

The State of South Carolina

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November 9, 1992

The Honorable Ernie Passailaigue
Senator, District No. 43
P. O. Box 299
Charleston, South Carolina 29402

Dear Senator Passailaigue:

In a letter to this Office you questioned whether a political subdivision, such as a school district, is legally prohibited from selling advertising space on publicly owned property, such as cars, buildings or vacant real estate, to be used by the private sector. You indicated that you had introduced legislation this past legislative session which would have provided a statutory framework for allowing advertising by the private sector on public property. However, such provision, which was included in the Appropriations Act, was vetoed.

As to school property generally, it has been recognized:

... statutes expressly empower school boards, or local authorities in control of land reserved for school purposes, to execute leases of such land. These statutes frequently contain provisions for the exercise of the power only where the land is not suitable or needed for school use.

68 Am.Jur.2d Schools, Section 77 p. 426. As to other political subdivisions, it is stated

... municipal corporations and counties have no power to rent their property to private persons, in the absence of a charter provision or statutory enactment

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empowering them to do so either in express terms or by necessary intendment. Conversely, it is generally held that a municipal corporation or county has the right to rent its property to private persons where such a right is conferred, either expressly or by necessary implication, by charter or by statutory enactment.

56 Am.Jur.2d Municipal Corporations Section 556, pp. 609-610. Such is consistent with the holding of the State Supreme Court in McKenzie v. City of Florence, 234 S.C. 428, 108 S.E.2d 825 (1959) where the Court determined:

The general rule is that municipal corporations possess and can exercise only such powers as are granted in express words, or those necessarily or fairly implied in or incident to the powers expressly conferred, or those essential to the accomplishment of the declared objects and purposes of the corporation.

234 S.C. at 437. See also: Lomax v. City of Greenville, 225 S.C. 289, 82 S.E.2d 191 (1954).

Pursuant to S.C. Code Ann. § 59-19-90(5) a board of school trustees is authorized to "(t)ake care of, manage and control the school property of the district." I am enclosing copies of prior opinions of this Office which cite such provision in association with the question of use of school facilities for certain purposes, such as church services. As stated in a 1970 opinion,

The law in South Carolina is obviously that the school board may make any arrangements that it cares to in regard to the incidental use of school property by private or public parties. But this discretionary power can be abused if the activities permitted on school property are other than incidental and casual in nature and conflict with school purposes.

It is well settled, however, that a school board, if it allows the school facilities to be used at all, must

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permit all individuals and organizations to use them if the purpose for which the facilities will be used are lawful. In other words, the school board may not discriminate. If the school board elects to make school facilities available it is required by constitutional provision, "...to grant the use of such facilities in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all". 1970 Ops. Atty. No. 3014 (November 2, 1970.)

Moreover, as referenced in the opinions, decisions of the State Supreme Court have recognized the custom in this State of utilizing public buildings for non-public purposes. Harmon v. Driggers, 116 S.C. 238, 107 S.E. 923 (1921); Carter v. Lake City Baseball Club, 218 S.C. 255, 62 S.E.2d 470 (1950). These opinions did not deal with the issue of selling advertising space on public property.

As to other political subdivisions, pursuant to S.C. Code Ann. § 4-9-30(2) and (3), counties are authorized to "... lease ... real and personal property ... (and) ... make and execute contracts" As to municipalities, see, S.C. Code Ann. § 5-7-40.

I am unaware of any State statutes or other specific authority dealing with the sale or lease of advertising space on publicly owned county or municipal property to the private sector. Likewise, I am unaware of any such authority as to school property. Therefore, to avoid any ambiguity, consideration should be given to seeking legislation providing for such the sale or lease of advertising space in such manner.

One other consideration in which should be kept in mind is that once the use of public property is made available, First Amendment Constitutional guarantees may be applicable. An opinion of this Office dated December 9, 1983 cited the decision in Sefick v. City of Chicago, 485 F.Supp. 644 (N. D. Ill. E. D. 1979) which dealt with a case brought by an artist who challenged a decision by a city official revoking permission to display certain sculptures in the city's civic center. The Court noted that the city was under "no constitutional compulsion to provide this public forum." However, the Court stated further that "once this

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forum has been provided, constitutional guarantees come into play." 485 F.Supp. at 649. See also: Police Dept. of City of Chicago v. Mosely, 408 U.S. 92, 96 (1972). The enclosed opinions also make reference to the requirement that when use of public property is made available, such must be made available in a non-discriminatory manner. See: Opin. of the Atty. Gen. dated November 2, 1970 ("If the school board elects to make school facilities available, it is required by constitutional provision, "... to grant the use of such facilities 'in a reasonable and non-discriminatory manner, equally applicable to all and administered with equality to all.'") Therefore, if school property is made available for advertising, as to regulation of the type advertising permitted, First Amendment rights may be relevant.

If there is anything further, please advise.

Sincerely,



Charles H. Richardson
Assistant Attorney General

CHR/an
Enclosures

REVIEWED AND APPROVED BY:



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