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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 29, 1996

The Honorable William H. O'Dell
Senator, District No. 4
510 Gressette Building
Columbia, South Carolina 29202

Re: Informal Opinion

Dear Senator O'Dell:

You have expressed concern over a particular bridge in Williamston. This bridge apparently was built and maintained by a railroad corporation for years until it was closed by the railroad approximately four years ago out of safety concerns. You request assistance regarding the railroad corporation's responsibility to replace this antiquated and hazardous wooden automobile bridge that crosses over its tracks with one which would accommodate today's traffic. As I understand it, the railroad still uses the tracks which are beneath the old bridge. Reference is made by you to S.C. Code Ann. Sec. 58-17-3420.

Of course, the questions you raise are largely factual in nature and thus beyond the scope of an Attorney General's opinion. Op. Atty. Gen., Dec. 12, 1983. The contract itself and any other pertinent documents would have to be reviewed and assessed. Moreover, the issues you raise involve complex issues of law as they relate to the particular facts, and thus would have to be resolved by a court unless negotiations between the Town and the Railroad prove fruitful. In other words, there is no one case or statute I can point to which easily resolves these questions. With those caveats in mind, and in an effort to assist you to the extent possible, I offer the following legal research for your use.

Law/Analysis

Section 58-17-3420 provides as follows:

> [e]very railroad corporation shall, at its own expense, construct, and afterwards maintain and keep in repair, all bridges, with their approaches or abutments, which it is authorized or required to construct over or under any turnpike road, canal, highway or other way and any city or town may recover of the railroad corporation whose road crosses a highway or town way therein all damages, charges and expenses incurred by such city or town by reason of the neglect or refusal of the corporation to erect or keep in repair all structures required or necessary at such crossing. But if, after the laying out and making of a railroad, the governing body of a county has authorized a turnpike, highway or other way to be laid out across the railroad, all expenses of and incident to constructing and maintaining the turnpike or way at such crossing shall be borne by the turnpike corporation or the county, city, town or other owner of it. (emphasis added).

To my knowledge, the highlighted portion of the statute has never been interpreted by our Supreme Court. However, several principles of statutory construction guide our review. First and foremost, is the fundamental tenet that the intent of the Legislature is controlling. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). The language used, therefore, must be construed in light of the intended purpose of the statute. Bohlen v. Allen, 228 S.C. 135, 89 S.E.2d 99 (1955). Thus, the statutory language should be read in a sense which harmonizes with its subject matter and accords with the general purpose and object of the law. 192 S.C. 271, 6 S.E.2d 270 (1939). In construing a statute, the words used should be given their ordinary and popular significance. Hay v. South Carolina Tax Commission, 273 S.C. 269, 255 S.E.2d 837 (1979). Courts will look to the last section in point of time where two provisions in the same law cannot be reconciled. Feldman v. S. C. Tax Comm., 203 S.C. 49, 26 S.E.2d 22 (1943).

On its face, the highlighted proviso contained in Section 58-17-3420, which was part of the general Railroad Law of 1881, would appear to mandate that a railroad bridge built over an existing railroad line is the responsibility of the particular political subdivision to maintain. However, other provisions contained in that same 1881 Railroad Law appear to provide otherwise. Section 58-17-1360 states as follows:

> [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 aldermen thereof, to lay out a way across a railroad in such manner as not to injure or obstruct the railroad. (emphasis added).

See also, Section 58-17-1350 [railroad whose road is crossed by highway within corporate limits "on a level therewith" shall at "its own expense" guard or protect its rails to "secure a safe and easy passage across its road".]

In Thomas v. Atlantic Coast Line Ry. Co., 168 S.C. 185, 167 S.E. 239 (1931), 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 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., 216 S.C. 33, 56 S.E.2d 591 (1949), 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 it 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." (emphasis added).

Moreover, Prosser recognized that the United States Supreme Court had opined in Chicago, B and Q. R. Co. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979, that

> "'The Company laid its tracks subject to the condition that their use could be so regulated by competent authority as to

> insure the public safety ... . The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the people.'"

Thus, reasoned the Prosser Court:

> [i]t appears to be well settled that railroad companies may be required at their own expense not only to establish crossings, but to abolish grade crossing, to build, and maintain suitable bridges or viaducts to carry highways newly laid out over their tracks or to carry their tracks over such highways. (emphasis added).

56 S.E.2d at 595. Prosser also cited in support of the foregoing statement, it previous case of Dobbins v. Seaboard Air Line, 108 S.C. 254, 93 S.E. 932 (1916). In Dobbins the trial judge had held that the defendant "was liable only for defects on the roadbed, and was not liable for defective approaches to the crossing." 108 S.C. at 257. Thus, Dobbins had concluded that "[w]hen, therefore, his Honor held that there was an absolute nonliability on the part of the defendant for any defect outside of its roadbed, he was in error". Instead, opined the Court in Dobbins

> [w]hen a new public highway is constructed across an established railroad, the railroad is liable only for the crossing on the roadbed. (emphasis added).

Thus, the Railroad was deemed in Dobbins to have a duty regarding the crossing over the railroad roadbed as well as the approach to it. It is significant to note that neither Thomas, Prosser or Dobbins referenced Section 58-17-3420, but instead relied primarily upon Section 58-17-1360, the statutory provision regarding the ordering of a highway across a railroad.

However, in Felder v. Southern Ry., 76 S.C. 554 (1906), the Court did interpret Section 58-17-1360 and had this to say:

> [t]his section [58-17-3420] would justify a charge to the jury that it is the duty of a railroad company to keep in repair any bridge which it had built for its own purposes in the construction or maintenance of its railroad, or has been required to build under legal authority. But it affords no warrant for

> holding the railroad company responsible for the condition of every bridge that may be found on the public roads of the state within the limits of railroad rights of way. So far as we can discern, there is no statutory authority for treating bridges on the right of way of a railroad, but not on the roadbed, and not constructed by the railroad or required by it for its purposes, on any different footing then bridges to be found on other portions of the public highway running over the lands of a private owner.

76 S.C. at 557. (emphasis added). The "legal authority" to which the Court was evidently referring was that exercised by a municipality pursuant to its police power as referenced in Prosser and the other aforementioned cases. Thus, Felder, appears to confirm the recognition by the Court that a railroad has a duty to maintain a crossing ordered constructed across its roadbed.

It is my understanding that the Railroad in question may have entered into an agreement with the State Highway Department for the maintenance of the bridge in question in 1928.[1] I am advised that the contract in question which I have not seen, may impose upon the Railroad only the duty to maintain the current bridge, and not to replace it with one that meets current needs.

It is true that the duty to "maintain" or keep in "repair" a particular property does not normally include the duty to rebuild or reconstruct new facilities. See, cases cited in Words and Phrases, under the heading, "maintain". However, there is also authority to the contrary. As was stated by the Court in Boston and M.R.R. v. County Commrs. of Worcester, 15 N.E.2d 455, 457 (1938),

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[1]It is not known which specific statutory provision guided the contract that may have been signed between the Highway Department and the Railroad. One possibility is Section 58-15-1670 et seq., which imposes certain duties and obligations upon the Highway Department for the construction of wooden overhead bridges over a railroad line. Section 58-15-1680 provides that such bridges "shall meet the specifications of the State Highway Department." Section -1690 provides that the Department shall issue an order to the railroad, without which, the railroad cannot be held responsible therefor. State Highway Dept. v. Southern Ry., 186 S.C. 315, 195 S.E. 633 (1938).

> [w]e do not think that the duty of the petitioner to construct and maintain the wooden bridge was limited to the life of that bridge. That was a temporary structure. Its span of life could not be very long. When it should come to an end, the duty to maintain that bridge must either be governed by general laws, or must become an unsettled question governed by no rule. The latter alternative could scarcely have been intended.

Moreover, in Whaley v. Ruiz, 242 P.2d 940 (Cal. 1952), the Court concluded that the duty to maintain included the duty to replace a structure which was worn out. The Court held it disagreed with the trial judge "that the agreement did not include any obligation on its part to maintain said structure according to the design and plan under which said bridge was originally built and that there was no obligation to make structural changes to meet changing conditions." In addition, the phrase "maintenance" is viewed as all acts necessary to prevent a decline lapse or cessation of a particular activity. State Farm Mut. Auto Ins. Co. v. Pan. Am. Ins. Co., 437 S.W.2d 542 (Tex. 1969). Furthermore, our own Supreme Court has also recognized that the word "maintain" may be defined as to "keep in existence or continuance". McDuffie v. McDuffie, 308 S.C. 401, 418 S.E.2d 331 (1992). Since the bridge in question is no longer being kept in "existence", but is instead closed, it could be argued that it is currently not being "maintained".

Of course, this Office cannot determine the Railroad's obligation, if any, to compensate the Town for reconstructing the bridge in question. As stated above, ultimately these issues are factual in nature and only a court can determine them with finality. Obviously, the specific contract itself would have to be reviewed by a court, although, as noted, a contract cannot serve to limit a statutory duty otherwise existing. Based upon the foregoing authority, however, it is at least arguable that the Railroad possesses a duty to contribute to the bridge's reconstruction, consistent with the Court's statement in Prosser that "railroad companies may be required at their own expense to ... build and maintain suitable bridges or viaducts to carry highways newly laid out over their tracks or to carry their tracks over such highways." Such contribution would also be consistent with the Dobbins case's conclusion that a railroad is "liable ... for the crossing on the roadbed ... ."

Moreover, the foregoing authorities are consistent with the general principles that a municipality may "compel a railroad company, without compensation, to construct and maintain suitable crossings at highways or streets extended over the right of way subsequent to the construction of the railroad." 65 Am.Jur.2d Railroads, § 273. It is "generally recognized that the police power of a municipality under its charter, suffices

to give it power to require the reconstruction, relocation, or elimination of highway crossings or trackage, where there is reasonable public necessity therefor, as in case of danger to the public." Id. at § 277.

In Durham v. So. R. Co., 185 N.C. 240, 117 S.E. 17 (1923), the North Carolina Supreme Court held that a municipality under its general police power could require a railroad to eliminate a grade crossing and build an underpass beneath its tracks, noting that "[t]he city having exclusive control of its streets, the question in the first instance is one for the local authorities." Referencing Chattanooga v. So. R. Co., 128 Tenn. 399, 161 S.W. 1000, the Court stated that at common law there existed the rule that a municipality could require a railroad to construct and maintain at its expense a proper bridge at a street crossing over its tracks. And quoting Chicago M. & St. P. R. Co. v. Minneapolis, 115 Minn. 460, 51 L.R.A. (N.S.) 236, 133 N.W. 169, Ann. Cas. 1912 D, 1029, the Court stated:

> "[t]he general rule so established is that, where the safety, convenience, or welfare of the public requires that a railway company carry its tracks over a public way or the public way over its tracks by a bridge, the uncompensated duty of providing such bridge devolves upon the railway company. The basis of this rule is the superior nature of the public right inherent in the reserved or police power of the state. A railroad, though constructed first in time, is constructed subject to the implied right of the state to lay out and open new highways crossing its right of way. If the operation of the railway upon a particular surface or with a particular form of support for its tracks interferes with the public safety, convenience or welfare in the exercise of the public right to the use of such highway, then upon the railway company is placed the burden of making such necessary and reasonable readjustment of its tracks as will permit the exercise of the superior public right.

Only recently in Hospitality Assn. of South Carolina v. Town of Hilton Head, 464 S.E.2d 113 (1995) our Supreme Court confirmed that

> [a]s for municipalities, S.C. Code Ann. Sec. 5-7-30 (Supp. 1994) grants every municipality in the state the power to "enact regulations, resolutions and ordinances ... respecting any subject which appears to it necessary and proper for the

> security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it." Like the broad grant of power to counties in Sec. 4-9-25, the only limitation on the broad grant of power to municipalities in Sec. 5-7-30 is that the regulation, resolution or ordinance may not be inconsistent with the Constitution and general law of this State.

464 S.E.2d at 118.

In summary, your questions relate to a matter which obviously should be settled amicably between the parties, if possible. If not, a court rather than an opinion of this Office would have to resolve the issue. If the question went to court, however, based upon the information presented to me and the authorities referenced herein, it would appear that the Town's position vis á vis the Railroad for monetary contribution toward reconstructing the bridge would certainly have a defensible legal basis.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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