



ALAN WILSON  
ATTORNEY GENERAL

April 30, 2024

Mr. Gary M. Mixon  
Administrator  
Sumter County  
13 East Canal Street  
Sumter, SC 29150

Dear Mr. Mixon:

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

Sumter County Council continues to grapple with the issue of how to provide maintenance to private roads so that residents who live on those roads will have safe, reliable passage to their homes but, more importantly, so that emergency vehicles will be able to travel along those roads to the homes of residents who need emergency services such as Emergency Medical Services, Fire Department and Sheriff's Department. Two proposals have been suggested recently and I have put those proposals in the form of questions.

- 1) May Sumter County donate *ad valorem* tax dollars to an eleemosynary corporation to be used to maintain and/or improve private roads?

This question arose because Sumter County previously received \$500,000.00 of American Rescue Plan Act (ARPA) funds earmarked for roof repair for privately-owned mobile homes. Sumter County distributed \$250,000.00 of those funds to United Ministries of Sumter, a South Carolina 501(c)(3) charity and \$250,000.00 to the Sumter Community Development Corporation, a nonprofit corporation. Each of those entities used the funds for the intended purpose and filed the requisite reports to show the use of the funds. In light of the fact that the ARPA funds were used to repair privately-owned property, would that use of government funds to improve private property support Sumter County donating *ad valorem* tax dollars to United Ministries of Sumter to be used for maintenance and repair of private roads?

- 2) If Sumter County accepts a private road into the county road system for maintenance, may the County Public Works Department provide only the minimum service necessary to allow emergency vehicle to pass or would a higher level of service be required to avoid liability?

This question arose when a proposed change to the Sumter County Road Acceptance Policy was introduced at the County Council meeting held on April 10, 2024. The proposed change did not receive a favorable vote, but it calls into question the extent to which Sumter County would be bound if it accepted a private road into its system of roads for maintenance. The County Attorney has taken a position regarding this proposal. However, out of an abundance of caution, we would like to call upon the resources of your good office to render an opinion on this specific proposal as well as the concept of providing “minimal maintenance measures” to repair or maintain private roads that are accepted into the county system of roads for maintenance.

#### **Law/Analysis**

It is this Office’s long-standing opinion that ad valorem taxes, or public funds generally, may not be used to maintain private roads as that would not serve a public purpose. For instance, in 1971, Attorney General McLeod wrote:

It is my opinion that the Constitution of this State requires that public monies be spent only for public purposes. The validity of this basic principle is so apparent that no citation of authority seems necessary. Carried to its extremes, the public funds could be used under it to provide essentially private roads of indeterminate length and cost to private residences or business establishments. The resultant burden, in my opinion, is not only an invalid expenditure of public monies for nonpublic purposes, but is the inevitable consequence of depriving citizens and taxpayers of due process and the equal protection of the laws.

Op. S.C. Att’y Gen., 1971 WL 22281 (October 20, 1971). While the opinion above did not provide citation, subsequent opinions cite Article X, Section 5<sup>1</sup> and Article X, Section 11<sup>2</sup> of the South

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<sup>1</sup> S.C. Const. art. X, § 5 (“No tax, subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled. Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied.”).

<sup>2</sup> In relevant part, Article X, Section 11 states, “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,

Carolina Constitution for the proposition that public funds must be spent for a public purpose and not for the primary benefit of private parties.<sup>3</sup>

The first question presented asks whether the County may donate public funds to an eleemosynary corporation to be used to maintain and/or improve private roads. It is this Office's opinion that this would still amount to a violation of the same constitutional provisions discussed in the opinions above, just accomplished through an intermediary. See City of Rock Hill v. Pub. Serv. Comm'n of S.C., 308 S.C. 175, 178, 417 S.E.2d 562, 564 (1992) (Reversing a trial court order that "would be tantamount to allowing the City to do indirectly what it could not do directly."); see also Op. S.C. Att'y Gen., 1981 WL 157810 (June 8, 1981) ("[L]et it be said that even the General Assembly may not do indirectly what it could not do directly.").

The second question presents an alternative scenario where, instead of using funds to maintain purely private roads, private roads are transferred to the County and accepted into the county road system. This Office understands that the County adopted Procedures and Policies for Sumter County Roads in August 2007. The policy document lists requirements for roads to be accepted into the county road system, including grading, utility installation, storm sewer installation, and paving to meet SCDOT specifications. We have previously opined that if a political subdivision accepts an irrevocable dedication of a private roadway, then maintaining such a roadway would constitute a valid public purpose and be permissible.

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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.

<sup>3</sup> See also Ops. S.C. Att'y Gen., 2016 WL 5820152 (September 23, 2016) (concluding a proposed Richland County ordinance which did not require public dedication of private roadway before county resources could be used to scrape private roadways likely violated the South Carolina Constitution); 2015 WL 7573851 (November 12, 2015) (advising Lee County on use of public funds and equipment on private property after the county was declared a disaster area under the Robert T. Stafford Disaster Relief and Emergency Assistance Act); 2003 WL 21471508 (June 2, 2003) (advising the Town of Briarcliffe Acres on use of taxpayer funds to maintain private lakes); 1997 WL 569010 (July 16, 1997) (advising Union County on use of county resources to repair private road located within a church cemetery); 1997 WL 419918 (June 20, 1997) (advising on Marion County maintenance of 500 miles of dirt roads within the County where it was not clear how many had been granted to the County through easement, deed, or other type of dedication); 1995 WL 803662 (May 19, 1995) (discussing whether the Town of Hampton could use public funds on private property to close one drainage ditch, and dig another drainage ditch); 1987 WL 342688 (September 30, 1987) (advising on York County use of road scrapers on private roads made impassable by weather conditions); 1987 WL 342831 (April 2, 1987) (advising Aiken County on use of public funds for installation of permanent structures on property not owned by the County); 1986 WL 192043 (August 1, 1986) (use of 'C' Funds for paving of private roads requires a dedication to the State); 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.").

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.

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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. Att’y Gen., 1990 WL 599297, at \*4-6 (June 4, 1990) (citations omitted). However, we also note that when a political subdivision accepts such a dedication, it is responsible for maintaining the roadway.

Once a political subdivision has accepted a dedication of land for use as a street or roadway, that political subdivision has a duty to keep the street or roadway open, to maintain it in good repair. Failure to do so could subject the political subdivision to liability. The political subdivision would exercise its discretion as to the nature and extent of necessary repairs or maintenance.

Id. at \*4 (emphasis added). While the Tort Claims Act generally provides immunity regarding road maintenance, the Act waives a governmental entity’s immunity from liability for the maintenance of roads when a “defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice.” S.C. Code § 15-78-60(15); see also Vaughan v. Town of Lyman, 370 S.C. 436, 635 S.E.2d 631 (2006) (holding town that had known of defect for at least ten years could not avail itself to the exception to waiver of immunity in S.C. Code § 15-78-60(15)). Accordingly, if the County accepts a private roadway into the county road system and only performs “minimal maintenance measures,” a court would likely hold the County can be found liable for remaining defects for which it has actual or constructive notice.

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**Conclusion**

As is discussed more fully above, it is this Office’s long-standing opinion that ad valorem taxes, or public funds generally, may not be used to maintain private roads as that would not serve a public purpose. See S.C. Const. art. X, §§ 5, 11. Alternatively, if the County accepts a private roadway into the county road system and only performs “minimal maintenance measures,” a court would likely hold the County can be found liable for remaining defects for which it has actual or constructive notice. See S.C. Code § 15-78-60(15).

Sincerely,



Matthew Houck  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General