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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

November 18, 2003

The Honorable David Parry
Mayor, Town of Briarcliffe Acres
P. O. Box 1250
North Myrtle Beach, South Carolina 29598

Dear Mayor Parry:

In a letter to this office you referenced that some residents of the Town of Briarcliffe Acres have requested that the Town consider gating the residential portion of the Town. You indicated the roads were acquired by the Town in 1982. The roads have been paved and maintained by the Town with tax revenue levied by the Town. A small portion of funds have been received from the County for road maintenance. Referencing such you have asked whether the Town can legally gate and control automotive access to the Town of Briarcliffe Acres including the public roads. If not, what methods can be used to return the roads to their earlier private status so that gates and control of access would be possible.

As referenced in a prior opinion of this office dated February 4, 1998, a "public road" is generally defined as

...a highway, a road or way established and adopted (or accepted as a dedication) by the proper authorities for the use of the general public, and over which every person has a right to pass and to use it for all purposes of travel or transportation to which it is adapted and devoted. The proper test in determining whether a road is a "public" or "private road" is use to which such roadway is put and (the) fact that (the) road has been constructed at public expense is not conclusive.

A prior opinion of this office dated February 17, 1982 concluded that an incorporated municipality cannot control traffic so as to prevent access by the public. The opinion stated that "(o)nce incorporated, ...(the town)...becomes a municipality and a municipality must have public streets." The opinion stated further:

Thus, residents of a particular area in a town or village do not possess and cannot be granted proprietary rights in the streets superior to or exclusive of use by the general

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public...The power of a municipality to regulate streets is not the power to prohibit their use by nonresidents.

But see: Op. Atty. Gen. dated May 14, 1976 ("Authorities do not seem to consider the existence of public streets to be an element necessary to constitute a municipality...It may be, however, that they will be imbued with such a public nature that they must be open to use by the public.").

In Sloan v. City of Greenville, 235 S.C. 277, 111 S.E.2d 573 (1959) the State Supreme Court determined that lands dedicated to the public for street use cannot by contract, ordinance or permit be devoted to a purpose inconsistent with such use. A prior opinion of this office dated July 9, 1962 concluded that a municipality was not authorized to convey a public alley to a private individual "on the rationale that, unless abandoned, streets are held in trust for the public." The opinion concluded that once a street is dedicated to the public, a municipality does not have the right to convey the street to private individuals for private purposes. Another prior opinion of this office dated August 1, 1986 commented that once a road is paved with public funds, it becomes part of the public road system and the road must be dedicated to the public.

Such construction is consistent with the general rule mandating that the use of public funds be for a public, and not a private, purpose. Elliot v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967); Haesloop v. Charleston, 123 S.C. 272, 115 S.E. 596 (1923). You had commented that public funds have been used for paving and maintenance. As to what constitutes a public purpose, in Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975) the Supreme Court described such as follows:

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 for all the inhabitants or residents, or at least a substantial part thereof.

An opinion of this office dated July 16, 1997 determined that as to use of public funds to maintain a private road, "not only must there be a determination of public purpose but there must be an irrevocable dedication of the private property to the public." Consistent with the above, it does not appear that the Town of Briarcliffe Acres would be authorized to gate and control automotive access to the public roads of the Town.

As to your question concerning the possible manner for a municipality to return roads to private status, I am unaware of any State statute specifically providing for transfer of a public road to private status. A prior opinion of this Office dated September 4, 1997 quoted from Stein v. Maddox, 215 S.E.2d 231 (Ga. 1975) that

Neither the General Assembly nor a subordinate public corporation acting under its authority can lawfully vacate a public street or highway for the benefit of a private individual. The street or highway cannot be vacated unless it is for the benefit of the public that such action be taken. The benefit may be either in relieving the public

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from the charge of maintaining a street or highway that is no longer useful or convenient to the public, or by laying out a new street or road in its place which will be more useful and convenient to the public in general.

An opinion of this office dated February 24, 1961 similarly determined that "public property, including streets, is held by municipalities in trust for the public and cannot be alienated unless the property be abandoned or properly vacated." See: S.C. Code Ann. Section 57-9-10 et seq. (1991) (procedure for abandonment of a road or street).

Such opinions appear to indicate that a municipality cannot convert once public streets to private status. Closing streets or roads to the public appear to be authorized only for situations such as abandonment or vacating the street or road in its entirety, such as when a new road is put in its place. This reasoning is especially true where public funds have been used to pave or maintain the roads in the past.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles H. Richardson", followed by a horizontal line.

Charles H. Richardson
Senior Assistant Attorney General