1984 WL 249909 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
June 20, 1984

***1** Honorable James M. Waddell, Jr.
Chairman
Board of Trustees
Clemson University
Clemson, South Carolina 29631

Dear Mr. Chairman:
You have requested an opinion as to the power of Clemson University, acting with the approval of the Budget and Control Board, to lease portions of its land to a private developer who would develop the land as set forth herein. The land in question consists of property conveyed to the State by the will of Thomas G. Clemson ('Clemson will' property) and property conveyed to Clemson by the U.S. Department of Agriculture ('Land use' property). Not involved in this opinion request is land purchased and owned outright by Clemson free of any restrictions.

Budget and Control Board approval of the proposed leases is necessary because § 11-35-3810, 1976 Code of Laws, and regulations promulgated thereunder (R 19-445.2150(F)) require Board approval when State property is to be leased.

One proposed development plan, which is more fully described in our opinion to you dated January 24, 1984, calls for the construction of a continuing education center, performing arts auditorium, golf course and marina. Also contemplated are numerous hotel suites and townhouses which would be leased or sold to the general public. This opinion addresses the legal issues raised by that particular proposal.

As presently proposed in the aforementioned draft development plan, the golf course would be built on all three categories of land (i.e., Clemson will property, land use property and unrestricted property). The Performing Arts Center appears to be situated in whole or in part on Clemson will land; a number of structures designated 'additional University housing' also would be built on Clemson will land, but these are not part of the initial development plan and hence are not discussed herein. Only the golf course would extend to land use land, and only the Performing Arts Center and part of the golf course would at present be built on Clemson will land. The Continuing Education Center, the hotel suites, all of the initial-stage townhome, and some of the golf course would be built on unrestricted land.

A. Land use land.

The land use land, which would have part of the golf course constructed thereon, was deeded to Clemson in 1954 by the United States through the Department of Agriculture. Such transactions were authorized by the Bankhead-Jones Farm Tenant Act, 7 U.S.C. §§ 1001 et seq. and specifically by 7 U.S.C. § 1011(C). That section provides that such land grants 'shall be made only to public authorities and agencies and only on condition that the property is used for public purposes.' The deeds similarly provide that the land 'shall be used for public purposes' and that it shall be immediately revert to the United States if not so used.

The question thus presented as to the land use land is whether the golf course would constitute a 'public purpose' within the meaning of the deeds and 7 U.S.C. § 1011(C). It will be assumed for purposes of this opinion that the golf course would be made reasonably open to the public upon the payment of greens fees, etc. The term 'public purpose' is generally construed liberally in favor of concluding that the project in question serves a public purpose. Thus, for example, in Marshall v. Rose, 213 S.C. 428, 49 S.E.2d 720 (1948), the court held that a public recreation center and swimming pool served a public purpose.

In Martin v City of Asbury Park, 176 A. 172 (N.J. 1935), city-owned property near the ocean was leased to an individual for a proprietary 'bathing establishment.' The court held that such a use did not diminish the character of the land as being held for public purposes, especially when such proprietary use was necessary to make the public purpose self-supporting. A golf course was held to be a valid public purpose in Capen v. City of Portland, 228 P. 105, 35 A.L.R. 589 (Ore. 1924). In Bradentown v. State, 102 So. 556, 36 A.L.R. 1297 (Fla. 1924), the court appeared to recognize that a golf course was a proper public purpose, but denied the power of a municipality to construct one under the particular statutory grant of power there involved.

***2** Based on the above authorities, we have no difficulty in concluding that a golf course, made reasonably available to the public, would constitute a 'public purpose' under the deeds and statutes restricting the 'land use' land. There appears to be no difference between the public purpose concept as expressed in the aforementioned cases and in the federal statute. However, since the decision whether to re-enter rests with the federal government, we recommend that an opinion be obtained from the appropriate federal authorities before proceeding.

B. Clemson will property.

The Clemson will devised the Fort Mill Plantation consisting of 814 acres, to the State in trust 'to be held as [an endowment] by the said State so long as it, in good faith, devotes said property to the purposes of the donation . . ..' The Clemson will itself describes the purposes of the donation as being 'the establishment of a scientific institution' or 'the establishment of an agricultural college.' In the 1889 statutes (now codified as §§ 59-119-10 et seq.) by which the State accepted the devise, essentially the same purpose ('establishing and maintaining an agricultural and mechanical college') is recited. The same act (§ 59-119-70) provides that the Clemson trustees may not 'sell or make title to' Clemson will property. Since the trustees would presumably be the lessors (although subject to Budget and Control Board approval), the first question presented is whether the statutory prohibition against 'selling or making title' also prohibits leasing the property.

It appears to be well settled that even though the sale of trust property is expressly prohibited, the property may be leased when the lease will further the purposes of the trust. Black v. Ligon, Harp.Eq. 205 (1824); Pa. Horticultural Society v. Craig, 87 A. 678 (Pa. 1913); In re Hubbell Trust, of Presbyterian Church, 214 S.W.2d 601 (Ky. 1948). As Professor Scott states, '[w]here by the terms of the trust the trustee is forbidden to alienate the land, he is not precluded from leasing it.' 3 Scott on Trusts, § 189 (3d ed. 1967). The rationale for the rule is that 'any transfer short of a conveyance of the title is technically not an alienation of the estate.' the proceeds from the lease would, of course, be impressed with a requirement that they be used to advance the purposes of the will, Restatement 2d, Trusts, § 182, and the trustees would have a fiduciary duty to obtain a reasonable return on the lease. Bogert, TRUSTS AND TRUSTEES, § 797 (2d ed. rev. 1981). Hubbell Trust, supra, 113 N.W. at 515. However, the lease must not be for so long a term as to be unreasonable. Absent a specific proposal at this time, it is impossible to say whether a given lease of the Clemson will property would be unreasonable. It can, however, be pointed out that most of the leases deemed unreasonable in charitable trust cases were of extremely long duration.

There is little question that the Performing Arts Center and the golf course, the only projects presently proposed to be constructed on Clemson will property are in keeping with 'the purposes of the donation,' i.e., the establishment of a college. Although citation of authority is hardly necessary, in Kibbe v. City of Rochester, 57 F.2d 542 (W.D.N.Y. 1932), it was held that a bequest for the establishment of a fine arts building was a bequest for educational purposes. Likewise, it is obvious that where, as here, the purposes of the devise include both 'physical and intellectual education,' the construction of a golf course is a use consistent with the will's terms. See Moyer v. Board of Education, 62 N.E.2d 802 (Ill. 1945) (school stadium a legitimate 'school purpose').

***3** In summary, then, and for the reasons stated hereinabove, it is the opinion of this office that:
1. The 'land use' land may be used for the construction of the golf course, assuming that the course is made reasonably open to the public. A confirmatory opinion should, however, be obtained as a precaution from the appropriate federal authorities.

2. The Clemson will property may be leased by the trustees, subject to Budget and Control Board approval, consistent with the purposes of the devise and for a reasonable length of time. The proceeds of the lease, which must be reasonable in amount, must be used to advance the purposes set forth in the will.

3. The proposed golf course and Performing Arts Center are consistent with the purposes of the will, and Clemson will land may accordingly be leased for those purposes.

As we understand it, this and our prior opinion answer all the legal questions which you had about this particular proposal for the project. If other questions arise, however, please do not hesitate to call on this office.

With kindest personal regards, I am
Sincerely yours,

Kenneth P. Woodington
Senior Assistant Attorney General

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