1980 WL 131247 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
June 12, 1980

RE: Fee Owner's Right to Install Subsurface Encroachment on Land Which is Occupied by South Carolina Department of Highways and Public Transportation Through Easement

***1** Mr. E. S. Coffey
State Highway Engineer

You have asked this office for an opinion regarding the request of Mr. J. Edwin Davis to install a one-inch water line under approximately three hundred feet of the unpaved shoulder of state road 32-938. Mr. Davis, who is the owner of the underlying fee over which the road is located and who granted the easement, has been refused permission to place the pipe by the Lexington County Maintenance Department. Mr. Davis thereafter appealed to you to reconsider and you asked my advice on this matter.

Bunton vs. South Carolina State Highway Department, 186 S.C. 463, 196 S.E. 188 (1938) holds that it is the duty of the Department to keep not only the paved portion of a highway in reasonably safe condition for motor vehicle travel, but also the road adjacent to the pavement, the shoulders of the highway, in such condition as will meet the reasonable needs of the motorist. Furthermore, Ankrim vs. South Carolina State Highway Department, 251 S.C. 42, 159 S.E.2d 911 (1968) establishes that the rights of an abutting owner who owns the fee to land over which the highway runs are subject and subordinate to the easement and servitude in favor of the public. The fee owner has no right to do anything to the Department's right of way which would impair the safety to travelers or in any way interfere with the use of the way as a highway by the public nor may the right of way be used for any purpose which amounts to a perversion of it from the uses for which it was intended. id.

Ankrim involved several abutting land owners who owned the underlying fee and who had established above ground facilities on the Department's right of way which were found by the trial court to constitute a hazard and a dangerous obstruction to those who traveled on the highway. Based on those findings, the court held that the Department had the right to order the removal of the obstructions.

In Hill vs. Carolina Power and Light Company, 204 S.C. 83, 28 S.E.2d 545 (1943), our court held that the unrestricted grant of an easement conveyed all rights that were incident or necessary to the reasonable and proper enjoyment of the easement. However, the court noted that the right to use such land and the space overhead remains in the owner of the fee so far as such right is consistent with the purpose and character of the easement.

In the subsequent case of Sloan vs. City of Greenville, 235 S.C. 277, 111 S.E.2d 573 (1959) our court held that a dedication for a public way included air rights up to the sky and further held that any encroachment of air rights by private individuals was prohibited. Neither Sloan nor Ankrim, however, considered the rights of the adjacent fee owner vis-a-vis the Department for encroachments that were located under ground.

***2** Furthermore, the decision in Sloan relies heavily on the fact that the property over which the road was located had been dedicated to the city. The Court spoke of the city's holding title to the property. This is clearly different from an ordinary easement, such as the one in this case, where the only thing granted to the Department is the right to locate the street over the property.

In Hill, supra, the court noted that:

The right of the easement owner and the right of the land owner are not absolute, irrelative and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable enjoyment of both. In other words, a grant or reservation of an easement in general terms is limited to a use which is reasonably necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated.

This holding in Hill, supra, clearly comports with the general law found in most of the jurisdictions. 28 C.J.S. Easement, §76; 39 C.J.S. Highways §142, Nichols on Eminent Domain, 3ed., §10.212.

Although the question has not been specifically addressed in this state, the Virginia Supreme Court has found that the owner of the underlying fee "has and may convey to another the right to lay a pipeline under the bed of the road provided he does not thereby obstruct the road." Anderson vs. Stuarts Draft Water Company, 197 Va. 36, 87 S.E.2d 756, 760 (1955). The holding in Anderson would seem to comport with the previous pronouncement of our court in Hill.

The Anderson case, and others like it which have allowed owners of the underlying fee to encroach on public rights of way, generally qualify the right of the fee owner by prohibiting him from interfering in any way with the public's right to use the right of way, by requiring him to obtain prior approval from the public authority concerned, and by requiring him to bear the expence of relocating such encroachments in the event such relocation is required in order to adeqnately accomodate the public's enjoyment of the right of way. See, Anderson, supra, and cases cited in West S.E. Digest Highways, Section 89. The Department currently has a procedure, through the use of its encroachment permits, by which encroachments made by abutting land owners who own the underlying fee to roads which exist by way of easement may be controlled and regulated for the benefit of the public.

Therefore, it is the opinion of this office that an abutting landowner who is the owner of the underlying fee of land on which a right of way exists for a public highway may lay pipes within the public right of way over his property provided that such pipes do not interfere with the enjoyment of the public of such highway. It is further the opinion of this office that the Department should regulate such encroachments through the use of its encroachment permits in order to protect the rights of the public.

***3** William L. Todd
Assistant Attorney General

Reviewed and Approved By:

Victor S. Evans
Deputy Attorney General

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