



HENRY McMASTER  
ATTORNEY GENERAL

February 17, 2009

Marvin C. Jones, Esquire  
Office of the Jasper County Attorney  
P.O. Box 420  
Ridgeland, South Carolina 29936

Dear Mr. Jones:

We understand you are the Jasper County Attorney and would like to request an opinion on “whether or not the granting of a utility easement by the county over real property which it owns should be authorized by ordinance or by resolution.” You state:

My review of the cases and opinions of the Attorney General has not revealed any guidance on the question of what interest in real property requires an ordinance. Is an ordinance required for the granting of a utility easement over county property? In this case, the county received compensation. Would it make a difference if a utility easement were granted on the basis that it serve the best interest of the county and without compensation?

#### **Law/Analysis**

While a county can exercise its authority via an ordinance or a resolution, most jurisdictions recognize a difference between ordinances and resolutions.

[I]t may be observed that a resolution deals with matters of a special or temporary character, that does not create a new expense or status of a constant and continuing nature, while an “ordinance” prescribes some permanent rule of conduct or government, to continue in force until the ordinance is repealed. Thus, an ordinance is distinctively a legislative act, while a resolution may be simply an expression of opinion or mind concerning some particular item of business coming within the legislative body’s official cognizance, ordinarily ministerial in character and relating to the administrative business of the municipality.

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56 Am. Jur. 2d Municipal Corporations § 296.

Our Court of Appeals recognized these differences between ordinances and resolutions in Glasscock Company, Inc. v. Sumter County, 361 S.C. 483, 489, 604 S.E.2d 718,721 (Ct. App. 2004) when it stated with regard to the “generally accepted function of resolutions as distinguished from ordinances in the conduct of local government legislation”: “Resolutions do not normally have mandatory or binding effect. Rather, the passage of resolutions is generally considered to be merely directory.”

Section 4-9-120 of the South Carolina Code (1986) specifically provides that county councils shall take legislative action by ordinance. As such, in a prior opinion of this Office, we pointed out:

Pursuant to Section 4-9-120 of the South Carolina Code of Laws, “legislative action” of a county governing body must be taken by ordinance. “Non-legislative action” may be taken by resolution or similar method. Op. Atty. Gen. dated October 1, 1976. A legislative act is an act that predetermines what the law shall be for the regulation of future cases falling under its provision. Life of the Land v. City Council of Honolulu, 606 P.2d 866 (Haw. 1980). A non-legislative act, or administrative act, is one that executes or administers a law. Id. The crucial test for determining that which is legislative from that which is administrative or executive is whether the action taken was one making a law, or executing or administering a law already in existence. Kelley v. John, 75 N.W.2d 713 (Neb. 1956).

Given the nature of the act in question, we believe taking action by ordinance is most appropriate. Granting an easement to a utility is an act that is permanent, rather than temporary, in character. In addition, we believe that granting an easement constitutes the making of a law, rather than administering a law in existence. As such, we find the granting of an easement to be in the nature of a legislative act requiring the use of an ordinance.

We find further support for our position in the fact the statutes governing counties appear to call for the transfer of property rights by use of an ordinance. Section 4-9-30 of the South Carolina Code (1986 & Supp. 2007) provides a list of the powers afforded to counties by the Legislature. Included in this list is the authority “to acquire real property by purchase or gift; to lease, sell or otherwise dispose of real and personal property . . . .” S.C. Code Ann. § 4-9-30(2) (1986). In addition, section 4-9-30(14) of the South Carolina Code (1986) gives counties the authority “to enact ordinances for the implementation and enforcement of the powers granted in this section . . . .” As such, section 4-9-30 contemplates the transfer of property interests by ordinance. Moreover, as you reference in your letter, section 4-9-130 of the South Carolina Code (1986), requiring public hearings on certain actions taken by county councils, states that a public hearing is required for the “sell, lease

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or contract to sell or lease real property owned by the county.” Moreover, this provision also references the fact that the procedures and requirements governing ordinances shall be used in taking these actions. Thus, this reference further indicates that an ordinance is required for a county to transfer an interest in real property.

In your letter, you question whether the transfer of an easement is subject to the same requirements as a transfer of a fee simple interest in property. Although sections 4-9-30 and 4-9-130 do not specifically address easements, we believe that the Legislature intended for these provisions to apply regardless of the property interest transferred. As such, we believe the County’s decision to grant a utility easement would be treated the same as a transfer of a fee simple interest in its property.

Furthermore, you ask whether or not the county receives compensation would make a difference in the method that the county must use to grant an easement. In our review, of the pertinent law, we did not discover any legal principle that would cause us to believe that the County could use a resolution in lieu of an ordinance to transfer such an interest in its real property.

### Conclusion

Given the binding effect that a transfer of a utility easement would have on the County and the fact that we believe the transfer of an easement on the County’s property constitutes a legislative act, we believe an ordinance calling for such a transfer is required. Moreover, we do not believe this opinion would change depending on whether the transfer is in the best interest of the County or whether the County receives compensation for the transfer.

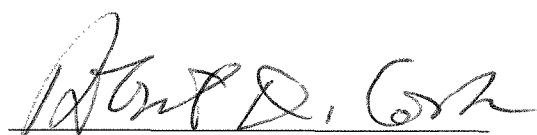
Very truly yours,

Henry McMaster  
Attorney General



By: Cydney M. Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Deputy Attorney General