

February 26, 2008

Walter H. Sanders, Jr., Esquire
Allendale County Attorney
Post Office Box 840
Fairfax, South Carolina 29827

Dear Mr. Sanders:

In a letter to this office you indicated that Allendale County wants to require CSX Railroad to open the Boogaloo Railroad Crossing north of Sycamore in Allendale County. A public hearing on the issue of whether public convenience and necessity require that CSX establish a crossing was held and it was determined that public convenience and necessity does require that CSX establish the crossing. Reference was made to S.C. Code Ann. § 58-17-360 which states:

[a] highway or town way may be laid out across a railroad previously constructed when the governing body of the county adjudge that the public convenience and necessity require it and, in such case, after due notice to the railroad corporation and hearing all parties interested, such body may thus lay out a highway across a railroad or may authorize a city or town, on the petition of the mayor and alderman thereof, to lay out a way across a railroad in such manner as not to injure or obstruct the railroad.

Such provision remains effective and was previously cited in State Supreme Court decisions in Prosser v. Seaboard Air Line R. Co., 216 S.C. 33, 56 S.E.2d 591 (1949) and Thomas et al. v. Atlantic Coast Line R. Co., 168 S.C. 185, 167 S.E.2d 239 (1933). As referenced in a prior opinion of this office dated May 29, 1996,

In Thomas v. Atlantic Coast Line Ry. Co.,...our Supreme Court held that Section 58-17-1360 had not been repealed by other provisions of law including statutes relating to the powers and duties of the Railroad Commission. There, the Williamsburg County Commissioner, on behalf of the City of Kingstree, and after a finding of public convenience and necessity, ordered a highway and grade crossing to be constructed across a railroad's right-of-way. Pursuant to this Order, the Railroad Company was "required to forthwith construct and thereafter maintain ... a safe and

Mr. Sanders
Page 2
February 26, 2008

adequate grade crossing ...”. Although Section 58-17-1360 does not explicitly mention a railroad's obligation under the statute, the Court found that Section 58-17-1360 was applicable and thus that the “Board of County Commissioners” is authorized to proceed in the manner that they did proceed” 168 S.C. at 194.

Subsequently, in Prosser v. Seaboard Airline R. Co.,...the Town Council of Johnsonville, pursuant to Section 58-17-1360, filed with the Florence County Governing Board a petition to establish a crossing across a railroad already in existence. The Court recognized that “[a] review of the many cases on this point reveals that the great weight of authority is to the effect that a state has power under its police powers to require a railroad company to construct and maintain at its own expense suitable crossings over the right of way of railroad companies even though the street be laid out subsequent to the railroad company ... ”. Reasoned the Court, a “railroad company receives its charter and franchise subject to the implied right of the state to establish and open such streets and highways over and across its right of way as public convenience and necessity require.”

Therefore, in the opinion of this office, compliance with such statutory provision would appear to authorize a crossing as to State law. As to any possible federal regulations regarding such, you would need to contact the relevant federal agencies for their input.

With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General