

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3970
FACSIMILE: 803-253-6283

November 29, 1989

The Honorable Harriet Keyserling
Member, House of Representatives
Post Office Box 1108
Beaufort, South Carolina 29901

Dear Representative Keyserling:

As you are aware, this Office has had under review, for several months, various contracts and documents relative to Santee Coastal Reserve and Washo Reserve. While you expressed an interest in questions related to Santee Coastal Reserve, your particular inquiry is what party is responsible for paying for a boardwalk at Washo Reserve.

The lease entered into between The Nature Conservancy and the State of South Carolina concerning the Washo Reserve provides in pertinent part that the State, as lessee, will pay "all real estate taxes and assessments and all operating and maintenance expenses for the entire duration of this lease and extensions thereof" The issue is, apparently, whether work related to the boardwalk is considered to be maintenance; if so, the cost would be borne by the State. If such is not maintenance, the cost would not be borne by the State, but alternate sources of funding would be required.

The term "maintenance" has no precise legal definition, and hence such definition would depend on construction of the lease, objectives to be accomplished by the lease, and so forth. Cf., Davis Holding Corp. v. Wilcox, 112 Conn. 543, 153 A. 169 (1931). The notion of maintenance generally involves the upkeep, preservation, or prevention of disrepair of property. Rickman Mfg. Co. v. Gable, 246 N.C. 1, 97 S.E.2d 672 (1957); Saphir v. Neustadt, 177 Conn. 191, 413 A.2d 843 (1979); Ross v. City of Chicago, 168 Ill. App. 3d 83, 522 N.E.2d 215 (1988). Some courts have distinguished between maintenance and repair, the latter meaning to restore to good condition following injury, decay, destruction, or the like. Barber Asphalt Pav. Co. v. Hezel, 155 Mo. 391, 56 S.W. 449

The Honorable Harriet Keyserling
Page 2
November 29, 1989

(1900). Other courts have included the concept of repair as being within maintenance. Hanlon v. Cleary, 142 Ky. 46, 133 S.W. 953 (1911). Thus, there is no clear answer as to exactly what actions are included within the term "maintenance."

In addition to the less-than-precise definition of "maintenance," it is also necessary to consider intentions of the parties to the lease, past actions of the parties to the lease, and such factual matters as the current state of the boardwalk, particularly in the aftermath of Hurricane Hugo. As well-stated in Op. Atty. Gen. No. 85-132 (copy enclosed), such fact-finding is outside the scope of this Office's authority. It would be up to a court to determine factual matters and declare with finality exactly what actions would constitute "maintenance" of the boardwalk and which party would be responsible for the costs thereof, depending on whether the needed work would or would not constitute "maintenance." The court would also be in a position to consider legal or equitable defenses such as laches, waiver, estoppel, unclean hands, prior inconsistent statements or actions by either party to the lease, and so forth, as a part of the fact-finding process.

The matters relative to the Santee Coastal Reserve and Washo Reserve are complex and present unusual questions to be answered. We regret that the foregoing must be general in nature and that, as with any contract, the ultimate conclusion must remain with the appropriate trier of fact. We hope that we have given you some guidance, however.

With kindest regards, I am

Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

PDP/an

Enclosure

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions