1979 WL 43625 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
September 28, 1979

***1** T. H. Rawl, Esquire
204 E. Main Street
Lexington, South Carolina 29072

Dear Mr. Rawl:
In your capacity as attorney for Richland/Lexington School District No. 5, you have requested the opinion of this Office as to several matters relating to a proposed transfer of land from the Harbison Development Corporation to District 5 for a school site.

You have asked whether the school district may accept a donation of land from Harbison Development Corporation and, at the same time, provide in the deed that the property will revert or that the donor will have a right of re-entry if a school is not built within five years. Relying on Beach Co. v. Charleston County School District, et al., 263 S.C. 7, 207 S.E. 2d 406 (1974), an opinion of this office written on January 21, 1977, by Kenneth L. Childs, Assistant Attorney General, stated that a school board was not precluded from accepting a donation of real property in less than fee simple absolute title. See § 59-19-180 of the Code of Laws of South Carolina (1976) which refers to purchases of land. See also §§ 59-19-160 and 59-19-170. Thus, a school district should be able to accept a deed to property which would revert to the donors if not used for school purposes. [1] Although the 'Application for Approval of School Building Project' of the State Department of Education Division of Finance and Operations specifies that State building funds may not be used to construct facilities on land not owned in 'fee simple,' (see the caveat in Mr. Childs' opinion), this requirement should be satisfied by the fee simple determinable title or fee simple subject to condition subsequent title which will probably be deeded to the school district. Even if the application is interpreted to require fee simple absolute title, no statute or rule or regulation of the South Carolina State Board of Education contains such a requirement. Thus, a requirement of fee simple absolute title is not backed by any authority of law and the construction of school building on land held in less than fee simple absolute title should be permissible.

As to whether the school district could agree to allow the school's recreational facilities to be used by the public, Carter v. Lake City Baseball Club, 218 S.C. 255, 62 S.E. 2d 470 (1950) and the attached opinions of this Office are on point. Under this authority, use of the property by the public should be permissible so long as it is casual, incidental, and does not interfere with school related activities. [2] If Harbison residents have an unlimited right to use the school property as by an easement in it, interference with school activities could occur.

Maps show the proposed school site as including what appear to be 'greenways' or 'common property.' Eppes v. Freeman, 261 S.C. 375, 200 S.E. 2d 235 (1973) stated as follows:
Generally, where property sold is described in the conveyance with reference to a plat or map on which streets, alleys, parks and other open areas are shown, an easement therein is created in favor of the grantee.

***2** Apparently, the residential lots in Harbison have not been sold with reference to a plat showing open areas around the school site; however, even if this procedure has been followed and the residents have an easement in these areas. '[t]he extent of the easement to be implied on a conveyance with reference to a map or plat depends on the intent of the parties which is to be determined from a consideration of all the circumstances surrounding the transaction and the practical

  

construction made by the parties.' 28 CJS Easements § 39; see also Briarcliffe Acres v. Briarcliffe Realty Co., Inc., 262 S.C. 599, 206 S.E. 2d 886, 895 (1974). [3] Here, all land sold is subject to the 'Declaration of Covenants, Restrictions, Easements, Charges and Liens for Harbison, South Carolina.' (Declaration). See pp. 3 and 4, Art. XV § 15.01 and Art. XVI § 16.07. Thus, the Declaration should limit any implied easement from the maps or plats if grantees of the developer have notice of the Declaration's provisions.

While portions of the property in question here appear to be 'greenways,' they are designated 'common property'. See Art. VII § 7.01 of the Declaration. Although 'Common Property' is defined as that in which the 'Association' owns an interest, Art. I § 1.07, this property is presently owned by the developer; however, if the Association has any interest in that property at this time, because of the recording of a map or plat, the Association could convey its interest in the property to the school district under Art. VI § 6.02(b)(iii).

As long as it is still owner of the land in question, the developer apparently could change its use designation under Art. VII §§ 7.01 and 7.02. Thus, it could change its designation from common property to 'schools' and convey the land to the school district. The school would then not be subject to an easement of the scope set out in Art. VI § 6.02; however, along with the developer's conveyance, a release by the Association of any interest that it may have in the property would be advisable.

In conclusion, to avoid the § 6.02 easement which could allow land usage which would interfere with normal school functions, all of the interest in the land of the developer and the Association should be conveyed to the school district.

Finally, the school could run into problems in the future with expansion if the Design and Development Review Committee disapproved any new structures or external alterations to existing structures under Article VIII. This Committee also must approve changes in the use of structures and the removal of trees under Art. X §§ 11.02 and 11.03. The only apparent means of avoiding such a possibility is by obtaining approval, at this time, of plans for all anticipated construction.

In conclusion, the school district should be able to accept a gift of and make plans to build a school on land in which it holds a less than fee simple absolute interest. While it may allow the public to use school land, this usage may not interfere with normal school functions. Thus, in the manner described above, the school district should take a fee simple interest in land presently designated as 'common property' to avoid being subject to an easement which could permit usage of the property which would interefere with school functions. Finally, the school district should be aware of the power of the Design and Development Review Committee to disapprove any future plans for expanding school facilities on the site.

***3** If you have any questions or if I can be of further assistance to you, please let me know.
Yours very truly,

J. Emory Smith, Jr.
State Attorney

Footnotes

1 This same kind of condition was present in Beach and that case did not indicate that it was, of itself, invalid. Although the condition was contained in an agreement separate from the deed, Beach indicated that it would have the same effect as if it were contained in the deed. An inference may be made from Beach that such an agreement would be proper and the case makes clear that the execution of this agreement would not be a sale of school property under § 59-19-250 of the Code.

2 See also § 59-19-120 of the Code which permits district boards of trustees to adopt '. . . rules and regulations which are not inconsistent with state law or the rules and regulations of the State Board of Education governing the use of school buildings for purposes other than normal school activity.' This statute contains no comma to assist in construing it but the latter phrase '. . . governing the use of. . . etc.,' appears to be the object of the district boards' rule making authority.

  

3 Although this rule was stated with reference to streets, it should apply to other uses of land such as those in the instant case. See 25 Am.Jur. 2d Easements § 26.

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