ALAN WILSON
ATTORNEY GENERAL

July 31, 2024

The Honorable G. Murrell Smith, Jr.
Speaker of the House
South Carolina House of Representatives
Post Office Box 580
Sumter, SC 29151

Dear Mr. Speaker:

We received your letter requesting an opinion of the Attorney General regarding "the ability of the South Carolina State Ports Authority ("Ports Authority") to dispose of certain real property after acquiring the property via its equivalent power to eminent domain." Specifically, you ask:

> Is the Ports Authority bound by language contained in a deed that conveys property to the State of South Carolina to use the property "for exclusively public purposes" when there is not reverter, right-of-entry, or other consequence and when, further, the property was substantially taken by way of its statutory authority to take certain state properties?

You also included the following information with your request:

> In 1957, the State of South Carolina acquired under the threat of eminent domain certain parcels of property ("Property") from the Southern Railway-Carolina Division ("Southern Railway"), a predecessor in interest to Norfolk Southern Corporation. The original deed to the State ("State Deed") provides that the property was obtained "for exclusively public purposes." [referring to the Deed attached to the request]. Through notices executed on two separate occasions, the Ports Authority ultimately took all of that property from the State pursuant its statutory power granted by S.C. Code Ann. § 54-3-170, which authorizes it to exercise eminent domain over State properties upon the giving of due notice. [referring to the notices]. The Ports Authority, pursuant to its power and authority under South Carolina Code § 54-3-170, took the parcels in furtherance of its statutory duties to develop and manage the State's ports, including the Port of Charleston.

Based on our analysis below, we do not believe the language included in the 1957 deed, restricting the use of the property "for exclusively public purposes," prohibits the Ports Authority from disposing of the property.

Law/Analysis

The enabling legislation creating the Ports Authority states it "[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, all or any of them . . . ." S.C. Code Ann. § 54-3-140(2) (1992). However, section 54-3-155 of the South Carolina Code (Supp. 2022) conditions the Ports Authority's ability to sell any real property on the prior approval of the State Fiscal Accountability Authority or the Department of Administration. Thus, as an initial matter, state law allows the Ports Authority to sell its property, but it must seek prior approval before doing so.

We understand you are concerned about language included in a deed in the chain of title to the property the Ports Authority wishes to dispose of and whether that language would prevent the sale of the property. From the information you provided, prior to 1957, Southern Railway, the predecessor in interest to Norfolk Southern Corporation, owned the property. In 1957, Southern Railway donated by deed the property to the State of South Carolina. The 1957 deed states the property is conveyed "for exclusively public purposes." Initially, we understand there is concern as to whether this language indicates a public dedication of the property, and if so, whether such would impact the Ports Authority's ability to convey the property to a private entity.[1]

As explained by our Supreme Court, a "[d]edication is the intentional appropriation of land, or of an easement therein, for some proper public purpose." Derby Heights, Inc. v. Gantt Water & Sewer Dist., 237 S.C. 144, 149, 116 S.E.2d 13, 16 (1960). "An offer of dedication of land to the use of the public may be either by express language, reservation, or by conduct of the owner manifesting an intent to set aside land for the public . . . ." Bumgarner v. Reneau, 105 N.C. App. 362, 365, 413 S.E.2d 565, 568, affd as modified, 332 N.C. 624, 422 S.E.2d 686 (1992).

> Dedication requires two elements. First, the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use. Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993). Second, there must be, within a reasonable time, an express or implied public acceptance of the property

[1] See Sloan v. City of Greenville, 235 S.C. 277, 111 S.E.2d 573 (1959) (finding a city's acceptance of land dedicated for public purposes left it "without authority to change the use or to apply the property to some other use inconsistent with the dedication. The city does not have the discretionary power to devote this dedicated property to the private use of the parties constructing a private parking building."); Op. Att'y Gen., 1964 WL 8307 (S.C.A.G. May 27, 1964) (finding a deed restricting use of property for public purposes prohibits the lease of the property to a private association); 26 C.J.S. Dedication § 78 (stating once property is dedicated to public use, it cannot be converted to private use unless specifically authorized by the Legislature).

> offered for dedication. Helsel v. City of North Myrtle Beach, 307 S.C. 24, 413 S.E.2d 821 (1992).

Mack v. Edens, 320 S.C. 236, 239, 464 S.E.2d 124, 126 (Ct. App. 1995).

The intent of Southern Railway and the State in including this language in the deed are, of course, a question of fact. As we have noted on numerous occasions, "this Office, unlike a court, cannot investigate and determine factual questions." Op. Att'y Gen., 2014 WL 1398595 (S.C.A.G. Jan. 2, 2014). Nevertheless, the history surrounding the transfer of this property, as contained in the public record, indicates the inclusion of this language was aimed at creating a tax benefit for both Southern Railway and ultimately the Ports Authority. There is no evidence that the intent was to dedicate the property for public use. To the contrary, it appears the Ports Authority planned to use the property as part of its expansion. As will be seen below, the language used is identical to provisions in the federal tax laws and is virtually identical to language in the State Constitution.

Even if a court were to determine the deed created a public dedication of the property, we do not believe the Ports Authority's transfer of the property would trigger a reversion to Southern Railway's successor, Norfolk Southern. Based on our review of the 1957 deed, we did not find a reversionary clause in the deed if the property is not used "for exclusively public purposes." "The intent to create a reverter must be clearly expressed, unambiguous, and unequivocal." 28 Am. Jur. 2d Estates § 176. Therefore, assuming arguendo, that a court found the property subject to a public dedication, if the property is used in a manner inconsistent with the public dedication, we do not believe it would revert back to the original grantor, Southern Railway.[2] Regardless, we do not believe the purpose of the language in question was for a public dedication.

In your letter, you assert the acquisition of the property by the Ports Authority through its statutory authority under section 54-3-170 creates "a new title that extinguishes preexisting rights in the property." However, based on our conclusions above, we do not find it necessary to address this novel issue as we not believe the language in the 1957 deed created a public dedication restricting the subsequent transfer or disposal of the property by the Ports Authority.

As our Court of Appeals recognized in Bluestein v. Town of Sullivan's Island, 429 S.C. 458, 462-63, 839 S.E.2d 79, 881 (Ct. of App. 2020), certain rules govern the construction of deeds. There, the Court noted:

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[2] Generally, an attempt to sell such property could result in an invalidation of the sale. As we explained in a 2012 opinion, when a county attempted to sell property dedicated for public use, "the proposed transaction might be invalid." Op. Att'y Gen., 2012 WL 440538 (S.C.A.G. Jan. 12, 2012). See also Springfield Twp. v. Bd. of Educ. of Springfield Twp., 217 N.J. Super. 570, 577, 526 A.2d 714, 717 (App. Div. 1987) (finding recission is the remedy when a contract is made to sell property subject to a public dedication).

> "In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." K&A Acquis. Grp., L.L.C. v. Island Pointe L.L. C., 383 S.C. 563, 581, 682 S.E.2d 252, 262 (2009). . . . "In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law." Id. . . . . "When the [deed] is ambiguous the court may take into consideration the circumstances surrounding the execution in determining the intent." Williams v. Teran, Inc., 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976).

As has been recognized also, "'[t]he vital question is the intent of the grantor at the time the deed is executed.'" Cook v. Kay, 2005 WL 7084367 at *2 (Ct. App. 2005). "When the intention of the grantor is not accurately expressed in the deed, extrinsic evidence may be admitted to explain it." Id. In this instance, there is, in the deed, no indication as to the meaning of the term "for exclusively public purposes." The parties did not define the term and there is clearly disagreement as to the meaning of the phrase. See S.C. Dept. of Social Services v. Lisa C., 380 S.C. 406, 669 S.E.2d 647 (Ct. App. 2008) (stating if a statute is susceptible to two reasonable interpretations, it is ambiguous). We will now review those circumstances surrounding the deed in question to determine intent.

While, at first blush, the argument that the phrase "for exclusively public purposes," as employed in the deed, might be construed to support a public dedication, the facts and circumstances in the public record surrounding the transfer by Southern Railway to the Ports Authority strongly leads to the conclusion that such was not the intent. Indeed, the phrase "for exclusively public purposes" is the very same language typically used for federal tax purposes. See Citizens and Southern Nat. Bank of S.C. v. U.S., 243 F.Supp 900, 907 (W.D. S.C. 1965) ("the contributions, were for exclusively public purposes and meet the requirements of Sec. 170(c) of the Internal Revenue Code."). Moreover, it is clear from the historical evidence that the Ports Authority intended to use the donated property not for a dedication to public use, but as a means for expanding the Port's operation, clearly a public purpose. Thus, we have little doubt that the phrase was inserted in the 1957 deed for tax benefits to both the Railroad and the Ports Authority.

The chronology leading to the formal transfer of the deed in late 1957 and early 1958 demonstrates that this was a time of Port expansion. Indeed, in January 1957, a $21 million Port development proposal was introduced in the General Assembly. In February, the Legislature enacted the Port development bond bill. See 1957 S.C. Acts 32 (General Assembly provides sum of 21 million dollars for the Ports Authority "and to authorize the expenditure of such sum . . . for the construction of modern docking facilities at the seaports of Georgetown, Port Royal and Charleston."). Thus, expansion of the Port was very much on the minds of the General Assembly and the Ports Authority when the transfer of the property in question was made.

At the same time, Southern Railway decided in January, 1957 against reactivation of its coal tipple facility on the Cooper River (the "Tipple). According to Southern Railway, "there is no possibility of reopening the pier." The Tipple had been idle since 1952. With Southern

Railway's decision, the Ports Authority immediately announced that it wished to use the Tipple. Cotesworth P. Means, chairman of the Ports Authority, stated that "if the Southern Railway has no plans for use of the coal tipple – and sees no use for it in the future – the Ports Authority will seek arrangements immediately with Southern [Railway] for use of the Tipple." Means termed the Tipple as a "valuable port asset" and added that the Ports Authority would use the Tipple in handling "coal or other bulk cargoes for the mutual benefit of the railroad and the Port of Charleston." Charleston News and Courier, January 8, 1957, at 7.

Apparently, there was strong interest in reactivation of the Tipple for use by coal producers. A conference was thus held between representatives of the coal industry and the Ports Authority on January 22, 1957. Charleston News and Courier, January 14, 1957, at 14. In the meantime, negotiations between the Ports Authority and the Southern Railway were ongoing with the idea that the Ports Authority would acquire the Tipple property, as well as other surrounding tracts. Id. Apparently, these negotiations went on for some time. The negotiators in these discussions were businessman Charles E. Daniel of Greenville, former chairman of the State Ports Planning Committee, and D.W. Brosnan of Washington, vice president of Southern Railway. Charleston News and Courier, September 18, 1957, at 10. We are unaware as to what these negotiations specifically entailed, but presumably one option was for Southern Railway to sell the property to the Ports Authority.

Indeed, in April, 1957, the Charleston Evening Post reported that the Ports Authority was having discussions at this time with three railroads. Involved in these talks were "railroad tracks, switching equipment and piers" owned by the Seaboard Air Line Railroad, the Atlantic Coast Line Railroad, as well as the Southern Railway. According to Cotesworth Means, these discussions stemmed from "'the authority's early planning for new facilities made public last June and the negotiations are aimed at the consolidation and streamlining of downtown Charleston switching activities.'" Means pointed out that "'Management by the State Ports Authority may mean profitable and more convenient handling of the waterfront trackage in support of waterborne cargoes.'" Charleston Evening Post, April 2, 1957, at 1-B. In short, the Ports Authority was – consistent with the State's goal of expansion – conducting talks to acquire additional property.

After lengthy negotiations between Southern Railway and the Ports Authority, on September 16, 1957, Southern Railway announced that it would donate the Tipple properties and surrounding areas to the State at no cost. According to the Charleston News and Courier's reporting,

> [t]he Southern Railway Co. will give two major waterfront properties and more than a mile of its mid-town Charleston trackage to the South Carolina State Ports Authority. . . .
>
> The property will be conveyed free of cost to the State, according to D.W. Brosnan, Southern vice president.

> Included in the gift are the site occupied by the United Fruit Co, pier and banana handling facility and the site of the former coal tipple at Town Creek and the Cooper River. The rail trackage from the United Fruit installation to a point on John Street between Meeting and King Streets also will be transferred as will shifting tracks at the United Fruit pier.
>
> In addition four separate parcels of land will be donated. These are: 1) slightly more than an acre in the block surrounded by Laurens, Marsh, Society and Concord Streets; about 1 ½ acres in the block bordered by Laurens, East Bay, Marsh and Society Streets; a small lot at the southeast corner of Calhoun and Washington Streets; nearly an acre at the southeast corner of East Bay and Chapel Streets, and a right of way and trackage from this property to Cooper River waterfront property recently acquired by the Ports Authority from the Atlantic Coastline Railroad Co. for the $110,000.

Charleston News and Courier, September 17, 1957, at 1-A.

Following this announcement of the donation of these properties to the State, over the next several months, the property was appraised and a deed prepared. The value of the properties to be transferred was deemed to be 1.5 million dollars. Charleston News and Courier, January 1, 1958.

On December 31, 1957, the deed was transferred to the Ports Authority. Presumably, the timing of the deed transfer was to ensure that the property was donated in the 1957 tax year. According to the Charleston News and Courier, "[t]he authority assumed formal title to the properties, which total more than 130 acres, at 6 p.m. The transfer was made as an outright gift." Ports Authority Chairman Cotesworth P. Means described the gift as making possible "'the restoration of a large area of the Charleston waterfront and its conversion to active use in the interest of expanded port commerce.'" (emphasis added). Means praised the work of former U.S. Senator Charles E. Daniel for his "'invaluable assistance in bringing about the transfer.'" He also thanked Southern Railway's Vice President D.W. Brosnan for the gift as a "'generous and forward looking contribution to the development of the port.'" Charleston News and Courier, January 1, 1958, at 9-A. (emphasis added). Thus, there is little doubt from the public record that the gift by the Southern Railway was made for the "development of the port" and in the "interest of expanded port commerce."

As noted above, the December 26, 1957 deed gave the State "several parcels between Society and Calhoun Streets that are now part of the Union Pier footprint." That deed contained what some argue is a "restriction" – using the language "for exclusively public purposes." The contention is that insertion of this language ensured "that the property wouldn't wind up in private hands." Charleston Post and Courier, September 17, 2023.

We disagree. We do not believe the history surrounding this transaction, nor the tax laws at the time, support this view. Shortly after the property was transferred, a column in the

Charleston News and Courier explained Southern Railway's purpose in donating the property to the Ports Authority, rather than selling it. The News and Courier columnist spoke with Cotesworth Means, the Ports Authority Chairman. Means explained:

> Many railroads find themselves in the predicament of owning run-down, unprofitably operated plants which they cannot rescue from further loss without offending the customers and shippers they have trained to expect all manner of concessions.
>
> In other words, I gather that a number of railroads are tickled to death to get out of the terminal business and to get out in such a manner that they will not offend their shippers. And public ports authorities, which can charge shippers realistic, breakeven rates and need not give subsidies, are sometimes the beneficiaries.
>
> Understand this though. The railroads wouldn't give up the property for love or money to any outfit that didn't intend to use the property as a shipping terminal. The railroad figures that it needs the freight and that a ports authority will provide the freight, while relieving the railroad of burdensome entanglements with shippers.

The columnist then asked what he described as "the big question" which was: "'Why didn't the railroad SELL you the property? After all, that is the usual procedure when one party is willing to get rid of some property and another party wants to obtain it.'"

Means responded that it is largely a matter of "taxes." According to Means,

> [a]s a public body, . . . the authority is fortunate in being the beneficiary of federal tax regulations, in the operation of which it was a greater advantage to the Southern Railway to make the Authority an outright gift of the properties than to sell them to us for the relatively small price we could afford to pay.

Charleston News and Courier, January 16, 1958, at 14-A. The News and Courier column goes on to say that Means emphasized that the official who was particularly helpful to Charleston in consummating this deal was Southern Railway's Vice President D.W. Brosman, who Means characterized as "[d]ynamic and extremely able." The columnist thought the donation "pictures Mr. Brosnan more as a shrewd businessman than as a generous chap eager to give away his employer's money. . . ."

An examination of the federal tax laws confirms the analysis of the News and Courier columnist. The applicable federal statute providing for a tax deduction uses the exact same phrase as is contained in the 1957 deed – "for exclusively public purposes." Pursuant to 26 U.S.C.A. § 170, there is allowed a deduction for "any charitable contribution [as defined] payment of which is made within the taxable year." A "charitable contribution" is defined as a "contribution or gift for the use of (1) A State, a possession of the United States, or any political subdivision of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes." (emphasis added).

This federal statute has been on the books for decades and was present in 1957 when Southern Railway conveyed the property to the Ports Authority. See Western Products Co. v. Comm'r of Internal Revenue, 28 T.C. 1196, 1216 (1957) (quoting § 23 of the 1939 Code). Thus, as the News and Courier columnist correctly noted, the purpose of the donation by Southern Railway was for the railroad to receive a charitable deduction; accordingly, employment of the language "for exclusively public purposes" involved Southern Railway's use of federal tax laws, not a purpose to provide a public dedication of the property.

It is important to note also that in order to claim a charitable deduction pursuant to federal law, "a taxpayer must show an intent to benefit the done." S. Pac. Trans. Co. v. Comm'r. of Internal Rev., 75 T.C. 497, 600-02 (1980), supplemented 82 T.C. 122 (1984). A benefit to the taxpayer for the donation does "not prohibit a corporation form deriving some benefit, direct or indirect, from charitable contributions. Indeed, it would seem to be requisite and proper that the corporation have some business purpose or derive some benefit from such contributions in order to justify them from a stockholder standpoint." Cit. & Southern Nat. Bank of S.C. v. U.S., 243 F.Supp. supra at 904. As noted above, the News and Courier columnist stated that Southern Railway would derive some benefit from the donation in the form of a shipping terminal, while being relieved "of burdensome entanglements with shippers." News and Courier, supra (January 16, 1958 at 14-A). As the News and Courier noted, "[a]cquisition of the Southern Railway properties adds to the scope of the Authority's plans [for expansion consistent with the 21 million dollar bond issuance.]". Charleston News and Courier, September 17, 1957, at 9.

In addition, the South Carolina Constitution, pursuant to Art. X, § 3(a), exempts from ad valorem taxation "all property of the State, counties, municipalities, school districts and other political subdivisions, if the property is used exclusively for public purposes." (emphasis added). In South Carolina Public Service Authority v. Summers, 282 S.C. 148, 318 S.E.2d 113 (1984), the assessors of several counties had "assessed certain real property of the Authority located within their jurisdictions for tax years 1979 and 1980." 282 S.C. at 150, 318 S.E.2d at 114. The argument by the assessors was that the property "is not used exclusively for public purposes and is therefore subject to taxation." Id.

However, the Supreme Court rejected the assessors' argument. Id. The Court determined that the Public Service Authority was authorized by statute to serve a public purpose. Id. Further, the Court concluded that the properties being leased to private persons or entities did not necessarily undermine the "public purpose" requirement. Id. According to the Court, several decisions had concluded that the public purpose requirement was preserved, notwithstanding a lease to private parties:

> [t]hese decisions hold that the public character of an agency's purpose is not diminished or altered by the nature of the transaction used to accomplish it. Were that the case, no leasing transaction could ever be used to accomplish a legitimate public goal. Private benefit to the lessee is always present. Where the purpose is clearly public in nature, we have consistently held this "incidental" private benefit does not convert the public purpose to a private purpose. [citations omitted].

Id. at 152-53, 318 S.E.2d at 115.

Thus, insertion of the phrase at issue – "for exclusively public purposes" – was inserted in the 1957 deed for the tax benefit of Southern Railway, as well as the Ports Authority. As can be seen from the Public Service Authority decision, it was not unusual for tax assessors to attempt to tax property belonging to a public entity, such as the Ports Authority, as not being used "exclusively for public purposes." See Chas. County School Dist. v. S.C. State Ports Auth., 283 S.C. 48, 320 S.E.2d 727 (1984) (school district lacked standing to challenge that numerous tracts of Ports Authority property should be taxed as not being used "exclusively for public purposes."). Therefore, both parties to the 1957 deed benefitted significantly in terms of taxation from the phrase "for exclusively public purposes."

Moreover, there is no indication whatsoever that there was any intent between donor and donee to dedicate these properties to the public. As noted, the General Assembly in 1957, enacted a bond bill for Port expansion. Further, Cotesworth Means described the gift as making possible "'the restoration of a large area of the Charleston waterfront and its conversion to active use in the interest of expanded port commerce.'" There is no question that the gift was intended for Port expansion consistent with the purpose of the earlier bond bill. The operation of the State Port is clearly a "public purpose." See e.g. South Carolina Farm Bureau Marketing Ass'n. v. South Carolina State Ports Authority, 278 S.C. 198, 293 S.E.2d 854 (1982); Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967). As the columnist for the News and Courier observed, "[t]he railroads wouldn't give up the property for love or money to any outfit that didn't intend to use the property as a shipping terminal." Charleston News and Courier, January 16, 1958. In short, the intent at the time of the deed in question was to use the donated property for Port expansion, not for dedication to the public. The tax benefit to the railroad was additional incentive for the donation.

Conclusion

In our opinion, the use of the term "for exclusively public purposes" in the 1957 deed is ambiguous. Thus, resort may be had to extrinsic evidence. Based upon the extensive historical evidence from the public record, we believe the phrase was inserted in the 1957 deed for tax purposes so as to indicate a charitable deduction for Southern Railway.

We do not believe the phrase was inserted to create a public dedication of the property. "Dedication is an exceptional manner of passing an interest in land and proof thereof must be strict, cogent and convincing." Tupper v. Dorchester County, 326 S.C. 318, 326, 487 S.E.2d 187, 192 (1997). In our view , such a strict standard is, by no means, met here.

First of all, the deed states that Southern Railway does "grant, bargain, sell and release unto State of South Carolina, for exclusively public purposes," the property in question. It appears to us that the phrase "for exclusively public purposes," which is set off by commas,

immediately following the words "grant, bargain, sell and release" is simply an explanation of Southern Railway's purpose in providing the property – to claim a charitable deduction, rather than a placement of any restriction upon the State. If Southern Railway meant to restrict the State in the future, it certainly would not have done so in this vague way. Clearly, the property was donated to the State for Port purposes as part of the Port's ongoing expansion efforts. If Southern Railway intended public use of the property, as opposed to use by the Ports Authority, as part of its statutory purpose, it would have said so far more clearly.

It is well recognized that "all doubts must be resolved in favor of the free use of property and against restrictions." Bomar v. Echols, 270 S.C. 676, 681, 244 S.E.2d 308, 311 (1978). Here, all indications are that Southern Railway chose to donate the property – rather than sell it – because the tax benefit to it was more valuable than any agreed upon sale price. The language "for exclusively public purposes" matches exactly the wording at the time (as well as today) in the federal tax laws in order for Southern Railway to obtain a charitable deduction.

Indeed, the deed expressly references "public and charitable considerations" as consideration for the transfer. Importantly, a column in the News and Courier immediately following the transaction quotes the Chairman of the Ports Authority as saying that the purpose of the donation of the property was to obtain a charitable tax benefit to Southern Railway. Clearly, both parties wished the property to be used as part of the Port's expansion – a clear public purpose . The fact that Southern Railway might obtain an indirect benefit from such Port expansion does not defeat the charitable deduction. See Citizens and Southern, supra.

Accordingly, while your question is a difficult one to be sure, and we understand how the argument for a public dedication can be made, we conclude that a court would likely find that the Ports Authority is not precluded from disposing of the property in question. In our view, the evidence points all in the same direction: that Southern Railway donated the property to obtain a tax benefit and that it used the exact language contained in federal tax law to demonstrate its charitable intent.

Sincerely,

Cydney Milling
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Robert D. Cook
Solicitor General