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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

June 20, 1997

Timothy H. Pogue, Esquire
Marion County Attorney
P.O. Box 790
Marion, South Carolina 29571

Re: Informal Opinion

Dear Mr. Pogue:

Your opinion request has been forwarded to me for reply. You have informed this Office that for a number of years, Marion County has been maintaining approximately 500 miles of dirt roads within the County. Apparently, none of these roads have been granted to the County through easement, deed or other type of dedication. You have asked what legal rights the county has to dirt roads which have not been acquired by the county by easement or dedication.

In regards to the maintenance of roads, Article X, Section 5 of the Constitution of the State of South Carolina provides in pertinent 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." 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. See, Ops. Atty. Gen. dated June 4, 1990, September 30, 1987, January 31, 1980 and March 12, 1979 as examples. In addition, this Office has previously stated that when the maintenance of a private road is involved, there must be both a determination of public purpose and an irrevocable dedication of private property to the public. Op. Atty. Gen. dated June 4, 1990.

In light of the foregoing, to determine whether a county may maintain a road, it must be determined whether the road in question is a public road or a private road. If a public road has not been established by statute, statutory proceeding, easement, or

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Request Letter

dedication, in certain instances, it may be possible for a county to have acquired a road by implied dedication or prescription. These two methods of acquisition are very similar.

A party seeking to prove an implied dedication has a steep burden of proof. Dedication is an exceptional mode of passing an interest in land, and proof of dedication must be strict, cogent and convincing. Cleland v. Westvaco Corporation, 314 S.C. 508, 431 S.E.2d 264 (Ct.Apps.1994). The owner of land must express an intention to dedicate his property to public use in a positive and unmistakable manner before a dedication may be perfected. Helsel v. City of North Myrtle Beach, 307 S.C. 24, 413 S.E.2d 821 (1992). Further, the owner's acts and conduct in regard to the property must be of such character that the public, dealing with him upon the strength of such conduct, could not but believe that his intention was to vest an easement therein in the public. Stone v. International Paper Company, 293 S.C. 138, 359 S.E.2d 83 (1987). It has been noted that the owner's intent to dedicate may be implied from long public use of the land to which the owner acquiesces. Cleland, supra. However, the acts proved must not be consistent with any construction other than that of a dedication. Id. Dedication is not implied from the permissive, sporadic and recreational use of the property, even though some of it has been used extensively. Id.

While courts have established the basic guidelines for the establishment of prescriptive rights, the ultimate determination of whether a public road exists by prescription is primarily one of fact for the fact finder. Op. Atty. Gen. dated June 17, 1975. It has long been recognized that the requirements necessary to establishing a right by prescription are; (1) the continued and uninterrupted use or enjoyment of the right for the full period of twenty years, (2) the identity of the thing enjoyed, and (3) that the use or enjoyment was adverse or under claim of right. Babb v. Harrison, 220 S.C. 20, 66 S.E.2d 457 (1951). Permissive use of a road does not convert it into a public highway. Fanning v. Stroman, 113 S.C. 495, 101 S.E. 861 (1919). Additionally, the route must be used by the public generally and not by particular individuals. In other words, the use must not be by a limited community or class of people. Bussell v. Kirkland, 242 S.C. 201, 130 S.E.2d 470 (1963). Finally, on numerous occasions, the South Carolina Supreme Court has held that the termini of a public way must be in a public highway or public place in order for the road in question to be public road. Id.

Obviously, I am not in a position to opine on the public or private nature of the 500 miles of dirt roads in question. That determination should be made by someone knowledgeable about the roads in question based on the legal rules surrounding implied dedication and prescription. Of course, a final determination of the precise nature of a particular road would be made by a court of competent jurisdiction.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I remain

Very truly yours,

Paul M. Koch

Paul M. Koch
Assistant Attorney General