9347-9897

ALAN WILSON
ATTORNEY GENERAL

March 31, 2015

The Honorable Larry A. Martin
Senator, District No. 2
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Martin:

You have requested an opinion of this Office regarding what you describe as "the ability of utilities to obtain encroachment permits on preexisting easements and rights of ways specifically related to the operations of the public utility." By way of background, you state:

> I have been informed that previously public utilities in South Carolina have applied to local government for encroachment permits to install needed utility infrastructure. These encroachment permits were granted along public roads whether the right of way was deeded or non-deeded. This process has changed in the past few years. Local government now claims that they will not issue an encroachment permit for public utilities unless they have a deeded right of way along the public roadway. The local governments now require that the public utility obtain private easements along the publically maintained road from all property owners along the proposed utility route. Of course, this means that one property owner can stop the process should they refuse to grant the easement.

You conclude with the following questions:

> [d]oes there exist an inherent ability of government to use a preexisting right of way obtained for a public purpose for another needed public purpose (utility infrastructure) that was not needed at the time of the initial granting of a right of way? Or, is the right of way statutorily or constitutionally limited to the specific purpose for which the right of way was originally obtained and subsequent approval is required from the impacted landowner for each subsequent use for a public purpose?

While the answer to your questions would be largely dependent on the facts specific to the case at hand, we will provide an overview of the applicable law in hopes to clarify your inquiries.

Law / Analysis

A public utility can be broadly defined as an entity that provides a service that benefits the public. See Black's Law Dictionary 1582 (8th ed. 2004) (defining a "public utility" as "[a] company that provides necessary services to the public, such as telephone lines and service, electricity, and water"). The term "public utility" is defined differently throughout the various Chapters of Title 58 of the South Carolina Code, however the definition of "public utility" as it pertains to utilities regulated by the Public Service Commission means:

> public utility as defined in Section 58-5-10[1], telephone utility as defined in Section 58-9-10, government-owned telecommunications service provider as defined in Section 58-9-2610, radio common carrier as defined in Section 58-11-10, carriers governed by Chapter 13 of Title 58, railroads and railways as defined in Sections 58-17-10, motor vehicle carrier as defined in Section 58-23-10, or electrical utility as defined in Section 58-27-10.

S.C. Code Ann. § 58-3-5(6) (Supp. 2014). As we do not know what public utility you are referencing in your correspondence, please note the authorities and regulations specific to a certain utility would differ dependent on the utility in question.

Generally speaking, public utilities often obtain land necessary for the provision of their services by way of a voluntarily real estate transaction. See, e.g., Simmons v. Berkeley Elec. Co-op. Inc., 404 S.C. 172, 176, 744 S.E.2d 580, 583 (Ct. App. 2013) (explaining that utility easement was first acquired when a landowner "granted a seventy-five-feet-wide easement to Berkeley County Electric for the 'construction and maintenance of an electric transmission line or lines, towers, poles, anchors and necessary fixtures and wires attached thereto....' "). The power of eminent domain is also provided to certain public utilities, permitting them to obtain property for the provision of public utility service when land cannot be obtained voluntarily. See, e.g., S.C. Code Ann. § 58-9-2030 (Supp. 2014) ("Whenever any telegraph or telephone company desires to construct its lines on, over, or under the lands of any person, including a railroad or railway, and fails to agree with the owner of the lands upon the compensation to be paid as damages for the right and use, the company may secure the right and privilege by condemnation . . ."); S.C. Code Ann. § 58-27-130 (Supp. 2014) ("Subject to the same duties and liabilities, all the rights, powers, and privileges conferred upon telegraph and telephone companies to acquire rights-of-way for the construction, maintenance, and operation of lines under . . . 58-9-2030 are granted unto electric lighting and power companies incorporated under the laws of this State . . . ."); S.C. Code Ann. § 58-7-30(A) (Supp. 2014) ("Any corporation engaged in the business of

[1] Chapter 5 of Title 58 of the South Carolina Code is titled "Gas, Heat, Water, Sewerage Collection and Disposal, and Street Railway Companies." "Public Utility" in Articles 1, 3, and 5 of Chapter 5 is defined as: "every corporation and person delivering natural gas distributed or transported by pipe, and every corporation and person furnishing or supplying in any manner heat (other than by means of electricity), water, sewerage collection, sewerage disposal, and street railway service, or any of them, to the public, or any portion thereof, for compensation; provided, however, that a corporation or person furnishing, supplying, marketing, and/or selling natural gas at the retail level for use as a fuel in self-propelled vehicles is not a public utility by virtue of the furnishing, supplying, marketing, and/or selling of natural gas and a corporation or person whose only purpose is the furnishing, supplying, marketing, and/or selling of treated effluent for irrigation purposes is not a public utility by virtue of the furnishing, supplying, marketing, and/or selling of treated effluent if the effluent is not permitted for consumption by a regulatory agency." S.C. Code Ann. § 58-5-10 (Supp. 2014).

supplying water or sewage services in this State . . . has the same rights and powers of condemnation as are conferred upon municipal corporations pursuant to the provisions of Sections 5-31-420, 5-31-430, and 5-31-440").

Statute also permits public rights-of-way be used by public utilities, upon obtaining the right to do so and subject to the consent of the governing body of the municipality in control of the public streets or places. See S.C. Code Ann. 58-9-2020 ("Any telegraph or telephone company incorporated under the laws of this State . . . may construct, maintain and operate its line through, upon, over and under any of the public lands of this State, under, over, along and upon any of the highways or public roads of the State, over, through or under any of the waters of this State, on, over and under the lands of any person in this State and along, upon and over the right of way of any railroad or railway company in this State; *provided*, that such line is constructed so as not to endanger the safety of persons or to interfere with the use of such highways or public roads, the navigation of such waters or the operation and running of the engines and cars of such railroads or railways and that just compensation is first paid such landowners and railroad or railway companies for such right and privilege, to be ascertained in the manner herein provided"); S.C. Code Ann. § 58-27-130 ("Subject to the same duties and liabilities, all the rights, powers, and privileges conferred upon telegraph and telephone companies to acquire rights-of-way for the construction, maintenance, and operation of lines under . . . 58-9-2020 are granted unto electric lighting and power companies incorporated under the laws of this State . . . ."); S.C. Code Ann. § 58-12-10 (Supp. 2014) (providing authority for installation of cables over or beneath public lands, highways, roads, or waters for cable television companies); S.C. Code Ann. § 57-5-350 ("The department shall neither lease nor sell any part of the state highway primary system, rights-of-way or any of the controlled-access highway facilities for commercial enterprise activities, except public utilities, which were acquired by easement"); but see S.C. Const. art. VIII, § 15 ("No law shall be passed by the General Assembly granting the right to construct and operate in a public street or on public property a street or other railway, telegraph, telephone or electric plant, or to erect water, sewer or gas works for public use, or to lay mains for any purpose, or to use the streets for any other such facility, without first obtaining consent of the governing body of the municipality in control of the streets or public places proposed to be occupied for any such of like purpose; nor shall any law be passed by the General Assembly granting the right to construct and operate in a public street or on public property a street or other railway, or to erect waterworks for public use, or to lay water or sewer mains for any purpose, or to use the streets for any facility other than telephone, telegraph, gas and electric, without first obtaining the consent of the governing body of the county or the consolidated political subdivision in control of the streets or public places proposed to be occupied for any such or like purpose").

Being that we interpret your question as the ability to construct utility infrastructure along a public road that has been laid pursuant to a public right of way, we note that such conveyance is typically granted either by an absolute fee simple conveyance or, more commonly, by an easement permitting public right of passage but leaving the fee simple interest in the land with the landowner. In the context of a quiet title action subsequent to a road closure, the Court of Appeals in Hoogenboom v. City of Beaufort, 315 S.C. 306, 433 S.E.2d 875 (Ct. App. 1992) explained that

> "[o]rdinarily, when a street is laid out, the public acquires a mere right of passage over the land, with the 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. On the other hand, if the fee to a street is in the municipality, the vacating of the street as a public way leaves the municipality in possession of the property to use it for any public purpose that it may see proper, without regard to its former use.

Id. at 318, 433 S.E.2d 833 (citation omitted) (footnotes omitted).

While it is unclear from your letter what type of property interest was conveyed for use of the public road in question, and also the specifics of the easement granted to the utility, it is well settled that the property interest conveyed by an express easement depends on the language within the conveying document. See Plott v. Justin Enters., 374 S.C. 504, 513, 649 S.E.2d 92, 96 (Ct. App. 2007) ("The language of an easement determines its extent") (footnote omitted); Smith v. Comm'rs of Pub. Works of Charleston, 312 S.C. 460, 467, 441 S.E.2d 331, 336 (Ct. App. 1994) ("The general rule is that the character of an express easement is determined by the nature of the right and the intention of the parties creating it") (citation omitted). Easements, however, can also be created by necessity or by prescription. Kelley v. Snyder, 396 S.C. 564, 572, 722 S.E.2d 813, 817 (Ct. App. 2012) ("An easement may arise in three ways: (1) by grant; (2) from necessity; and (3) by prescription") (citation omitted); see, e.g. Simmons v. Berkeley Electric Co'op, 404 S.C. 172, 744 S.E.2d 580 (Ct. App. 2013) (analyzing establishment of utility easement by express grant and utility easement by prescription).

If a public right-of-way has been obtained for the purpose of a public road or highway, whether a public utility can utilize the public right-of-way for a purpose related to the utility without compensation to the landowner owning the fee simple interest rests in the question of whether the new use imposes an additional servitude not within the contemplated use of public road or highway. In other words, the utility's use of the land must fall within the public purpose for the public road or highway to not constitute a "taking" in violation of both the United States and South Carolina Constitutions. See U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation"); S.C. Const. art. I, § 13(A) ("Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property"). This principle was summarized by our Supreme Court in Leppard v. Central Carolina Telephone Co., 205 S.C. 1, 30 S.E.2d 755, 756 (1944) as follows:

> [t]he proposition is equally elementary that the acquisition by the public of an easement in land for the construction of a public highway, gives no right to another and different easement subversive of its proper use. But when a use is granted by proper authority, and does not constitute an additional burden upon the fee, no compensation is due to the owner.

A number of cases and prior opinions of this Office have addressed whether certain uses by a utility created an additional servitude on an existing public right-of-way. We will provide a summary of these authorities below.

First, Lay v. State Rural Electrification Authority, 182 S.C. 32, 188 S.E. 368, 368 (1936) involved the ability of State Rural Electrification to place electric lines on a right of way granted by the affected landowner to the State for highway purposes. Specifically at issue was an Act allowing the Rural Electronic Authority to install electric lines along any public highway. Id. Ultimately, the Court found that erecting electric lines on the highway was not an additional servitude to the easements granted for highway purposes; therefore, the new use did not constitute an additional taking of private property for public use without just compensation. Id. at 370. In its analysis, the court explained its reasoning as follows:

> the original grantor doubtless did not have in mind that the highways might be used for the carrying of communications by wire instead of by post and the carrying of electricity by wire for heat or light instead of the conveyance of coal or oil along the highway for such purposes, but the mere fact that the grantor could not have foreseen the great progress in modern life did not prevent the governing body from saying that the highways may be adapted to these uses.

Id. Thus, although the installation of electric lines was not a foreseen use of the highway easement at the time it was granted, the Court nonetheless found such use to be within the terms of the original easement. Id. Because the new use did not create an additional servitude, no taking of private property for public use without just compensation occurred. Id.

Similar to Lay, Leppard v. Central Carolina Telephone Co., 205 S.C. 1, 30 S.E.2d 755, 756 (1944) addressed whether the construction of telephone lines on a public street which the State Highway Department had laid after acquiring an "unqualified right of way" by deed would constitute an additional servitude. The case involved what is now S.C. Code Ann. § 58-9-2020 (Supp. 2014), providing in part that "[a]ny telegraph or telephone company. . . may construct maintain and operate its line . . . under, over along, and upon any of the highways or public roads of the State." After considering various cases from other jurisdictions, the Court concluded that the new use of the public right of way did not create an additional servitude, reasoning that:

> we are of the opinion that the grant or a condemnation of a public street or highway must be presumed to have been made not for such purposes and usages only as were known to the landowner at the time of the grant, but for all public purposes, present and prospective, consistent with its character as a public highway, and not actually detrimental to the abutting real estate. The convenience and advantage of all the inhabitants of the city and of the public at large must be regarded as objects contemplated when the grant was made.

Leppard, 30 S.E.2d at 757. Accordingly, the court explained that "the telephone, with its necessary poles and wires upon the street, cannot be regarded as a new and different easement or

an additional servitude, for which the abutting property owner is entitled to compensation." Id. at 758.

Next, we point out Richland County v. Palmetto Cablevision, 261 S.C. 222, 199 S.E.2d 168 (1973) where our Supreme Court addressed the ability of a cable television provider to contract with a telephone company and power company for use of their poles and rights-of-way to lay cable. Holding that the cable television provider's use of the telephone and electric poles and rights-of-way was permissible, the court relied on Leppard. First it noted that "[t]he extent of the rights-of-ways granted to these utilities [telephone and electric lighting and power utilities] is very broad as can be seen from the case of Leppard v. Central Carolina Telephone Co., 205 S.C. 1, 30 S.E.2d 755(1)." Palmetto Cablevision, 261 S.C. at 233, 199 S.E.2d at 173. The Court went on to note that

> we have utilities with very broadly defined rights-of-way, the use of which necessarily changes in character and extent from time to time. The stringing of additional cables and the leasing of new cables for newly conceived uses is clearly authorized. By the same reasoning, the licensing of the defendant to string its cables on the existing poles of the utilities is also authorized.

Id. at 234. 199 S.E.2d at 173. As was subsequently explained by the Supreme Court, "[i]n essence, [the Court] found the television cables did not constitute an additional servitude on the underlying telephone easements." Gressette v. South Carolina Elec. and Gas Co., 370 S.C. 377, 635 S.E.2d 538 (2006).[2]

The Supreme Court in Timberlake Plantation Co. v. County of Lexington, 314 S.C. 556, 431 S.E.2d 573 (1993) addressed whether a subdivision had the ability to reserve the right to control the use of all easements and rights of ways granted within its subdivision while also dedicating the roads within the subdivision for public maintenance. Specifically, the issue arose as a result of Lexington County's issuance of an encroachment permit to a cable television provider to lay cable along the public rights-of-way within the subdivision despite the subdivision's contract with another cable television company to be its exclusive provider. Id. at 558, 431 S.E.2d at 574. The Court affirmed the Court of Appeals, holding that the subdivision's attempt to place restrictions on the use of public roads and their attendant rights-of-way were ineffective, and that the dedication of the roads constituted a public easement. Id. at 559, 431 S.E.2d at 575. In its analysis, the Court noted that:

> [t]he grant of a public street or highway must be presumed to have been made not for such purposes and usages only as were known to the landowner at the time of the grant, but for all purposes, present and prospective, consistent with its character as a public highway, and not actually detrimental to the abutting real

[2] In Gressette v. South Carolina Elec. and Gas Co., 370 S.C. 377, 635 S.E.2d 538 (2006) the Supreme Court addressed whether SCE & G, who had been conveying excess fiber optic capacity to third-party telecommunications companies without notice or compensation to the affected landowners, could apportion its allowed use to third parties under the terms of easements granted by the landowners. Because the parties agreed that fiber optic cable lines were within the scope of the easement, the Court noted that "there is no real issue of an additional servitude." Id. at 382, 635 S.E.2d at 540.

> estate. The convenience and advantage of the public at large must be regarded as objects contemplated when the grant was made.

Id. at 560-61, 431 S.E.2d 575 (1993) (citing Leppard v. Central Telephone Co., 205 S.C. 1, 8, 30 S.E.2d 755, 757 (1944)). Reaching this conclusion, the Court found that the cable company was permitted to install its cable within the public easements pursuant to S.C. Code Ann. § 58-12-10. Id. at 561, 431 S.E.2d at 576 ("The language of section 58-12-10 clearly expresses the Legislature's intent to grant cable television companies access to the highways and public roads of this state for the purpose of installing and operating cable television where, as here, the local governing body has granted its approval").

Our Office has also previously addressed questions related to the ones you have asked. When asked whether the Highway Department could grant an encroachment permit on a right of way it acquired by easement to the Wildlife Department for the purpose of a public boat ramp, we opined that it could. Op. S.C. Att'y Gen., 1980 WL 120863 (Sept. 10, 1980). Specifically, we reasoned that "[t]his use is consistent with the purpose of that right of way as a public avenue of travel, traffic and communication, and such does not amount to an additional servitude upon the land." Id. at *1. We also noted that because the Highway Department's interest in the land was a right of way for a public highway, "the grant [was] made not only for the purposes and usages as are known to the landowner at the time of its acquisition, but for all new and improved methods which may afterwards be discovered and developed in aid of the general purpose for which highways are designed." Id. at *1.

A similar conclusion was reached in a 1978 Opinion which, in part, addressed a landowner's right to cut trees and shrubs blocking advertising signs on a public highway the Highway Department acquired by public easement. Op. S.C. Att'y Gen., 1978 WL 22518 (Feb. 22, 1978). We concluded that:

> [i]f the South Carolina Department of Highways and Public Transportation concludes that trees and shrubs, situate on rights of way of the Interstate System in South Carolina held by easement for highway purposes, are not necessary to the public purpose and are outside the scope of the easement, owners of the underlying fee simple title may cut and harvest such trees and shrubs under such regulations as the Department may establish for the protection of the motoring public.

Id. at *7 (emphasis in original). This opinion reiterates that the determination of whether a certain subsequent use can be maintained on a public easement is reliant upon whether or not the use creates an additional servitude.

Conclusion

From analysis of the authorities above, it is clear that if a right of way has been obtained for a public highway or road, the public easement is inclusive not only of the purposes and usages that were known by the affected landowner at the time of the acquisition, but also for

additional purposes fitting within the purpose of the highway or road. While certain utility infrastructure has been held to constitute part of the public purpose of the highway or road, whether an additional servitude would be created by the new use would have to be determined based upon the facts specific to the case at hand and, more specifically, the language in the easement itself if the property interest was conveyed by express grant. Should it be determined that the installation of utility infrastructure along the public right of way does not create an additional servitude, it is our opinion that a court would find the impacted landowners would not be entitled to compensation as a "taking" has not occurred and the new use could be permitted upon approval of the local governing body in control of the public road or highway.

Should you have any additional questions, please do not hesitate to contact our Office.

Very truly yours,

Anne Marie Crosswell

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REVIEWED AND APPROVED BY:

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