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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER  
ATTORNEY GENERAL

January 7, 2004

The Honorable Glenn F. McConnell  
President Pro Tempore  
South Carolina Senate  
Post Office Box 142  
506 Gressette Senate Office Building  
Columbia, South Carolina 29202

Dear Senator McConnell:

You have requested an advisory opinion from this Office on behalf of unnamed parties who brought to your attention a situation which concerns the applicability of the public purpose doctrine. You have specifically questioned the propriety of the following actions under South Carolina law:

The issue is whether it is appropriate for taxpayer funds to be used for personnel, equipment and materials to erect a fence to prevent vehicular traffic from private property such that the fence is for the benefit of that private property. It is my understanding that the fence is an attempt to cure a problem of vehicular intrusion onto private property. The reason given for the fence is that it also prevents traffic from going onto public property. However, the fence does not separate the public and private property. Instead it separates two different private tracts of land.

Law/Analysis

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:

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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.

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 this well-settled body of law to the facts provided to this Office regarding your written request, it would appear that the public purpose doctrine would preclude the public entity from building the fence in question. You state that the primary purpose of the fence is to prevent vehicular intrusion into a piece of private property, and the fence would separate two pieces of private property. You indicate the stated reason for the fence is to prevent vehicular intrusion onto

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public property, but that the fence is not contiguous with such public property. It appears that the primary beneficiaries of the fence would be private parties, with only an indirect or remote public benefit. The use of public resources to build such a fence would likely violate the principles of law laid out in Nichols v. South Carolina Research Authority, *supra*, and Bauer v. S.C. State Housing Authority, *supra*. Accordingly, this Office advises against using public resources to erect the fence in question.

We would note that the foregoing opinion is based upon the limited facts provided in your letter. Only a court of competent jurisdiction, and not this Office, can serve as a finder of fact and conclusively determine whether this action would violate the public purpose doctrine. See Op. S.C. Attn. Gen., dated June 30, 2003. We would advise that a declaratory judgement from the courts, based upon all of the relevant facts, would be the mechanism to provide a binding decision on whether this action is violative of the public purpose doctrine.

#### Conclusion

Based on the foregoing authorities as well as the limited facts provided in your request, this Office advises that building the fence in question would likely violate the well-settled constitutional principle that public resources must be used only for public and not private purposes.

Very truly yours,



Robert D. Cook  
Assistant Deputy Attorney General