

May 30, 2008

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Dear Mr. Roper:

We received your letter requesting an opinion of this Office regarding the authority of the Commissioners of Public Works of the City of Greenwood (“the CPW”) to transfer property. We understand from your letter that your firm represents the CPW, which owns approximately 54 acres of land known as the Grace Street Water Plant property (“the Property”). We further understand from our conversations with you that the Property was originally acquired by the City of Greenwood in 1911 through eminent domain. The City obtained the Property for CPW purposes, and it was originally used as a water source due to the springs located on the Property. We further understand that while the Property had always been held on behalf of the CPW, it was re-titled in the name of the CPW in 1992. Although the Property was formerly used by the CPW as a water treatment facility, it has not been used by the CPW in any manner since 1996. You asked the following questions:

1. Does the CPW have authority to transfer the Property to the City of Greenwood without receiving compensation for such transfer?
2. Does the CPW have authority to transfer the Property to Greenwood County or some other public or private entity without receiving fair and adequate consideration for such transfer?
3. Does the CPW have authority to transfer the Property to the City of Greenwood subject to a specific condition that the City is required to transfer the Property to the County of Greenwood?
4. Does the CPW have authority to sell all or a portion of the Property to a public or private party for fair and adequate compensation?

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We also received the copy of your firm's opinion letter regarding the above questions. As we noted in a prior opinion of this Office, while we have issued numerous previous opinions on issues involving commissioners of public works, "the law in this area is far from settled and has been the subject of heated litigation. Thus, it is impossible to reach absolutely definitive answers to your questions." Ops. S.C. Atty Gen., August 24, 2005 and May 23, 1973. In this opinion, we will attempt to outline the legal principles that apply to the issues you raised –the principles that a court would analyze in determining the CPW's authority to transfer property. While we will make our best determination of what a court may find, our conclusions are not free from doubt. Therefore, out of an abundance of caution, it is our recommendation that the CPW seek a declaratory judgment by the court prior to proceeding with any transfer of the Property.

### **Law/ Analysis**

You stated in your opinion letter that the Greenwood CPW is a public body established pursuant to South Carolina Code Section 5-31-210 *et. seq.*, originally enacted in 1896. Under Section 5-31-250, commissioners of public works are generally endowed with the following powers:

The board of commissioners of public works of any city or town may purchase, build or contract for building any waterworks or electric light plant authorized under Article 7 of this chapter and may operate them and shall have full control and management of them. It may supply and furnish water to citizens of the city or town and also electric, gas or other light and may require payment of such rates, tolls and charges as it may establish for the use of water and light.

Moreover, as you noted in your opinion letter, the General Assembly passed legislation specific to the Greenwood CPW. Act No. 216 of the Acts of the General Assembly of 1955 provides as follows:

[T]he Board of Commissioners of Public Works of the City of Greenwood may purchase, build or contract for building any waterworks, electric system, gas system and/ or sanitary sewage system, and all appurtenances and parts of such systems, authorized under Article 6 of this chapter, and may operate them and shall have full and exclusive control and management of them. Such board may supply and furnish such facilities and may require payment of such rates, tolls and charges as it may establish for the use of any such utilities.

1955 S.C. Acts 311.

As you noted in your opinion letter, the CPW is the municipal agency through which the City of Greenwood carries out the management, operation, and control of its electric, water, and gas systems. As the Court stated in Sossamon v. Greater Gaffney Metropolitan Utilities Area, 236 S.C. 173, 113 S.E.2d 534 (1960) (citing City of Union v. Sartor, 91 S.C. 248, 74 S.E. 496; City of Spartanburg v. Blalock, 223 S.C. 252, 75 S.E.2d 361), "[a] board of public works is not a separate corporation but

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a mere municipal agency through whose management and control the General Assembly has required that the municipality shall operate and manage its waterworks.”

An opinion of this Office dated May 5, 1966 determined that “a Board of Commissioners of Public Works and the governing body of a municipality are separate and distinct bodies; that the Board of Commissioners is given the full control and management of the municipal waterworks system, including the power to fix rates and determine the fiscal policies in connection therewith...” Boards of commissioners of public works are unique, hybrid entities – the CPW is an agency of the City, but it is also a distinct entity created by the Legislature and endowed by the Legislature with a limited corporate purpose. Pursuant to S.C. Code Section 5-31-210, the CPW consists of three elected commissioners, who exercise the powers granted by Section 5-31-250, above.

In a prior opinion of this Office dated August 24, 2005, we addressed the question of who owns the infrastructure of the water system in Ellore. After indicating that the board of commissioners was a municipal agency, we opined that the board itself would not “own” the infrastructure of any water system. We cited a prior opinion dated January 23, 1968, which cited Hyams, et al. v. Carroll, et al., 146 S.C. 470, 474-5 (1928), for the proposition that the real owner of a waterworks system operated and managed by a commission of public works is the city. Therefore, we reached the conclusion that the municipality should be considered the “owner” of the municipality’s water system administered by the board of commissioners, a separate municipal agency. In the August 24, 2005 opinion, we also addressed the issue of whether property purchased with funds of the commission of public works should be in the name of the commission or the town. Consistent with the principle set forth in the January 23, 1968 opinion that the city is the real “owner,” we opined that the property should be in the name of the municipality.

This prior authority tends to indicate that since the Greenwood CPW is an agency of the City of Greenwood, your first question may be answered in the affirmative. It is our opinion that a court would probably find that the CPW has the authority to transfer title to the Grace Street Property to the City of Greenwood without receiving compensation, since it is essentially the City who is the owner of the waterworks system that the CPW manages.

It could be argued, however, that since the CPW is a specific entity created by the Legislature for a limited corporate purpose, any transfer, even to the City, would have to further some essential purpose of the CPW (see discussion of a transfer to the County, below). However, we believe the better argument is that since the CPW is an agency of the City, the Property may be re-titled in the name of the City without the CPW receiving compensation.

It is worth noting the distinction that must be drawn between the situation of the CPW in this case and the situation of the Department of Mental Health in the case of S.C. Dept. of Mental Health v. McMaster, 372 S.C. 175, 642 S.E.2d 552 (2007). In that case, the Court found that property owned by the Department of Mental Health was held in a charitable trust. Therefore, if the property were to be sold under the doctrine of equitable deviation, the proceeds from the sale were to be placed in

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trust to be used in furtherance of the purposes of the Department of Mental Health (rather than for the general public purposes of the State.) In the case of the CPW, however, we are aware of no charitable trust or restrictive covenants that would trigger the application of the rule found in the Department of Mental Health case.

We now turn to the issues raised by your other questions concerning the authority of the CPW to transfer the Property to Greenwood County or some other public or private entity. In Town of Myrtle Beach v. Suber, 225 S.C. 201, 81 S.E.2d 352 (1954), the Supreme Court stated that the Commission of Public Works had the authority to sell miscellaneous property no longer needed in the operation of its waterworks system. In Suber, the miscellaneous property consisted of water tanks, rather than real property.

In a previous opinion, this Office addressed the issue of the authority of the Gaffney Board of Public Works to dispose of real property. Op. S.C. Atty. Gen, December 17, 2007. We noted that the authority of the Board had two sources: legislation applying particularly to the Gaffney Board of Public Works, and general legislation applicable to all commissioners of public works. The latter was found in South Carolina Code Section 5-31-210 *et. seq.* In that opinion, we stated as follows:

As a creature of statute, the Board has no inherent power and derives its power from the Legislature. S. Ry. Co. v. South Carolina State Highway Dep't, 237 S.C. 75, 80, 115 S.E.2d 685, 688 (1960). Accordingly, the Board “possesses only those powers that are conferred expressly or by reasonable necessary implication, or are merely incidental to the powers expressly granted.” Brooks v. South Carolina State Bd. of Funeral Serv., 271 S.C. 457, 461, 247 S.E.2d 820, 822 (1978). From the 1908 act [the enabling legislation of the Gaffney Board of Public Works], it appears the Board has authority to sell its electric light plant or waterworks plants, but only with voter approval. However, neither this legislation granting the Board particular powers nor section 5-31-250, address whether the Board may dispose of other real property. Thus, we must determine whether such authority is incidental to the powers granted to the Board and necessary for its operation.

Although the sale or disposal of property is not a primary function of the Board, we can imagine circumstances under which the disposal of property could be necessary for the Board's operation. For example, if the proceeds from the sale of the Board's property are necessary to fund the purchase of additional property used to expand its facilities, we believe a court may find this type transaction within the scope of the Board's authority as it would be incidental and necessary to the Board's authority to provide electric and water service to the citizens of Gaffney. However, without knowledge of the purpose for which the Board is selling the property, we cannot fully analyze whether the disposal of such property is incidental to the Board's general authority to operate waterworks or an electrical light plant. Nonetheless, we are of

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the belief that the disposal must serve some core function of the Board explicitly authorized by law.

Applying the same principle to analyze the powers of the Greenwood CPW, we again note that Act No. 216 of the Acts of the General Assembly of 1955 authorizes the Greenwood CPW to “purchase, build or contract for building any waterworks, electric system, gas system and/ or sanitary sewage system, and all appurtenances and parts of such systems, authorized under Article 6 of this chapter, and may operate them and shall have full and exclusive control and management of them.” Neither this legislation granting the CPW particular powers nor S.C. Code Section 5-31-250 addresses whether the CPW may dispose of other real property. Since the CPW “possesses only those powers that are conferred expressly or by reasonable necessary implication, or are merely incidental to the powers expressly granted,” Brooks at 461, we must now determine whether the authority to dispose of real property- the Grace Street Water Plant property- is incidental to the powers granted to the Greenwood CPW and necessary for its operation.

To do so, we must first consider the nature of the proposed transfer. We understand from the CPW’s July 2007 press release that the CPW is interested in having a portion of the Property developed as a park. The press release stated that “[t]he Commissioners continue to be in favor of the development of a portion of the Grace Street Water Plant Property as a park, but they are committed to proceeding in a way that is in the best interest of the CPW’s customers.” We understand from our conversations with you that the CPW is considering a transfer of the Property to the Parks Commission, a county entity.

There is authority indicating that some forms of donation from one political subdivision to another is permissible if the transfer satisfies both a public purpose and the donor’s corporate purpose. In a prior opinion of this Office dated January 21, 1985, we stated as follows:

A number of cases, decided by our Supreme Court, have generally upheld a local government's expenditure of funds to another political subdivision or governmental entity for the purpose of assisting that entity in some public venture. For example, in Allen v. Adams, 66 S.C. 344 (1963), the Court upheld the Edgefield town council's issuance of bonds to construct a school building in the town. The Court concluded that, unquestionably, such construction would constitute both a corporate purpose (of the town) and a public purpose; but, it was argued that, under existing law, the town council could have no management or control over the school bus operations as such had been delegated to the school district. The Court rejected the argument, concluding that it was clear that such expenditure of funds was within the town's corporate purpose, because the presence of the school building would surely ‘promote the convenience, welfare and order of its inhabitants . . .’ 66 S.C. at 355.

Thus, if the CPW transfers the Property to a county agency such as the Parks Commission, the transfer should serve not only a public purpose, but also a corporate purpose of the CPW. An

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outright donation of the Property to the County or another public entity would probably not fulfill any corporate purpose of the CPW. The purposes of the CPW are to manage and operate the electric, water, and gas systems of the City of Greenwood. Since the development of parks is most likely not a corporate purpose of the CPW, some form of compensation that furthers a corporate purpose of the CPW must be received. This could take the form of monetary compensation to be used to lower rates for CPW customers, or it could take the form of another benefit, such as water lines, as you mentioned in your opinion letter. The key is that the transfer should further some core function of the CPW.

In opposition to the above conclusion, it may be argued that since the City is the real owner of the Property, any transfer must fulfill a corporate purpose of the City, rather than a corporate purpose of the CPW. It may be further argued that the development of a park would further a corporate purpose of the City, providing space to its residents for recreation. However, in view of the fact that the CPW is a creature of statute, and is therefore limited to exercising those powers that are expressly conferred on it, or are incidental and necessarily implied from the express powers (see Brooks, supra), we believe the better argument is that any transfer must serve some core function of the CPW explicitly authorized by law. Thus, if the Property were to be transferred in order to develop it as a park, the CPW must structure the transfer in a way that furthers its corporate purpose of providing utility and water service to the residents of the City of Greenwood. In other words, some benefit relating to an essential purpose of the CPW must be received in return for the transfer of the Property.

It is our opinion that the CPW may not transfer the Property to the County or a private entity without receiving some benefit that serves a core function of the CPW. An outright donation without some benefit received in return furthers no statutorily authorized purpose of the CPW.

Moreover, as you stated in your opinion letter, the CPW may not transfer the Property to the City subject to a specific condition that the City transfer it to the County. As we previously stated, ownership of the Property essentially rests in the City since the CPW is an agency of the City. Inasmuch as the Property essentially is the City's already, subject to the CPW's corporate purpose, we believe it is inadvisable for the CPW to transfer the Property to the City subject to specific conditions.

We now turn to the other issue raised in your second and fourth question regarding the CPW's authority to transfer all or a portion of the Property to a private party. As we discussed above, assuming that a court would find that the CPW has the implied authority to transfer real property, any transfer to a private party still must serve some core function of the Board explicitly authorized by law. Also, as you noted in your opinion letter, the CPW has a fiduciary duty concerning the Property. This duty was discussed by the Supreme Court in Haesloop v. City Council of Charleston, 123 S.C. 272, 115 S.E. 596, 600 (1923), as follows:

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In the sense that all powers of municipal corporations are held in trust for public use, all property held by such corporations is held in a fiduciary capacity. 28 Cyc. 621. Property held by such corporation for strictly governmental purposes or which has been devoted to a special public use may be sold or disposed of only under express legislative authority; but property acquired and held for general municipal purposes is subject to the corporation's discretionary power of use and disposal. 28 Cyc. 622. It is universally conceded, however, that such discretionary power of use and disposal does not include the authority to donate municipal property to a strictly private use, for the obvious reason that a transfer or release of such property by a municipality to a private ownership without receiving in return some consideration of reasonably equivalent value would amount to a palpable breach of the trust upon which it is held. 28 Cyc. 625.

Thus, while the CPW has a certain degree of discretion, it is prohibited from donating public property to a strictly private use. Therefore, in answer to the second part of your fourth question, it is clear that if public property, such as the Grace Street Property, is transferred to a private entity, "consideration of reasonably equivalent value" must be received in return. An outright donation of public property to a private entity would be prohibited.

### **Conclusion**

Although cogent arguments to the contrary may be advanced, a court would probably find that the Greenwood CPW, as an agency of the City of Greenwood, may re-title the Grace Street Property in the name of the City of Greenwood without the CPW receiving compensation. This conclusion would be in keeping with the prior opinion of this Office viewing the City as the "owner" of the property which is managed by the CPW. It would also be in keeping with the principle found in Sossamon that a board of public works is not a separate corporation but rather, a municipal agency "through whose management and control the General Assembly has required that the municipality shall operate and manage its waterworks."

Regarding transfer of the Property to another public entity such as the County, or to a private entity, it is our opinion that a court could find that the CPW has the implied authority to dispose of real property such as the Grace Street Property. It may be argued that if the City is the real "owner" of the property, it is the City's corporate purpose that must be satisfied in order to effect any transfer to another public or private entity. It may be further argued that the development of a park would serve a public purpose, as well as a corporate purpose of the City. However, we believe the better argument is that the corporate purpose of the CPW, not the corporate purpose of the City, must be fulfilled in any transfer of the property to another public entity such as the County, or to a private entity. The CPW is a creature of statute, limited to exercising those powers that are expressly conferred on it, or are incidental and necessarily implied from the express powers (see Brooks, supra). Therefore, we believe the better argument is that any transfer must serve some authorized function of the CPW. Thus, if the Property were to be transferred in order to develop it as a park,

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the CPW must structure the transfer in a way that furthers its corporate purpose of providing utility and water service to the residents of the City of Greenwood. In other words, some benefit relating to an essential purpose of the CPW must be received in return for the transfer of the Property, whether the transfer is to a public or private entity.

Additionally, if the transfer is to a private entity, the principle found in Haesloop applies. If public property is transferred to a private entity, some consideration of reasonably equivalent value must be received.

The foregoing are our conclusions as to what a court would probably determine regarding the authority of the CPW to transfer property. However, as we previously mentioned, this area of law is subject to much debate, and the conclusions we reached are not free from doubt. Therefore, out of an abundance of caution, we recommend that the CPW seek a declaratory judgment by the court prior to proceeding with any transfer of the Grace Street Property.

Sincerely,

Henry McMaster  
Attorney General

By: Elizabeth H. Smith  
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook  
Deputy Attorney General