Counties, maintenance of private road

Number: INFORMAL

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Mr. Marlin M. Feagle
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Dear Mr. Feagle:

Thank you for contacting this office following our telephone conversation of September 2, 2011. During that conversation we discussed this office's request for additional information relating to your opinion request of July 12, 2011. You had submitted an Attorney General's Opinion request on the issue of whether the Columbia County Commission may expend county funds to repair and maintain a private roadway when the landowner has authorized county school buses to travel for the purpose of transporting handicapped children.

While your initial letter of inquiry suggests that "recent laws at both the state and federal levels promote a policy of providing accommodations and assistance to handicapped persons in their employment, travel, and every other respect," you have not provided this office with any citation to the laws upon which you rely for this statement or any analysis of how this public policy consideration would affect the conclusions of earlier Florida Attorney General Opinions.

As I indicated in my letter of August 1, 2011, this office has, on several occasions, addressed substantially the same question as the one you have posed. In Attorney General Opinion 92-42, the issue was whether public funds could be dedicated to repairing and maintaining private roads upon which county school buses were authorized to travel pursuant to agreements with the landowner/parents of children attending school. The opinion concluded that the county could not lawfully expend county funds to repair and maintain private roads, regardless of an agreement allowing school buses to travel upon the road to transport the children of the landowner/parent. This conclusion is based on the premise, developed in Florida case law, that public funds may only be spent for public roads since the expenditure of public funds must serve a public purpose.[1]

Thus, this office and the courts of Florida have determined that a governmental entity may use public funds for the construction, maintenance, or repair of a road only when the road is a "public" road. This office has concluded that a "public" road is one open to and set apart for the public, as opposed to a private road that by its nature is not open to the public and upon which the public has no right to travel.[2] From your letter, I understand that the roadway about which you inquire has not been dedicated to the public.

In the absence of any additional information from you providing citations to and discussing the public policy provisions your letter mentions and their application, this office will continue to suggest that these earlier opinions of both the courts and this office represent the current state of

the law.

I would also call to your attention several recent Attorney General Opinions concluding that a county has the authority to enter a program of private road maintenance if the board of county commissioners, in the exercise of the county's home rule powers, determines that such a program serves a county purpose.[3] These opinions conclude that counties may enter such arrangements if provision is made for payment of all actual costs by the owner of the private property to the county. The opinions caution that all actual costs of providing such service must be reimbursed, "such costs to include not only the cost of using the equipment but the depreciation of the machinery, salary and employee benefits being accrued by the county personnel providing such services."[4]

I trust that these informal comments will provide some direction to you in advising your client. This informal advisory opinion has been prepared by the Department of Legal Affairs in an effort to be of assistance. The conclusions expressed herein are those of the author and should not be considered a formal opinion of the Attorney General.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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[1] *See Padgett v. Bay County*, 187 So. 2d 410 (Fla. 1st DCA 1966); *Collins v. Jackson County*, 156 So. 2d 24 (Fla. 1st DCA 1963); Ops. Att'y Gen. Fla. 06-24 (2006), 99-73 (1999), 99-15 (1999), 94-89 (1994), 78-88 (1978), 75-309 (1975), and 73-222 (1973). *Cf. Lovey v. Escambia County*, 141 So. 2d 761 (Fla. 1st DCA 1962) (county’s maintenance of road for more than four years raised presumption of dedication).

[2] Ops. Att'y Gen. Fla. 06-24 (2006), 99-73 (1999), and 99-15 (1999).

[3] Ops. Att'y Gen. Fla. 02-48 (2002), 99-73 (1999), and 99-15 (1999).

[4] *See* Ops. Att'y Gen. Fla. 99-73 (1999) and 02-48 (2002).