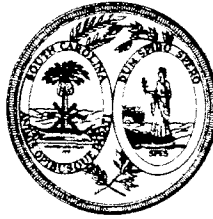


6958 Liberty



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

September 21, 2000

James A. Preacher, Chief of Police
Norway Police Department
P. O. Box 127
Norway, South Carolina 29113

Re: Your Letter of July 10, 2000

Dear Chief Preacher:

In your letter, you ask the following:

Do private property owners have the right to post their lands stating if persons or vehicles that enter their property are giving consent to search and if persons and vehicles that enter are giving consent to be searched? (sic) Are these signs a legal consent to search?

First, private property owners are not subject to the restrictions and proscriptions against unreasonable searches and seizures as are agents of the government. In fact, "[t]he Fourth Amendment does not bar a search and seizure, even an arbitrary one, effected by a private party on his own initiative." State v. Cohen, 305 S.C. 432, 409 S.E.2d 383 (1991). Further, as long as all general laws are complied with (such as those prohibiting unlawful touching), a private property owner could ask guests to consent to a search or leave his property. (It is questionable whether a property owner could legally search his guest using force.)

The same does not necessarily hold true for an agent of the government, such as a police officer. If a private party is acting as an agent or instrument of the government, then, prior to any search and seizure the requirements of the Fourth Amendment must be met, or a recognized exception must be present. If those requirements are not met, any evidence gained as a result of the search may be inadmissible in a trial involving the offending party.

Whether a private citizen is acting as an agent of the government is determined on a case-by-case basis. Factors to consider include: "the citizen's motivation for the search or seizure, the degree of government involvement, such as advice, encouragement, knowledge about the nature of

Request Letter

Chief Preacher
Page 2
September 21, 2000

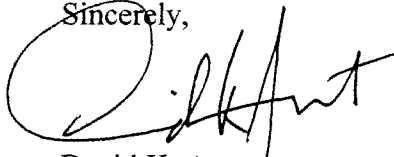
the citizen's activities, and the legality of the conduct encouraged by the police." State v. Cohen, supra at 386; State v. Sanders, 327 N.C. 319, 395 S.E.2d 412 (1990).

Further, whether a person entering private property has impliedly given consent for the government to search his person or property is also an issue that is fact driven. Merely posting a sign, while evidence of consent, is not dispositive of the issue. Factors to be considered in this regard are: (1) was the person searched on notice that undertaking certain conduct would be subject him to a search, (2) did the person voluntarily engage in the certain conduct, (3) was the search justified by a "vital interest", (4) was the search reasonable effective in securing the "vital interest", (5) the search was only intrusive as is necessary to further interest justifying the search and (6) the curtailed, to some extent, the unbridled discretion in the searching officers. See McGann v. Northeast Illinois Reg. Commuter R.R., 8 F.3d 1174 (7th Cir. 1993).

Accordingly, it does not appear to be illegal for a private property owner to post his land with signs as you have illustrated. Whether, however, a law enforcement agency could use the signs as a means of satisfying the requirements of the Fourth Amendment is unclear and would depend upon the facts of each case.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Avant", written over a horizontal line.

David K. Avant
Assistant Attorney General

DKA/an