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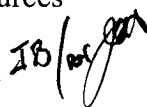
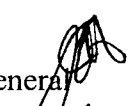
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MEMORANDUM

DATE: January 23, 2006

TO: Emily P. Hitchcock, Esq.
Legal Executive Assistant
Georgia Department of Natural Resources

THROUGH: Isaac Byrd, Deputy Attorney General 
John E. Hennelly, Senior Assistant Attorney General 

FROM: James D. Coats, Assistant Attorney General 

RE: Your memo dated December 9, 2005, directed to Senior Assistant Attorney General, John Hennelly, requesting advice on behalf of the Board of Natural Resources with respect to DNR Rule 391-5-9-.08, "Consideration (Compensation) for Deadhead Logs."

This responds to your request for advice as above-referenced. The specific question you have asked to be addressed is as follows:

"Whether [DNR] Rule 391-5-9-.08 setting \$1.28 per board foot as the amount to be paid to the Department [of Natural Resources] pursuant to O.C.G.A. § 12-3-82.1(i) violates the gratuities clause of the Georgia Constitution."

BACKGROUND

DNR Rule 391-5-9.08, "Consideration (Compensation) for Deadhead Logs" ("the Rule") was adopted by the Board of Natural Resources ("the Board") on December 7, 2005, and reads, in pertinent part, as follows:

(1) The holder of a Salvage Log Permit shall pay the Department compensation of \$1.28 per board foot for deadhead logs removed from the State's rivers as authorized by the Official Code of Georgia Annotated, Title 12, Chapter 3 and any other law, rule, regulation or policy that authorizes this activity...

Adoption of the Rule by the Board is both authorized and required by statute. Specifically, the Board is authorized under O.C.G.A. § 12-2-42(a) to adopt rules and regulations with respect to governance of the Department of Natural Resources (“the Department”). In addition, under O.C.G.A. § 12-3-82.1(i), the General Assembly has specifically directed that “[T]he sale price rate or rates for deadhead logs shall be established by the board by rule or regulation.”

O.C.G.A. § 12-3-82.1 (S.B. 283) was passed during the 2005 Legislative session, and became effective on July 1, 2005. In short, this Code Section requires the Department to establish a permitting program for the “investigation, survey, or recovery of deadhead logs from particular segments of rivers..” O.C.G.A. § 12-3-82.1(b). “Deadhead logs” are defined under the Code Section as *“logs that were commercially harvested from forests in this state during the nineteenth or twentieth century and that sank or were sunken in a river either while in the process of being floated to mill or market or intentionally for storage.”* O.C.G.A. § 12-3-82.1(a)(1).

Persons who are issued a permit under O.C.G.A. § 12-3-82.1 are required to pay an annual permit fee of \$10,000 for each two mile segment of a river,¹ and post a bond in an amount of up to, but not exceeding \$50,000 per permitted river segment. O.C.G.A. § 12-3-82.1(f)(1)(A), (B). The \$10,000 annual permit fee is deposited into the State’s general treasury. O.C.G.A. § 12-3-82.1(f)(1)(A). In addition to the annual permit fee, a permittee must also pay “adequate consideration” to the Department for any recovered deadhead logs in order for the permittee to obtain title to same. O.C.G.A. Section 12-3-82.1(i). As previously noted, the Code Section provides that “[T]he sale price rate or rates for deadhead logs [to be paid by the permittee] shall be established by the board by rule or regulation.” *Id.* The Department is specifically “authorized to retain all funds received in consideration for sales of recovered deadhead logs ...for use in administration of the [permitting] program...,” but any such funds not expended for such purposes in the fiscal year in which they are generated are required to be deposited into the state treasury. O.C.G.A. § 12-3-82.1(j).

ANALYSIS

“A solemn act of the legislature is presumed to be constitutional.” See *Buice v. Dixon*, 223 Ga. 645 (1967). Accordingly, this analysis of the Rule begins with the general proposition that in enacting O.C.G.A. § 12-3-82.1(i), the General Assembly did not intend for either the statute, or the amount of “adequate consideration” for deadhead logs set by Board rule pursuant to the

¹ Each issued permit covers a specific river segment equal to two miles in length. O.C.G.A. § 12-3-82.1(b), (e)(1).

statute, to run afoul of the Georgia Constitution, including without limitation the provision of the Georgia Constitution commonly referred to as the “gratuities clause.”

The “gratuities clause” is set forth at Article III, Section VI, Paragraph VI of the Georgia Constitution. For purposes of our analysis, only paragraph (a) of this provision is applicable:

Except as otherwise provided in the Constitution...the General Assembly shall not have the power to grant any donation or gratuity or to forgive any debt or obligation owing to the public...

In plain terms, for the Rule not to be in violation of this clause, payment to the State of \$1.28 per board foot (as provided in the Rule) in exchange for the State’s title to deadhead logs must not result in the granting of a “gratuity” to any permittee. A benefit flowing from one to another, with no reciprocal benefit from any source, is a “donation or gratuity.” See Haggard v. Board of Regents, 257 Ga. 524, 526 (1987); Smith v. Board of Commissioners, 244 Ga. 133, 140 (1970). Generally speaking, in order for a “gratuity” not to exist, the reciprocal benefit received by the State in exchange for its property must be a “substantial benefit.” Garden Club of Georgia v. Shackelford, 274 Ga. 653 (2002); 2004 Op. Att’y Gen. 2004-3.

Unfortunately, there is no clear definition or test for determining whether the State will be deemed to have received a “substantial benefit” in any particular situation. Rather, prior determinations by the appellate courts, and prior opinions of this Office as to whether such a benefit has been received by the State have necessarily been made on a case-by-case basis, taking into consideration all the attendant facts and circumstances. As stated in 1993 Op. Atty. Gen., U93-14, “...it is fair to say that the cited precedent and other reported cases and opinions [i.e., dealing with the “gratuities clause”] require a good faith expectation, and primary motive, that the State will benefit in fair return for the cost or the value bestowed and further that the actual gratuitous activity and the function expected to benefit indirectly are expressly authorized by law, or are authorized by implication...”

This Office has previously noted three primary situations established in case precedent and prior Attorney General opinions where the State will be deemed to have received the requisite “substantial benefit,” to wit:

- (1) Most clearly, these include "privatization" cases where the State grants funds or the use of state property pursuant to a good faith contract and receives in equivalent value a bargained-for performance of public functions. See, e.g., Haggard v. Board of Regents, 257 Ga. 524 (1987) (Board may transfer student athletic fees to athletic association in return for promise to perform University System functions); Smith v. Board of Commissioners, 244 Ga. 133 (1970) (county may allow use of fire station in

return for fire fighting services).

(2) In certain other "public welfare" cases, there is no promised return of service or payment to the State, but the "gratuitous" activity is valid because it itself is the performance of a public service authorized by law. *See, e.g., Brock v. Chappell*, 196 Ga. 567 (1943) (county may pay for hospital care for the poor); *Ops. Att'y Gen. 84-31* (Labor Department may perform services for the unemployed even if not reimbursed by federal program); *see also U75-1* (county may pay for day care in center participating in a statutory assistance program but may not grant funds to another day care center which simply performs a worthy cause).

(3) Finally, in certain other "state benefit" cases, the gratuitous use or grant of public property is allowed because it is reasonably expected that the use will benefit a public program or function. These exceptions are more problematic because there is no agreement or bargained-for promises by the recipients to use the property for state benefit and because the grant of use is not itself, strictly-speaking, a public function authorized by law, but only aids in the performance if [sic] one. *See, e.g., State of Georgia v. Trustees of Cincinnati So. Rwy.*, 248 U.S. 26 (1918) (State bound by legislative grant which shared with a private railroad the right-of-way of a state-owned railroad, established by law, where the General Assembly only required the grantee to adopt the same grade as the state railroad but the legislation also recited expected advantage of new rail links to North and West and expected efficiencies in maintenance, both of benefit to the state railroad); *Op. Att'y Gen. 73-145* (State may donate litter bags to motorists to alleviate roadside maintenance where maintenance authorized by law); 1964 *Op. Att'y Gen. p. 558* (State may give industrial prospects mementos to preserve memory of promotional trip where "promotion" authorized by law).

1993 *Op. Atty. Gen. 110, U93-14.*

In these three situations, the reciprocal benefit to the State from the receipt or use of state property takes the form of the fulfillment of a state responsibility or function. One is concerned with the value of the receipt or use of state property and the reciprocal value of the fulfillment. The determination of the benefit has been described judicially as a mixed question of law and fact. *See Op. Att'y Gen. 04-3 n7.*

In a fourth situation, the State is conducting an outright sale or exchange of its property, (hereinafter, "sale or exchange situation"). Here, too, it must receive a "substantial benefit," generally understood to mean full or fair market value in payment. 1971 *Op. Atty Gen., U71-17; see also 1995 Op. Atty Gen. 95-25* (no violation of the "gratuities clause" of the Ga. Constitution

where University property is leased in return for an amount equal to the fair market value of the lease). In regard to the sale of its property, the State has fiduciary duties as well as a duty not to violate the gratuities prohibition. Ga. Const., art. I, sec. II, par. I; Malcom v. Webb, 211 Ga. 449, 459 (1955). It is breach of fiduciary duty to sell land and timber for less than the highest price the market will offer. *Cf. id.*

Subject to the restraints of fiduciary duty and the prohibition against gratuities, the General Assembly may authorize the sale of state property, as it has here. Western Union Telegraph Co. v. Western and Atlantic Railroad Co., 142 Ga 532 (1914); cf. Op. Att’y Gen. U94-3. The transaction embodied in the Rule and authorized by O.C.G.A. §12-3-82.1(i), contemplates an outright sale of the state’s title to deadhead logs in exchange for a defined monetary consideration (characteristic of the “sale or exchange” situations), with furtherance of a public service or interest not being the primary focus of the transaction. That being the case, **it is advisable that the price or rate for deadhead logs as set forth in the Rule be equal to the fair market value of the logs, and that this price (in conjunction with the statutory permitting fees) also be “adequate,” to use the statutory language, to cover the costs of the sale.** This situation will then be distinguishable from the conclusion in 2004 Op. Att’y Gen. 04-3, which states, “[I]n the absence of some substantial benefit flowing to the state or the public, the gratuities clause generally prohibits the use of [state property], *even where the costs of [the use] are reimbursed to the state.*” (Italics added) In this case, the Department has taken steps to determine and secure fair market value as well as cover costs of sale. The sales will be according to specific, statutory authorization to sell for fees and other payments under procedures established by the General Assembly. In addition to the fair market board-foot rate, there will be a statutory permit fee for the right to harvest. Further, gratuities analysis may also involve other considerations. For example, in the case of surplus property, it may be appropriate to consider the possibility of loss in value over time due to deterioration in quality or other factors. So, the record in this situation appears to be closer to the situation in the combined Garden Club decisions than to the simple reimbursement of costs situation described in the 2004 opinion.

“Fair market value” means:

The amount at which property should change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. By fair market value is meant the price in cash, or its equivalent, that the property would have brought at the time of taking, considering its highest and most profitable use, if then offered for sale in the open market, in competition with other similar properties at or near the location of the property taken, with a reasonable time allowed to find a purchaser [CITE] Fair market value is the price that the asset would bring by bona fide bargaining between well-informed buyers

and sellers at the date of acquisition. Usually the fair market price will be the price at which bona fide sales have been consummated for assets of like type, quality, and quantity in a particular market at the time of acquisition.... (emphasis added)

Black's Law Dictionary, Fifth Edition.

In short, in order to avoid possibly running afoul of the "gratuities clause," the price or rate set forth in the Rules should, at a minimum, reflect the best price that the Department believes it can obtain, and that a willing buyer would be willing to pay for the deadhead logs, in their present state and condition, taking into consideration that the buyer would be responsible for removing those logs in accordance with the terms of the permit. Moreover, receipt by the State of a fair price in exchange for its title to the logs, representative of that which would be paid by a willing buyer and accepted by a willing seller in light of the surrounding circumstances, is consistent with the mandate under O.C.G.A. Section 12-3-82.1(i) that the state receive "adequate consideration" for the deadhead logs, meaning:

One which is equal, or reasonably proportioned, to the value of that for which it is given. One which is not so disproportionate as to shock our sense of that morality and fair dealing which should always characterize transactions between man and man. Fair and reasonable under circumstances. Reasonably just and equitable. See Fair market value; Fair Value; Just Compensation.

Black's Law Dictionary, Fifth Edition.

Underlying the concept of "fair market value" is the basic assumption that a "market" for a particular item of property exists from which comparisons can readily be made, and a resultant value determined from the prices of similarly situated products in the market place. If such a market does not readily exist for deadhead logs, then the Department should take reasonable steps to ascertain the full worth of the logs through some sort of alternative appraisal or other valuation methodology. In either case, **it is advisable that the methods applied by the Department in arriving at "fair market value" or other valuation be of the type generally recognized and accepted in the normal course of business for such purposes.**

It appears from the materials you have forwarded that the Department has invested a great deal of time and effort in setting the \$1.28 per board foot price. These efforts include, without limitation, consideration of data from established recovered deadhead log markets and traditional land timber markets, and the drawing of various assumptions and conclusions based upon that data. It also appears from the forwarded materials that the Department's objective in setting the price in the Rule was to cover its administrative costs. In the final analysis, the Department appears to have made principled efforts to comply with the statute and the constitutional criteria related to gratuities. Whether more information or guidance (i.e., from a CPA or other financial professional as to whether the methods employed by the Department in the valuation of its logs

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are commonly recognized and accepted for such purposes) is needed depends upon whether the Board is satisfied that the price established by the Rule meets the criteria discussed above.

Please be advised that this memorandum constitutes the views of the writer only and is not intended to express an official opinion or the position of the Attorney General. If I can provide any further assistance at this time, please do not hesitate to contact me.

JDC/jdc

