



HENRY McMASTER
ATTORNEY GENERAL

June 9, 2006

Chris Noury, Esquire
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1018 Second Avenue South
North Myrtle Beach, South Carolina 29582

Dear Mr. Noury:

We received your letter requesting an opinion as to the legal implications of the City of North Myrtle Beach's decision to close or abandon an easement providing beach access to the public. Specifically, you state:

A request has been made to the City Council for North Myrtle Beach to close or abandon four ten-foot beach access ways in the Crescent Beach section of North Myrtle Beach. The access ways were dedicated by plat and were formally accepted by resolution of the North Myrtle Beach City Council in 1989. Several residents that own property in the area of the access ways are opposed to the closing or abandonment of the access ways.

Your letter indicates the reason for closing or abandoning access ways is to make way for the development of a condominium project over the area where the ways are located. You also indicate, if the access ways are abandoned, City Council

will require that the walkways be relocated in an area in close proximity to the original location of the walkways so as to provide access to the beach for the public in addition to public parking and other amenities. However, one of the residents opposed to the closure of the access ways indicated that he purchased his property via a conveyance that made reference to a plat or map on which streets, alleyways and walkways (which are the access ways that have been requested to be closed) were depicted and that an easement was therein created in his favor for such streets, alleyways and walkways.

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You also informed us that the resident claiming he holds an easement informed the City of his intention to file a claim against the City "for 'taking his private property rights' if the City issues a building permit for the construction of the condominium project over the area in which he claims an easement." Thus, you request, on the City's behalf, an opinion "regarding the question of whether the grantee or holder of the easement (over the area of the access ways proposed for abandonment) would have a claim against the developer and/or against the City for being divested of his private property right without due process if the easement is obstructed with a building."

Initially, based on our analysis below, the resident you referenced in your letter may have two avenues by which he may claim rights in the access ways you describe, one as a member of the public claiming rights under public dedication and two as a holder of a private easement. Whether the resident may have a claim based on these rights involves numerous questions of fact, which are beyond the scope of this opinion. However, we will attempt to provide you with pertinent information as to the impact City Council's actions in may have with regard to potential claims against the City and the developer of the property.

Law/Analysis

Public Dedication

From your letter, we understand the beach access ways in question are the subject of a dedication. Thus, prior to analyzing City Council's ability to abandon or close the access ways, we find it pertinent to discuss the concept of public dedication of property.

"Dedication is the giving of land or an easement for the use of the public by the owner." Grady v. City of Greenville, 129 S.C. 89, 123 S.E. 494, 496 (1924). As espoused by our Supreme Court in Helsel v. City of North Myrtle Beach, 307 S.C. 24, 26-27, 413 S.E.2d 821, 823 (1992): "Perfecting a dedication of property to public use involves two steps. First, an owner must express an intention to dedicate his property to public use in a positive and unmistakable manner. Second, there must be a public acceptance of the property offered for dedication." To find the requisite intent of the owner to dedicate a street end used by the public for beach access, the Court relied on the principle that "[w]here land is divided into lots according to a plat, showing streets, and lots are sold and conveyed with reference to said plat, the owner thereby dedicates the streets to the use of the lot owners, their successors in title, and the public." Id. at 27, 413 S.E.2d at 823. Although the City did not formally accept the dedication, the Court found such acceptance through continuous use by the public and by maintenance of the street end by public authorities. Id. at 27, 413 S.E.2d at 823-24. Finding the street end the subject of a public dedication, the Court in Helsel further concluded the dedication of the street end was to "the public at large, not the City." Id. at 28, 413 S.E.2d at 824.

The South Carolina Court of Appeals further explored the idea of public dedication of an easement and the impact on the property should the dedicated easement cease to exist in Hoogenboom v. City of Beaufort, 315 S.C. 306, 433 S.E.2d 875 (Ct. App. 1992).

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Ordinarily, when a street is laid out, the public acquires a mere right of passage over the land, with fee simple title remaining as it was before the street was laid out. In such cases, when the public right of way ceases to exist, the fee simple is no longer burdened with the public right of passage and the private owner of the fee holds an unencumbered title to the land.

Id. at 318, 433 S.E.2d at 883-84 (citations omitted). As you mentioned in your letter, the Supreme Court in City of Greenville v. Bozeman, 254 S.C. 306, 175 S.E.2d 211 (1970) reiterated:

the rule which is generally accepted and which is followed in South Carolina is that in the absence of some statutory disposition, abandonment or vacation of a public street vests absolute possession and title in the abutting property owners and not the original owner, at least unless the original owner is the abutting owner at the time of the vacation, or has specifically reserved the right of reversion on vacation.

Id. at 317-18, 175 S.E.2d at 216.

According to your letter, the access ways were dedicated by a plat presumably dividing the surrounding property. Furthermore, you indicate City Council formally accepted the dedication pursuant to a resolution adopted in 1989. Based on this information, we presume the public acquired its right to the access ways pursuant public dedication. Moreover, in keeping with the Supreme Court's decision in Helsel, the dedication is to the public, rather than to the City. In addition, your letter does not state the City owns the access ways in fee simple but rather it appears the public owns a mere right of passage over the land due to the plats reference to the access ways. Thus, pursuant to Hoogenboom, if the public's right to access the access ways ceases to exist, the underlying property is no longer burdened and the private owner holds an unencumbered title to the property.

You state City Council intends to abandon the property, thus as explained the public's right to the access ways will cease causing the adjacent landowner to acquire a fee simple interest in the access ways. With regard to the abandonment under common law, our Supreme Court explained:

"An abandonment occurs where the use for which the property is dedicated becomes impossible of execution, or where the object of the use for which the property is dedicated wholly fails. Any use which is not inconsistent with the declared purpose of a dedication will not support a charge of abandonment."

City of Myrtle Beach v. Parker, 260 S.C. 475, 486, 197 S.E.2d 290, 296 (1973) (citing 26 C.J.S. Dedication § 63).

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“An easement created by dedication may be abandoned by unequivocal acts showing a clear intent to abandon. To constitute abandonment, the use for which the property is dedicated must become impossible of execution, or the object of the use must wholly fail. Generally, a mere misuser or nonuser does not constitute abandonment of land dedicated to public use.”

Id. (quoting 23 Am. Jur. 2d Dedication § 66).

Whether or not a beach access way, subject to a public dedication, has been abandoned involves a question of fact. Thus, given the limitations of this Office that prevent us from investigating or determining facts, we are precluded from determining whether the access ways you reference in your letter have been abandoned. Op. S.C. Atty. Gen., November 28, 2005 (“[A]n opinion of the Attorney General cannot investigate or determine facts.”). However, your letter does not indicate use of the access ways to access the beach has become impossible and to the contrary, indicates the public’s continual use of these access ways. Furthermore, you do not point to evidence of the public’s unequivocal intent to abandon the access ways. Thus, we presume a court, based on the information provided in your letter, is unlikely to find the publicly dedicated beach access ways abandoned.

In the alternative to abandonment, you suggest the City Council is considering closing the access ways to make way for development of the property. In Bethel Methodist Episcopal Church v. City of Greenville, 211 S.C. 442, 45 S.E.2d 841 (1947), the Supreme Court heard an appeal from a suit by a landowner wishing to declare a resolution passed by city council to close a street void. Initially, the Court noted: “In dealing with the question of the exercise of discretion in closing streets, the general rule is that courts will not interfere with the exercise of these discretionary powers by a municipal body except in cases of fraud or clear abuse of power.” Id. at 450, 45 S.E.2d at 845. With its standard of review in mind, the Court determined:

A municipal corporation holding and controlling its streets in trust for the use and benefit of the general public, without power of converting them to any other use, it follows necessarily, that the right to vacate a street is to be exercised only when the municipal authorities, in the exercise of a sound official discretion, determine that the street is no longer required for the public use or convenience.

Id. at 450-51, 45 S.E.2d at 845. The Court did not find a showing of that a public interest would be subserved by closing the road in question. Thus, it determined the municipality abused its power resulting in injury to the landowner whose property the road served. Id. at 451, 45 S.E.2d at 845. Based on this finding, the Court enjoined the municipality from closing the road. Id.

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Subsequent to the Supreme Court's decision in Bethel Methodist Episcopal Church, the Legislature passed a statute specifically granting certain municipalities the authority to open, close, or alter streets. Currently, this statute reads:

The 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 be claimed, to any landowner through whose premises the streets may run, according to the Eminent Domain Procedure Act (Chapter 2 of Title 28).

S.C. Code Ann. § 5-27-150 (2004) (emphasis added).

In City of Myrtle Beach v. Parker, 260 S.C. 475, 197 S.E.2d 290 (1973), a declaratory judgment action, the South Carolina Supreme Court considered this statute, previously codified as section 47-1327 under the 1962 South Carolina Code of Laws, with regard to a road closing. Citing Bethel Methodist Episcopal Church, the Court stated in regard to a municipality's authority to close a road: "this power may be exercised only when it is determined by the council, in the exercise of a sound official discretion, that the street is no longer required for the public use or convenience." Id. at 487, 197 S.E.2d at 296. The Court found no evidence that street was no longer required for public use or convenience. Id. Accordingly, the street could not be abandoned pursuant to the statute. Id.

Contrary to the Court's decisions in Bethel Methodist Episcopal Church and City of Myrtle Beach, our courts also found road closing appropriate in certain instances. In City of Rock Hill v. Cothran, 209 S.C. 357, 40 S.E.2d 239 (1946), our Supreme Court considered an action by a property owner against the City of Rock Hill seeking to enjoin it from closing a road. This case, like Bethel Methodist Episcopal Church, arose prior to the enactment of section 5-27-150 and its predecessors and thus, follows the common law. Recognizing the public purpose requirement, the Court addressed whether the city council for the City of Rock Hill served a sufficient public purpose in its decision to close a road. Id. The property owner argued the city council's decision to close the road was predicated on a benefit to the abutting property owner who initiated the road closing based on a desire to join property it owned on both sides of the road. Id. Considering the city council's actions, the Court stated as follows:

The law undoubtedly is that a municipality cannot vacate a street or a part thereof for the sole purpose of benefitting an abutting owner; and that the power to vacate streets cannot be exercised in an arbitrary manner, without regard to the interest and convenience of the public or individual rights. The mere fact, however, that the vacation was at the instigation of an individual or a private corporation who owns abutting property, to enable him or it to use the vacated portion in his business, does not of itself invalidate the vacation, nor constitute such

fraud or abuse of discretion as, in the absence of any further showing, will authorize a court of equity to interfere and declare the vacating resolution to be void.

The fact that some private interest may be served incidentally will not invalidate the vacation resolution. On the other hand, it must appear clearly that no consideration other than that of public interest could have prompted the action. If it appears that the vacation is a mere attempt to alien or otherwise dispose of the public right and interest for a private use, the courts will protect the public right. In such case the court will look beyond the recitals of the ordinance or resolution or the declarations of the members of the municipal council and examine the results and surrounding circumstances to learn the real purpose of the proposed action.

Id. at 366-67, 40 S.E.2d at 242-43. Although a private landowner would benefit from the closing of the street, the Court in City of Rock Hill found the city council's decision to close the street served the following public interests:

By closing a portion of one block of Laurel Street, they were moved to do so on the record, in order to enlarge the resources, increase the industrial energies of the city, and promote the productive power of a great number of the inhabitants of Rock Hill, in addition to eliminating a dangerous grade crossing and the hazard to school children, and generally to pedestrian and vehicular traffic.

Id. at 368, 40 S.E.2d at 243.

Although the Court in City of Rock Hill found the city council's decision to close the street proper, it also found the closing of the street resulted in a taking of the property of the owner instituting the action. The road closing did not cut off access to the owner's property, but the Court found it would decrease the value of his land, resulting in a special injury to the property owner. Id. As a result, the Court determined the property owner was entitled to damages from the City of Rock Hill. However, in a subsequent case, the Court determined the property owner could not seek recovery of damages from the business initiating the road closure. Cothran v. Rock Hill, 211 S.C. 17, 43 S.E.2d 615 (1947).

Based on the Court's conclusions in these cases, we can gather a municipality may remain liable to affected property owners even if it properly closes a road, for the municipality is taking away the public's right to use the road. Furthermore, the Legislature expressly instructed in section 5-27-150 that prior to the closing of a road, a municipality is responsible for paying damages to "any landowner through whose premises the streets may run, according to the Eminent Domain Procedure Act" Accordingly, we suggest the City Council keep in mind the City may be responsible for

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paying damages to surrounding property owners for the taking of their property rights should it decide to close the access ways.

In 1970, the Supreme Court addressed whether a city had authority to close several streets pursuant to the statute now codified as section 5-27-150 of the South Carolina Code. City of Greenville v. Bozeman, 254 S.C. 306, 175 S.E.2d 211 (1970). The action arose after the City of Greenville entered into an agreement with The Peoples National Bank to redevelop a portion of downtown Greenville, which included the construction of a high-rise office building and two parking facilities. Id. at 310, 175 S.E.2d at 212. Finding a public interest would be served, the Court distinguished Bethel Methodist Episcopal Church. Id. at 315, 175 S.E.2d at 215. "The primary objective of the City is to erect a parking building which will serve the public generally and afford the public convenient parking and easy access to the 'downtown' part of Greenville, and, in addition, will benefit the merchants of the 'downtown' part of Greenville." Id. In addressing the fact that in closing the road, the City of Greenville would benefit the bank, the Court cited City of Rock Hill, but "found no selfishness on the part of the Bank in this case, but on the contrary, I find that the proposed project is a joint venture, so to speak, between the City of Greenville and the Bank which will inure to the benefit of both and by benefitting the City it will benefit its citizens." Id. at 316, 175 S.E.2d at 215. Based on these findings, the Court concluded the agreement entered into between the bank and the city for the redevelopment project was valid. Id.

You are correct in your assessment that if the City successfully abandons or closes the access ways, the public easement will cease vesting a fee simple interest in the property in the adjacent landowner. However, only the public may abandon the property and it must show clear intent to abandon. Furthermore, the City may have authority to close the road either pursuant to common law or section 5-27-150 of the South Carolina Code, but in either case, City Council's decision to close the access ways must be predicated on the subservience of a public interest. As stated in City of Rock Hill, the fact that an adjacent property owner may benefit from the closing of the access ways, does not automatically indicate a public interest is not served by the closure. However, City Council cannot base its decision to close a road purely on the benefit to the adjoining landowner. Moreover, even if a public interest is served, the City may be required to compensate affected property owners for the taking of their right to use the access ways to gain entry to the beach. However, a member of the public may not recover damages from a private property owner due to the City's closure of the access ways.

Private Easement

As referenced above, when a property owner subdivides land into lots referenced in a plat and sells the lots according to the plat, streets referenced in the plat become dedicated to the use of not only the public, but the owners of the lots. Helsel, 129 S.C. at 27, 413 S.E.2d at 823. As explained in by the South Carolina Supreme Court in Carolina Land Co., Inc. v. Bland, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975):

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[T]he purchaser of lots with reference to the plat of the subdivision acquired every easement, privilege and advantage shown upon said plat, including the right to the use of all the streets, near or remote, as laid down on the plat by which the lots were purchased.

Furthermore, our courts holding an owner of a lot sold with reference to a plat has a private easement in the streets depicted on the plat, also maintain this easement is held independent to interest of a member of the public in the public dedication of the street. Blue Ridge Realty Co. v. Williamson, 247 S.C. 112, 145 S.E.2d 922 (1965). Even if the municipality holds the property in fee simple, it must abide by easements depicted on the plat. Thus, the private easement "survives the vacation, abandonment, or closing of the road or highway by the public." Id. at 121, 145 S.E.2d at 926.

In Hill v. Beach Co., 279 S.C. 313, 306 S.E.2d 604 (1983), the South Carolina Supreme Court considered an action brought by lot owners claiming they held a right of access to the beach over property held in fee simple by Beach Company due to an easement referenced in a plat. Initially, the lot owners sought to prevent Beach Company from developing its property. Id. The Court, agreeing with the trial court, found the lot owners had no right to prevent the development of the property. Id. at 314, 306 S.E.2d at 605. However, the Court ruled the lot owners did hold a valid easement guaranteeing them the right ingress and egress. Id.

Your letter states a plat depicts the access ways. Furthermore, you indicate a resident maintains he purchased a lot contained in a plat depicting walkways, which are the same as the access ways you reference. Thus, the resident claims "an easement was therein created in his favor for such . . . walkways." Again, this Office does not have authority to determine whether or not a particular property owner holds a private easement in the access ways because to do so would require us to investigate and determine facts. Op. S.C. Atty. Gen., September 26, 2005. However, the information contained in your letter points to the conclusion that the resident holds a private easement in the access ways. Thus, assuming the City properly abandons or closes the access ways, the resident's easement will be unaffected by the City's actions. Furthermore, although the release of the public's interest in the property will result in the in the release of such interest to the abutting property owner, that property owner remains bound by any easements granted in favor of the resident under the plat.

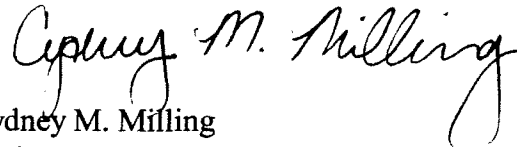
South Carolina law recognizes a private easement, like a public easement, may be abandoned. Carolina Land Co., Inc. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975). But, again as with property subject to public dedication, clear and unequivocal evidence of intent by the easement holder to abandon must be found. Id. at 109, 217 S.E.2d at 21. As we stated previously, abandonment involves a factual determination beyond the scope of this opinion. However, your letter does not imply that the resident claiming the easement has shown evidence of abandonment. To the contrary, you infer the rationale for the resident's opposition to abandonment or closure of the access way is based on his use of the easement. Therefore, absent facts to the contrary, a court is unlikely to hold the resident abandoned his easement, assuming one exists.

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Conclusion

Presuming the access ways described in your letter are found to be subject to a public dedication, determining whether the City may abandon or close the access ways is factual in nature and beyond the scope of an opinion of this Office. Nevertheless, based on the information you provided in your letter, we find it unlikely that a court would determine the public abandoned the access ways. As for the City's ability to close the access ways, we do not have enough information to speculate as to whether a court would find such action appropriate and in satisfaction of the public purpose requirement. However, even if City Council appropriately closes the access ways, the resident may be entitled to compensation for the taking of his property rights. Finally, although the resident to which you refer may not have a claim against the developer of the property upon which the access ways are located due the City's closure of such access ways, we find the resident may have a private easement granting him the right to ingress and egress over the property. Therefore, a court could find the developer is precluded from interfering with the resident's rights with regard to the private easement.

Very truly yours,



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REVIEWED AND APPROVED BY:



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