

11111 Secretary

The State of South Carolina



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August 27, 1985

The Honorable Glenn F. McConnell
Member, South Carolina Senate
1370 Remount Road - Suite D
Charleston, South Carolina 29406

Dear Senator McConnell:

You have asked us to advise you as to the required procedures for the College of Charleston to sell land. You have particularly referenced a proviso contained in the 1985-86 State Appropriations Act authorizing a sale by the College as part of a larger transaction. You wish to know whether this proviso is merely an authorization to buy certain property and finance it over four years with a loan to be paid back out of proceeds from the sale of other lands by the College; or whether this proviso exempts the College from state procedures as to the sale of land. We will review below the relevant statutes in this area, including the proviso which you have mentioned in your letter.

The proviso which you have referenced is contained in Part III, Section 2 of the 1985-86 State Appropriations Act. That proviso reads as follows:

Subject to the approval of the Budget and Control Board:

- (1) The State College [of Charleston] Board of Trustees is authorized to purchase for the College of Charleston certain property located in the City of Charleston at a cost not to exceed \$4,250,000;
- (2) The trustees are authorized to enter into agreements with the lending institutions under which the trustees would borrow \$4,250,000 for the purchase of the property;

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(3) The trustees must repay this indebtedness not more than four years subsequent to its having been incurred using proceeds from the sale of the various College of Charleston properties or other sources of revenue as may be made available as a special source of funds for the repayment of this indebtedness;

(4) The trustees are authorized to sell various properties of the College of Charleston and to apply all net proceeds of these sales to this indebtedness until both principal and interest costs have been repaid.

We agree with your reading of this proviso, i.e. that the General Assembly intended merely to authorize pursuant thereto the relevant transaction in question. There is no suggestion therein that the proviso sought to alter any other existing laws or procedures relevant to the sale of land by the College. As a general rule, statutes must be read in pari materia. Moreover, the title to the proviso, which is indicative of legislative intent, states that the Section is intended simply "... TO PROVIDE FOR THE MANNER IN WHICH FUNDS WILL BE OBTAINED AND REPAID CONCERNING THE PURCHASE." Thus, further examination of other relevant statutes and constitutional provisions is necessary to determine the governing procedures for the sale of the property.

Pursuant to Section 59-101-20 of the Code of Laws of South Carolina, the College of Charleston was transferred to the State. Section 59-107-10 (1983 Cum.Supp.) designates the College of Charleston as a "state institution". The governing board of the College is established pursuant to § 59-105-10 et seq. By virtue of § 59-105-40, the Board is constituted a body corporate and politic. Subsection (4) of § 59-105-40 authorizes the Board

... to sell and dispose of personal property and any buildings that are deemed by it as surplus property or not further needed and any buildings that it may need to do away with for the purpose of making room for other construction; provided, however, the board shall not have power to sell or

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dispose of any of its real estate, other than buildings, except with the consent of the State Budget and Control Board. (Emphasis added.)

Section 59-105-70 further provides:

After obtaining the approval of the State Budget and Control Board, the board is authorized to lease or to sell and convey from time to time any real property which may have been or may hereafter be donated to the college in the course of any fund campaign which may be conducted at any future time, for such consideration and upon such terms and at such times and in such manner as shall be set forth in the resolution of approval of the State Budget and Control Board. (Emphasis added.)

Thus, the foregoing statutes are consistent with the proviso contained in Part III, Section 2, requiring at a minimum Budget and Control Board approval before the sale of real property by the College.

To our knowledge, no other statutes specifically address the situation you have referenced. The Consolidated Procurement Code, § 11-35-10 et seq. does not expressly address the sale of real property; instead, the Procurement Code governs the acquisition of goods and services by the State and its agencies. We would further note that R-19-445.2120(B) of the Budget and Control Board deals with leases of State-owned property, requiring approval by the division of General Services, but again no reference is made as to the sale of State properties.

Thus, we now turn to the various principles of general and constitutional law which would also govern in the situation which you have described, 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 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

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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 are 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.

Thus, even though State statutes require, strictly speaking, only that State land be disposed of upon approval of the Budget and Control Board, we would advise that the foregoing constitutional provisions must still be complied with in any sale of State lands. The State must receive a fair and reasonable return for its lands. The adequacy of consideration is, of course, primarily a factual question based upon consideration of all the factors outlined in the cases cited above.

In addition, "[i]t is fundamental that the sales of public property must be openly and fairly conducted... ." 10 McQuillin, Municipal Corporations, § 28.45. This Office only recently advised that "the sale of property by a public entity must be made in such manner and upon such terms as would be most advantageous to the public." Op. Atty. Gen., February 22, 1983.

Accordingly, with respect to the sale, we would suggest consideration be given to employing procedures which would provide "notice, a reasonable opportunity for those interested to appear and be heard, and fairness in connection with the sale." McQuillin, supra. While not expressly required by statute, such procedures would insure that the various constitutional and policy considerations expressed above are fully met.

I am enclosing for your consideration a copy of the "State-wide Procedure For State Owned Surplus Real Property Under The Purview of the Division of General Services." As we understand it, that is the procedure presently followed by the Budget and Control Board in the disposal of State lands under its jurisdiction. As you can see, that procedure at a minimum requires that "the dispersement of ... property will be made at fair market value as determined by an independent appraiser." Moreover, in addition to an independent appraisal, the Board formerly required a competitive bidding process. Again, we note that these procedures are not mandatory upon the College, unless imposed by the Budget and Control Board as a condition of approval pursuant to

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the proviso which you have cited. However, such procedures could, nevertheless, be followed by the College in disposing of the property in question.

If we can be of further assistance, please let us know.

Sincerely,



Robert D. Cook
Executive Assistant for Opinions

RDC:djg

Enclosure