ALAN WILSON
ATTORNEY GENERAL

September 23, 2016

Mr. Bradley T. Farrar, Esq.
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P.O. Box 192
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Dear Mr. Farrar,

Attorney General Alan Wilson has referred your letter to the Opinions section regarding two ordinances adopted by Richland County that allow county resources to be used on private property. Your letter requests this Office's opinion on whether either ordinance violates "the general prohibition against using public funds to perform work on private property, under circumstances where the County in each ordinance articulates public purposes as part of specific criteria principally tailored toward health, safety, public emergency vehicular access and the like?"

Law/Analysis

The first ordinance addressed in your request is found in the Richland County Code of Ordinances, Chapter 21, "Roads, Highways and Bridges," Section 21-13, "Emergency maintenance of roads," which reads as follows:

> (a) No work may be performed on any roadway not already maintained by the county unless the county administrator determines that access to such roadway is necessary for the performance of one or more public functions, and the following conditions exist:
> (1) Such a roadway is the only access for one (1) or more property owners or residences, and
> (2) Emergency medical services, sheriff department vehicles and other county vehicles cannot, in the lawful performance of their duties, gain full and immediate access to at least one (1) residence unless road scraping is performed, and
> (3) At least one (1) of the properties to be accessed is used as a primary residence.
> (b) Any work pursuant to this section will be done on a one-time basis only. In such cases, the county department of public works is limited to the minimum improvements that will allow full and immediate access to the affected residences. Crusher-run, gravel, pipe or other materials will not be routinely provided.

The second ordinance, Section 21-16, "Work on private property," reads as follows:

> The county department of public works is prohibited from performing any work on private property not specifically authorized under the provisions of this article except in emergency situations involving public health or safety and authorized, in writing, by the county administrator.

Initially, we note that the courts have consistently recognized the basic principle that a local ordinance, just like a state statute, is presumed to be valid as enacted unless or until a court declares it to be invalid. See McMaster v. Columbia Bd. of Zoning Appeals, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011); Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984); Op. S.C. Atty. Gen., 2003 WL 21471503 (June 4, 2003). Only the courts, and not this Office, possess the authority to declare such an ordinance invalid. Therefore, any ordinance would have to be followed until a court sets it aside.

The Supreme Court of South Carolina established a two-step process to determine the validity of a local ordinance. Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 361, 660 S.E.2d 264, 267 (2008).

> The first step is to ascertain whether the county had the power to enact the ordinance. If the state has preempted a particular area of legislation, then the ordinance is invalid. If no such power existed, the ordinance is invalid and the inquiry ends. However, if the county had the power to enact the ordinance, then the Court ascertains whether the ordinance is inconsistent with the Constitution or general law of this state.

South Carolina State Ports Auth. v. Jasper County, 368 S.C. 388, 395, 629 S.E.2d 624, 627 (2006). The General Assembly gave counties broad authority to enact ordinances in the South Carolina Code of Laws as follows:

> All counties of the State... have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county...

S.C. Code Ann. § 4-9-25 (1976 Code, as amended). Since your request concerns whether the ordinances violate the prohibition on the use of public funds to perform work on private property, we must consider Article X, Sections 5 and 11 of the South Carolina Constitution.

> Article X, Section 5 of the South Carolina Constitution reads as follows:
>
> 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.

S.C. Const. art. X, § 5. This Section has been interpreted to "require that all taxes must be levied for a valid and distinctly stated public purpose." Bus. License Opposition Comm. v. Sumter Cty., 304 S.C. 232, 234, 403 S.E.2d 638, 639 (1991).

> Article X, Section 11 of the South Carolina Constitution provides, in relevant part:
> 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, 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. This Section has been interpreted to prohibit the expenditure of public funds or resources for the primary benefit of private parties. See State ex rel. McLeod v. Riley, 276 S.C. 323, 329, 278 S.E.2d 612, 615 (1981), *overruled on other grounds by* WDW Prop. v. City of Sumter, 342 S.C. 6, 535 S.E.2d 631 (2000).

In an August 29, 2003 opinion, this Office examined the case law interpreting what constitutes a "public purpose" and how courts review a legislative determination of public purpose. In that opinion we stated the following:

> It is well-settled that the expenditure of state funds must be for a public, not a private purpose. Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967); Haesloop v. Charleston, 123 S.C. 272, 115 S.E. 596 (1923). As the Court suggested in Elliott, the 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 South Carolina 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:
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> > [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.
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> 217 S.E.2d at 47. 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); Bauer v. S.C. State Housing Authority, 271 S.C. 219, 246 S.E.2d 869 (1978); Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798 (1953). As emphasized in Bauer, the "mere fact that benefits will accrue to private individuals or entities does not destroy public purpose." 271 S.C. at 29.

Op. S.C. Atty. Gen., 2003 WL 22050883 (August 29, 2003). In Anderson, the Court cautioned, "It 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.'" 265 S.C. at 163, 217 S.E.2d at 48. Further, the Court stated in Elliott that "the question of whether an act is for a public purpose is primarily one for the Legislature, and this court will not interfere unless the determination by that body is clearly wrong." 250 S.C. at 88, 156 S.E.2d at 428.

In Nichols, the Court reaffirmed the following test to determine whether a legislative finding of a "public purpose" is clearly wrong:

> The 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.

351 S.E.2d at 163.

With this frame work in mind, we examine the ordinances contained in your request to determine whether they comply with Section 4-9-25 and applicable constitutional provisions. As your request letter notes, this Office has affirmed in numerous prior opinions that "there is a prohibition against using public equipment and labor (i.e. public funds and resources) on private property."[1] In fact, this Office's June 4, 1990 opinion written to Richland County Attorney C. Dennis Aughtry is strikingly similar to the instant opinion request. Op. S.C. Atty. Gen., 1990 WL 599297 (June 4, 1990). The question raised in that opinion was, "May public funds be constitutionally expended by Richland County Council for the maintenance of private roads or driveways? Is the enclosed ordinance constitutional?" Id. at *2. The proposed ordinance read as follows:

> No work may be performed on any road not already maintained by the County unless such road be dedicated by recorded instrument to the public, and the following conditions are satisfied:
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> 1) Such road is the only access for one or more property owners or residents and at least one of the properties to be accessed is used as a primary residence;
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> 2) Emergency medical services, sheriff's department vehicles and other county vehicles cannot, in the lawful performance of their duties, gain full and immediate access to a residence unless road scraping is performed.
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> When such roads are dedicated and the above-cited conditions are noted, the Richland County Public Works department may perform only such work necessary to allow full and immediate access to the affected residences by emergency medical service, sheriff's department vehicles and other county vehicles.

[1] Ops. S.C. Atty. Gen., 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 roadscrapers 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.").

> Such proposal would amend Section 21-7 of the present Richland County Code.

Id. (emphasis added). The proposed ordinance in the prior opinion closely tracks the language of Section 21-13 in the instant opinion with the notable omission of the requirement of that such roads be dedicated to the public.

In the following excerpt, the opinion discussed how after acceptance of an irrevocable dedication of the private roadway by a political subdivision, the maintenance of such roadways would constitute a valid public purpose:

> 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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> ...
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> There is authority in other jurisdictions which concludes that public safety alone represents a legitimate public purpose and that where an ordinance designed to promote public safety provides for the maintenance of private roads or streets, such is valid.... We decline to follow these cases, however, because other authority suggests that a much stricter standard is preferable where the maintenance of roadways at public expense is involved. These cases suggest that, in the enactment of an ordinance such as here, there must not only be a determination of a need to promote public safety or some other public purpose, but that there must also be an irrevocable dedication of the private property to the public, before an ordinance meets the public purpose test.
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> ...
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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...."

Id. at *4-6 (emphasis added). The opinion concluded that the proposed ordinance would likely be found constitutionally valid because it required both a determination of necessity for emergency vehicle passage and public dedication before a road could be scraped. In contrast, Section 21-13 omits the condition of an irrevocable public dedication of a private roadway before public funds or resources can be allocated to maintenance of the private road. Although Section 21-16 does not track as closely as Section 21-13 to the proposed ordinance in our prior opinion, its effect is similar. Section 21-16 prohibits "performing work on private property not specifically authorized under the provisions of this article..." The referenced article is Article I, "In General" of Chapter 21, "Roads, Highways, and Bridges." The effect of this ordinance would, like article 21-13, allow the use of public funds and resources on private roadways without a condition of a prior irrevocable public dedication. Because both ordinances omit the

requirement of an irrevocable dedication of the private property to the public, under Judge McKown's order and our prior opinions[2], it is this Office's opinion that a court would likely find these ordinances violate the South Carolina Constitution's prohibition on using public funds on private property.

Your opinion request raises an additional question of whether, under Section 21-16, an authorization by the county administrator in an emergency situation would provide an exception to the constitutional prohibition on using public funds on private property. Attached to your request, is this Office's November 12, 2015 opinion which was written to Lee County Attorney, Paul M. Fata. Op. S.C. Atty. Gen., 2015 WL 7573851 (November 12, 2015). In that opinion, we considered a similar issue of whether the President of the United States declaring certain counties within the State, including Lee County, disaster areas would serve as an exception to the state constitutional prohibition against using public funds on private property, particularly for hauling dirt and scrapping driveways. In declining to find such an exception, our prior opinion stated:

> The [Robert T. Stafford Disaster Relief and Emergency Assistance Act] provides a means for the federal government to take certain action to supplement state and local resources to assist the victims of a major disaster. Its purpose is not to grant local governments the ability to do that which is prohibited by state law.

Id. at *4. By the same token, we find that an authorization by the county administrator does not act as a grant for the county to do that which is prohibited by the South Carolina Constitution.

In researching this request, we have not found case law, statutes, or other authority which demonstrates a change in applicable law which would lead us to overrule our prior opinions or come to a different conclusion in regards to this opinion request. In fact, the state statutes which account for emergency situations only allow public bodies to vary from ordinary statutory or regulatory procedures to act in an expedited manner. See Sloan v. Dep't of Transp., 379 S.C. 160, 666 S.E.2d 236 (2008) (interpreting emergency procurement section of the S.C. Consolidated Procurement Code); Occupy Columbia v. Haley, No. 3:11-CV-03253-CMC, 2011 WL 6698990 (D.S.C. Dec. 22, 2011) (interpreting standard for promulgating emergency regulations under S.C. Code Ann. § 1-23-130). These statutes do not allow state agencies or political bodies to deviate from the South Carolina Constitution.

During the Great Depression, the Supreme Court of South Carolina addressed the constitutionality of an act of General Assembly which provided for relief from a deficiency judgment based on the "true value of the mortgaged property." Fed. Land Bank of Columbia v. Garrison, 185 S.C. 255, 193 S.E. 308 (1937). In finding the act unconstitutionally impaired the obligation of mortgage contracts, the Court commented on the exigent circumstances which motivated the General Assembly to act where it stated:

> The question of the constitutionality of said act has given me much concern. I am not unmindful of the purpose prompting its passage, nor of the hardship in some instances it was designed to remove. The courts will take judicial notice of the world-wide financial crisis which has existed during the last few years, and that it has been difficult to sell real

[2] This Office recognizes a long-standing rule that it will not overrule a prior opinion unless it is clearly erroneous or a change occurred in the applicable law. Ops. S.C. Atty. Gen., 2013 WL 6516330 (Nov. 25, 2013); 2013 WL 3762706 (July 1, 2013); 2009 WL 959641 (March 4, 2009); 2006 WL 2849807 (September 29, 2006); 2005 WL 2250210 (September 8, 2005); 1986 WL 289899 (October 3, 1986); 1984 WL 249796 (April 9, 1984).

> estate, or other property, at a fair price, either at public or private sale... I am also not unmindful of the well-settled rule that an act of the Legislature is presumed to be constitutional, and will not be held by the courts to be otherwise unless its unconstitutionality is shown beyond a reasonable doubt. However, it is equally well settled that, if an act runs counter to the plain provisions of the Constitution, the courts should not hesitate to so declare and hold the act invalid.

Id. at 310-311. This Office is likewise mindful that the Richland County Council likely passed Sections 21-13 and 21-16 in good faith to address emergency needs within the County. However, this Office is obligated to follow our state courts' interpretation of the South Carolina Constitution and our prior opinions.

Conclusion

We hope that the guidance provided above will assist you and Richland County Council in your consideration of the further action regarding the ordinances discussed above. This Office is, however, only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20 (1976 Code, as amended). If it is later determined otherwise, or if you have any further questions or issues, please let us know.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General