

1997 WL 569010 (S.C.A.G.)
Office of the Attorney General
State of South Carolina
July 16, 1997

RE: Informal Opinion

*1 Robert E. Guess, Esquire
Union County Attorney
109 W. South Street
Union, South Carolina 29379

Dear Mr. Guess:

Your recent opinion request has been forwarded to me for reply. According to the information provided, found within the Gilead Baptist Church Cemetery property in Union County, is a private road in need of repair. You ask whether it would be legal for Union County to expend public funds to do repair work upon real property in this cemetery.

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 Op. Atty. Gen. dated May 19, 1995; September 30, 1987; January 31, 1980; and March 12, 1979 as examples. However, each case must be decided on its own merits. Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975). To determine what constitutes a public purpose, the reasoning found in Anderson v. Baehr is helpful:

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

To be a public purpose, the advantage to the public must be direct, not merely indirect or remote. Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798 (1953).

A determination of whether a specific expenditure of public funds is for a public purpose depends on the facts of the particular situation. Of course, this Office does not have the authority to make factual determinations in a legal opinion. Op. Atty. Gen. dated December 12, 1983. However, I can inform you that it is widely recognized that the determination of public purpose is one for the legislative branch. Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986). Therefore, in this instance, such a decision to expend public funds can only be made by the Union County Council after consideration of all relevant facts and circumstances, in accordance with the constitutional provision discussed above.

When the question turns to the use of public funds to maintain a private road, this Office has previously opined that not only must there be a determination of public purpose but there must also be an irrevocable dedication of the private property to the public. Op. Atty. Gen. dated June 4, 1990 (copy enclosed). As to your specific question, as previously stated, this Office does not have the authority to make a factual determination in this case. In addition, this Office has not been informed as to whether the road in question has been irrevocably dedicated to the public. Thus, again, the decision to expend public funds should be made by the Union County Council in accordance with Article X, Section 5 and the June 4, 1990 opinion of this Office.

*2 In addition to the above stated law, in this case, you may also have a problem with providing public funds to a sectarian entity. Based on the information provided, while it seems very likely, I am unable to conclude with absolute certainty whether the cemetery itself is a sectarian entity.¹ However, if the cemetery is a sectarian entity, I call your attention to an opinion dated April 13, 1971 (copy enclosed), in which former Attorney General McLeod concluded that if an entity is sectarian in nature, public funds may not be used in their aid.

To summarize the foregoing, the use of county equipment on private property is generally prohibited. However, the decision to expend public funds on private property should be made by the Union County Council after consideration of Article X, Section 5 and the facts of the case. If county funds are to be used to maintain a private road, there must be a determination of public purpose and an irrevocable dedication of the property to the public. Finally, in accordance with former Attorney General McLeod's opinion, public funds should not be used to aid a sectarian entity.

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
Assistant Attorney General

Footnotes

1 In a letter dated November 29, 1996, sent to you by C.W. Moore, Chairman of the Gilead Cemetery Committee, Mr. Moore appears to be arguing against the idea that the cemetery is a sectarian entity.

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