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June 24, 1987

Dr. James A. Timmerman, Jr.
Executive Director
Wildlife and Marine Resources Department
Post Office Box 167
Columbia, South Carolina 29202

Dear Dr. Timmerman:

You have requested an opinion as to whether various statutes which authorize obstruction of the creeks entering into Brookgreen Gardens are constitutional in light of Article XIV, Section 4 of the South Carolina Constitution. See Act No. 462 of 1935; Act No. 160 of 1943.

The referenced acts authorize Brookgreen Gardens to construct and maintain dams and other obstructions in certain creeks, all of which enter the property of Brookgreen Gardens. The General Assembly found in the 1935 Act that Brookgreen was a game and bird sanctuary, that the creeks are entirely within the lands of Brookgreen Gardens, that the creeks are not and cannot be used for any purpose of commerce, and that "[a]s long as the said creeks continue open the game on the lands bordering on these creeks is at the mercy of trespassers coming in boats through these streams and it is practically impossible to protect the game." Act No. 462 of 1935.

After the 1935 Act was enacted, the General Assembly in 1942 enacted legislation designating Brookgreen Gardens and all streams, creeks and waters entering thereon as a game sanctuary. § 50-11-2810, 1976 Code of Laws.

Article XIV, Section 1 of the Constitution of South Carolina provides that "all navigable waters within the limits of the State shall be common highways and forever free...."

The question which you have presented is, we believe, governed by the following language in an opinion of this Office dated October 29, 1986:

> Although there is no South Carolina case on the subject, the United States Supreme Court, in a federal case which arose in South Carolina, has held that statutes authorizing the damming of streams for public purposes do not violate constitutional provisions to the effect that navigable streams are "common highways and forever free." Manigault v. Springs, 199 U.S. 473 (1905). This case would not bind the Supreme Court of South Carolina on this question of state law, but the authorities cited therein are so exhaustive that it is unlikely that our Supreme Court would follow any other rule.

In this instance, the purpose for which the obstruction was authorized is the protection of fish and game within a sanctuary. There is no question the creation and maintenance of game sanctuaries constitutes a public purpose, and one which is routinely the subject of legislation. Accordingly, it is extremely unlikely that the Supreme Court of South Carolina would read Article XIV, Section 4 as prohibiting the obstruction in question.

Sincerely yours,

Kenneth P. Woodington
Senior Assistant Attorney General

KPW:jca

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