6066 Library

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

February 10, 1997

Paul S. League, Assistant Chief Counsel
South Carolina Department of Natural Resources
Post Office Box 167
Columbia, South Carolina 29202

Re: Informal Opinion

Dear Mr. League:

You have asked that I outline and discuss the standards which govern the placement of enclosures or fences upon state lands by state officials.

LAW / ANALYSIS

Art. III § 31 of the State Constitution (1895 as amended) provides in pertinent part as follows:

> [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. Nor shall such land be sold to corporations, or associations, for a less price than that for which it can be sold to individuals.

Our Supreme Court has interpreted this constitutional provision in Haesloop v. City Council of Charleston, 123 S.C. 272, 278, 115 S.E. 596 (1922), noting that "manifestly, we think, the reference in this constitutional provision is to public lands belonging to and controlled by the State in its capacity as sovereign proprietor." And in McKinney v. City of Greenville, 262 S.C. 227, 242-3, 203 S.E.2d 680 (1974), the Court recognized that the

Request Letter.

Constitutional prohibition is not violated if the indirect benefits are deemed to be sufficient. The Court stated that

> ... 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. Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967); Bobo v. City of Spartanburg, 230 S.C. 396, 96 S.E.2d 67 (1956); State v. Broad River Power Company, 177 S.C. 240, 181 S.E. 41 (1935); Babb v. Green, 222 S.C. 534, 73 S.E.2d 699 (1952); O'Dowd v. Waters, 130 S.C. 232, 125 S.E. 644 (1924); Antonakas v. Anderson Chamber of Commerce, 130 S.C. 215, 126 S.E. 35 (1924); Haesloop v. City Council of Charleston, 123 S.C. 272, 115 S.E. 596 (1923); Chapman v. Greenville Chamber of Commerce, 127 S.C. 173, 120 S.E. 584 (1923). In State v. Board River Power Company, supra, the Court stated ...
>
> > "These cases establish the rule that the indirect benefits expected to result from the improvement of the land granted, by way of the promotion of the public convenience, increase in the value of adjacent property, and taxes to be paid on the improvements themselves are sufficient to keep such a grant from amounting to a donation within the constitutional inhibition."

Moreover, in Op.Atty.Gen., Op.No. 89-137 (November 27, 1989) we quoted with approval from an opinion issued August 27, 1985 wherein we stated:

> ... Article III, Sec. 31 provides that "lands belonging to or under the control of the state shall never be donated, directly or indirectly, to private corporations or individuals...." While our Court has clearly stated that neither this provision nor the Due Process Clause in themselves require public bidding or a maximum price for the sale of property, Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967), it is also clear that the consideration from such a sale must be of "reasonably

> equivalent value ..." or "adequately equivalent ...". Haesloop v. Charleston, 123 S.C. 272, 283, 285, 115 S.E. 596 (1923). In determining "what is a fair and reasonable return for disposition of its properties", a public body "may properly consider indirect benefits resulting to the public ...". McKinney v. City of Greenville, 262 S.C. 227, 242, 203 S.E.2d 680 (1974). But such benefits must not be "of too incidental or secondary a character...." Haesloop, supra. In short, when public officials sell the state's land, they are acting in a fiduciary relationship with the public and thus held to the "standard of diligence and prudence that [persons] ... of ordinary intelligence in such matters employ in their own like affairs." Haesloop, 123 S.C. at 284.

It is also recognized that "[t]he state has a duty to protect and maintain public land held in trust, not surrender the rights thereto and regulate its use." 73B C.J.S., Public Lands, § 178. The State "is authorized to permit private use of public trust lands [only] when the private use will improve the public trust or the private use will not substantially impair the remaining trust lands and waters." Id.

Further, as to the management and use by the State of public property generally, it is said that

> [t]he State does not have an unlimited right to property but may use it only for a public purpose ... . The extent and manner of use of the state property may be determined by a statute in the exercise of legislative power. Where a statute requires certain public lands to be used only for a specific public purpose, such land cannot be diverted to another inconsistent public use without explicit authorization.
>
> In the absence of statutory restrictions, the state generally may use land deeded to it in such manner as reasonable public necessity may require.

Id. at § 146.

In Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986), our Supreme Court stated that "[p]ublic purpose is not easily defined." The Court further commented that "[i]t is oftentimes stated that a public purpose has for its objective

the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof." Nichols approved a four-part test first enunciated in Byrd v. County of Florence, 281 S.C. 402, 315 S.E.2d 804 (1984) for determining a public purpose:

> [t]he Court should first determine the ultimate goal or benefit to the public intended by the project. Second, the Court should analyze whether public or private parties will be the primary beneficiaries. Third, the speculative nature of the project must be considered.

In an Opinion dated July 6, 1984, we addressed the question of "whether the Town of Hampton may close two roads which have never been opened for use by the public and, if so, whether the property may be given to a nearby church and adjacent property owners." There we noted that a "municipal corporation hold and controls its streets in trust for the use and benefit of the general public ...". Bethel Methodist Episcopal Church v. City of Greenville, 211 S.C. 442, 45 S.E.2d 841 (1947). Additionally, we stated that

> ... as all property held by municipal corporations is held in a fiduciary capacity, a street can be closed only to serve a public purpose and not for the sole benefit of an abutting property owner. Haesloop v. City Council of Charleston, 123 S.C. 272, 115 S.E. 596 (1923); City of Rock Hill v. Cothran, 209 S.C. 357, 40 S.E.2d 239 (1946). However, the court in Cothran went on to say that the mere fact that the closure of the street was at the instigation of an abutting owner does not, of itself, invalidate the closure or constitute an abuse of discretion by the city council.

We further concluded that a number of factors should be considered "in determining whether the action is in the best interest of the public." Among these were:

1. Enlarging the public resources;

2. Increasing the industrial energies of the city;

3. Promoting the productive power of a greater number of the city's inhabitants; and

4. Eliminating hazards to pedestrian and vehicular traffic;

5. The use made of the street being closed;

6. Alternate routes of travel;

7. The location of markets, schools and churches;

8. The character and physical features of the land, etc.

These foregoing factors could be readily adopted to the situation where the State or a public entity makes the decision to enclose or fence in public property. The same type of "cost-benefit" analysis applicable to the closing of a public street would serve well in determining whether such an enclosure is in the public interest and serves a public purpose or is primarily for the benefit of private parties. Such a determination is crucial in any such decision and, of course, each situation is unique to its own factual circumstances.

Thus, I would conclude that any improvements or enclosures upon public property must primarily benefit the public. In addition, such use must serve the specific public purpose to which it may be dedicated (if applicable). This would include compliance with all relevant statutes and regulations for use of the agency's or the State's property. Third, factors which would be considered as to whether or not such enclosures would be for a public purpose would include:

1. Whether such use would enlarge public resources;

2. Whether such was for economic development, a clear public purpose;

3. Who would be benefited by, particularly the primary beneficiary for such enclosure;

4. To what use was the unenclosed property previously put;

5. What impositions and increased inconveniences are placed upon the public.

6. What is the cost to the public, weighed against the public benefit?

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph