to the name of the commonwealth; and shall be subject to the jurisdiction of the division of capital planning and operations as provided by for by Sections 11-13 of this act. All state agencies shall cooperate with the deputy commission of capital planning and operation in effecting such transfer of title.

At the time that statute was enacted, the trustees of Worcester State Hospital held title to the land in dispute. Pursuant to the statutory provision, the Hospital's land was transferred to the Worcester Business Development Corporation.

The State Hospital alleged that the statute was invalid, as was the transfer of property, infringing upon the Hospital's and patient's federal constitutional rights. The

constitutional argument centered upon the claim that the transfer of property from the Hospital was a "taking" of property without due process of law.

The Court refused to hear the case on its merits. Concluding that the "plaintiffs as a governmental corporate entity, lack standing to seek declaratory or injunctive relief or relief by way of mandamus, based on ... constitutional challenges ...," the Court affirmed the dismissal of the action by the lower court.

I have not located any case which concludes that the type of statute which you reference in your letter -- one which would retroactively place title to all property owned by state agencies in the name of the State -- would be unconstitutional. Of course, there would be a strong presumption that such a statute is valid and would be enforceable, unless and until a court concluded otherwise. In all likelihood, a court would not find that such an enactment, if carefully drafted, was invalid. As referenced above, it appears that the Legislature has, on previous occasions, enacted statutes which transferred title to the State from state agencies or other entities.

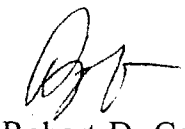
I must caution, however, that I could foresee circumstances where such a statute might present difficulties in individual cases. There could be legal problems, for example, where a particular agency may have issued bonds or incurred contractual obligations based upon its maintaining record title to a particular piece of real property. There indeed may, in other words, be "vested rights" involved, where private individuals have relied upon a particular agency to continue to maintain legal title to a particular tract of land. The Legislature would, in short, need to proceed with considerable caution because of potential legal problems and the practical difficulties which might ensue with respect to altering record title retroactively. Of course, it is the purpose of a record title to provide "a place and a method by which an intending purchaser or encumbrancer can safely determine just what kind of title he is in fact obtaining." 66 Am.Jur.2d, Records and Recording Laws, § 48. See, Id., § 50 ["... a retroactive recording act is unconstitutional if it is made to take effect instanter, or if it fails to allow a reasonable time after its enactment within which to record preexisting deeds or mortgages."]

In conclusion, while I believe that a statute which transfers previous state agency titles to land to the name of the State would most likely be upheld by a court, such a statute must be carefully drafted to insure that vested rights are protected. The Legislature would need to be cautious in insuring that existing reliances upon the fact that a particular agency possesses record title to a tract of land pursuant to its present statutory authority is not infringed by a statute which retroactively operates upon such title.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

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