

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3970

September 30, 1987

Melvin B. McKeown, Jr., Esquire
York County Attorney
Post Office Drawer 299
York, South Carolina 29745

Dear Mr. McKeown:

You have asked for the opinion of this Office regarding the use of county road equipment on private property, private roads, and private driveways.

You have advised that Act No. 304, 1959 Acts and Joint Resolutions, and Section 15-9 of the York County Code are identical and provide:

No road equipment of whatever description owned by the county shall be used on private property or property which the county is not legally required to maintain, except as hereinafter provided.

Each of these further provides:

Such equipment may be used on any private or other property for the construction, paving or maintenance of a road or parking area on said property only where the owner thereof has entered into a contract with the county for such work; provided, however, that roadscrapers may be used to scrape and ditch any road which has been rendered impassable by weather conditions. Provided, further, that nothing herein contained shall be construed so as to prohibit the use of such equipment in fulfilling contracts entered into with the South Carolina Highway Department.

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You have advised that under a long-standing policy, York County road equipment has been used to scrape private roads and driveways upon request of the property owner when such county equipment is working in the general area. Such practice has been suspended, however, pending receipt of this opinion. The questions which have arisen are these:

(1) Does the use of county road equipment and the expenditure of county funds on private property constitute a violation of Act 304 and § 15-9 of the York County Code?

(2) Does the use of county road equipment and the expenditure of public funds on private property constitute a violation of applicable constitutional provisions and standards established by case law?

(3) Do the provisions of subparagraph (c) of Act 304 of 1959 and § 15-9 of the York County Code permit the county council to enter into a contract with private property owners for the construction, paving or maintenance of roads, and if such contracts are permitted, what standards and limitations are applicable to such contracts?

(4) To what extent may county equipment (road scrapers) be used to scrape or maintain private roads which have been "rendered impassable by weather conditions" under the provisions of subparagraph (c) of Act 304 of 1959 and § 15-9 of the York County Code?

(5) Is Act 304 of 1959 unconstitutional special legislation?

(6) Do the "contract" and "weather conditions" exceptions contained in subparagraph (c) of Act 304 of 1959 and § 15-9 of the York County Code, relating to the use of county equipment on private property, satisfy the public purpose requirements under the South Carolina Constitution for the expenditure of public funds or the use of county road equipment?

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You have advised that your informal opinion to York County Council was that the contract provision noted above could not be used without full reimbursement of the cost incurred by York County. As discussed more fully below, we concur generally with your informal opinion.

Background

Article X, Section 5 of the Constitution of the State of South Carolina provides in relevant part that "[a]ny tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied." To determine what a public purpose is, the reasoning found in Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975) is relevant:

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., 265 S.C. at 162. To be a public purpose, the advantage to the public must be direct, not merely indirect or remote. Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798 (1953). The court in Anderson stated that each case must be determined on its own merits, considering each situation. Applying this definition to the situation of using county road equipment to work on private property, it is difficult to reach the conclusion that all, or at least a substantial portion of the York County residents would benefit from each particular scraping project; the benefit to the private property owner is paramount.

This Office has opined on numerous occasions that use of county equipment on private property, within the context of Article X of the State Constitution, is generally prohibited. In this regard, we have already forwarded to you Ops. Atty. Gen. dated June 11, 1975; January 9, 1976; October 26, 1977; February 10, 1975; September 12, 1975; December 9, 1975; March 12, 1979; and January 31, 1980.

Of particular importance is the opinion of January 9, 1976, which dealt with the provision of services such as burying dead animals on private property and placing stone on private driveways. This Office concluded that such services could properly be provided by the county "when full payment for the subject services is made to the county in advance of performance of the work."

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With this background in mind, each of your questions will be examined.

Question 1

Applying the conclusion of the opinion of January 9, 1976, to the situation in York County, use of county road equipment to work on private property, private roads, or private driveways should be undertaken only under a contract between the county and the property owner, as provided by Section 15-9 of the York County Code and Act No. 304 of 1959, provided that the county be reimbursed in full for the costs to be incurred in such work. Anything less than full reimbursement would appear to violate the requirements of Article X, Section 5, which requires public funds to be used only for public purposes, as well as the provisions of Act No. 304 of 1959 and § 15-9 of the York County Code.

Question 2

Your second question is answered within the first question, as stated above. Without full reimbursement to York County, such use of York County equipment on private property would constitute a violation of Article X, Section 5 of the State Constitution.

Question 3

As noted above, a contract may be entered into between York County and a private property owner for work on private roads or driveways only if full reimbursement of the costs incurred by York County is made to the county.

Question 4

The proviso stated in § 15-9 of the York County Code and Act No. 304 of 1959 appears, at first glance, to authorize certain roadwork: "provided, however, that roadscrapers may be used to scrape and ditch any road which has been rendered impassable by weather conditions." Notwithstanding the language of the proviso, an expenditure of public funds must nevertheless be for a public purpose. It is difficult to see how the public, or a substantial portion thereof, would benefit from having a private road scraped, having been made impassable by weather conditions. If York County Council can identify a public purpose to be served thereby, York County Council may wish to authorize such work on private property; otherwise, this Office advises that the county be fully reimbursed for such work to avoid constitutional difficulties.

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Question 5

Article III, Section 34 of the State Constitution provides in subsection IX that "where a general law can be made applicable, no special law shall be enacted" and in subsection X that the "General Assembly shall forthwith enact general laws ... which shall be uniform in their operations" Because Act No. 304 of 1959 is an act relating solely to use of county equipment on private property in York County, it appears to be a special law for York County rather than a general law. Thus, the issue of constitutionality must be addressed.

In considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional. In this instance, this Office must advise that Act No. 304 may be constitutionally infirm.

As stated in Townsend v. Richland County, supra,

The language of the Constitution which prohibits a special law where a general law can be made applicable, plainly implies that there are or may be cases where a special Act will best meet the exigencies of a particular case, and in no wise be promotive of those evils which result from a general and indiscriminate resort to local and special legislation.

Id., 190 S.C. at 275. While of course a court must make the final determination as to constitutionality, this Office can locate no evidence which establishes some exigency or other reason for treating York County differently from other counties; it would appear that a general law could have been made applicable. Every other county of this State undoubtedly has private property owners who would be in the same position as York County property owners; hence, a general law would be more preferable than an act for a particular county, assuming it otherwise passes constitutional muster. Thus, constitutionality of Act No. 304 of 1959 is doubtful.

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Article VIII, Section 7 of the State Constitution prohibits the adoption of laws for a particular county by the General Assembly. Because this constitutional provision was not in effect when Act No. 304 of 1959 was adopted, it is not necessary to comment on the applicability of this provision to the Act.

Question 6

In response to the fourth question, we advised that unless York County Council can identify a public purpose to be served by scraping private roads or driveways made impassable by weather conditions (i.e. identify the benefits to the public generally or at least a substantial portion thereof), using county equipment, the county should be fully reimbursed for such work. If Council cannot identify a public purpose, a contract between the property owner and the county, providing for full reimbursement of costs incurred by the county, would be appropriate. Otherwise, Article X, Section 5 of the State Constitution may be violated.

We trust that the foregoing has satisfactorily responded to your inquiry. Please advise if clarification or additional assistance should be needed.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/rhm

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions