The State of South Carolina

Office of the Attorney General

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The Honorable Eugene D. Foxworth, Jr.
Member, House of Representatives
102 Church Street
Charleston, South Carolina 29401

Dear Representative Foxworth:

In a letter to this Office you referenced that on July 22, 1987 the Trustee of Dewees Island, South Carolina and the South Carolina Wildlife and Marine Resources Department (hereafter "the Department") executed a conservation easement pertaining to the Island which established certain uses and restrictions on the Island. As stated in the document, the intent of the easement was to supercede a previous conservation easement pertaining to Dewees Island which had been granted to the State of South Carolina through the Department on February 7, 1975. You have raised several questions relative to this matter.

In your first question you asked whether the Department acted properly in rescinding the 1975 easement without following procedures established by the Division of General Services relative to the disposal of State property and without obtaining permission of the State Budget and Control Board. In your letter you asserted that the easement constituted an interest in real property of this State.

The term "conservation easement" or "conservation restriction" is defined by Section 27-9-10 of the Code. Section 27-9-20 of the Code states in part that such conservation easements

> ... are interests in land and may be acquired by any governmental body ... which has the power to acquire interests in land, in the same manner as it may acquire other

> interests in land ... Such a restriction or easement may be released, in whole or in part, by the holder for such consideration, if any, as the holder may determine, in the same manner as the holder may dispose of land or other interests in land, subject to such conditions as may have been imposed at the time of creation of the restriction.... 1/ (emphasis added.)

Moreover, Section 27-9-30 of the Code states further that

> ... a conservation restriction or easement as described in § 27-9-10 shall be devisable, assignable and otherwise freely alienable, whether held by public or private interests.

The reference in Section 27-9-20 to conservation easements being "interests in land" is consistent with the language of the South Carolina Supreme Court in Morris v. Townsend 253 S.C. 628 at 635, 172 S.E.2d 819 (1970) where the Court defined an easement as

> ... a right which one person has to use the land of another for a specific purpose not inconsistent with a general property in the owner, or as a servitude imposed as a burden on land ... An easement gives no title to the land on which the servitude is imposed. It is, however, property or an interest in the land. (emphasis added.)

As to your particular question regarding the State Budget and Control Board, Section 1-11-65 of the Code states:

> (a)ll 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 unless a governmental body is expressly exempted by the Budget and Control Board.

1/ Pursuant to Section 50-3-100 of the Code, the Department is authorized to "... acquire, own, sell, lease, exchange, transfer or rent real property...." for various purposes, including the protection, management or propagation of fish and game.

To our knowledge, no other statutes specifically address possible review by the Budget and Control Board or the Division of General Services of the situation you have referenced. The Consolidated Procurement Code, Sections 11-35-10 et seq. of the Code, controls the acquisition of goods and services by the State and its agencies and therefore would be inapplicable in the situation addressed here.

Section 1-11-65, a provision enacted in 1985, according to our research, has not been previously interpreted by the courts in this State or by this Office. For such statute to be applicable to the conservation easement pertaining to Dewees Island, the action by the Department in agreeing to supercede the original 1975 conservation easement in executing the easement in July of this year would have to be interpreted as a "transaction involving real property".

Admittedly, some courts have determined that in certain circumstances an easement is distinguishable from real property itself. See: Henry Bickel Co. v. Texas Gas Transmission Corp., 336 S.W.2d 345 (Ky. 1960); Platt v. Pietras, 382 So.2d 414 (Fla. 1980). Yates v. Metropolitan Government of Nashville and Davidson County, 451 S.W.2d 437 (Tenn., 1969). Moreover, as stated by the South Carolina Supreme Court in Douglas v. Medical Investors, Inc., 256 S.C. 440 at 445, 182 S.E.2d 720 (1971) an easement is "... not an estate in lands in the usual sense."

However, other authorities have concluded that an easement would come within the definition of real property. In an opinion of the California Attorney General dated March 1, 1979 the question was presented as to whether the transfer of an easement constitutes the transfer of "lands, tenements, or other realty" as set forth in a tax provision. The opinion concluded that as to an easement,

> ... although it does not create 'title' in the servient tenement or constitute an 'estate', it is an interest in land and is treated similarly to other interests in real property.

Therefore, the opinion concluded that an easement being an interest in real property came within the noted tax provision which referenced "lands, tenements or other realty." See also: Opinion of the Iowa Attorney General dated August 15, 1977 (an easement constitutes "lands or other realty" as used in an Iowa provision imposing a tax on certain real estate transfers);

Opinion of the Wyoming Attorney General dated June 14, 1979 (an easement for highway purposes constitutes "real estate" as used in a statute removing tax liability on real estate taken for a highway right-of-way).

Several courts have also concluded that an easement should be treated similarly to real property. In Ladd v. Teichman, 103 N.W.2d 338 (Mich. 1960) the Michigan Supreme Court determined that an easement constitutes a property right in real estate. The Washington Court of Appeals in Carpenter v. Franklin County Assessor, 638 P.2d 619 (Wash. 1982) held that a particular easement was within the definition of "real property" for taxation purposes. See also: City of Corpus Christi v. State, 155 S.W.2d 824 (Tex. 1941); Jacobsen v. Incorporated Village of Russell Gardens, 201 N.Y.S.2d 183 (1960); Kansas City Southern Railroad Co. v. City of DeRidder, 206 So.2d 562 (La. 1968); Farmers Drainage District v. Sinclair Refining Co., 255 S.W.2d 745 (Mo. 1953); Fajen v. Powlus, 533 P.2d 746 (Idaho 1975).

It is recognized that the primary consideration in construing a statute is the intention of the legislature. Belk v. Nationwide Mutual Insurance Co., 271 S.C. 24, 244 S.E.2d 744 (1978). However, as stated by the South Carolina Supreme Court in Citizens and Southern Systems Inc. v. South Carolina Tax Commission, 280 S.C. 138, 311 S.E.2d 717 (1984), where the terms of a statute may be read literally, courts must apply such terms according to their literal meaning. See also: Garris v. Cincinnati Insurance Co., 280 S.C. 149, 311 S.E.2d 723 (1984). Based on the language of the statute referenced above, in the opinion of this Office, the literal and thus the better reading of Section 1-11-65 supports the conclusion that its provisions are applicable to the execution of the conservation easement pertaining to Dewees Island. As a result, the approval of the State Budget and Control Board of such transaction should be sought. However we would advise that because an alternative reading of Section 1-11-65 is possible, legislative clarification is advisable. Also, legislative clarification is suggested inasmuch as this Office has been advised that all transactions similar to that addressed here are not currently being reviewed by the Board. Due to the administrative difficulties which might be placed upon the Budget and Control Board, legislative clarification may be necessary. Of course, any decision as to clarification is a matter for the General Assembly to resolve.

Your second and third questions raise issues associated with this State's Freedom of Information Act, Section 30-4-10 et seq. of the Code. In your second question you asked whether

actions taken by the Department in rescinding the first easement and executing the second one constituted a violation of this State's Freedom of Information Act. You indicated that allegations have been made that the issue concerning the easements was not placed on the agenda of the meeting at which action concerning the easements was taken and that a formal vote of the Commission concerning the easements was never taken in public session.

Section 30-4-70(a)(6) of the Code states in part that "(n)o formal action may be taken in executive session ... No vote may be taken in executive session." Section 30-4-80(a) provides for written, public notice of regular or special meetings of public bodies and further states that agendas for such meetings shall also be posted.

While the provisions referenced above are quite specific in their requirements, resolution of the questions raised by you concerning the action by the Department in association with the conservation easement would involve fact-finding and an adjudication of facts. This Office has repeatedly stated that issues involving factual determinations cannot be addressed by an opinion of this Office. See: Opinions of Atty. Gen. dated May 12, 1987, November 15, 1985, and December 12, 1983. For a similar reason, this Office cannot in an opinion respond to your further question concerning the status of the files of the Department.

You have also inquired whether the proposed transaction violates Article III, Section 31 of the South Carolina Constitution. Article III, Section 31 provides in pertinent part

> (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.

The foregoing provision applies only to "lands" held by the State in its capacity as sovereign proprietor. McKinney v. City of Greenville, 262 S.C. 227, 203 S.E.2d 680 (1974). It has been recognized that the term "land" does not include incorporeal hereditaments or easements. See: 24 Words and Phrases at 285-287. Assuming, arguendo, that our courts would construe Article III, Section 31 to include easements (see, 36 Words and Phrases at pp. 364-365 ["land" includes real property]), we cannot conclude that Article III, Section 31 has been violated in this particular instance. Our Supreme Court has

stated that for purposes of Article III, Section 31

> ... 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.

McKinney v. City of Greenville, 262 S.C. supra at 242-243. See also: Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967). Our Court has also determined that it is proper for a public agency to consider whether or not a public purpose is served by use of the State's property. We understand that there is a dispute of fact as to whether or not there is a public benefit or public purpose served by modification of the first easement to the form taken by the second easement. Compare news release of South Carolina Wildlife and Marine Resources Department dated August 5, 1987 with editorial, Charleston News and Courier August 17, 1987. Of course, the question of whether or not there is a public purpose or public benefit depends upon the factual circumstances involved in each case considered. Moreover, as indicated by the Supreme Court each case must be "... determined on its own peculiar circumstances." Anderson v. Baehr, 265 S.C. 153, 162, 217 S.E.2d 43 (1975). As stated above, an Attorney General's opinion is unable to determine factual issues. Thus, while we may assume that Article III, Section 31 of the Constitution prohibits the State from donating its easements, we cannot conclude whether such has been done in this instance in violation of such constitutional provision inasmuch as such a determination is primarily a factual question.

If there is anything further, please advise.

Sincerely,

Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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