

7530 Liberty



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

June 2, 2003

The Honorable David Parry
Mayor, Town of Briarcliffe Acres
Post Office Box 1250
North Myrtle Beach, SC 29598

Dear Mayor Parry:

You have requested an advisory opinion from this Office concerning whether the Town of Briarcliffe Acres may legally spend taxpayer funds for the maintenance of private property. By way of background, you indicate that a request has been made by the Briarcliffe Acres Association, a property owners association (POA) within the municipality, for the Town to take over the two lakes which are in the Town but are owned by the POA. You note the town consists of 230 lots, 35 of which are on the lake fronts. You further state that there is lake access to the other home owners via the POA owned land. In addition, your letter points out that this request is based on the allegation that the lakes serve as a natural storm water run off retention and should therefore be a Town maintenance responsibility.

Law/Analysis

We begin with the basic principle that it is generally recognized that a local ordinance, just like a state statute, is presumed valid as enacted unless or until a court declares it to be invalid. Op. S.C. Atty. Gen., May 7, 2003, citing Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984). Only the courts, and not this Office, possess the authority to declare invalid an ordinance that is enacted by the Town of Briarcliffe. Therefore, a municipal ordinance which authorizes the proposed maintenance project would be presumed valid until a court sets it aside.

With this background in mind, we address the question of how the courts would likely rule should this municipal action be challenged. The primary legal issue raised by the proposed maintenance project is whether the project would run afoul of the "public purpose" doctrine. All legislative action must serve a public rather than a private purpose. Elliot v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967). The use of government resources for the sole purpose of promoting or assisting individuals, corporations or other private entities violates this fundamental constitutional principle. S.C. Const. Art. I, § 3; Art. 10, §11.

The question of whether an act or action serves a public rather than private purpose is one primarily for the Legislature. The judiciary will generally not interfere unless the legislative

The Honorable David Parry

Page 2

June 2, 2003

determination is clearly wrong. Elliot v. McNair. However, our courts have frequently addressed the issue of determining whether or not a public purpose exists. In Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986), the State Supreme Court stated that “[p]ublic purpose is not easily defined.” The Court further commented that “[i]t is oftentimes stated that a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity and contentment of all of the inhabitants or residents, or at least a substantial part thereof.” Nichols approved a three-part test first enunciated in Byrd v. County of Florence, 281 S.C. 402, 315 S.E.2d 804 (1984) for determining a public purpose. There, it was stated that

[t]he 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.

An application of Nichols to the situation presented by your letter requires an analysis of all relevant facts and circumstances in order to determine the ultimate goal or objective of the proposed project. Further, a determination of which parties are the primary beneficiaries of the proposed project would also be very fact specific. This Office has cautioned repeatedly that we may not make factual determinations in an opinion of the Attorney General. Op. S.C. Atty. Gen., December 12, 1983. Thus, we must respectfully decline to state with certainty how the courts might rule here. However, from the information you have provided, we note that there are some factors present which would work in favor of finding of a public purpose for the proposed maintenance project.

First, the storm water drainage and retention properties of the lakes would appear to benefit the entire Town if they are the only such retention areas in the municipality. The key question which must be answered is, what percentage of the Town residents are to receive a benefit from the community drainage system. Secondly, the lakes are publicly accessible to all of the citizens of Briarcliffe Acres for their usage and enjoyment. Again, the question must be answered whether there is any real benefit in the public access, since you indicate that it is rarely used.

Even if these factors suggest the existence of a public objective or benefit, the specifics of the proposed project must pass muster under the second part of the Nichols test in order to constitute a valid public purpose. It is unclear whether the Town of Briarcliffe Acres or the 35 lake front property owners would be the primary beneficiaries of the proposed maintenance. If the condition of the lakes affect the property values of a substantial percentage of the lots in the Town, then this part of the test might be satisfied. However, if only the property values of the lake front lots are significantly affected by the condition of these lakes, then the maintenance project may fail this part of the test. As stated above, this Office must decline to state with certainty how this issue might be decided by the courts. We advise that if the Town of Briarcliffe Acres wishes to proceed on the proposed maintenance project, it should be prepared to articulate a valid public purpose which passes the Nichols test, and specify such findings in any proposed ordinance to that effect.

The Honorable David Parry
Page 3
June 2, 2003

We also advise that public officials who use public funds for private purposes may well be exposed to personal liability in a lawsuit brought by the taxpayers. In a previous opinion, this Office recognized that "typically, a public officer responsible for the handling and collection of public funds is considered a trustee, a bailee, or an insurer with all applicable duties and responsibilities of such funds or property (internal quotations omitted)." See Op. Atty. Gen., dated March 3, 1997. Such public funds

... are considered trust funds, and he [the public officer] is responsible to the same degree as the trustee of a private fund. It is the policy of the law to hold an official custodian of public funds to strict accountability, and he must exercise ordinary diligence to keep informed of the conditions of funds subject to his disposal. 67 C.J.S., Officers, § 211.

Id. When presented with similar questions, our Supreme Court has expressed general agreement with the principle stated above. For example, in Sumter Co. v. Hurst, 189 S.C. 316, 319, 1 S.E.2d 242 (1939), the Court held that "when a public officer receives money for the public use, he is a trustee to receive such monies and to pay them to the public official or function for whom or which they were intended." In other words, the Town should be reasonably certain that a public purpose is being served here before acting. Thus, we suggest that you consult and work closely with your local attorney regarding this matter. See also, Op. S.C. Atty. Gen., February 21, 2003.

Conclusion

This Office advises that any project which the Town undertakes involving the expenditure of public funds must have a valid public purpose pursuant to Nichols v. South Carolina Research Authority. Whether or not a particular expenditure meets the test set forth in Nichols involves questions of fact which are beyond the scope of an opinion of this Office. We further advise the Town that before authorizing the use of public money for the maintenance of the two lakes in question that the Town determine whether a public purpose in fact exists in this situation. Certainly, any ordinance approving the foregoing project must contain factual findings demonstrating that a public purpose is being served by the project. We additionally caution that there is the potential for liability to the Town should a court subsequently determine that a public purpose is not promoted by such expenditure.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General