



ALAN WILSON
ATTORNEY GENERAL

March 2, 2017

Thomas M. Boulware, Esquire
Brown, Jefferies & Boulware
Attorneys and Counsellors at Law
19 Jefferson Street
Barnwell, SC 29812

Dear Mr. Boulware:

Attorney General Alan Wilson has referred your letters dated January 18 and 23, 2017 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue:

May Barnwell County vacate by ordinance the Barnwell County Economic Development Corporation's and the Barnwell County Economic Development Commission's duties and ownership of land and assets as negotiated with three municipalities?

Law/Analysis:

This Office, like a court, begins with the presumption of constitutionality for a county ordinance. See, e.g., Op. S.C. Att'y Gen., 2003 WL 21998995 (S.C.A.G. August 8, 2003) (citing Rothchild v. Richland County Board of Adjustment, 309 S.C. 194, 420 S.E.2d 853, 856 (1992)). After discussions with you, it is our understanding three municipalities gave (for no consideration) real and personal property to the Barnwell County Economic Development Corporation ("Corporation") pursuant to Barnwell County Resolution No. 2014-10-306, -307, -420 and various municipal resolutions and ordinances based on an understanding that, among other things, these and other municipalities would have representation on the board of the Corporation to protect the interest of the municipalities in the property to be given to the Corporation.¹ While it is our understanding that Barnwell County negotiated the property transfer with the municipalities (the Town of Williston, Town of Blackville, and City of Barnwell) and previously passed a resolution not to "disband the E[conomic] D[evelopment] C[orporation] without a majority vote of both the EDC and County Council" as a part of that negotiation, that does not necessarily bind future councils. Barnwell County, S.C., Resolution No. 2014-10-420 (October 4, 2014). As you may be aware, we have previously opined that future councils are not necessarily bound by contracts of prior councils. See, e.g., Op. S.C. Att'y Gen., 1997 WL 87939 (S.C.A.G. Jan. 17, 1997). Quoting from such an opinion, we stated that:

¹ While this Office recognizes the Corporation, the County and municipalities have a complex history, we limit our opinion to the law and the legal question asked. Please submit any follow-up questions from this opinion in a new request.

[I]f the term of the contract in question extends beyond the term of the governing members of the county council entering into the contract, the validity of the contract is dependent on the subject matter of the contract. See, Piedmont Public Service District v. Cowart, 319 S.C. 124, 459 S.E.2d 876 (1995). With respect to the power of a county council to enter, [o]n behalf of the county, into a contract which will extend beyond the term for which the members of the council were elected, a distinction is drawn based upon the subject matter of the contract, whether legislative or governmental, or whether business or proprietary. Thus, where the contract involved relates to governmental or legislative functions of the council, or involves a matter of discretion to be exercised by the council unless the statute conferring power to contract clearly authorizes the council to make a contract extending beyond its own term, no power of the council so to do exists, since the power conferred upon councils to exercise legislative or governmental functions is conferred to be exercised as often as may be found needful or politic, and the council presently holding such powers is vested with no discretion to circumscribe or limit or diminish their efficiency, but must transmit them unimpaired to their successors. See, Newman v. McCullough, 212 S.C. 17, 46 S.E.2d 252 (1948).

The acts of former councils relating to the governmental functions of said councils which involve a matter of discretion to be exercised by such councils are without force and effect upon succeeding councils. Id. The power conferred upon councils to exercise legislative or governmental functions is done so to be exercised as often as may be found needful or political; and the council holding such powers is vested with no authority to circumscribe, limit or diminish their efficiency, but must transmit them unimpaired to their successors. Id. A council is bound always to act as trustee of the power delegated to it and may not surrender or restrict any portion of such power conferred upon it. Id.

Op. S.C. Att’y Gen., 1997 WL 87939, at *1 (S.C.A.G. Jan. 17, 1997) (emphasis added). Moreover, this Office has previously opined regarding whether a multi-year economic development services agreement would be binding on future council members. See Op. S.C. Att’y Gen., 2014 WL 1398598 (S.C.A.G. February 3, 2014). In the 2014 opinion we stated that contracts involving the council’s business matters could extend beyond the council subject to sufficient funding, while legislative functions or governmental powers were not binding on successor councils unless there is a statute authorizing a contract beyond the council’s terms Id. (citing City of Beaufort v. Beaufort-Jasper County Water and Sewer Authority, 325 S.C. 174,480 S.E.2d 728 (1997); Newman v. McCullough, 212 S.C. 17, 46 S.E.2d 252 (1948)). Based on the information provided to us, we believe a court will find the transfer of the land is a proprietary function, not a legislative one. Thus, we believe a court will find the action proprietary and would bind successor councils.

Next, let us examine the Statute of Frauds, which requires contracts for the sale of land to be in writing. The South Carolina Code of Laws states that “[n]o action shall be brought whereby: ... (4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; ... [u]nless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.” S.C. Code Ann. § 32-3-10. It is this Office’s understanding both sides entered into agreement for the transfer of the property by means of council

resolutions. The South Carolina Code of Laws has a statute directly on point regarding a municipality selling land. It states that:

In addition to other acts required by law to be done by ordinance, those acts of the municipal council shall be by ordinances which:

- (1) Adopt or amend an administrative code or establish, alter or abolish any municipal department, office or agency;
- (2) Provide for a fine or other penalty or establish a rule or regulation in which a fine or other penalty is imposed for violations;
- (3) Adopt budgets, levy taxes, except as otherwise provided with respect to the property tax levied by adoption of a budget, pursuant to public notice;
- (4) Grant, renew or extend franchises;
- (5) Authorize the borrowing of money;
- (6) Sell or lease or contract to sell or lease any lands of the municipality;
- and
- (7) Amend or repeal any ordinance described in items (1) through (6) above.

In matters other than those referred to in this section council may act either by ordinance or resolution.

S.C. Code Ann. § 5-7-260 (emphasis added). Additionally, a county has a similar limitation which states that:

Public hearings, after reasonable public notice, must be held before final council action is taken to:

- ...
- (5) levy taxes;
 - (6) sell, lease or contract to sell or lease real property owned by the county.
- ...

Not less than fifteen days' notice of the time and place of such hearings shall be published in at least one newspaper of general circulation in the county. ...

S.C. Code Ann. § 4-9-130 (emphasis added). Thus, a municipality must sell and contract to sell land by ordinance. S.C. Code Ann. § 5-7-260. Likewise, a county must have a public hearing before it sells land. S.C. Code Ann. § 4-9-130. It is this Office's understanding the real and personal property were transferred according to municipal and county ordinances, thus we believe a court will find these ordinances to be considered evidence of the contract of sale.

Nevertheless, it is also our understanding the deeds from the municipalities were granted without consideration cited.² As you are aware, our courts have consistently held that a deed without any consideration can still be a valid transfer of real property. Quoting from one such case, our State's Supreme Court stated:

² Though this Office is only relying on information as provided by you to us as we have not reviewed all of the documents. Please also note S.C. Code Ann. § 48-46-60(A)(5)(a) specifically references the Corporation.

“Where fraud is not put in issue by the pleadings in an action to set aside a conveyance of real estate under seal, and there is no evidence of fraud, it is not error to reject evidence as to whether the consideration has been paid, since the only effect would be to show that the deed was without consideration, which cannot be shown where it is under seal.” Cook v. Cooper, 59 S.C. 560, 38 S.E. 218. “Grantor cannot assail deed under seal solely for lack of consideration.” Baynard v. Ulmer, 153 S.C. 100, 150 S.E. 610. “A grantor cannot impeach his deed on the sole ground that it was without consideration.” Brown v. Brown, 44 S.C. 378, 22 S.E. 412. “A deed is good without any consideration.” Knighton v. Desportes Mercantile Company, 119 S.C. 340, 112 S.E. 343.

Godfrey v. Godfrey, 182 S.C. 117, 188 S.E. 653, 654 (1936). Thus, while a court may not find any consideration in the deeds from the municipalities to the Barnwell County Economic Development Corporation, we believe a court will find the lack of consideration would not alone void the deeds from the municipalities to the Barnwell County Economic Development Corporation. Moreover, the court has recognized that extrinsic evidence may be considered in some circumstances regarding a deed. Quoting from such a case, the court states that:

“The construction of a clear and unambiguous deed is a question of law for the court.” Bennett v. Inv. Title Ins. Co., 370 S.C. 578, 635 S.E.2d 649, 655 (S.C.Ct.App.2006). In ascertaining the meaning of a deed, the court looks to the intention of the grantor. *See id.* To determine the intention of the grantor, the court must construe the deed as a whole. *Id.* When a deed is ambiguous as to intention, extrinsic evidence may be considered to explain it. Gardner v. Mozingo, 293 S.C. 23, 358 S.E.2d 390, 391–92 (1987); *see Bellamy v. Bellamy*, 292 S.C. 107, 355 S.E.2d 1, 3 (S.C.Ct.App.1987).

Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 791 F. Supp. 2d 431, 496–97 (D.S.C. 2011), *aff'd*, 714 F.3d 161 (4th Cir. 2013). Nevertheless, the South Carolina Constitution prohibits the State from donating land to private corporations when it states that:

Lands belonging to or under the control of the State shall never be donated, directly or indirectly, to private corporations or individuals, or to railroad companies. Nor shall such land be sold to corporations, or associations, for a less price than that for which it can be sold to individuals. This, however, shall not prevent the General Assembly from granting a right of way, not exceeding one hundred and fifty feet in width, as a mere easement to railroads across State land, nor to interfere with the discretion of the General Assembly in confirming the title to lands claimed to belong to the State, but used or possessed by other parties under an adverse claim.

S.C. Const. art. III, § 31. The Barnwell County Economic Development Corporation is listed as a nonprofit on the South Carolina Secretary of State’s website. This Office has previously opined that a governmental entity may create a nonprofit corporation *See, e.g., Op. S.C. Att’y Gen.*, 2014 WL 3886692 (S.C.A.G. July 29, 2014). However, when we searched on the IRS’s website, there was not an entity under the same name. The IRS’ website acknowledges some entities do not have a tax-exempt number,

including organizations organized pursuant to § 170(c)(1) of the Internal Revenue Code used exclusively for public purposes that are states and political subdivisions of states. <https://Avwv.irs.gov/Government-Entities/Federal-State-&-Local-Governments/Governmental-Information-Letter> (last updated Jan. 26, 2016). Thus, a court would take into consideration that the municipalities donated land to a nonprofit corporation and that the corporation was ordered by county ordinance to transfer its assets to the county. As you may be aware, a nonprofit corporation can seek judicial relief to call a meeting or transact business. S.C. Code § 33-31-160. Additionally, this Office investigates nonprofit corporations pursuant to South Carolina Code § 33-31-170 et seq.

It is this Office's understanding that the property within the Barnwell County Economic Development Corporation is held in trust for Barnwell County as expressly stated by County ordinance. See Barnwell County, S.C., Ordinance 2014-9-306-0 Section 2 (September 9, 2014). However, we also believe there is a legal argument that the third-party beneficiaries of the express trust are the municipalities, as a beneficiary is one who "has a present or future beneficial interest in a trust, vested or contingent; or ... holds a power of appointment over trust property."³ S.C. Code § 62-7-103(2). Moreover, a trustee must "administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this article" and must have a duty of loyalty to the beneficiaries "solely in the interests of the beneficiaries." S.C. Code §§ 62-7-801; 62-7-802. A transaction by the trustee could be voidable if a court found it violates the personal interests and duties as trustee. S.C. Code § 62-7-802. Thus, if a court finds the municipalities are a beneficiary of the Barnwell County Economic Development Corporation and the Corporation holds the property in a trust, then a court could find such action violative of the trustee's duties. If a trustee violates a duty owed to an express trust, a court may:

- ...
- (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means...
 - (5) appoint a special fiduciary to take possession of the trust property and administer the trust...
 - (6) remove the trustee as provided in Section 62-7-706...

S.C. Code § 62-7-1001.⁴ Nonetheless, even if the court does not find an express trust existed, it could find a resulting trust existed. Our courts have stated regarding a resulting trust that:

Resulting trusts arise by operation of law and may be proved by parol evidence. The general rule is that when real estate is conveyed to one person and the consideration is paid by another it is presumed the person who pays the purchase money intended a benefit to himself and a resulting trust is raised in his behalf. *Lollis v. Lollis*, 291 S.C. 525, 354 S.E.2d 559 (1987).

Campbell v. Campbell, 300 S.C. 68, 70, 386 S.E.2d 305, 306 (Ct. App. 1989). While it is this Office's understanding the Corporation transferred its assets to the municipalities, the municipalities transferred the assets to the Corporation with the understanding⁵ that they would relinquish their title to the assets to

³ While we are not making a factual determination, this is based on information provided such as letters and ordinances.

⁴ Please note the statutes in Chapter 7 of Title 62 would apply to an express trust.

⁵ Based on negotiations, ordinances, etc.

the Corporation as long as they had representation regarding the use and benefit of the assets by their membership on the Corporation. Thus, a court could find a resulting trust based on the transfer of the property for no consideration to the Corporation based on understandings with the County and the Corporation. Lastly, we also believe a court could find a constructive trust as an equitable remedy for the municipalities based on their deed to the Corporation for no consideration in reliance in good faith on the ordinances and negotiations with the County and the Corporation. See Scott v. Scott, 216 S.C. 280, 57 S.E.2d 470 (1950); Whitmire v. Adams, 273 S.C. 453, 257 S.E.2d 160 (1979).

Courts have concluded that legislative interference with a trust which the legislative body has itself created may be void. For example, in S.C. Dept. of Mental Health v. McMaster, 372 S.C. 175, 182, 642 S.E.2d 552, 555 (2007), our Supreme Court found that properties donated to a public charity “are impressed with a charitable trust” and that “[p]roperty subject to a charitable trust may not be terminated or altered by the General Assembly, but rather, must be approved by the court.” (citing Smith v. Moore, 225 F.Supp. 434 (E.D.Va. 1963)). And, in S.C. Op. Att’y Gen., 1992 WL 575616 (Op. No. 92-09) (March 19, 1992), we referenced numerous authorities to the effect that “special funds may be considered in the nature of a trust” and thus such funds or property are “not subject to diversion until the purposes for which the [trust]...was established have been accomplished or, in the alternative, without the consent of the people by whom it was created.” These authorities all support the concept that the creation of a trust by a legislative body prevents that body from disposing of the trust properties. Such principles would apply equally to a county council. We note that it is this Office’s understanding that the Corporation is listed as a nonprofit corporation with the South Carolina Secretary of State, and thus a court could find the municipalities’ donations of the property was to be held in a charitable trust if the Corporation is holding itself to be a public charity.

Conclusion:

While we, like a court, will presume the acts of a county council are constitutional, we believe a court will find the Barnwell County Economic Development Corporation held property in trust for Barnwell County and that the transfer by county ordinance of the property from the Corporation at the detriment of a beneficiary such as the municipalities (whether direct or third-party beneficiaries) could void the action based on a court finding a trust (either express, resulting, constructive or charitable). However, we caution that we are advising that opinion is conditional on the court finding a trust and the municipalities to be a beneficiary of a trust. This Office is only issuing a legal opinion based on the current law at this time and the information as provided to us. We understand and recognize this is a complicated situation and we encourage you to seek judicial review of these actions. You may petition the court for a declaratory judgment or a quiet title action, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Moreover, if you have additional questions, please submit them to us in a follow-up opinion request. If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

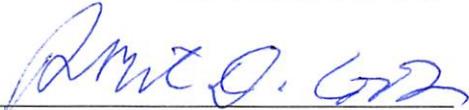
Thomas M. Boulware, Esquire
Page 7
March 2, 2017

Sincerely,



Anita (Mardi) S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General