

1977 S.C. Op. Atty. Gen. 66 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 7768, 1977 WL 24410

Office of the Attorney General

State of South Carolina

Opinion No. 77-68

March 1, 1977

\*1 TO: J. W. Lawrence

Assistant Director

South Carolina Department of Parks, Recreation and Tourism

QUESTIONS PRESENTED:

1) Can the South Carolina Department of Parks, Recreation and Tourism prohibit the transfer of leases for Hunting Island State Park lots?

2) Is the Parks, Recreation and Tourism Commission required to lease Huntington Beach State Park lots to private individuals?

AUTHORITIES INVOLVED:

Section 51–242, Code of Laws of South Carolina, 1962;

Section 51–76, Code of Laws of South Carolina, 1962, as amended;

DISCUSSION:

In 1940, the General Assembly enacted legislation enabling the State Commission of Forestry, Parks, Recreation and Tourism's (PRT) predecessor agency, to create Hunting Island State Park. The act provides, in pertinent part:

The Commission may set aside such portion of the island as it shall deem proper as a residential area. It may divide this area into building lots and may lease the lots for such terms of years, for such annual rentals and upon such conditions and covenants as the Commission may determine. . . . The Commission may also require, in its discretion, further and additional coverants in all leases to insure proper use of the leased premises for purposes consistent with the proper development and maintenance of the residential area . . . Section 51–242, Code of Laws of South Carolina, 1962.

The provisions of Section 51–242 are made applicable to PRT pursuant to Section 51–76, Code of laws of South Carolina, 1962, as amended. During the development of Hunting Island the Commission saw fit to lease several lots. The question has now arisen as to whether the Commission can prevent the assignment or transfer of these leases from one party to another.

The standard Hunting Island lease, a copy of which is attached hereto, provides in paragraph seven:

That the Lessee will not assign this lease or sub-let said premises or any part thereof without the previous consent in writing of the Lessor, . . .

Furthermore, paragraph eight of the lease provides that '[i]t is agreed between the parties, however, that the Lessee, upon the written consent of the Lessor, may sell or transfer this lease and the buildings and improvements on the premises.' To prevent the current leaseholders from assigning or transferring their leasehold interests, the Commission only has to refuse to give

written consent to such transfers. Moreover, in the event the leases are renewed pursuant to the renewal provisions contained therein, the Commission may add an additional covenant to the leases flatly preventing assignment thereof.

A second question has arisen with regard to the existence of Hunting Island State Park Village. This Village has been in existence since the early 1940's. There are, however, fewer and fewer residents in the Village. In the event that PRT is able to buy the existing houses from the current leaseholders, can the Commission close the Village or do Sections 51–241, *et seq.*, Code of Laws of South Carolina, 1962, require the Commission to keep the residential Village open. The question is whether the statutes enabling the Commission to establish a residential area and lease the same is a mandatory or discretionary statute. If the statutes are mandatory in terms, they would have to be amended by the General Assembly to allow the Commission to close the Village. At first glance, however, Sections 51–241 *et seq.* appear to be discretionary or directory in nature because of the use of the term 'may' in the statutes. Unfortunately, the distinction between the two types of legislation cannot be made so easily.

\*2 The distinction between the two types of legislation grows out of the differences in the intention of the legislature in enacting the statutes.

If the legislature considers the provisions sufficiently important that exact compliance is required then the provision is mandatory. But if the statute is merely a guide for the conduct of business and for orderly procedure rather than a limitation of power, it will be construed as directory only. 1A Sutherland Statutory Construction, Section 25.03 at 298–299.

Also, the South Carolina Supreme Court has stated:

While it is true that 'may,' in a statute, is often construed 'must,' or 'shall,' especially where, as in the present case, the thing to be done is of interest or benefit to the public, the intention of the legislature must always be given effect . . .; and for that purpose the Court may inquire into the history of the legislation, as disclosed by the records of the two houses . . . [Moore v. Waters](#), 148 SC 326, 329 (1928).

The journals of the House and Senate, in the case of the act establishing Hunting Island State Park, do not shed any light on legislative intent. With the intent of Sections 51–241 *et seq.* so unclear, the better course for the Commission to follow would be to amend the act prior to attempting to close the Park Village.

M. Elizabeth Crum  
Assistant Attorney General

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