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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

February 3, 2005

The Honorable Wayne C. Ramsey
Member, Gaffney City Council
P. O. Box 2109
Gaffney, South Carolina 29342

Dear Mr. Ramsey:

You have requested an opinion "about the City of Gaffney doing work on private property." You note that the Gaffney City Council has "had a request to move a storm drain that is located on church property." You indicate that "the current drainpipe only drains church property" and no other private property. You further state that "[n]o city street storm water goes into this system" and that "[t]he church wants the line moved so they can build a new building." You seek "an opinion on using taxpayer money to do this work that only benefits private property."

Law / Analysis

Of course, it is the policy of this Office to issue opinions to municipal or county councils as a body and not to a single member thereof. It is not clear from your letter as to whether you are requesting an opinion on behalf of the entire Town Council of Gaffney or simply as one member thereof. However, since we have addressed your question in numerous prior opinions, we will review these for you herein.

This office has repeatedly recognized that public funds must be used for public and not private purposes. See, e.g., Opinion of the Attorney General dated October 8, 2003 citing decisions of the South Carolina Supreme Court in Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967); Haesloop v. Charleston, 123 S.C. 272, 115 S.E.2d 596 (1923). In an opinion dated August 29, 2003, we advised that, "[T]he Due Process Clause of the Constitution (federal and state) requires that public funds must be expended for a public purpose." Moreover, Article X, Section 5 of the State Constitution requires that taxes (public funds) be spent for public purposes. While each case must be decided on its own merits, the notion of what constitutes a public purpose has been described by our Supreme Court in Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975) as follows:

> (a)s a general rule a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity and contentment for all the inhabitants or residents, or at least a substantial part thereof . . .Legislation (i.e.,

> relative to the expenditure of funds) does not have to benefit all of the people in order to serve a public purpose.

See also: WDW Properties v. City of Sumter, 342 S.C. 6, 535 S.E.2d 631 (2000); Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986); Carll v. South Carolina Jobs-Economic Development Authority, 284 S.C. 438, 327 S.E.2d 331 (1985); Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798 (1953). An opinion of this office dated December 18, 2000 commented that the constitutional requirement of "public purpose . . .was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests or by engaging in non-public enterprises." Furthermore, Article X, Section 11 of the State Constitution provides that:

> (t)he 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 private education institution except as permitted by Section 3, Article XI of this Constitution.

This provision proscribes the expenditure of public funds "for the primary benefit of private parties." State ex rel. McLeod v. Riley, 276 S.C. 323, 329, 278 S.E.2d 612 (1981). The term "credit" has been construed as any "pecuniary liability" or "pecuniary involvement". Elliott v. McNair, supra.

In Nichols, the court established the following test to determine whether the "public purpose" requirement has been met:

> (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. Fourth, the Court must analyze and balance the probability that the public interest will be ultimately served and to what degree.

318 S.E.2d at 163. In Bauer v. S.C. State Housing Authority, 271 S.C. 219, 256 S.E.2d 869 (1978), the Supreme Court warned that "(i)t is not sufficient that an undertaking bring about a remote or indirect public benefit to categorize it as a project within the sphere of public purpose."

Applying these general principles of constitutional law, we have recognized on numerous occasions that counties and municipalities cannot expand public funds or use equipment or employees to perform work on private property unless a public purpose can be demonstrated. See, e.g. Op. S.C. Atty. Gen., April 2, 1987 ["(t)his Office has opined on numerous occasions that county equipment and personnel ... may not be used for work on private property."]; Op. S.C. Atty. Gen., August 2, 1985 ["this Office has ruled on numerous occasions that public funds or other resources could not be used to perform work or otherwise improve private property."]; Op. S.C. Atty.

Gen., January 9, 1976 [removing dead animals from private property is a proper public purpose for the health and safety of the community and is thus permissible under the State Constitution]; Op. S.C. Atty. Gen., Op. No. 3968 (February 10, 1975) [a statute authorizing public funds or equipment to be used on private property for no public purpose is invalid]; Op. S.C. Atty. Gen., February 26, 1971 [use of county prison labor on private property for no public purpose violates the State Constitution]; Op. S.C. Atty. Gen., August 18, 1967 [county may not use road machinery of county for private purposes].

Of course, church property is private property. See, Op. S.C. Atty. Gen., January 6, 1978 [church property is considered non-commercial private property].

The Supreme Court of Texas, in Ex Parte Conger, 163 Tex. 505, 357 S.W.2d 740, 742 (1962) stated the following with respect to the question of using public funds primarily for the benefit of a church:

> The complaint against Commissioner Conger was that by implied consent he allowed county-owned machinery to be used for the benefit of private parties in blading and scraping off two lots in the town of McCamey so that the members of a church would have a place to park their cars while attending religious services. The employee who did this work had been instructed by Commissioner Conger not to use the county equipment on private property. He testified, however, that 'I had had permission to use the equipment on the lands wherein the Lions Club had given the church permission, and I just presumed that if it was all right for me to use them for a parking area on one it would be all right to use it on another lot for the same purposes.' Work performed on privately owned property to furnish parking facilities for the use of members in attending services at their church is not for a public use or purpose, whether that work consists in scraping off weeds or paving the lot or excavating for a foundation. The matter does not turn on the extent of character of work, but rather for whose benefit it was performed. A denominational church is a private institution, privately owned and operated. ...

Thus, it is clear that the general constitutional prohibitions against using public funds for private purposes or expending public funds for work on private property apply with equal force to church property.

Conclusion

Your letter indicates that the City's funds would be expended to remove a storm drain on church property, and that this cost would serve no public purpose. However, the State Constitution protects taxpayers against a governmental entity's spending public funds for private purposes. As stated above, the constitutional requirement of public purpose "was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests or

by engaging in non-public enterprises." Thus, assuming these facts, such an expenditure of public funds as described in your letter would be violative of the South Carolina Constitution.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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