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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

October 11, 2005

The Honorable Dick Elliott
Senator, District No. 28
P. O. Box 3200
North Myrtle Beach, South Carolina 29582

Dear Senator Elliott:

In a letter to this office you questioned who has the authority to open or close a state highway that runs through the municipal boundaries of a city. You particularly asked whether such authority rests solely with the State Department of Transportation ("SCDOT") or does a municipal government have to concur in the closing or opening of such highway.

In examining your questions, several state statutes are relevant. It must first be acknowledged that pursuant to S.C. Code Ann. § 57-5-10,

The state highway system shall consist of a statewide system of connecting highways which shall be constructed by the Department of Transportation and which shall be maintained by the department in a safe and serviceable condition as state highways. The complete state highway system shall mean the system of state highways as now constituted, consisting of the roads, streets and highways heretofore designated as state highways or designated for construction or maintenance by the department pursuant to law, together with the roads, streets and highways heretofore added to the state highway system by the Commission of the Department of Transportation, and such roads, streets and highways as may hereafter be added to the system pursuant to law. Roads and highways in the state highway system are classified into three classifications: (1) interstate system of highways; (2) state highway primary system; and (3) state highway secondary system.

As to the statutory authority to open streets and highways, pursuant to S.C. Code Ann. § 57-3-110 (1), the Department of Transportation is given the duty to "...lay out, build and maintain public highways and bridges...." As determined by the State Supreme Court in Brashier v. South Carolina Department of Transportation, 327 S.C. 179, 191 490 S.E.2d 8, 14 (1997), *overruled on other grounds*, P'On, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000), "SCDOT

has been given the police power and duty to plan, construct, maintain and operate the state highway system, consistent with the needs and desires of the public.” The Court further recognized that

[t]o accomplish its functions and purposes of the systematic planning, construction, maintenance, and operation of the state highway system...consistent with the needs and desires of the public...SCDOT has the following relevant powers. Generally, it has the power to “lay out, build, and maintain public highways and bridges”...It may “enter into such contracts as may be necessary for the proper discharge of its functions and duties,” and “do all other things required or provided by law.”

327 S.C. at 192.

In association with its duty to maintain public highways, SCDOT is given specific authority regarding the present system of highways and streets. For instance, pursuant to S.C. Code Ann. § 57-5-1050,

The Department may provide for the elimination of intersections at grades with existing State or county roads and city or town streets or other public ways, if the public interest shall be served thereby, or may provide for the elimination of intersections at grade by closing off intersecting roads or streets at the right of way boundary line of such controlled-access facilities.

Such statute further provides for a city’s authority regarding such in that

No city or town street or other public way shall be opened into or connected with such controlled-access facility without the consent of the Department, and the respective city, town, county or other political subdivision authorities may close local roads and streets in connection with the establishment of controlled-access facilities and make all necessary agreements with the Department to fully perform and fulfill the purposes of this article. (emphasis added).

Also, pursuant to S.C. Code Ann. § 58-15-1625,

Notwithstanding any other provision of law, the Department of Transportation may order legally closed and abolished as a public way, within the limits of a railroad right-of-way, a grade crossing then in existence at the time the department assumes jurisdiction of the matter, upon a finding that the enhancement of public safety resulting from such closing outweighs any inconvenience caused by increased circuitry of highway routes. This order by the department may be issued either in connection with, or independent of, an order relating to automatic train-activated warning signals. The authority of the department legally to close and abolish grade crossings is in addition to authority granted by law to other state agencies or to local

The Honorable Dick Elliott

Page 3

October 11, 2005

units of government to close and abolish grade crossings. Upon the issuance of the order by the department, the railroad or railroads involved shall physically remove the crossing from the tracks, and the governmental unit maintaining the highway shall remove or barricade the approaches to the crossing.

The SCDOT is also given authority to abandon rights-of way. Pursuant to S.C. Code Ann. § 57-5-600,

Whenever the Department of Transportation shall determine that any property previously acquired for right-of-way is not required for either right-of-way or departmental purposes, it may expressly abandon that right-of-way or property or any portion thereof, or may grant written permits to encroach thereon under such rules and regulations as the Department of Transportation may establish.

As to city streets, such provision further states that:

...no city street may be closed under this section without concurrence of the governing body of the municipality, except for interstate routes or controlled-access highways.

Further authority is given SCDOT by S.C. Code Ann. § 57-5-80 which states that

[t]he department may delete and remove from the state highway secondary system of roads in any county any roads which are of low traffic importance and substitute therefor an equal, or less, mileage of other roads of higher traffic importance as determined by traffic surveys and estimates. Maintenance responsibility for roads deleted and removed from the state highway secondary system pursuant to the provisions of this section shall transfer from the jurisdiction of the department to the jurisdiction of the county or municipality in which such roads are situated, effective upon notice from the department of official action deleting and removing the roads from the state highway system.

Also, pursuant to S.C. Code Ann. § 57-5-120

[t]he department may abandon as a part of the state highway system any section of highway which may be relocated, and every such section so abandoned as a part of the state highway system shall revert to the jurisdiction of the respective appropriate local authorities involved or be abandoned as a public way. But the department, in its discretion, may retain in the system any such relocated section when it serves as a needed connection to the new section or when it serves as a proper part of the state highway system.

The closure of a street may be also accomplished by judicial means. Pursuant to S.C. Code Ann. § 57-9-10,

[a]ny interested person, the State or any of its political subdivisions or agencies may petition a court of competent jurisdiction to abandon or close any street, road or highway whether opened or not. Prior to filing the petition, notice of intention to file shall be published once a week for three consecutive weeks in a newspaper published in the county where such street, road or highway is situated. Notice shall also be sent by mail requiring a return receipt to the last known address of all abutting property owners whose property would be affected by any such change.

S.C. Code Ann. § 57-9-20 states that

If the court shall determine that it is to be the best interest of all concerned that such street, road or highway be abandoned or closed, the court shall then determine in whom the title thereto shall be vested and issue an appropriate order.

In its decision in South Carolina Department of Transportation v. Hinson Family Holdings, Inc., 361 S.C. 649, 655, 606 S.E.2d 781, 784 (2004), the State Supreme Court recognized Section 57-9-10 as "...creating a formal judicial procedure for terminating a public right of way over land." The Court also commented that the SCDOT and the local municipality are "...indispensable parties that must be joined in an action to abandon a public road." Ibid. See also: Hoogenboom v. City of Beaufort, 315 S.C. 306, 319, 433 S.E.2d 875, 884 (Ct.App. 1993). As similarly stated in BancOhio Nat. Bank v. Neville, 310 S.C. 323, 329, 426 S.E.2d 773, 777 (1993),

The statutory duties and the State's interest in the closing of a public roadway dictate that any court action to effect a closure must include the State as a party. South Carolina precedent has not directly addressed this issue; however, cases which have dealt with the closing of public roads have included the municipality or controlling government entity as a party.

See also: Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988); City of Greenville v. Bozeman, 254 S.C. 306, 175 S.E.2d 211 (1970); City of Rock Hill v. Cothran, 209 S.C. 357, 40 S.E.2d 239 (1946). In First Baptist Church of Mauldin v. City of Mauldin, 308 S.C. 226, 229, 417 S.E.2d 592, 593-594 (1992), the State Supreme Court noted that "(u)nder Section 57-9-20, the court is empowered to close roads on a finding that it is in the best interest of all concerned."

As to a municipality's authority to close a street, pursuant to S.C. Code Ann. § 5-27-150,

[t]he city council of any city containing more than five thousand inhabitants may open new streets, close, widen or alter streets in the city when, in its judgment, it may be necessary for the improvement of the city. It shall first pay damages, should any

The Honorable Dick Elliott

Page 5

October 11, 2005

be claimed, to any landowner through whose premises the streets may run, according to the Eminent Domain Procedure Act.

In First Baptist Church, supra, the city asserted that Section 5-27-150 gave the city exclusive rights to close roads within the city limits. However, in that decision, the Court concluded that "(w)e can find no language supporting the City's contention of exclusive jurisdiction in the text of Section 5-27-150." 308 S.C. at 229. Instead, referencing Sections 57-9-10 et seq, the Court determined that the City's jurisdiction to close roads was concurrent with that of the court.

As set forth, various statutes provide for the opening and closing of roads, streets and highways in this State and there is no exclusive manner of accomplishing such. Reliance on any particular method would be dependent on the situation presented.

With kind regards, I am,

Sincerely,



Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General