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Opinion No. 13-32

Allocation of State Gasoline Tax Revenue to Private Property Owners Association

QUESTION

Would allocating a portion of the state gasoline tax revenue to a private property owners association for the purpose of maintaining private roads that are open to travel by the general public be constitutionally permissible?

OPINION

Yes. The building and maintenance of roads used by the public is a public purpose, even if the roads are privately owned, so that allocation of State revenues for those purposes is permissible under Article II, Sections 24 and 31, of the Tennessee Constitution.

ANALYSIS

The General Assembly has imposed a privilege tax on all gasoline imported into or manufactured or produced in Tennessee. Tenn. Code Ann. § 67-3-201(a). A portion of the gasoline tax revenue is allocated to counties and municipalities for the building and maintenance of roads, bridges, and other public ways. Tenn. Code Ann. § 67-3-901. Tennessee law does not currently provide for the allocation of any part of the gasoline tax revenue to a private property owners association for the purpose of maintaining private roads that are open to the public. The question presented is whether such a provision, if enacted, would be constitutional.

As noted in a recent opinion of this Office, Tennessee courts have interpreted Article II, Sections 24 and 31, of the Tennessee Constitution, to prohibit the appropriation of public monies for other than public purposes. *See* Tenn. Att'y Gen. Op. No. 12-07, at 3 (Jan. 13, 2012). Tennessee courts have reviewed the "public purpose" provision under Article II, Section 31, but do not appear to have done so with regard to Article II, Section 24. *See* Tenn. Att'y Gen. Op. No. 00-104, at 2 (June 1, 2000). Nonetheless, this Office previously opined that the "public purpose" requirement of Article II, Section 31, is applicable to Article II, Section 24. *Id*. (citing Tenn. Att'y Gen. Op. 83-489 (Nov. 10, 1983)).

The Tennessee Supreme Court has long acknowledged that the building and maintenance of public roads is a public purpose. *Pack v. Southern Bell Tel. & Tel. Co.*, 215 Tenn. 503, 510, 387 S.W.2d 789, 792 (1965). Because an activity may serve a public purpose even though a

private person benefits from it, it is not necessary that the State own the roads being built and maintained. As the Tennessee Supreme Court explained:

> What is a 'public purpose' that will justify the expenditure of public money is not capable of a precise definition, but the courts generally construe it to mean such an activity as will serve as a benefit to the community as a body and which, at the same time, is directly related to the functions of government.
>
> The mere fact that some private interest may derive an incidental benefit from the activity does not deprive the activity of its public nature if its primary purpose is public.

Id. at 515-16, 387 S.W.2d at 794 (quoting *Minneapolis Gas Co. v. Zimmerman*, 253 Minn. 164, 91 N.W.2d 642 (1958)). The public purpose test "is not authorization or retention of title by the State, but rather the *right of use* by the State for its benefit." *Bedford County Hospital v. Browning*, 189 Tenn. 227, 235, 225 S.W.2d 41, 44 (1949) (emphasis in original). The Court in *Bedford* observed that

> the vital point in all such appropriations is whether the purpose is public; and that, if it is, it does not matter whether the agency through which it is dispensed is public or is not; that the appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means.

Id., 225 S.W.2d at 45 (quoting *Hager v. Kentucky Children's Home Society*, 119 Ky. 235, 83 S.W. 605 (1904)). Accordingly, "the true test of public purpose as regards the expenditure of public funds is in the end or total result, and definitely not the element of State control or use." *Pack*, 387 S.W.2d at 795.

This Office is unaware of any other constitutional concerns with legislation providing that a portion of gasoline tax revenue be allocated to a private property owners association to maintain private roads open to public travel. Accordingly, such legislation is constitutionally defensible.

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