

1984 WL 249711 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

July 6, 1984

*1 The Honorable Harold S. McMillan
Mayor
Town of Hampton
608 First Street, West
Hampton, South Carolina 29924

Dear Mayor McMillan:

By your letter of April 5, 1984, you have asked the opinion of this Office as to whether the Town of Hampton may close two roads which have never been opened for use by the public and, if so, whether the property may be given to a nearby church and adjacent property owners. With your letter you enclosed a plat on which the two dedicated streets, never opened to the public, are marked. You indicate that a delegation from St. Mary's Catholic Church has requested that the Town close the streets to give the church more room for parking and building an addition to the church.

A complete and thorough answer to your question is not possible, as you, by your letter and subsequent telephone conversations with Ms. Ernie Glenn, are not able to advise this Office as to the nature of the Town's interest or how the Town obtained the property for dedication as streets. The following response will apprise you of the general law in this area with advice on how to proceed. We would advise, however, that public property (i.e., that owned by a municipality) should not be given outright to a sectarian organization such as a church.

The first part of your request concerns the authority of the Town of Hampton to close the streets in question. A South Carolina statute (§ 7-30, SOUTH CAROLINA CODE OF LAWS (Cum.Supp.1983)) and case law ([Seaboard Air Line Railway Company v. McFadden](#), 156 S.C. 147, 152 S.E. 809 (1930)) make it clear that a town council has the right and authority to supervise and control the streets within the municipality and to close a street if necessary. 152 S.E. at 813. This right to close a street may be limited, however, by the nature of the interest which the town holds in the the street.

A dedication is the giving away by the owner of an interest in land for the use of the public. [Grady v. City of Greenville](#), 129 S.C. 89, 123 S.E. 495 (1924). In the case of a common law dedication, the fee does not pass, and the public acquires only an easement in the land designated for its use. 23 Am.Jur.2d, Dedication, § 58. It is a dedication to the public and not to the city or county in which the land is situated. [Chapman v. Greenville Chamber of Commerce](#), 127 S.C. 173, 120 S.E. 584 (1923).

Generally two types of dedication are recognized in South Carolina. In either case the intent of the dedicator, as to the use to which the property may be put, controls. "Where such intent is clearly expressed and is specific and restricted, no deviation from such use may be permitted no matter how advantageous the changed use may be to the public." [Knoerr v. Crews](#), 246 S.C. 174, 143 S.E.2d 120, 121 (1965).

In the case of a dedication for the express, specific and restricted use as a street, the City has no discretionary power to devote such dedicated property to a purpose inconsistent with the object to which the street was dedicated. [Sloan v. City of Greenville](#), 235 S.C. 277, 111 S.E.2d 573 (1959).

*2 By your letter you indicate that the land has been dedicated as streets. If this dedication is "clearly expressed, specific, and restricted," then the Town of Hampton is without authority to close the streets no matter how advantageous to the general public, as to do so would violate the intent of the dedicator.

The second type of dedication would best be called a general or unrestricted dedication. This type of dedication arises where the intention of the dedicator is uncertain or the dedication is expressed in general, unrestricted terms. In this case the property can be used for other public purposes as determined by the town council and the fact that it has been devoted to one use, even over a long period of time, does not deprive its devotion to other public uses consistent with the general wording of the dedication. *Knoerr v. Crews*, supra.

A municipal corporation holds and controls its streets in trust for the use and benefit of the general public, *Bethel Methodist Episcopal Church v. City of Greenville*, 211 S.C. 442, 45 S.E.2d 841 (1947), and as all property held by municipal corporations is held in a fiduciary capacity, a street can be closed only to serve a public purpose and not for the sole benefit of an abutting property owner. *Haesloop v. City Council of Charleston*, 123 S.C. 272, 115 S.E. 596 (1923); *City of Rock Hill v. Cothran*, 209 S.C. 357, 40 S.E.2d 239 (1946). However, the court in *Cothran* went on to say that the mere fact that the closure of the street was at the instigation of an abutting owner does not, of itself, invalidate the closure or constitute an abuse of discretion by the city council.

In deciding to close a street, a municipal corporation should consider a number of factors in determining whether the action is in the best interest of the public. Among these factors are:

1. Enlarging the public resources;
2. Increasing the industrial energies of the city;
3. Promoting the productive power of a greater number of the city's inhabitants; and
4. Eliminating hazards to pedestrian and vehicular traffic;¹

Other factors to consider in determining the utility of a public street are:

1. The use made of it;
2. Alternate routes of travel;
3. The location of markets, schools, and churches;
4. The character and physical features of the land;² and
5. Any other factors pertinent to your particular situation.

Should it be determined that the dedication in question is general and unrestricted and that the public interest will be greater served by closing the street, the procedure provided by [Section 57-9-10 of the Code](#) may be employed. That section contains the procedural safeguards of notice and hearing for all abutting property owners, and the court would determine in whom the title should be vested. Use of this procedure may forestall later lawsuits by property owners claiming to have been unconstitutionally deprived of their property or access to their property. See, *Houston v. Town of West Greenville*, 126 S.C. 484, 120 S.E. 336 (1923); *Brown v. Hendricks*, 211 S.C. 395, 45 S.E.2d 603 (1947); and *State Highway Department v. Allison*, 246 S.C. 389, 143 S.E.2d 800 (1965).

*3 The second part of your inquiry concerns the authority of the Town of Hampton to give the underlying land to nearby property owners should the decision be made to close the street. As indicated above, in common law dedications the fee does not pass to the city; thus, the city in actuality would have no property to give away. Should the streets be closed, absolute title and

possession would vest in the abutting property owners and not in the original owners, unless they are abutting owners or they have specifically reserved the right of reversion on vacation. Vacated portions of streets would be vested in abutting property owners to the center line of said streets. [City of Greenville v. Bozeman](#), 254 S.C. 306, 175 S.E.2d 211 (1970). Resort must be had to the dedication in question to determine the nature of the Town's interest; for the purposes of this letter, it will be assumed that the Town does possess the fee to the property in question.

[Section 5-7-40 of the Code](#) empowers municipalities to own and possess real, personal, and mixed property and to alienate the same. This statute would appear to authorize municipalities to give away property, but there are other considerations to the question of alienation.³

The first consideration is that should the Town of Hampton give away public property to St. Mary's Catholic Church, such action may be in violation of the Establishment Clause of the Constitution of the United States, in addition to a portion of the Constitution of South Carolina. See, for example, Opinion of Former Attorney General McLeod, dated April 13, 1971 (copy enclosed).

[Article I, § 2 of the South Carolina Constitution](#) and the First Amendment to the United States Constitution⁴ prohibit South Carolina from taking action respecting an establishment of religion. The clause is broadly written and prohibits laws respecting establishment of religion rather than simply prohibiting establishment of religion. [Lemon v. Kurtzman](#), 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971); [Hall v. Bradshaw](#), 630 F.2d 1018 (4th Cir.1980). The First Amendment prohibits those acts of state which, though not actually establishing religion, tend toward such a result. [Kosydar v. Wolman](#), 353 F.Supp. 744 (S.D.Ohio 1972). The clause was intended to protect against sponsorship, financial support, and active involvement of the sovereign in religious activity. [Walz v. Tax Commission](#), 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970).

In evaluating whether an act of the state violates the United States Constitution, the three part test found in [Committee for Public Education and Religious Liberty v. Nyquist](#), 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973), must be applied. To pass muster under the establishment clause, the action must: (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion. The challenged governmental action will be found to violate the Constitution if it runs afoul of any part of the three part test. [American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.](#), 698 F.2d 1098 (11th Cir.1983).

*4 In applying the Nyquist test to the instant set of facts, it could be argued that part three is complied with as there will be no government entanglement with religion after the land is donated to the church. However, it is hard to imagine a clearly secular purpose advanced by giving land to a church and it would be difficult to contend that donating the land does not advance religion. [Hunt v. McNair](#), 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973). It should be noted that the mere fact that a church is involved does not necessarily indicate a constitutional violation. See [Kosydar v. Wolman](#), supra. Compare [Brashich v. Port Authority of New York and New Jersey](#), 484 F.Supp. 697 (S.D.N.Y.1979). There is no indication as to the use to which the building addition will be put, but in all likelihood, donation of publicly owned property for a church building necessarily permits an inference of official endorsement of the general religious beliefs contained within that building. [Lowe v. City of Eugene](#), 254 Or. 518, 463 P.2d 360 (1969). The municipality might be hard pressed to justify placing its property at the disposal of private persons or groups to aid any religion. Id. Based on the foregoing, the action of the Town of Hampton in giving property to a church would very likely violate the constitutional prohibitions against the establishment of religion.

As to the Town of Hampton's giving away property to individuals (i.e., adjacent or abutting property owners), there are additional considerations. In [Haesloop v. City Council of Charleston](#), supra, the court noted that as all powers of municipal corporations are held in trust for public use, so would all property held by such corporations be held in a fiduciary capacity. According to the court, it would be a breach of trust upon which this property is held to donate it to a strictly private use without receiving in return some consideration of reasonably equivalent value. [Haesloop](#), 115 S.E. at 600.⁵

In Haesloop the Charleston City Council voted to donate city property upon which was to be build a one million dollar tourist hotel. Such a donation would clearly not be illegal given the City's statutory authority to dispose of its property, nor would it be fraudulent. The Court held that such a donation was not an abuse of the City Council's discretionary power given the tax revenues that would flow from the addition of one million dollars worth of taxable property and the benefit to the public good by erection of such a structure. If the Council of the Town of Hampton finds that the Town or the public would similarly benefit, such as by increased tax or other revenues, as in Haesloop, such a donation of public property for private purposes may be justified. See also, 81A C.J.S., States, § 207; Cf.Op.Atty.Gen., Nov. 16, 1983. This Office cannot comment on such a justification, as such would be subject to the discretion of the Town of Hampton, however.

We hope that the foregoing discussion answers most of your questions. If you require clarification or additional information, please advise us.

Sincerely,

*5 James P. Hudson
Staff Attorney

Footnotes

- 1 [Cothran, 40 S.E.2d at 243.](#)
- 2 39 Am.Jur.2d, Highways, Streets, and Bridges, § 144.
- 3 In addition, if the Town of Hampton has adopted a procurement code as required by [Section 11-35-50 of the Code](#), there may be provisions contained therein concerning the sale or other alienation of surplus public property. The Town of Hampton should check its code and follow any applicable provisions.
- 4 The First Amendment has been held applicable to the states by the operation of the Fourteenth Amendment to the United States Constitution. [Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 \(1952\).](#)
- 5 The court in Haesloop also states that, absent illegality, fraud, or clear abuse of authority, courts will not attempt to control or interfere with a municipality's discretionary control or disposition of its property.

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