

The State of South Carolina



Office of the Attorney General

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June 4, 1990

OPINION NO. _____

- SYLLABI:
1. Public funds may not be expended for private purposes, but may only be expended for public purposes. Thus, Richland County Council may not enact an ordinance which expends public funds primarily for a private purpose and may not provide for the scraping of private roads or driveways with public funds where such is primarily for a private purpose.
 2. Our Supreme Court has concluded that the determination of what constitutes a public purpose is a decision for the legislative branch, in this instance, Richland County Council. Thus, Richland County Council must conclude that a particular expenditure of public funds is for a public purpose before such funds may be spent.
 3. With respect to private road maintenance, an opinion issued during the administration of former Attorney General Daniel R. McLeod indicates that where a landowner reserves a right to revoke his dedication of road property to the public, the maintenance of such a road at public expense is unconstitutional because such would primarily serve a private purpose. Implicitly, this opinion also concluded that any such dedication should be irrevocable, in order for constitutional standards to be met.
 4. Therefore, where driveways or roads are being scraped with the use of public funds, such must be for a public, not a private, purpose. Cases in other jurisdictions indicate that one way such may be done constitutionally is where the road property has previously been conveyed irrevocably by deed from the landowner to the county in the form of a dedication for public use. See, Wine v. Boyar, 33 Cal. Rptr. 787 (1963).

5. 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...." Judge McKown also held that roads should not be built "except in exceptional circumstances or [on a] bona fide emergency basis."
6. The Ordinance in question here appears to require a deeding from the landowner to the county, together with certain other conditions, primarily that any scraping must be done as a means for allowing emergency and other county vehicles to get through. Of course, we would presume that if such a proposal is implemented, the county would insure that a particular property owner conveying property for public use, possessed title sufficient to grant such a conveyance.
7. Our research also indicates that 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. Klink v. Monroe Tp., 436 A.2d 545 (1981). See also, 18 McQuillin, Municipal Corporations, §53.44 at 246. Therefore, it could be argued that because Richland County, in this Ordinance, requires that scraping be done on roadways only for emergency vehicle passage, such a finding is sufficient to meet the public purpose in that it promotes public safety.

We decline to follow these cases however, because, consistent with Judge McKown's Order referenced above, other authority suggests that a much stricter standard is preferable where the maintenance of roadways at public expense is involved. These cases in other jurisdictions suggest that in the enactment of an ordinance such as here, there must not only be a

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determination of a need to promote public safety, but that there also must be an irrevocable dedication of the private property to the public, before an ordinance meets the public purpose test. Here, Richland County, in its ordinance, requires both a determination of necessity for emergency vehicle passage, as well as a public dedication before a road may be scraped. Because both requirements are contained in the ordinance, a court would probably conclude that Richland County's determination of public purpose is constitutionally valid on its face. Moreover, based on Judge McKown's ruling, if Richland County, in its acceptance of the dedication of a particular roadway, concludes that the public benefit in that instance is substantial, then the proposed ordinance would also be constitutional as applied in a given situation.

8. As is our policy, this Office comments upon the legal issues relevant here. Whether or not Richland County wishes to adopt the ordinance under consideration, as a matter of public policy, is entirely a matter for council to consider.

TO: C. Dennis Aughtry, Esquire
Richland County Attorney

FROM: Charles W. Gambrell, Jr.
Deputy Attorney General

QUESTIONS: May public funds be constitutionally expended by Richland County Council for the maintenance of private roads or driveways? Is the enclosed ordinance constitutional?

DISCUSSION AND CONCLUSION:

PROPOSED ORDINANCE

The proposed ordinance provides for the dedication of roads for scraping; the proposal states:

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:

- 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;
- 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.

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.

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

Attached to the proposed ordinance were copies of forms proposed to be utilized in the dedication process. The first is entitled "Dedication of Roadway and Hold Harmless Agreement." The form would set forth the legal description of the property to be dedicated "unto the public for public use." The habendum clause states that Richland County would hold the dedicated roadway "for the benefit of the public" subject to specified terms and conditions. The

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form would be dated and signed by the property owner and chairman of county council and also by two witnesses each for the property owner and the county. Two probate forms, to be signed by witnesses to the parties' signatures and notarized, were also attached. Upon execution these documents would presumably be filed with the Richland County Register of Mesne Conveyances.

Constitutional Concern

Article X, Section 5 of the Constitution of the State of South Carolina provides in relevant 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 September 30, 1987; June 11, 1975; January 9, 1976; October 26, 1977; February 10, 1975; September 12, 1975; December 9, 1975; March 12, 1979; and January 31, 1980.

Public Purpose

To determine what constitutes a public purpose, the reasoning found in Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975), is relevant:

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

Id., 265 S.C. at 162. 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). The court in Anderson stated that each case must be determined on its own merits, considering each situation.

This Office has never squarely addressed the situation where a property owner actually conveys by deed a piece of property for the public use. Thus, the situation is novel from a legal standpoint. To determine whether a public purpose exists in the situation you have referenced, it is necessary to examine the concept of dedication, who benefits, and the duty or responsibility of the political subdivision accepting the dedication. While I present the legal considerations as follows, I stress that it is ultimately a matter for Richland County Council to consider and determine that a public

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purpose exists and that road maintenance should be undertaken in a given situation. As our Supreme Court has stated, "[i]t is uniformly held by courts throughout the land that the determination of public purpose is one for the legislative branch." Nichols v. South Carolina Research Authority, 290 S.C. 415, 426, 315 S.E.2d 155 (1986). "The question of whether an Act [or in this instance an ordinance] is for a public purpose is primarily one for the legislature." Park v. Greenwood County, 174 S.C. 35, 41, 176 S.E. 870, 872 (1934).

Dedication

As stated in Derby Heights, Inc. v. Gantt Water and Sewer District, 237 S.C. 144, 116 S.E.2d 13 (1960),

Dedication is the intentional appropriation of land, or of an easement therein, for some proper public purpose. ... It is not a unilateral transaction; for its completion there must be acceptance by the public, of the property, for the particular purpose.

Id., 237 S.C. at 149-150. Furthermore,

"The essence of dedication is that it shall be for the use of the public at large. *** Properly speaking, there can be no dedication to private uses, nor for a purpose bearing an interest or profit in the land, as distinguished from general public uses. ..."

"There is no such thing as a dedication between the owner and individuals. The public must be a party to every dedication. *** In short, the dedication must be made to the use of the public exclusively, and not merely to the use of the public in connection with a user by the owners in such measure as they may desire."

Safety Building & Loan Company v. Lyles, 131 S.C. 542, 544-45, 128 S.E. 724 (1922). A dedication for street purposes is a dedication to the public at large. Chapman v. Greenville Chamber of Commerce, 127 S.C. 173, 120 S.E. 584 (1923).

How dedication may be effectuated was discussed in Anderson v. Town of Hemingway, 269 S.C. 351, 237 S.E.2d 489 (1977):

[D]edication involves not only an offer to dedicate, but an acceptance thereof, either express or implied, by a public authority having power to pass upon the matter.

It is generally accepted that to constitute a valid dedication, there must not only be an intention on the part of the owner to dedicate a property to the public use, but that such intention must be manifested in a positive and unmistakable manner. It need not be made by deed or other writing, but may be effectually and validly made by acts or verbal declarations. It may also be implied from long use by the public of the land claimed to be dedicated.

Id., 269 S.C. at 353-54. Our court's statements appear to be in accord with the common law doctrine that "no particular formality is necessary to effect a dedication." 23 Am.Jur.2d Dedication § 27.

Examining the above-described documents in light of the foregoing general law as to dedication, it would appear on the face of the documents that the roadways subject of the dedication documents are being turned over by the landowner to the County for the benefit of the public. (Of course, in a given factual situation, it might be shown that such roadway was not open to the public, notwithstanding the documents to the contrary. Other questions would then arise in conjunction with that roadway which are not considered herein.) Such intent would be readily inferred from the plain, clear language in the documents. 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.

Once a political subdivision has accepted a dedication of land for use as a street or roadway, that political subdivision has a duty to keep the street or roadway open, to maintain it in good repair. 26 C.J.S. Dedication § 55; Harshbarger v. County of Jerome, 107 Idaho 805, 693 P.2d 451 (1984); United States Bung Mfg. Co. v. City of Cincinnati, 73 Ohio. App. 80, 54 N.E.2d 432 (1943); Sarty v. Millburn Township, 28 N.J.Super. 199, 100 A.2d 309 (1953); Miller v. Fowle, 92 Cal. App. 2d 409, 206 P.2d 1106 (1949). Failure to do so could subject the political subdivision to liability. 26 C.J.S. Dedication § 55. The political subdivision would exercise its discretion as to the nature and extent of necessary repairs or maintenance.

Previous Opinion and Other Law

In a previously-rendered opinion of this Office dated June 20, 1972, this Office examined the constitutionality of Florence County's use of public resources to maintain a dirt road leading to a chicken farm. The owner gave the county a revocable easement over this land for the purpose of maintaining the road for public use. The opinion stated:

Two methods of acquiring property for public roads are eminent domain and dedication. It has been stated, however, that the reservation of the right to revoke defeats the dedication. See McQuillin, The Law of Municipal Corporations, Dedication, Section 33.10 at page 658 (1964). Were it otherwise the property owner would receive the benefit of county maintenance since he may revoke the easement at will. It is the opinion of this office that such would be inconsistent with the constitutional prohibition against the use of public funds on private property.

This prior opinion only underscores more definitely the need for some action to be taken by the property owner which will leave no question that the road is being irrevocably conveyed by the landowner to the county for public use if public funds or resources are to be used for the maintenance thereof. See also Op. Atty. Gen. dated August 1, 1986 (public funds may be expended to pave a roadway leading to an industrial park, with agreement by the current property owner that the property will be dedicated to the public, in this case the State of South Carolina; essential to the conclusion of this opinion was the fact that industrial development clearly meets the public purpose test as stated in cases such as Nichols, supra).

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. Klink v. Monroe Tp., 436 A.2d 545 (1981). See also, 18 McQuillin, Municipal Corporations, §§53.44 at 246. Therefore, it could be argued that because Richland County, in this ordinance, has mandated that scraping be done on roadways only for emergency vehicle passage, such a finding is sufficient in that it promotes public safety.

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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.

Opinion of the Justices, 560 A.2d 552 (Me. 1989) is a good example. There, a statute provided for the maintenance of private roadways. The legislature found that the maintenance of private roadways promoted public safety in that it insured "adequate access and egress for police, fire and emergency vehicles, as well as other vehicles traveling to and from those residences."

The Court, nevertheless, ruled the statute unconstitutional because it did not promote a public purpose. The Court emphasized that the statute provided that the public "has no legal right of travel" on the roads. The Court warned that, without a public dedication, any such statute is unconstitutional.

Any possible consent by the private owners to the public's use of the road at most would arise only by inference from the absence, at the time of expenditure, of any barrier or sign "hav[ing] the effect of discouraging public travel." But even that questionable implicit consent could disappear at the whim of owners who subsequently put up a "no trespassing" sign or similar barrier. Any indirect public benefits derived from the proposed public expenditures upon private roads from which the public is or may be barred are outweighed by the public detriment.

560 A.2d at 555. It is apparent from the Court's citation of authorities in this case that the decision turns on the fact that the Legislature did not insure public access. Clearly, the Court was willing to give great deference to a legislative determination of public purpose, but was unwilling to approve any statute where public dedication was not provided for. Consistent with the idea that the "essence of dedication is that it shall be for the use of the public at large", one Court has stated,

[t]he distinguishing characteristic of a public way is that it is open to general public use, and it is the right to travel upon the street, and

not the exercise of the right which makes the street public. Its character is not determined by the number of persons who actually use it; if it is open, it is immaterial that but few persons are in a position to make use of it, or that one person is most benefited by it... . [T]he fact that the terminus of the dedicated street fails to connect with another public road, making of it a technical dead end, [does not] deprive it of its public character... .

Measured by the foregoing standard the alley is clearly a public way and for a public purpose.

Dorris v. Hawk, 292 P.2d 417 (Okl. 1956).

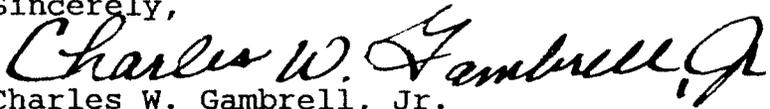
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Here, Richland County, in its ordinance, requires both a determination of necessity for emergency vehicle passage, as well as a public dedication before a road may be scraped. Because both requirements are contained in the ordinance, a court would probably conclude that Richland County's determination of public purpose is constitutionally valid on its face. Moreover, based on Judge McKown's ruling, if Richland County, in its acceptance of a particular roadway, concludes that the public benefit in that instance is substantial, then the proposed ordinance would also be constitutional as applied in a given situation.

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Sincerely,


Charles W. Gambrell, Jr.
Deputy Attorney General

CWGjr/nnw
Enclosure

REVIEWED AND APPROVED BY:


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