The State of South Carolina

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Dr. James A. Timmerman, Jr.
Executive Director
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Dear Dr. Timmerman:

You have requested an opinion as to the power of the General Assembly to enact proposed legislation which would grant certain tidelands in Georgetown County to Brookgreen Gardens. The lands in question are those which abut the highland property of Brookgreen Gardens. You have also asked whether various statutes which authorize obstruction of the creeks entering into Brookgreen Gardens are constitutional.

The Supreme Court of South Carolina has held on a number of occasions that tidelands "enjoy a special or unique status, being held by the State in trust for public purposes." Hobonny Club v. McEachern, 272 S.C. 392, 252 S.E.2d 133, 135 (1979). However, in Lane v. McEachern, 251 S.C. 272, 162 S.E.2d 174 (1968), as well as Hobonny, supra, and State v. Holston Land Co., 272 S.C. 65, 248 S.E.2d 922 (1978), the Court has held certain tidelands to have been granted by the Crown or by the State. There is thus no question that tidelands are susceptible of grants to private entities if the stringent standards for evidence of intent can be satisfied.[1]

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[1] The decided cases all have dealt with grants made in either the Colonial or early State periods. Presumably the Crown had general land-granting authority in the Colonial period; in the early State period, executive grants of vacant lands in general were authorized by a 1791 statute.

Neither the present Constitution of South Carolina nor any prior constitution has ever prohibited conveyances of tidelands by the General Assembly. There appears to be little reason to doubt that the General Assembly does have the power to grant tidelands, presumably so long as such public rights as exist in the overlying navigable waters are not extinguished.[2] There is simply no source of authority which prohibits such grants.

The proposed grant therefore only presents two other questions, which can be discussed as one. The first is whether such a conveyance would impair the public trust, and the second is whether the transaction would violate Article III, Section 31 of the South Carolina Constitution, which prohibits donations of public lands.

Brookgreen Gardens is a public eleemosynary corporation. It holds its present lands pursuant to a deed which requires that the property be used and maintained in a wild state for the preservation, protection and propagation of wild flora and fauna; in the event the property is not used for such purposes, the deed provides for it to revert to the grantors or their heirs.

The General Assembly has passed a number of specific acts relating to Brookgreen Gardens: Act No. 695 of 1932, amended by Act No. 171 of 1937 (granting tax-exempt status to the property); Act No. 462 of 1935 (referencing an agreement whereby Brookgreen became a wildlife sanctuary, and authorizing blockage of several streams to prevent trespassing); Act No. 570 of 1942 (establishing Brookgreen as a game and fish sanctuary by statute); Act No. 160 of 1943 (permitting Brookgreen to block an additional stream); Act No. 120 of 1961 (further amendments). Several other statutes, largely cumulative, also exist. The game sanctuary provisions are largely codified in § 50-11-2810 of the 1976 Code.

In addition to the foregoing, substantially all of the beach and salt marsh owned by Brookgreen Gardens has been voluntarily included in the Heritage Trust Program pursuant to §§ 51-17-10, et. seq. of the 1976 Code. Also, for more than 25 years and without charge, Brookgreen Gardens has provided the State with exclusive use of all of its property (thousands of acres of beach, salt marsh and highland) located east of U.S. Highway 17.

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[2] A 1957 opinion (1957 Op.A.G. 291) expressed some doubt about the General Assembly's power to convey tidelands, but that opinion was issued prior to the line of cases beginning with Lane, supra, which made it clear that tidelands could be, and were, granted.

From the above, it can clearly be seen that the General Assembly for over 50 years has treated Brookgreen Gardens as a unique place which served a substantial public benefit as it is presently maintained and operated. In a like manner, Brookgreen Gardens has apparently carried out the public purposes of its charter. Thus, the preservation of the adjoining tidelands through a conveyance would probably be deemed by a court to confer a substantial public benefit, and thus not violate Article III, Section 31.

There is likewise nothing in the proposed transaction which would offend the public trust doctrine. In practical effect, the public, under the aforementioned statutes, has been banned from using the creeks and marshes as part of the State's effort to protect the property. There is nothing in the public trust doctrine which precludes the State from making laws and regulations necessary to regulate navigation and protect game and fish. See, e.g., Commonwealth v. Hilton, 54 N.E. 362 (Mass. 1899; State v. Lemar, 87 A.2d 886 (Md. 1952). Moreover, § 50-11-2810 permits fishing from the beaches and salt-water creeks entering the property, and also retains the State's right to lease oyster bottoms in the area. The regulation thus in effect at present, and which will presumably not be changed by the proposed legislation, balances the need for a wildlife sanctuary with the need for public trust interests.

From the foregoing, the following can be said in summary:

1. It is unlikely that there is any other undisturbed tideland property in the State which carries the long history of State-recognized dedication to public use which Brookgreen Gardens presents. It is not incompatible with the public trust objective for the General Assembly to grant tidelands such as these to a public eleemosynary corporation, all of the property of which has long been freely accessible to the general public for public purposes. This opinion in no way stands for the proposition that the General Assembly could validly grant tidelands to private individuals for private purposes.

2. The proposed conveyance would not offend Article III, Section 31 because the property in question has for many years been treated by the State as property held for public purposes. It should also be pointed out that the proposed statute would provide for a reversion to the State if the land should cease to be used for charitable, educational or eleemosynary purposes.

3. There is nothing which prohibits grants of tidelands by the General Assembly, provided the public trust is not destroyed. However, the policy decision of whether this conveyance should be made is obviously a decision for the General Assembly.

I hope this will provide a satisfactory answer to your first question. A response relating to your second question will be forthcoming shortly.

Sincerely yours,

Kenneth P. Woodington
Senior Assistant Attorney General

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REVIEWED AND APPROVED:

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