HENRY MCMASTER
ATTORNEY GENERAL

December 2, 2008

Cathy D. Caldwell, CPA
Administrative Finance Director
Western Carolina Regional Sewer Authority
561 Mauldin Road
Greenville, South Carolina 29607

Dear Ms. Caldwell:

We received your letter requesting an opinion on behalf of the Western Carolina Regional Sewer Authority ("WCRSA") concerning WCRSA's ability to allow other utilities and third parties to use its rights-of-way. You state as follows:

> WCRSA maintains numerous sewer rights-of-ways which could be used for irrigation of golf courses, industrial parks, residential areas or commercial areas by installing a purple pipe which would transport effluent water from our wastewater treatment plants. These sewer rights-of-ways could also accommodate public access trails for walking, hiking or biking.

Thus, you ask for an opinion "on multiple utilities and third parties using the same rights-of-ways for various purposes and under what criteria the respective use may occur."

Law/Analysis

In order to address your question, we must first evaluate WCRSA' s authority to convey easements. The Legislature created WCRSA, formally known as the Greater Greenville Sewer District and the Greenville County Sewer Authority, in 1925 via act 362. Thus, as a creature of statute, WCRSA only has the authority expressly conferred or necessarily implied for it to perform its statutory duties. S.C. Coastal Conservation League v. South Carolina Dep't of Health and Envtl., 363 S.C. 67, 610 S.E.2d 482 (2005).

According to WCRSA's original enabling legislation, a commission governs WCRSA and this commission has specific powers that included the power to "buy, lease, own and hold property . . . ." 1925 S.C. acts 744. In 1926, the Legislature amended the WCRSA's enabling legislation.

1926 S.C. Acts 1537. Among the amendments to its original legislation, the Legislature gave its commission the

> power to establish, extend, enlarge and maintain, conduct and operate Sewer Systems, Sewer lines and Sewer Mains in said District; to construct, establish and maintain such water lines and pipe lines as may be necessary; to purchase, lease, hold and sell such real estate and easements as they may deem necessary . . .

Id. (emphasis added). The Legislature subsequently amended WCRSA's enabling legislation on several occasions. However, we did not discover an amendment removing the authority of its commission to sell or lease its real estate and easements. As such, we believe the Legislature gave WCRSA the authority to sell easements to third parties.

Nonetheless, our analysis does not end with WCRSA's authority to sell easements. As we understand the facts presented in your letter, WCRSA is not planning to sell its easements to a third party, but wants to allocate a portion of the easement to other types of utilities and third parties. Although WCRSA may lease or sell a portion of its rights-of-way to third parties, whether or not such easements may be conveyed to third parties and whether they can be used for purposes other than the transport of wastewater depends on the language in the easement granted to WCRSA.

In 2006, our Supreme Court addressed the similar issues of an electric company's ability to convey excess capacity on its fiber optic cables to third parties. Gressette v. South Carolina Elec. and Gas Co., 370 S.C. 377, 635 S.E.2d 538 (2006). In that case, the language in the easement did not allow the electric company to convey use of its fiber optic cable to third parties. Id. at 380, 635 S.E.2d at 539. Thus, the Court addressed whether the easement may be apportioned despite the lack of language to that effect in written easement. Id.

The Court first discussed three prior cases. Two of these cases involved the erection of electric and telephone lines on highway easements and the other involved use of telephone easements to run television cables. Id. (referring to Lay v. State Rural Electrification Authority, 182 S.C. 32, 188 S.E. 368 (1936); Leppard v. Central Carolina Telephone Co., 205 S.C. 1, 30 S.E.2d 755 (1944); Richland County v. Palmetto Cablevision, 261 S.C. 222, 199 S.E.2d 168 (1973)). The Court stated that these cases determined that such additional use of the easement did not create an additional servitude, which Court stated addresses "whether some new use fits within that category of allowed use . . . ." Id. at 381-82, 635 S.E.2d at 539. However, the Court concluded that those cases did not determine whether the easement could be apportioned, which it states "involves the interpretation of a restriction on the easement holder's conveyance of part of its own allowed use to a third party."

Based on the fact that the parties in Gressette agreed that fiber optic cable lines are within the scope of the easement, the Court continued by addressing whether apportionment was allowed. The Court made the following determination:

> Here, there is no real issue of an additional servitude-Landowners concede the fiber optic lines are within the use allowed under the terms of the easements. Rather the issue is whether SCE & G may apportion its allowed use to third parties. This is clearly an issue that cannot be resolved without construing the instruments granting the easements in question. It is well-settled that the rights of an easement holder depend upon the interpretation of the grant in the easement. Patterson v. Duke Power Co., 256 S.C. 479, 183 S.E.2d 122 (1971). Moreover, were we to read our earlier decisions as broadly as SCE & G suggests, the owner of a servient estate could never limit the grant of a utility easement, no matter how specific the language in the easement.

Id. at 382, 635 S.E.2d at 540.

While the electric company argued that it could apportion the easement because of its commercial nature, the Court stated:

> Even with such an easement, the court will look at the language of the easement to determine whether there was an intention to attach the attribute of assignability by the use of such language as "to his heirs and assigns." Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 143 S.E.2d 803 (1965) (parties may make an easement in gross assignable by the terms of the instrument; commercial easement in gross assignable where language included "successors and assigns"); Douglas v. Medical Investors, Inc., 256 S.C. 440, 182 S.E.2d 720 (1971) (commercial easement in gross assignable where instrument included "his heirs and assigns"). Here, the easements attached to Landowners' complaint do state a conveyance to SCE & G and "its successors and assigns." While this language indicates assignability, the language limiting the use of the easement to communications necessary to SCE & G's business appears to restrict that assignability. This ambiguity requires construction of the written easements themselves.

Id. at 382-83; 635 S.E.2d at 541.

Initially, WCRSA must determine whether the use contemplated creates an additional servitude. Without reviewing the written easement, we are unable to determine whether the additional uses described in your letter create an additional servitude. However, if the written easement describes the purpose as to convey wastewater or for sewerage purposes, then a court could find that use of the easement for irrigation or for walking or biking trails adds an additional servitude

and thus, would not be allowed under the current easement held by WCRSA. Pursuant to Gressette, in addition to determining whether the uses described impose an additional servitude on the easement, WCRSA would also need to consider whether the easement may be apportioned to a third party. Following Gressette, WCRSA should consider whether the easement specifies that it is given to WCRSA and its successors or assigns. Accordingly, while we are unable to opine as to WCRSA's ability to apportion its easements, we hope the above analysis will serve as guidance to WCRSA.

Conclusion

Based upon our analysis above, we believe it is possible for other utilities and third parties to use rights-of-way held by WCRSA. However, this determination must be made based upon the language of the easements granting the rights-of-way. First, WCRSA must consider whether the use by the other utility or third party creates an additional servitude not provided for in the right-of-way granted to WCRSA. If the use does not create an additional servitude, we then suggest that WCRSA consider whether, given the language in the easement, WCRSA has the authority to apportion its use.

Very truly yours,

Henry McMaster
Attorney General

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REVIEWED AND APPROVED BY:

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