

1982 WL 189234 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

April 2, 1982

*1 Racine D. Brown, Ph.D.
Acting State Commissioner
S. C. Department of Mental Health
Box 485
Columbia, S. C. 29202

Dear Dr. Brown:

Thank you for your letter of March 17, 1982 requesting the advice of this office as to whether the State Hospital may enter a lease with a mortician under which the mortician would use the State Hospital morgue as an operating base. The lease would provide, in exchange, that the mortician would perform certain services for the State upon the death of a patient, that would be of a value equivalent to the fair rental value of the property. This matter should be referred to the Division of General Services for review.

The South Carolina Mental Health Commission does not appear to have any direct statutory authority, itself, to lease any parts of the buildings or facilities under its jurisdiction. Any such authority would rest in the Budget and Control Board. See Act 178, § 137, Acts and Joint Resolutions of South Carolina, 1981; [§ 1-5-40](#), [1-11-70](#) and [11-9-630 of the Code of Laws of South Carolina \(1976\)](#) and the amendments thereto. In addition, the proposed transaction appears to come within the terms of the procurement code in that the State Hospital would be procuring the mortician's services for the rental value of the morgue. See [§§ 11-35-40](#) and [11-35-310\(8\) of the Code](#), as amended. Therefore, you should refer this proposal to the Division of General Services of the Budget and Control Board for its review if you desire to pursue it further.

Before any lease is approved, careful attention should be given to whether the contemplated operation would be a permissible use of public property. Previous opinions of this office (copies attached) have held that public funds may not be expended for private purposes; however, cases have held that a state may lease property to private persons where such action is in furtherance of a public purpose and where there is no interference with public use. 81A CJS States § 150. [Wilmington Parking Authority v. Rankin](#), 34 Del.Ch. 439, 105 A.2d 614, 621 (1954) noted that abundant authority existed that the state ' . . . may lease for commercial purposes buildings, or surplus space in buildings temporarily not needed for public use. Such leasing is deemed to be merely an incidental use of public property for a private purpose, and it does not destroy the public character of the project as a whole.' Thus, here, the proposed arrangement will have to be analyzed in detail to weigh the various public and private interests involved in this proposed lease and the affect of this arrangement on other use of the property by the State Hospital. Cf. [Carter v. Lake City Baseball Club](#), 218 S.C. 255, 62 S.E. 2d 470 (1950).

In addition to these matters, attention should be given to potential liabilities of the State Hospital arising from the proposed use of its facilities and the possibility of the imposition of various taxes on this operation, including business license fees and ad valorem taxes. See [Charleston County Aviation Authority v. Robert C. Wasson](#) (Smith Advance Sheet, Opinion No. 21673 filed March 17, 1982. Safeguards for these potential problems could be accomplished by adding various terms to the lease. The lease could provide that the lessee would hold the State Hospital, the Commission for Mental Health, etc. and their employees harmless and defend and indemnify them as to any liabilities or claims against them arising from the lessee's use of the property. Requiring that the lessee provide liability insurance would also be a good precaution. Finally, the lease could provide that the lessee would pay or reimburse the lessor for any taxes imposed on the property or the business operating there.

*2 If we may be of further assistance, please let us know.

Yours very truly,

J. Emory Smith, Jr.
Assistant Attorney General

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