

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 27, 1989

The Honorable James J. Bailey
Member, House of Representatives
18 Broad Street
Charleston, South Carolina 29401

Dear Representative Bailey:

Referencing a large tract of land located in Charleston and Georgetown counties and known as the Santee Coastal Reserve, obtained by the State of South Carolina from The Nature Conservancy, you have inquired about restricting public access to a boat ramp located within the Reserve or constructing a new boat ramp at another site within the Santee Coastal Reserve. To fully respond to your inquiry, it is necessary to consider both state and federal law, as well as various documents related to the transfer of the land to the State of South Carolina. In so doing, this Office can look only at the face of the documents; we cannot make factual findings by way of an opinion or comment upon legal or equitable defenses (such as laches, estoppel, waiver, prior inconsistent actions or statements of any party, or the like) which might be raised by any party should litigation result from the conduct of any individual, entity, agency, or other party. As we stated in Op. Atty. Gen. No. 85-132, dated November 15, 1985 (copy enclosed), interpretation of contracts necessarily depends on factual determinations and consideration of all other relevant factors.

Background

The tract of land now known as the Santee Coastal Reserve was transferred to the State of South Carolina by quitclaim deed on September 20, 1974, by The Nature Conservancy. The quitclaim deed referenced an Agreement of Lease and License entered into between The Nature Conservancy and Collins Creek Gun Club, Inc. dated July 26, 1974, which agreement was accepted by the State of South Carolina by its acceptance of the quitclaim deed. Additionally, the State of South Carolina, by the South Carolina Department of Wildlife and Marine Resources, entered into an agreement and contract with the

The Honorable James J. Bailey
Page 2
November 27, 1989

Collins Creek Gun Club on October 24, 1975, whereby the Collins Creek Gun Club leases certain premises from the Wildlife and Marine Resources Department. These documents and several schedules attached thereto have been examined by this Office in the preparation of this opinion.

Furthermore, it is our understanding that federal funds from the Land and Water Conservation Fund have been utilized with respect to this tract of land. For this reason, the tract of land is thus subject to application of certain federal laws such as 16 U.S.C. §4601 et seq. One such requirement is apparently the development of a use plan. See, for example, 16 U.S.C. §4601-8(d). This Office has not examined grant documents, any use or comprehensive plans, or documents of a similar nature and thus is not in a position to comment thereon.

The quitclaim deed contains contains several provisions entitled "Conditions Subsequent," which conditions have been accepted by the State as grantee. Applicable to Zone A, designated a waterfowl management area and the area subject to the aforementioned Agreement of Lease and License, and Zone B, other parts of the granted lands, is a condition concerning improvements, numbered 2:

Existing buildings, roads and other improvements on the Property may be maintained or replaced, but such existing buildings, roads and other improvements may not be expanded, enlarged, or the like, and no additional buildings, roads, or other improvements may be constructed thereon by the Grantee or by any other party without the prior written approval of the Grantor.

In addition, paragraph 7 covers improvements to be made in Zone B:

The construction of new buildings, roads, parking lots, or other improvements, as well as the storage of equipment, shall be confined to Zone B, unless prior written approval is obtained from the Grantor. The number and type of such improvements shall be determined by reference to a Use Plan, as provided for hereinafter.

On its face, the quitclaim deed, by the express conditions subsequent, would appear to prohibit the placement of a boat ramp on the property without the prior written consent of The Nature Conservancy. As will be seen below, The Nature Conservancy has reserved the right of reversion if such conditions are breached.

The quitclaim deed contains a provision for the right of re-entry for the breach of conditions subsequent, as follows:

Should the property cease to be used solely as provided herein or should any of the herein-stated conditions subsequent be breached, then the estate hereby granted to the State of South Carolina may be terminated by The Nature Conservancy, its successors and assigns, under a power of termination in the nature of a right of re-entry for breach of a condition subsequent, which right shall be exercised by the mailing to the Grantee, by certified mail, of notice of that breach. Such notice shall declare that the power of termination and right of re-entry has been exercised and shall describe the breach which caused this action to be taken. At the time of mailing, a copy of the notice also shall be recorded with those governmental land records which reflect the ownership of the Property. Since the above noted power of termination and right of re-entry are not automatically operative, but are reserved expressly by the Grantor, its failure to exercise such power and right in the event of a breach by the Grantee shall not be deemed to extinguish the Grantor's option to exercise such right in the event of any future breach.

The Grantee further agrees that title to the Property conveyed hereunder shall revert to the Grantor, its successors and assigns, upon the enactment of any law, statute or legislation, or entry of any executive or judicial order abrogating, limiting, amending, modifying, changing, altering or in any wise affecting any of the terms or conditions of this grant, including, but not limited to, the right of re-entry reserved to the Grantor hereunder, and the cancellation of the Agreement of Lease and License to which this conveyance has been made subject, without the mutual consent of the Lessee-Licensee thereunder.

Your letter indicated an intent to prevent further funding for this property unless greater public access is permitted, perhaps by way of construction of a public boat ramp. We would caution, however, that the immediately foregoing clause is mandatory. Whether a court would enforce the conditions subsequent or enforce the reserved right of re-entry of The Nature Conservancy cannot be determined by this Office.

The Agreement of Lease and License contains provisions which must be considered in responding to your inquiry. For example, in section 4 concerning operation and use of the premises, it is stated that "[t]here shall be no new roads or buildings made or constructed on either the Leased Premises or the Licensed Premises by the Lessee-Licensee." 1/ Section 5 expresses the scope of the license: "During the term of this Agreement the Lessee-Licensee shall have an exclusive license to utilize the Licensed Premises for the purpose of hunting, during the game hunting seasons, subject to the numerical limitations set forth herein." Limitations on use are specified in section 6: a maximum of twenty (members and their guests) on the leased premises and a maximum of ten persons hunting on the licensed premises on any one day. The lease and license appears to establish exclusive hunting rights on the licensed premises, with no access permitted to other than The Nature Conservancy.

Of particular interest, as well, are two portions of the agreement of October 24, 1975 between the Wildlife and Marine Resources Department and the Collins Creek Gun Club. Section 6 is entitled "Boat Ramp" and provides that "The Department shall upgrade the one existing boat ramp on the property - but use of this ramp shall be exclusively limited to Department personnel, Club members and their guests when accompanied by a member." Within section 8, entitled "Management Plan," is the following: "Any public hunting or public usage which might interfere or diminish the Club's rights and use of the property under their lease/license agreement shall be coordinated in advance with the Club, and shall be conducted only if approval thereby is granted in advance." We perceive no inconsistency of these provisions with the provisions contained in the other documents and would also note that none of the documents provides an enforcement mechanism to be exercised by the Collins Creek Gun Club. Whether the use of the existing boat ramp by the public, construction of a public boat ramp, or other uses of the property might constitute an interference or diminishing of the Club's rights or use of the property as contemplated in section 8 would be a factual question for the court, but it is possible that a court could so conclude after a consideration of all relevant factors. See Op. Atty. Gen. No. 85-132.

A number of policy considerations have been advanced to justify limited public access to or usage of the area. For instance, we are informed that a tremendous number of ducks winter along South Carolina's coast and use the Santee Coastal Reserve as a resting area.

1/ According to Schedule A-1, the leased premises comprise approximately 11.8 acres as described therein. Schedule B-1 described the licensed premises as, effectively, the remaining acreage known as the Santee Coastal Reserve.

Additionally, the Reserve has had within its bounds fifty osprey nests and two active bald eagle nests in the last year or so. The significance and value of this tract cannot be overlooked with respect to game management. The foregoing represent only a few of the many policy considerations which could be advanced in responding to your inquiry; however, the role of this Office is to opine on legal issues rather than to comment on policy matters.

State Law

Whether the State of South Carolina may enter into agreements such as those described above must first be examined. Section 50-3-100 of the South Carolina Code of Laws is pertinent in this respect, providing:

The [Wildlife and Marine Resources] Department may acquire, own, sell, lease, exchange, transfer or rent real property, alone or in cooperation with agencies of the Federal Government, for the purpose of providing game reserves, ...public hunting and fishing grounds and for other purposes necessary and proper for the protection, managing or propagating of fish and game and furnishing the people of the State with hunting areas and fishing facilities. ...2/

This Code section gives the Wildlife and Marine Resources Department wide latitude in acquisition or disposal (including leasing) of real property for game reserves or other related purposes. No limitation is placed thereon, by this statute, with respect to the entities who might be involved in such a real property transaction, nor does this statute specify any terms or conditions which must be met if this statute is utilized.

2/ In construing this Code section, formerly codified as Section 28-107 of the 1962 Code, former Attorney General Daniel McLeod opined on September 13, 1974, that the Wildlife and Marine Resources Department had the authority to accept a conveyance of land from The Nature Conservancy.

The Honorable James J. Bailey
Page 6
November 27, 1989

Additionally, Section 50-13-2020 of the Code provides the following:

The South Carolina Wildlife and Marine Resources Department has management control over the lakes and ponds which it owns or leases. It may establish the terms and conditions under which the public may use the lakes and ponds for fishing, boating, picnicking, and other related activities. Before taking effect, the conditions and terms must be approved by the Wildlife and Marine Resources Commission and a majority of the county legislative delegation of the county where the lake or pond is located and published in a newspaper of general circulation in the county.

Any person violating the terms and conditions of this section is guilty of a misdemeanor and upon conviction must be fined not more than two hundred dollars or imprisoned for not more than thirty days.

It is noted that this section was not in effect at the time the aforementioned agreements were executed, as this section was adopted as a part of Act No. 496, 1986 Acts and Joint Resolutions. It is mentioned herein to demonstrate the latitude which the Wildlife and Marine Resources Department has in terms of game management.

A review of other statutory and constitutional provisions does not reveal any which would govern an agreement or contract as described above. Regulation 19-445.2120 of the Budget and Control Board specifies procedures to be followed when the State of South Carolina or one of its agencies desires to lease state-owned real property; a specific exemption is contained therein with respect to game management areas of the Wildlife and Marine Resources Department, however.

Guidance in this situation could be found in an opinion of this Office dated August 27, 1985, concerning the sale of real property by a state institution, a situation which likewise was not covered by statute. Therein, it was stated:

...Article III, §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 them-

selves 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 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.

While this opinion dealt with the sale of real property rather than the lease and license as with the Santee Coastal Reserve, the opinion is helpful in several respects. The State must receive a fair and reasonable return for its lands, though what would be considered fair and reasonable would be a factual matter, the determination of which is outside the scope of an opinion of this Office. It is noted, however, that the various documents referenced above contain provisions for determining periodically the consideration to be paid to the State by the Collins Creek Gun Club; the adequacy of such consideration is not commented on herein.

It may thus be concluded that the above-referenced documents, as detailed above, do not appear to violate any constitutional or statutory provisions of the State of South Carolina. This Office does not comment on factual matters or policy considerations relative to entering into such agreements.

Federal Law

Because a grant from the federal Land and Water Conservation Fund were used in conjunction with the Santee Coastal Reserve, the tract is subject to both state and federal laws. The relevant portions are 16 U.S.C. §4601 et seq. and Part 59 of Title 36, Code of Federal Regulations. The thrust of these federal provisions is that once these federal funds have been used in a particular area, the area must be continually maintained for public recreation use unless the Secretary of the Interior or his designee approves other provisions. See 16 U.S.C. 4601-8(f)(3) and 36 C.F.R. §59.3(a).

It is the responsibility of the Secretary of the Interior, through the National Park Service, to ensure compliance with applicable federal statutes and regulations. We understand that the agreement entered into by the Wildlife and Marine Resources Department and the Collins Creek Gun Club is being examined by regional officials of the National Park Service for compliance with federal law. For this reason, it would be inappropriate for this Office to opine on whether the referenced agreement may or may not be consistent with federal law, particularly as to use of the boat ramp by the public. In short, whether or not there has been a change with respect to the original use plan submitted with the grant application could only be determined by the appropriate federal agencies involved. See, Friends of the Shawangunks v. Clark, 754 F.2d 446 (2d Cir. 1985) (any such change requires approval by the Secretary of the Interior or his designee).

Conclusions

Based on the foregoing, this Office concludes as follows:

1. The agreements entered into by The Nature Conservancy and the Collins Creek Gun Club and accepted by the State as a part of the quitclaim deed and also entered into between the Wildlife and Marine Resources Department and the Collins Creek Gun Club concerning the use or lease of a specified portion of the Santee Coastal Reserve do not appear to violate state statutory or constitutional provisions.

2. The role of this Office in an opinion is to review legal provisions relevant to a given issue. For this reason, we do not comment on policy considerations relative to the State, through its agency, entering into such agreements as to use of its property.

3. Whether public use of the existing boat ramp, construction of a new public boat ramp, or any other use of the property by any individual, group, entity, or party would violate any provisions of the above-referenced documents, thus violating rights of the Collins Creek Gun Club (contained in the agreement and contract as well as the lease and license) or possibly breaching conditions subsequent so that The Nature Conservancy would exercise its reversionary rights (as contained in the quitclaim deed), would involve factual determinations which could be made only by a court considering all relevant factors. Certainly it is possible to imagine circumstances under which a court could reach that conclusion.

4. Federal law and regulations are also applicable to the Santee Coastal Reserve and its use as a public recreation area. The appropriate federal agencies are presently examining the various

The Honorable James J. Bailey
Page 9
November 27, 1989

relevant documents and agreements to determine compliance with federal statutes and regulations. Of course, such a determination is a matter for the federal authorities who are responsible for monitoring federal funding.

With kindest regards, I am

Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

PDP/nw
Enclosure

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions