ALAN WILSON
ATTORNEY GENERAL

June 2, 2015

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

Dear Senator Martin:

In a previous letter written to this Office, you requested an opinion regarding what you described 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 provided:

> 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 concluded 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?

After receiving our response to the above inquiries in Op. S.C. Att'y Gen., 2015 WL 1593294 (March 31, 2015), you have requested a follow up opinion to clarify whether our opinion was limited to a road right-of-way acquired by express grant (referenced as "a deeded right of way") or whether it was also inclusive of a situation where the road right-of-way was established by prescription (referenced as "a non-deeded right of way"). In your follow up letter, you also specify that the concern is primarily related to gas and water lines. Below we will clarify our belief that the conclusions reached in our prior opinion would likely also be

applicable to situations involving highway and road rights-of-way acquired by prescription. Our analysis follows.

Law / Analysis

"An easement may arise in three ways: (1) by grant; (2) from necessity; and (3) by prescription." Kelley v. Snyder, 396 S.C. 564, 572, 722 S.E.2d 813, 817 (Ct. App. 2012) (citing Frierson v. Watson, 371 S.C. 60, 67, 636 S.E.2d 872, 875 (Ct. App. 2006)). As you have indicated your inquiry centers around public roads where the right-of-way or easement was established by prescription, we focus our attention there. "A prescriptive easement is analogous to adverse possession." 12 S.C. Jur. Easements § 10 (Supp 2015). Therefore, it arises from the conduct of the owner of the dominant tenement contrary to the fee simple interest of the owner of the servient tenement rather than by an express grant or reservation or by implication. Id.

To establish an easement by prescription, it is necessary to prove: "(1) the continued and uninterrupted use or enjoyment of a right for a full period of twenty years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under claim of right." Loftis v. South Carolina Elec. and Gas Co., 361 S.C. 434, 439, 604 S.E.2d 714, 716 (Ct. App. 2004) (citations omitted); see also Darlington County v. Perkins, 269 S.C. 572, 576, 239 S.E.2d 69, 71 (1977); Poole v. Edwards, 197 S.C. 280, 15 S.E.2d 349, 350 (1941). Our Supreme Court has recently clarified that the standard of proof to establish an easement by prescription is proof of each of the elements, by the moving party, by clear and convincing evidence. Bundy v. Shirley, __ S.E.2d __, 2015 WL 2088551 (2015).

In the context of the public's acquisition of a prescriptive easement on a road, our Supreme Court has provided that "[t]he rule in this state is that a prescriptive right arises in favor of the public after the continuous use of a road for twenty years, when it runs through cultivated land, but that when it passes over unenclosed woodland it must be shown that the user was adverse." State v. Miller, 125 S.C. 289, 118 S.E. 624 (1923) (quoting State v. Rodman, 86 S.C. 158, 68 S.E. 343(1910)) (internal quotations omitted). In other words, the use of a way for twenty years through unenclosed and uncultivated woodlands is considered permissive, but when the road runs through enclosed and cultivated land, the use is presumed to be adverse. Hutto v. Tindall, 40 S.C.L. 396, 401 (Ct. App. 1853). The purpose of this rule relating to unenclosed woodlands is to put the landowner on notice because "[t]he owner of the land might not know of the existence of the way, or having no immediate use for the land, might have no inducement to oppose the use of it." Hogg v. Gill, 26 S.C.L. 329, 332 (Ct. App. 1841). The rule that the mere use of unenclosed and unimproved woodlands does not give rise to a right-of-way by prescription is inapplicable, however, when additional evidence of extensive long-term public maintenance is shown, in which case the area is considered "improved." Darlington County v. Perkins, 269 S.C. 572, 576, 239 S.E.2d 69, 71 (1977). In such circumstances, the public can acquire rights in the road through prescriptive use alone. Cleland v. Westvaco Corp., 314 S.C. 508, 512, 431 S.E.2d 264, 267 (Ct. App. 1993).

Assuming the public road prescriptive easement has been established by the applicable standard, we turn to the question of whether a municipality has the ability to issue an encroachment permit for the installation of utility infrastructure along the prescriptive roadway

easement. In other words, is the scope of a public roadway easement established by prescription comprehensive of the ability to permit the install utility of infrastructure without constituting an increased burden on the servient estate. Our research shows that courts of other jurisdictions have addressed this question; as we believe such cases are informative to our analysis, we will summarize them below.

In the oldest case we wish to highlight on the subject – Heyert v. Orange & Rockland Util., Inc., 17 N.Y.2d 352, 218 N.E.2d 263 (N.Y. 1966) – the court concluded that a town was not permitted to authorize a private utility corporation to install a gas main under a public highway arising from "presumption of dedication through user" because such use was not within the scope of the town's easement for highway purposes.[1] The court based its finding on past authority, specifically referencing cases where the court found that certain utility infrastructure, such as stringing wires for telephone poles and installing utility mains for the service of domestic customers, were not related to the right of passage over the public highway easement, in contrast to wire or storm sewers for lighting or draining the street itself. Id. at 359, 218 N.E.2d at 266-67. Therefore, the court noted that

> [t]he only basis on which this order could be reversed would be that the law on this subject, unequivocally reiterated as recently as 1959 in *Holden v. City of New York* (7 N Y 2d 840, supra.;) and in 1955 in *Ferguson v. Producers Gas Co.* (286 App. Div. 521), should be overruled on the ground that times have changed.

Id. at 359, 218 N.E.2d at 267. Declining to overrule precedent, the court concluded that the install of the gas main on the public roadway easement was outside the scope of use of the easement acquired for highway purposes. Id. at 365, 218 N.E.2d at 270.

Both the concurring opinion and dissent in Heyert noted disagreement with the majority due to the necessities of modern day needs. Id. at 365-66, 218 N.E.2d at 270-71. Specifically, the dissenting justice noted that

> [t]o say the plaintiff is entitled to an injunction or damages because there are gas service pipes under the road in front of her house would be like saying that when the few horse-drawn vehicles gave place to automobiles in great numbers, she could have had relief in the courts because of the added burden not anticipated when the strip was dedicated to public highway uses.

Id. at 366, 218 N.E.2d at 271 (Desmond, J., dissenting).

Similarly, the concurring opinion, referencing precedent, noted that "a rule which had its origin in the limited uses to which public streets were once put should not forever handicap the obvious necessities of modern day needs." Id. at 365, 218 N.E.2d at 270-71 (Keating, J., concurring). In accord with these views, courts have since seemed to increasingly broaden the scope of public highway and road easements, including those acquired by prescription, to adapt

[1] In this case, the standard for "presumption of dedication through user" of the road in question was defined by statute and required use by the public as a highway for the statutory required number of years only. Heyert v. Orange & Rockland Util., 17 N.Y.2d 352, 357, 218 N.E.2d 263 (N.Y. 1966). Similar to our state's standard to establish a public easement by prescription over improved lands, we think the court's analysis is applicable.

the use of public roads and highways to the needs of the pubic arising from advancements of society. Examples of such cases follow.

In Bentel v. Bannock County, the Idaho Supreme Court addressed the question of whether a county's prescriptive easement over a road surface included the ability to authorize installation of an underground wastewater transmission pipeline. Bentel v. Bannock County, 104 Idaho 130, 133, 656 P.2d 1383, 1386 (Idaho 1983). As a general rule, the court pointed out that prescriptive easements are strictly limited to the actual use which gave rise to the easement. Id. In addition, while the use of a prescriptive easement may change under the proper circumstances, such change must not unreasonably increase the burden on the servient estate and must have been foreseeable at the time the easement was established. Id. However, it was distinguished that this general rule relates to *private* prescriptive easements opposed to *public* prescriptive easements, the court stating that:

> [i]n this case we are concerned with a *public* prescriptive easement. Appellant argues that public prescriptive easements should be construed as narrowly as private prescriptive easements. We are persuaded otherwise.
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> . . .
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> In more contemporary decisions, other jurisdictions have held the scope of such [public prescriptive] easements comprehensive enough to include reasonably foreseeable public uses of such roadways, such as subsurface installations for sewage, runoff, communications and other services necessary to the increased quality of life which generally accompanies the growth of civilization. "[A] highway easement acquired by prescription is no less comprehensive than one acquired by grant, dedication or condemnation."

Id. (quoting Hill Farm, Inc. v. Hill County, 436 S.W.2d 320, 323-24 (Tex. 1969)) (emphasis in original).

The Court also pointed out that all public roads, including those created by prescription, are subject to the rights of utilities to place utility transmission facilities on or under the road area, quoting the pertinent Idaho statute as follows: "Any [gas company] shall have ... the right to construct, maintain, and operate [a] pipeline upon, along, and over, or under, *any and all* public roads, streets, and highways...." Id. at 134, 656 P.2d at 1387 (quoting Idaho Code Ann. § 62-1101) (emphasis and modifications in original). Therefore, because the statute encompassed all public roads, including those acquired by prescription, the Court concluded that "the installation of a sewage disposal pipeline within an existing roadway easement does not, as a practical matter, involve an expansion of the easement or an increased burden on the servient estate." Id. The Court also strengthened its conclusion by indicating that several underground utilities already existed within the prescriptive easement at issue in the case. Id.

In Blackburn v. Brazos Valley Util., Inc., 777 S.W.2d 758, 758-59 (Tex. App. 1989), the Texas Court of Appeals addressed a similar question, being whether a waterline could be installed along the right-of-way of a public road acquired by prescription. Referencing a Texas statute authorizing any water corporation to lay its pipes under and along public roads outside

city limits[2], the court held that the county was permitted to authorize construction of the waterline without the water supply corporation having to exercise the power of eminent domain to acquire a right-of-way for the lines. Id. at 759. Like the court in Bentel discussed above, it was clarified that "[t]he road in question was a public road by prescription, but a highway easement acquired by prescription is no less comprehensive than one acquired by grant, dedication or condemnation." Id. at 759 (citations omitted). Accordingly, the court ruled that, pursuant to statute granting authority to lay pipes under and along public roads, the water supply corporation was permitted to lay its pipes in the right-of-way along the public road without the action being considered a taking without due process or compensation. Id.

While not involving the installation of utility infrastructure, recently in Public Land Access Ass'n v. Board of County Comm'r of Madison County, 373 Mont. 277, 291, 321 P.3d 38, 46 (Mont. 2014), the Montana Supreme Court addressed the scope of a public road right-of-way established by prescription and whether it was limited to its "historic" use or whether it extended to other public uses. Discussing the Bentel case referenced above and others, the Court concluded that:

> [o]ur review of case law from other jurisdictions reveals that the scope of use for public prescriptive easements generally is not construed as strictly as the scope of use for private prescriptive easements. "Numerous authorities hold that the scope of public prescriptive easements is broad enough to include reasonably foreseeable public uses."

Id. at 293, 321 P.3d at 47-48 (citing Bruce & Ely, Law of Easements and Licenses in Land § 8:12, 8-42). The Court also noted that "[j]ust as the Court has determined that the uses of a dedicated public highway change over time, so do the uses of a public roadway acquired by prescription." Id. at 296, 321 P.3d at 49. Accordingly, the court held that the scope of the public road right-of-way established by prescription extended to uses that were reasonably incident to the uses through which the easement was acquired as well as public uses that were reasonably foreseeable. Id.

The case law above reveals authorities have increasingly held the scope of use for public prescriptive roadway easements generally are not construed as strictly as the scope of use for private prescriptive easements. Rather, they have found that public prescriptive roadway easements are broad enough to include reasonably foreseeable public uses to accompany the growth of civilization, which has been interpreted to include the install of utility infrastructure.

To our knowledge, our courts have not addressed a distinction between the scope of use of a public prescriptive easement and a private prescriptive easement generally or in the context of installation of utility infrastructure along a public road easement established by prescription. In fact, in the one case we have found on point, Burrell v. Kirkland, 242 S.C. 201, 130 S.E.2d 470 (1963), our Supreme Court appeared to apply the general rule, that a prescriptive easement

[2] While Tex. Water Code. Ann. § 1433 (Vernon 1980), the statute cited by the court, has been repealed, its counterpart permits water districts and water supply corporations use of public rights-of-way without distinguishing how the right-of-way was acquired. See Tex. Water Code Ann. § 49.220 (Vernon 1995).

cannot be expanded beyond its customary use, to public prescriptive easements. Specifically, in Burrell, the plaintiff sought to establish that a public prescriptive easement had been established across a portion of privately owned land by its continued use as a pedestrian footpath thereby permitting the expanded use of the property for vehicular traffic. Id. at 206-07, 130 S.E.2d at 472-73. Stating hypothetically that "should it be established a public footpath existed by prescription," the court rejected expansion of its scope for vehicular use. Id. at 207, 130 S.E.2d at 473. It explained that:

> [w]hether one claiming a way over another's land by prescription is entitled to a foot-way, horse-way, or carriage-way, depends upon the mode the property has customarily been used. Minor on Real Property, Vol. II, Section 1060. See also Tiffany on The Law of Real Property, Vol. I, Section 322. 'If the adverse use on which the prescriptive claim to a way is based was for one particular purpose only, as in the case of a way used by foot passage only, or for the carriage of timber only, this is not sufficient to support a claim to a right of way for all purposes.'

Id. Both the time period the case was decided and the conclusion reached in Burrell are consistent with Heyert, the first case discussed above, restricting the scope of a public prescriptive easement to its customary use.

However, unlike the contemporary decisions outlined above, it does not appear our courts have examined the specific question of whether the scope of pubic prescriptive roadway easement is comprehensive enough to include reasonably foreseeable public uses, such as the installation of utility infrastructure. As we explained in our prior opinion on this subject, our courts have held on many occasions that the installation of certain utility infrastructure is included as part of the public purpose of the highway or road easement therefore not constituting an increased burden on the servient estate. See Op. S.C. Att'y Gen., 2015 WL 1593294 (March 31, 2015) (discussing Timberlake Plantation Co. v. County of Lexington, 314 S.C. 556, 431 S.E.2d 573 (1993); Richland County v. Palmetto Cablevision, 261 S.C. 222, 199 S.E.2d 168 (1973); Leppard v. Central Carolina Tel. Co., 205 S.C. 1, 30 S.E.2d 755, (1944); and Lay v. State Rural Electrification Authority, 182 S.C. 32, 188 S.E. 368 (1936)). In addition, legislation pertaining to a utility's use of public highways and roads do not distinguish that use is permitted only if the rights for the public highway or road have been obtained in a particular manner (*i.e.* legislation typically permits use over, beneath, or along *any* highway or *any* public road). See, e.g., S.C. Code Ann. § 58-9-2020 (1976) (telegraph and telephone company); S.C. Code Ann. § 58-27-130 (Supp. 2014) (electric lighting and power companies); S.C. Code Ann. § 58-12-10 (Supp. 2014) (cable television companies); S.C. Code Ann. § 5-31-10 (2004) (water pipes); 58-7-10 (1976) (conferring the same powers given to telegraph and telephone companies under Article 17 Chapter 9 of Title 58 to pipeline companies). Taken together, we believe the above cited legislation and the tendency of our courts to broadly construe the use of public highway and road easements to include installation of utility infrastructure without being considered as an additional servitude, suggests a court would likely find the scope of a public highway or road easement established by prescription is no less comprehensive than a public highway or road easement established by express grant. Thus, we believe the scope of a public highway or road easement or right-of-way established by prescription would likely include reasonably foreseeable

public uses of the easement or right-of-way without being considered an increased burden on the servient estate.

Conclusion

Based on the reasoning of the more contemporary cases decided outside of our jurisdiction discussed above, tendency of our courts to broadly construe the use of public highway and road easements to include installation of utility infrastructure without being considered an additional servitude generally, as well as the fact that legislation pertaining to a utility's use of public highways and roads do not distinguish that use is permitted only if the rights for the public highway or road have been obtained in a particular manner, we believe a court within our state would find the scope of use of a public prescriptive highway or road easement would be inclusive of reasonably foreseeable public uses of the roadway, including the installation of utility infrastructure, without constituting an increased burden on the servient estate. However, this is only our interpretation of how a court would rule on the subject and should in no way be construed as definitive. We also point out that a utility's use of a public roadway right-of-way or easement is always subordinate to the superior rights of the public,[3] must adhere to the municipal consent provision of S.C. Const. art. VIII, § 15, and is subject to imposition of any applicable fees imposed by the municipality for use of its roads.[4]

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

Very truly yours,

Anne Marie Crosswell

Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General

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[3] See South Carolina State Highway Dept. v. Parker Water and Sewer Dist., 247 S.C. 137, 143, 146 S.E.2d 160, 163 (1966) ("It is fundamental that any use of a highway or street for a purpose other than one for which it was primarily established is always subject to the police power. Any right granted with respect thereto is at all times subordinate to the superior rights of the public") (quoting Sammons v. City of Beaufort, 225 S.C. 490, 499, 83 S.E.2d 153, 157 (1954)) (internal quotations omitted).

[4] See S.C. Code Ann. § 5-7-30 (Supp. 2014); see also South Carolina Elec. & Gas Co. v. Town of Awendaw, 359 S.C. 29, 596 S.E.2d 482 (2004) ("We consistently have taken the view a utility provider generally should not be allowed free use of a municipality's streets in light of the constitutional and statutory authority reserving or granting power to municipalities to impose charges for such use.").