



ALAN WILSON
ATTORNEY GENERAL

July 05, 2023

Mr. G. Waring Parker, Esq.
Attorney
Town of Summerville
200 S. Main Street
Summerville, SC 29211

Dear Mr. Parker:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states the following:

Approximately eleven (11) years ago the Town of Summerville (Town) installed two (2) culverts in a Town maintained drainage ditch/stream which were then covered with rocks and dirt to form a bridge to give the property owner access to his property which was otherwise landlocked. The property owner paid for the materials and the Town used its Employees and equipment for the installation. Some nine (9) years later the Town determined the bridge was contributing to the flooding of adjacent properties and removed it. At the time of removal, the property owner was told by the Town it would rebuild the bridge when he or his successor in title applied for and granted a building permit. The issue on which the Town is requesting an opinion is as follows:

ISSUE

Is it a violation of the Public Purpose Doctrine for a municipality to use public funds to replace/repair a culvert for access over a stream on a portion of a public road which is maintained by the municipality where that portion of the road and culvert terminates and serves only the private property with the culvert being solely on municipal property? The culvert (now removed) was built approximately eleven (11) years ago with the then property owner paying for the materials and the municipality using its labor and equipment for installation.

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In subsequent correspondence, you clarified that the proposed project would place the culvert in Richardson Creek and the public would have access to drive over the new portion of the road until it terminates at the private property.

Law/Analysis

Although it is not free from doubt, it is this Office's opinion a court may hold the use of public funds to replace/repair a culvert for access over a stream on a portion of a public road which is maintained by the municipality and serves only a single privately-owned property does not violate the South Carolina Constitution's prohibition on using public funds for the primary benefit of private parties. See S.C. Const. art. X, §§ 5, 10. It must be noted that the resolution to your question concerning the expenditure of public funds on a particular project requires factual determinations which are beyond the scope of this Office's opinions. See Op. S.C. Att'y Gen., 2006 WL 1207271 (April 4, 2006) ("Because this Office does not have the authority of a court or other fact-finding body, we are not able to adjudicate or investigate factual questions"). However, we will assume the facts provided in your letter in order to offer guidance.

Article X, Section 5 of the South Carolina Constitution states, in relevant part, "Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied." S.C. Const. art. X, § 5. This Section has been interpreted to "require that all taxes must be levied for a valid and distinctly stated public purpose." Bus. License Opposition Comm. v. Sumter Cty., 304 S.C. 232, 234, 403 S.E.2d 638, 639 (1991).

Article X, Section 11 of the South Carolina Constitution provides, "The credit of neither the State nor of any of its political subdivisions shall be pledged or loaned for the benefit of any individual, company, association, corporation, or any religious or other private education institution except as permitted by Section 3, Article XI of this Constitution." S.C. Const. art. X, § 11. This section has been interpreted to prohibit the expenditure of public funds or resources for the primary benefit of private parties. See State ex rel. McLeod v. Riley, 276 S.C. 323, 329, 278 S.E.2d 612, 615 (1981), *overruled on other grounds by* WDW Prop. v. City of Sumter, 342 S.C. 6, 535 S.E.2d 631 (2000).

In S.C. Public Interest Foundation v. S.C. Department of Transportation, 421 S.C. 110, 804 S.E.2d 854 (2017), the South Carolina Supreme Court described what constitutes a public purpose.

In deciding whether governmental action satisfies a public purpose, we look to the object sought to be accomplished. As a general rule a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof.

Id. at 123, 804 S.E.2d at 861 (citations omitted). In Elliott v. McNair, 250 S.C. 75, 88, 156 S.E.2d 421, 428 (1967), the Court explained that “the question of whether an act is for a public purpose is primarily one for the Legislature, and this court will not interfere unless the determination by that body is clearly wrong.” In Nichols v. S.C. Research Authority, 290 S.C. 415, 351 S.E.2d 163 (1986), the Court reaffirmed its four-part test for determining whether a legislative finding of a “public purpose” is valid.

The Court should *first* determine the ultimate goal or benefit to the public intended by the project. *Second*, the Court should analyze whether public or private parties will be the primary beneficiaries. *Third*, the speculative nature of the project must be considered. *Fourth*, the Court must analyze and balance the probability that the public interest will be ultimately served and to what degree.

290 S.C. at 429, 351 S.E.2d at 163 (emphasis in original). Therefore, initially the question of whether this particular project serves a public purpose is one for the town council to determine. The council should make legislative findings that clearly state how the project will benefit the public interest.

In regard to the use of public funds on private property, this Office’s prior opinions have generally found the use of public funds to build or maintain roadways on private property to be prohibited. For instance, in 2016, this Office issued an opinion addressing a proposed Richland County ordinance that sought to allow the county to repair private roadways if the county administrator determined that “access to such roadway [was] necessary for the performance of one or more public functions.” Op. S.C. Att’y Gen., 2016 WL 5820152, at 1 (September 23, 2016). Therein, it was noted, “[T]his Office has affirmed in numerous prior opinions that ‘there is a prohibition against using public equipment and labor (i.e. public funds and resources) on private property.’” Id. at 4; see also Op. S.C. Att’y Gen., 1967 WL 11888 (August 18, 1967) (“I advise that the County Supervisor, in the opinion of this office, cannot use the road machinery of Calhoun County for hire to do work on private property. The public equipment is provided by public funds to be used for public purposes and cannot validly be used for private purposes.”).

However, in an August 29, 2003 opinion, we discussed how, after acceptance of an irrevocable dedication of private roadways by a political subdivision, the maintenance of such roadways could constitute a valid public purpose:

It is beyond argument that maintenance of a public road constitutes a public purpose for which public resources (funds, equipment, personnel, etc.) may be expended. I would also note that the ordinance under consideration requires that any scraping must be done for the passage of certain emergency vehicles.

...

There is authority in other jurisdictions which concludes that public safety alone represents a legitimate public purpose and that where an ordinance designed to promote public safety provides for the maintenance of private roads or streets, such is valid.... We decline to follow these cases, however, because other authority suggests that a much stricter standard is preferable where the maintenance of roadways at public expense is involved. These cases suggest that, in the enactment of an ordinance such as here, there must not only be a determination of a need to promote public safety or some other public purpose, but that there must also be an irrevocable dedication of the private property to the public, before an ordinance meets the public purpose test.

...

While we have not found any authorities rendered by our Supreme Court directly addressing the kind of ordinance being considered here, we have located an Order issued by the Honorable Jonathan McKown, dated October 22, 1984, which substantially deals with this question. Judge McKown held that roads should neither be built, nor maintained, on private property at public expense, unless certain stringent guidelines are followed, namely that there has been an irrevocable conveyance of such property by the landowner for public use; that such instrument is recorded in the county courthouse; and that there is a determination by the county that "the public benefit and use [is] substantial...."

Op. S.C. Atty. Gen., 2003 WL 22050883 at *4-6 (August 29, 2003) (emphasis added).

Subsequent to issuance of these opinions, the South Carolina Supreme Court held that the S.C. Department of Transportation's inspection of the privately owned bridges unconstitutionally contravened the requirement that public funds only be used for a public purpose.

We find the inspection of the bridges did not serve a public purpose. We do not doubt that the inspection was conducted to assuage safety concerns. However, the owners of the bridges were the beneficiaries of the inspection, not the public at large, whose access to the bridges is limited to the authorization provided by the

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homeowners. In short, it is not the public's responsibility to pay the maintenance costs of bridges located within a gated community that seeks to exclude the public from enjoying the use of the bridges. Thus, because it did not serve a public purpose, we find the inspection was unconstitutional.

S.C. Pub. Int. Found., 421 S.C. at 123, 804 S.E.2d at 861. Broadly, these authorities can be understood to prohibit the expenditure of public funds on the private roads and bridges where the public at large is denied access to use that same infrastructure. This is not to say that public access alone will transform an otherwise prohibited expenditure into one which is acceptable. Every expenditure remains subject to review under the four-part Nichols test to evaluate whether the legislative findings of public purpose is valid.

Turning to the scenario described in your letter, two elements of the proposed project suggest that a court may uphold a legislative finding of public purpose; namely that the project would take place on municipal property and that road would be accessible to the public. Your letter states the culvert would be “solely on municipal property.” The road over the culvert would be accessible to the public and connect to a currently existing public road. The public’s access to the new portion of the public road would terminate at the boundary of a privately owned property. While the project will certainly be a benefit to the private property in that it is no longer landlocked, the town council may find the culvert and road project somehow serves the public interest. This Office is unable to speculate what public purpose the project would serve, if any, or if a court would ultimately uphold such an expenditure.

Conclusion

As is discussed more fully above, although it is not free from doubt, it is this Office’s opinion a court may hold the use of public funds to replace/repair a culvert for access over a stream on a portion of a public road which is maintained by the municipality and serves only a single privately-owned property does not violate the South Carolina Constitution’s prohibition on using public funds for the primary benefit of private parties. See S.C. Const. art. X, §§ 5, 10. It must be noted that the resolution to your question concerning the expenditure of public funds on a particular project requires factual determinations which are beyond the scope of this Office's opinions. See Op. S.C. Att’y Gen., 2006 WL 1207271 (April 4, 2006) (“Because this Office does not have the authority of a court or other fact-finding body, we are not able to adjudicate or investigate factual questions”).

The initial question of whether this particular project serves a public purpose is one for the town council to determine. Elliott v. McNair, 250 S.C. 75, 88, 156 S.E.2d 421, 428 (1967). The

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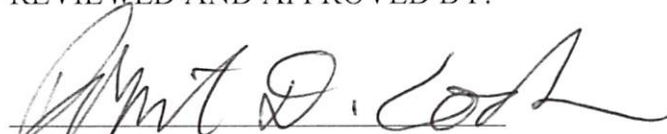
council should make legislative findings that clearly state how the project will benefit the public interest. While the project will certainly be a benefit to the private property in that it is no longer landlocked, the town council may find the culvert and road project serves the public interest. This Office is unable to speculate what public purpose the project would serve, if any, or if a court would ultimately uphold such an expenditure.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General