ALAN WILSON
ATTORNEY GENERAL

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Randolph R. Lowell, Esquire
Counsel to the South Carolina Ports Authority
c/o Willoughby & Hoefer
P.O. Box 8416
Columbia, SC 29204-8416

Dear Mr. Lowell:

You note that "[q]uestions have arisen regarding the interpretation of a statutory provision regarding property currently owned by the South Carolina State Ports Authority ('SCPA') on Thomas Island in Berkeley County and the SCPA seeks the Attorney General's opinion and direction." By way of background, you state:

> In the late 1990s, SCPA planned to develop and construct a terminal and access corridors on Daniel Island. As a result, SCPA notified various landowners on Thomas (St. Thomas) Island of its intent to exercise its eminent domain powers to obtain property necessary for the project. Ultimately, SCPA decided against proceeding with the development of the Daniel Island terminal.
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> South Carolina Code Section 54-3-119 was enacted effective June 16, 2009 (Act 73 of 2009), to address the sale of the Thomas (St. Thomas) Island property over which eminent domain was exercised.
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> > SECTION 54-3-119. Sale of property on Daniel Island and Thomas (St. Thomas) Island; rights of first refusal granted certain former landowners.
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> > (A) Except as provided in subsection (B), the State Ports Authority Board is directed to sell under those terms and conditions it considers most advantageous to the authority and the State of South Carolina all real property it owns on Daniel Island and Thomas (St. Thomas) Island except for the dredge disposal cells that are needed in connection with the construction of the North Charleston terminal on the Charleston Naval Complex and for harbor deepening and for channel and berth maintenance....
> >
> > (B) The board shall give the right of first refusal to those former landowners on Thomas (St. Thomas) Island who sold their land located within the transportation corridor to the authority in anticipation of the authority's exercise of eminent domain. The right of first refusal must provide that

> the landowner may repurchase his land at the same price for which the authority purchased it from him. Each contract for the sale of a parcel located in the transportation corridor on Thomas Island must contain a covenant creating an easement over the parcel. The easement must permit the authority, and any successor in interest to the authority, reasonable ingress and egress to the real property on Daniel Island owned by the authority as of the effective date of this section. The easement must contain express language that the easement runs with the land.

(Emphasis added.)

The term "former landowner" contained in Subsection B is not defined. However, a literal reading of Subsection B is that the right of first refusal go to the landowner "who sold their land". Subsection B also envisions that the original selling party can repurchase "his land". In support of this position, while the term "former landowner" is defined at South Carolina Code Section 28-2- 30(12), the definitional section of the Eminent Domain Procedure Act, as follows:

> (12) "Landowner" means one or more condemnees having a record fee simple interest in the property condemned or any part thereof, as distinguished from condemnees who possess a lien or other nonownership interest in the property; where there are more than one, the term means the condemnees collectively, unless expressly provided otherwise.

However, it is unclear whether this definition should be applied to Section 119. Arguably, the definition of landowner in the Eminent Domain Procedure Act should logically have application to the interpretation of Section 119 since the property was initially acquired pursuant to condemnation (or the threat of condemnation).

Between the time of the transfer of title of some properties to SCPA in the late 1990s and the date of this request, several of the former landowners passed away and in the case of a testamentary trust, the SCPA's position is that the trust terminated by its terms. Because the term "former landowner" is undefined in the statute at issue, SCPA requests guidance on its statutory obligation to grant the right of first refusal to heirs and beneficiaries.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Charleston Cnty. Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606-07 (2006). Here, Section 119 does not specifically contemplate the passage of the right of first refusal to heirs and beneficiaries, and the statute specifically requires the SCPA to "sell under those terms and conditions it considers most advantageous to the authority and the State of South Carolina." S.C. Code Ann.

> § 54-3-1 19(A); Bennett v. Sullivan's Island Bd. Of Adjustment, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993).
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> Utilizing the definition of "landowner" contained in South Carolina Code Section 28-2- 30(12), a literal reading of the statutory provision at issue would require that SCPA grant the right of first refusal only to those individuals, trusts, or entities that held a fee simple interest in the property at the time title passed to SCPA, and that such right is not transferable or inheritable. See, e.g., Estate of Deeble v. Rhode Island Dep't of Transp., 134 A.3d 183, 187-88 (R.I. 2016) (statutory right to repurchase does not inure to heirs or beneficiaries). As a result, one interpretation of the statute is that only the original property owners have a legal right to the right of first refusal, and that if the "former landowner" is deceased then the SCPA has the right to sell the property. Nonetheless, the SCPA also recognizes that ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial result. See, e.g., Cain v. S.C. Pub. Serv. Auth., 222 S.C. 200, 215, 72 S.E.2d 177, 184 (1952) (defining "owner" to include heirs and beneficiaries for a right of repurchase).
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> Because the term "former landowner" is not specifically defined, SCPA is uncertain of its exact legal obligations in the instances described above.

Law/Analysis

We begin with the fundamental principle, recognized throughout the United States, that the word "heirs" or "beneficiaries" or "assigns" is no longer necessary to convey a fee simple interest. In Restatement (3rd) of Property, § 4.6, it is recognized:

> . . . (c) Determining whether a benefit is personal. Under the rule stated in this section, the benefit of a servitude is transferable unless the parties intended or reasonably expected otherwise. Use of words like "heirs," "successors," or "assigns" is not necessary to indicate an intent that benefits be transferable, and lack of such words does not indicate that the parties intended the benefit to be personal to the original beneficiary.

(emphasis added).

Moreover, in a will case long ago, our Supreme Court explained that the rule is as follows:

> [t]here can be no reasonable doubt that the testator intended to dispose of his whole interest in the property, leaving no part of it intestate. We think that such intention was effectually carried out, and that the fee in the land was devised directly to the trustee. It is true that the word "heirs" is not used, but our statute (Gen. Stat § 1861) makes the use of the words of limitations in a will unnecessary. Every devise shall be considered as a gift in the simple, unless such construction be inconsistent with the will of the testator, expressed or implied.

Farr v. Gilreath, 23 S.C. 502, 511 (1885). And, in Wise v. Poston, 281 S.C. 574, 316 S.E.2d 412 (Ct. App. 1984), our Court of Appeals noted that "it is not necessary to use words of limitation, such as 'to them, their heirs and assigns forever,'" when such words are used, as they were in that case, such usage "further support[s] our conclusion." See also 96 C.J.S. Wills § 1349 ["The words 'heirs and assigns,' while customary, are not necessary to create a fee."].

Of course, in this instance, the issue is a bit different, involving the right of first refusal. In Webb v. Reames, 486 S.E.2d 384, 385 (Ct. App. 1997), the Court of Appeals described a right of first refusal as follows:

> [t]his pre-emptive right is a contingent, nonvested interest in that the grantee or the grantee's heirs might never choose to sell the property. It is an interest no conditioned on an event certain to occur.

In Reames, the Court of Appeals held that the right of first refusal violated the Rule Against Perpetuities.

Moreover, it is your view that the plain language of § 54-3-119 must be construed as limiting the right of first refusal to the original landowner — i.e., the "former landowner" — and no repurchase right passes to heirs or beneficiaries. It is your position that interpreting § 54-3-119 using the definition of "landowner" found in § 28-2-30(12) of the Eminent Domain Procedures Act is appropriate because the Thomas Island property was acquired by the SCPA either pursuant to that Act or under threat of a condemnation proceeding under that Act. Understood in this manner, the repurchase right provided in § 54-3-119 does not include heirs or beneficiaries of a deceased landowner. Further, you note that because the statute specifically requires the SCPA to "sell under those terms and conditions it considers most advantageous to the authority and the State of South Carolina," S.C. Code Ann. § 54-3-119(A), there is an implied directive from the General Assembly to narrowly construe the availability of the right of first refusal to allow the State to maximize the properties' value for the benefit of the State through a public sale of the property. Your arguments in this regard are certainly well taken.

In addition, you reference a Rhode Island case that involves similar facts and circumstances. There, the Court concluded that a repurchase right did not extend to heirs and beneficiaries. In that case, the Rhode Island Constitution contained a provision requiring that a repurchase right be offered to the "person or persons" from whom the property was taken. The question arose as to whether the repurchase right terminated on the death of the original landowner or instead passed to the heirs and beneficiaries. The Rhode Island Supreme Court held that the repurchase right terminated when the original landowner died, concluding that

> had the General Assembly intended for the right of first refusal to transcend the death of the original condemnee, it would have expressly included such language within article 6, section 19. It did not. . . . To hold otherwise would add language to the constitution, an exercise in which we will not engage.

Estate of Deeble v. Rhode Island Dep't of Transp., 134 A.3d 183, 187-88 (R.I. 2016).

In sum, you believe that all of these provisions, taken together, limit the repurchase right to the original landowner and not his heirs or assigns. However, you note that this conclusion is not entirely clear due to the lack of express language or direction in § 54-3-119 regarding heirs and beneficiaries. Because of the uncertainty involved with respect to interpreting the statute in this situation, you request an opinion regarding the interpretation of the term of "former landowner" in § 54-3-119 with respect to the heirs and beneficiaries of an original landowner that transferred property to the SCPA.

You are correct that neither the condemnation statute nor South Carolina case law addresses heirs or beneficiaries in the specific context or a reversionary interest or the right of first refusal in § 54-3-119. Thus, the application of the statute in the context of a deceased landowner is not expressly set forth by the legislature. It is true that, "[i]f a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995).

However, we do not believe that a literal interpretation of § 54-3-119 ends the inquiry. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Charleston Cty. Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606-07 (2006). Our Supreme Court has further explained:

> [i]n construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect. A statute should not be construed by concentrating on an isolated phrase.

S.C. State Ports Auth. v. Jasper Cty., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (internal citations omitted). Our appellate courts also have instructed that

> [w]here . . . there is something about the statute that makes it clear the legislature did not intend the letter of the statute to prevail, the court can consider the spirit of the enactment. "[T]he court will reject the ordinary meaning of words used in a statute" and apply the rule of construction according to the spirit of the law when to accept the ordinary meaning of such words "would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature."

Soil Remediation Co. v. Nu-Way Envtl., Inc., 317 S.C. 274, 276, 453 S.E.2d 253, 254-55 (Ct. App. 1994), aff'd, 323 S.C. 454, 476 S.E.2d 149 (1996) (internal citations omitted). Therefore, in order to evaluate whether our state courts likely would follow the approach and analysis of the Rhode Island Supreme Court, thereby applying § 54-3-119 according to its strict literal terms, it is necessary to consider if the intent of the General Assembly is one of remedial purpose. We conclude that it is.

We believe the purpose of § 54-3-119 as a whole is remedial in nature because it seeks to restore to the prior landowner property that was taken under the sovereign authority of eminent domain (or the threat thereof). Cf. Parker v. City of New York Dep't of Hons. Pres. & Dev., 237 A.D.2d 268, 271, 654 N.Y.S.2d 801, 803 (1997) ("The purpose of this provision is to give former owners a right of first refusal before the property is offered for public sale.") A remedial statute should be construed to effectuate its purpose. S.C. Dep't of Mental Health v. Hanna, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978) ("A remedial statute should be liberally construed in order to effectuate its purpose."). Therefore, although the term "landowner" is not defined by the statute, and there are reasons to construe it narrowly, we believe that the courts of this state would conclude that the purpose of the statute is remedial in nature and would interpret it to effectuate such purpose.

We think the case of Cain v. S.C. Pub. Serv. Auth., 222 S.C. 200, 214, 72 S.E.2d 177, 183 (1952), is instructive as to the question you have asked. In Cain, our Supreme Court considered the definition of "owner" in the context of a condemnation statute allowing the South Carolina Public Service Authority to condemn certain lands. The statute at issue provided that, "if the lands acquired in fee simple, or any portion thereof, are not occupied or used for certain specified purposes, the 'owner' shall have the absolute right to repurchase same." Cain, 222 S.C. at 214, 72 S.E.2d at 183. The Public Service Authority argued that the language should be strictly construed and such a repurchase right does not inure to the benefit of heirs or beneficiaries. Such position was rejected by our Supreme Court.

> For the foregoing reasons, the basic assumption underlying appellant's argument that the repurchase provision should be construed strictly against the landowner is unsound. On the contrary, it should receive a liberal construction. Of course, no rule of construction may be used to defeat the legislative intent.
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> . . . .
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> It is argued that if it had been intended to extend the right of repurchase to the heirs or devisees of the owner that this right would have been likewise expressly extended to such heirs or devisees. But we do not think that in a statute so loosely worded the omission is of much significance.

Cain, 222 S.C. at 214-5, 72 S.E.2d at 183-4. The Supreme Court held that a liberal construction required that the repurchase right extended to the landowner's devisees. Cf. 26 Am. Jur.2d

Eminent Domain § 213 (noting that where the owner of land dies during a condemnation proceeding, the estate (and thus the landowner's heirs) are entitled to the proceeds).

The Cain case is in accord with other states which have enacted similar statutes providing for the repurchase of condemned property specifically provide that the right to repurchase inures to heirs and beneficiaries. See Ala. Code § 10A-21-2.08 ("Should the lands not be used for the purposes of condemnation within one year from the date of their condemnation or should the lands be abandoned for the use condemned or be used for purposes not authorized by the condemnation, the same shall revert to the owner or owners or his, her, or their heirs."); Ariz. Rev. Stat. Ann. § 28-7099 (if property is acquired under threat of condemnation, "the deed transferring the property shall provide the original owner or the original owner's heirs with a right of first refusal to acquire the property" if the property is no longer needed); 6 Summ. Pa. Jur.2d Property § 5.37 ("Where previously condemned property is abandoned (such as an authorized abandonment by a railroad), the base fee acquired on condemnation reverts to the owners at the time of the condemnation, their heirs or assigns."); Va. Code Ann. § 25.1-108 ("If a condemnor has acquired a fee simple interest in property by exercise of its power of eminent domain and subsequently declares that the property is surplus, the condemnor shall offer, within 30 days following such determination, to sell such property to the former owner or his heirs or other successors or assigns."); see also 27 Am. Jur.2d Eminent Domain § 807 (where an interest acquired by a railroad is abandoned, the title in the land reverts to the "original owner or his heirs or assigns...."); Thompson v. United States, 101 Fed. Cl. 416 (2011) (same).

Further, authorities note that courts have reached different conclusions regarding interpretation of a right of first refusal:

> [s]ome courts will construe a right of first refusal as personal unless language such as "heirs and assigns" is included in the contract. . . . Other courts will construe the preemptive right as assignable, even without this precise language. . . .

Mitchell, "Can A Right of First Refusal Be Assigned?" 68 U. Chi. L.Rev. 985, 993 (2001). Cited as support for the latter proposition of assignability is Brooks v. Terfeling, 688 P.2d 1167, 1169-70 (Ida. 1984). In that case, the Court stated that "the language employed by these parties . . . [means] that should the Brooks, their heirs or assigns, decide to sell or otherwise encumber the subject property, that property shall first be subject to a right of first refusal at the agreed price by Mr. Terfeling, his heirs or assigns." (emphasis added).

In addition, it is our understanding that when the General Assembly enacted § 54-3-119 in 2009, at least some of the "former landowners" of the property in question had died. As our Supreme Court has noted, "[t]he Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something." Denene, Inc. v. City of Chas., 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002). Certainly, the legislature must have been aware of this fact and thus we believe it intended to include heirs and beneficiaries within the scope of the statute.

Finally, we deem § 54-3-119 as a statutory exception to the Rule Against Perpetuities or the restraint upon alienation. See § 27-6-60; Webb v. Reames, supra; [right of first refusal is "one that might not vest either within a life in being at the time of the creation of the interest or until later than 21 years thereafter, the interest violates the rule against perpetuities and is therefore void."]. In Selig v. State Highway Adm., 861 A.2d 710 (Md. App. 2004), the Maryland Court of Appeals found that a statute constituted an exception to the Rule. Petitioner, the executrix of the estate of her deceased husband, sought enforcement of a right of first refusal to buy property no longer needed for highway condemnation. The Court concluded that the right of first refusal did not violate the Rule Against Perpetuities. The Court noted that "[n]one of the parties dispute that the General Assembly has the power to create statutory exceptions to the common law." 861 A.2d at 721. After analyzing the statute, which granted a right of first refusal to the grantor "or his successor in interest," as well as the legislative intent, the Court concluded:

> [W]e hold that Md. Code (1977, 1977 Supp.), § 8-309 of the Transportation Article created a statutory exception of the rule Against Perpetuities. In so concluding, we have determined that the contract and the deed's language creating a contractual right of first refusal which echoes the statutory language, is not rendered void by the lack of a specified period within which the conditions precedent, i.e. abandonment of the project for which the property was acquired and the Secretary's determination that the property is no longer needed for any transportation purpose, must occur. . . .

Id. at 726. While in that case, the statute expressly included "heirs," as noted, we believe here the General Assembly intended to include "heirs" within the statute. The Selig case is important to any conclusion that § 54-3-119 is a statutory exception to the Rule Against Perpetuities.

In addition, § 54-3-119, unlike the typical right of first refusal, such as by will or deed, is a command by the General Assembly in 2009 that the property in question must be sold. Thus, the rule Against Perpetuities is inapplicable because it is presumed that the Ports Authority will comply with the statute forthwith. Section 54-3-119, like the statute in Maryland in Selig, is a specific instruction by the Legislature, and thus must be viewed as an exception to § 27-6-20 (Rule Against Perpetuities). See Clarke v. South Carolina Pub. Service Auth., 177 S.C. 427, 181 S.E. 481, 486 (1935) [". . . the powers of the General Assembly are plenary as to all matters of legislation unless limited by some provision of the Constitution."]. Accordingly, we do not deem § 54-3-119 to be a restraint upon alienation or a violation of the Rule Against Perpetuities..

Conclusion

The question is a close one. However, we believe for all the reasons set forth herein that § 54-3-119 is remedial in nature and should be broadly construed to include heirs of the "former landowners" within the right of first refusal set forth therein. In our opinion, such a reading fully effectuates the legislative purpose of restoring former landowners, as well as their heirs, to their

original status prior to the eminent domain threat. Thus, we believe a court will afford the benefit of the doubt to the landowners as opposed to the State.

Accordingly, while it is a close question, and one not free from doubt, we believe that a court would more likely than not find that the statute at issue here, S.C. Code Ann. § 54-3-119(B), is a remedial statute and should be construed and interpreted to extend the right of first refusal to heirs and beneficiaries of the "former landowner."

Sincerely,

Robert D. Cook
Solicitor General