

July 9, 2008

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Dear Ms. Winters:

We understand you represent Chester County (the "County") and wish to obtain an opinion from this Office on the County's behalf. You provided the following information in your letter to Attorney General Henry McMaster:

a) In 1945, Chester County passed Act 190 which pertained specifically and solely to the Forfeited Land Commission in Chester County particularly as to the disposition of funds and procedures regarding land sales. In an August 7, 1995, Attorney General's opinion, the AG opined that this Act was in effect until repealed. We have found no record whatsoever that repeals Act 190. The question therefore begs an answer as to whether Act 190 is still valid and not superseded by Title 12.

b) In 2007, Chester County Council adopted the codification of its ordinances. In the codification, Title 12 is listed as the authority by which the Forfeited Land Commission operates and it refers to an ordinance from 1995. Our Clerk of Court cannot locate this ordinance nor any ordinance that would invalidate Act 190. In its codification of the ordinances, did Chester County by default, repeal Act 190?

c) Chester County Forfeited Land Commission contends that it has a valid contract with a buyer for one of its abandoned mill properties. The FLC has yet to provide a bona fide contract, agreement or otherwise and has contended that despite the fact that no money has changed hands on this transaction, there remains a valid agreement because the FLC attorney has prepared a General Warranty Deed to transfer ownership. Is there a bona fide and binding agreement with

the proposed buyer on this property and the FLC, despite the absence of consideration.

d) Finally, even if there is a bona fide agreement, there are many discrepancies in the information surrounding the agreement.

- i. The environmental study performed by the “environmental agency” secured by a proposed buyer for the property is actually owned by the buyer. The study report did not disclose this information.
- ii. The proposed buyer is heavily leveraged and has several bankruptcies filed.
- iii. The proposed buyer inferred he has the ability to perform many clean up functions with respect to DHEC’s concerns when in fact his licensing is not in South Carolina and has in fact been suspended.
- iv. The minutes of the FLC indicate in several different areas that the agreement has not been consummated due to lack of consideration.

Law/Analysis

As you mentioned in your letter, title 12 of the South Carolina Code (2000) contains general provisions allowing for the creation and operation of county forfeited land commissions. Section 12-59-10 of the South Carolina Code, in particular, creates these bodies, which are composed of various county officials acting in an ex officio capacity. Section 12-59-40 of the South Carolina Code gives these commissions authority to sell forfeited lands. Moreover, this provision states that the commissions “shall sell and dispose of such lands in such a manner and upon such terms and conditions as to it may appear to be for the best interest of its county, but the terms of sale shall not in any case provide for a longer term than ten years for the full payment of the purchase price of such property and shall be secured by a first real estate mortgage upon the property sold.” S.C. Code Ann. § 12-59-40.

In our research of the legislative history of the statutes governing forfeited land commissions, now found in chapter 59 of title 12, it appears that the general provisions pertaining to the creation and functions of county forfeited land commissions existed prior to the 1932 Code. However, in 1934, the General Assembly amended the general provisions to add a specific provision pertaining only to the forfeited land commission of the County. 1934 S.C. Acts 1366. This provision, codified in section 2168 of the South Carolina Code (1942), allowed the Chester County Forfeited Land

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Commission (the "FLC") to employ someone to keep its books. Id. In 1936, the General Assembly further amended the general law by adding a provision, codified in section 2850-4 of the South Carolina Code (1942), requiring the FLC to pay for expenses associated with the purchase and sale of forfeited property. 1936 S.C. Acts 1408.

In 1945, as indicated in your letter, the General Assembly amended section 2850-4 via act 190. 1945 S.C. Acts 305. This amendment, later codified in section 65-2911.1 of the 1962 Code, in addition to adding provisions pertaining to the disposition of funds received from the sale of forfeited land, also added the following provision:

PROVIDED, FURTHER, That all lands and properties in the hands of the Forfeited Land Commission of Chester County shall be advertised for sale and sold at public action as other public sales, to the highest bidder therefor, and at and on such terms as may be designed in such advertisement.

Id. Thus, act 190 provides a limitation not contained in the general law on the method by which the FLC may sell forfeited property.

Initially, you question whether the provisions in title 12 of the South Carolina Code supersede act 190. As noted above, the general law governing forfeited land commissions predates the 1932 Code. Based upon our research, the Legislature passed act 190 as an amendment to the general law. The Legislature may have amended the general law regarding forfeited land commissions over the years. However, our courts recognize the general rule that "a statute of a specific nature is not to be considered as repealed in whole or in part by a later general statute, unless there is a direct reference to the former or the intent of the legislature to repeal is explicitly implied therein." Spartanburg County Dep't of Soc. Serv. v. Little, 309 S.C. 122, 125, 420 S.E.2d 499, 501 (1992). Finding nothing in the general law repealing act 190, we are of the opinion that the provisions currently codified in title 12 do not amend or repeal act 190.

Next, you question whether or not the County, in the codification of its ordinances, repealed act 190. As you mentioned in your letter, this Office issued an opinion in 1995 pertaining to the County's ability to repeal act 190 of 1945. Op. S.C. Atty. Gen., August 7, 1995. In that opinion, we cited to section 3 of Act 283 of 1975, passed as part of the Home Rule Act, which provides as follows:

All operations, agencies and offices of county government, appropriations and law related thereto in effect on the date the change in form becomes effective shall remain in full force and effect until otherwise implemented by ordinance of the council pursuant to this act. Provided, however, that county councils shall not enact ordinances in conflict with existing law relating to their respective

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counties and all such laws shall remain in full force and effect until repealed by the General Assembly, or until January 1, 1980, whichever time is sooner

We did not find any indication that the General Assembly repealed act 190. Thus, citing to the South Carolina Supreme Court case of Graham v. Creel, 289 S.C. 165, 345 S.E.2d 717 (1986) for support, we opined that act 190 remains in effect “unless and until Chester County Council should take some action respecting this local law” Id.

In your letter, you informed us that no ordinance invalidating act 190 has been located. However, the Chester County Code, as codified, includes the following provision under the portion of the Chester County Code entitled “FORFEITED LAND COMMISSION”:

Sec. 2-573. Authorization and duties under state law.

The forfeited land commission for the county shall be constituted and shall perform duties as prescribed by S.C. Code 1976, § 12-59-10 et seq.

Chester County, S.C., Code § 5-573. In addition, this provision references ordinance no. 9-5-95 as authority for the provision. Thus, you inquire as to whether the inclusion of this provision constitutes enacting an ordinance in conflict with existing law.

While the County Clerk of Court was unable to locate any proof that Chester County passed an ordinance creating section 2-573, we presume this section of the Chester County Code is valid and enforceable. First, as you mentioned, the County included this provision in its codification of the County Code. Second, section 2-573 makes reference to the ordinance enacting the provision and the date upon which the ordinance was passed. Thus, without evidence to the contrary, we are of the belief that section 2-573 of the Chester County Code is presumptively valid and should be treated as such.

Based on this belief, we address your concern as to whether this provision repeals act 190. Section 2-573 does not specifically repeal act 190 or other special legislation governing the FLC. Our courts disfavor repeal by implication. B & A Dev., Inc. v. Georgetown County, 372 S.C. 261, 268, 641 S.E.2d 888, 892 (2007). Furthermore, courts only find that a law is repealed by implication when “two statutes are incapable of reconciliation.” Justice v. Pantry, 330 S.C. 37, 43, 496 S.E.2d 871, 874 (Ct. App. 1998).

The circumstances presented in your letter are unique and the determination as to whether the County’s enactment of section 2-573 repeals an act of the Legislature is unclear. As you point out, act 190 requires the County to hold a public auction for the sale of land, whereas, the general law leaves the method upon which land is sold up to the commission’s discretion. Therefore, if the

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County, by the enactment of section 2-573, sought to have only the general law and not the special legislation governing the FLC to apply, we believe this provision of the Chester County Code repeals act 190.

Thus, we must consider whether the County intended, in its passage of section 2-573, that only the general law apply to the FLC. In construing section 2-573, we must presume the County intended to accomplish something by enacting this provision and did not intend a futile act. See Duvall v. South Carolina Budget and Control Bd., 377 S.C. 36, 659 S.E.2d 125 (2008). Accordingly, it may be argued the County, by the enactment of section 2-573, is expressing its desire for the general law and only the general law to apply. If the County wanted to continue to allow the general law along with the special legislation to apply, in accordance with our 1995 opinion, the County did not need to take action. Thus, by taking action on the matter, we glean the County's intent for only the general law provided in sections 12-59-10 et seq. to apply.

Furthermore, this understanding of the County's intent is supported by the County's actions subsequent to our 1995 opinion. Courts recognize the basic presumption that "the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997). Following the same lines, in this situation, we presume that the County had knowledge of both the special laws governing the FLC and our opinion issued on August 7, 1995, as referenced above, when it adopted the ordinance now codified as section 2-573 on September 5, 1995. In our opinion, we clarified that the local law would remain in effect until the county modified it by ordinance. Thus, because the County enacted section 2-573 shortly after the release of our opinion, the timing of the passage of the ordinance indicates the County's intent to repeal act 190 by requiring the application of the general law. Accordingly, while not free from doubt, we believe a court could find that the County's actions with regard to the passage of section 2-573 operate to repeal act 190.

In addition to your inquiries on the status of act 190, you inquire as to whether a contract between FLC and a private party for the sale of one of its abandoned mill properties is a bona fide and binding contract due to lack of consideration. Initially, we recognize that a contract requires "an offer and an acceptance accompanied by valuable consideration." Carolina Amusement Co., Inc. v. Connecticut Nat'l Life Ins. Co., 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993). Thus, sufficient consideration must be provided in any contract. However, the determination of whether the buyer of the mill property gave sufficient consideration to the FLC involves a factual determination. As stated on numerous occasions, only a court, not this Office, may make factual determinations. Op. S.C. Atty. Gen., March 20, 2007. Thus, we are without jurisdiction to determine what if any consideration the buyer provided.

You also point out in your letter several discrepancies surrounding the agreement between the buyer and FLC. In making this point, we are unsure of your question. However, given that this

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Office does not have the ability to investigate and determine fact, we cannot opine as to issues surrounding the agreement.

Conclusion

Based on our analysis above, we do not believe that title 12 of the South Carolina Code superseded act 190 of 1945. However, by enacting the ordinance, now codified as section 2-573 of the Chester County Code a court could find that the County effectively repealed act 190 when it called for the FLC to be governed in accordance with sections 12-59-10 et seq. Lastly, with regard to the validity of the contract entered into by the FLC and a buyer, this determination requires factual determinations, and we are without jurisdiction to make factual determinations.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General