

1974 WL 27706 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

April 10, 1974

***1 Re: Proposed Agreement Between the Belle W. Baruch Foundation and Clemson University and the University of South Carolina**

G. L. B. Rivers, Jr., Esquire
Attorney at Law
28 Broad Street
Charleston, South Carolina 29402

Dear Buist:

The purpose of this letter is to identify certain areas contained in the present proposed agreement which cause this office some degree of concern. It is not my purpose at the present time to delve into the proposed agreement in great detail, nor to point out specific areas where I feel cosmetic changes are in order but rather to specify the broader legal problems I see with the agreement in its present form. In this regard, therefore, I shall attempt to catalog the legal problems I see in the order in which they appear in the proposed agreement.

The first major area of concern is found on page 8 of the proposed agreement, paragraph 3, entitled 'Protection of Property.' It is our opinion that this provision is unacceptable in its present form and will need substantial modification before either of the Universities can legally bind themselves to a provision of this nature. I have been informed by Ed Latimer, who reviewed this particular provision, that there is considerable doubt under current Court decisions whether the Foundation can continue to claim title to property below the high water mark, notwithstanding the Federal Court decision to the contrary. Additionally, there is also a serious question as to whether the Universities can resort to legal process to prevent individuals from engaging in activities such as hunting or fishing, etc., within the perimeters of the Foundation property. Furthermore, I do not think that the Universities can contractually agree to obligate themselves to mandatorily call in State, local and federal law enforcement officials to prosecute potential trespassers.

The next provision of the proposed agreement which raises serious legal problems is found on page 15, paragraph 10, entitled 'Insurance.' This provision in its present form would require the Universities to maintain comprehensive liability insurance covering claims for bodily injury, disease, death or property damage occurring on the Foundation's property. This Office has previously taken the position that a State agency or instrumentality cannot purchase liability insurance absent specific authorization from the General Assembly. See, e.g., 1967-68 OP. ATTY. GEN. 287. Inasmuch as no statute presently exists which gives the Universities the authority to purchase the type of insurance contemplated in paragraph 10, it is not possible for either of the Universities to enter into an agreement of this sort at this time.

Another area of concern appears in the last sentence on page 16, paragraph 11 of the proposed agreement. I do not think that the Universities can contractually waive the immunity which would otherwise be available to them without a specific act of the General Assembly.

***2** The same problem is also evident in paragraph 13 of the proposed agreement, found on pages 17 and 18. Neither of the Universities can agree to indemnify and hold the Foundation harmless against liabilities and damages occurring on Foundation property in the absence of an express legislative enactment granting to them that authority.

The problem areas which I have attempted to outline above necessarily have an impact on and raise legal questions concerning the language currently contained in paragraphs 16, 18, 19 and 25 of the proposed agreement.

As I indicated earlier, the purpose of this letter is merely to point out areas in the proposed agreement which I feel raise legal problems which will have to be reconciled.

As you are aware, there are other areas of the agreement which apparently cause the Universities, individually and collectively, some concern but I have restricted my comments only to those areas which, I feel, raise the more serious legal problems.

Looking forward to hearing from you and with best regards,

I am,
Very truly yours,

Ellison D. Smith, IV
Assistant Attorney General

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