

2010 WL 1808717 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

April 27, 2010

*1 The Honorable Creighton B. Coleman
Senator
District No. 17
P. O. Box 1006
Winnsboro, South Carolina 29180

Dear Senator Coleman:

We received your letter requesting an opinion of this Office concerning the maintenance of an easement in the subdivision Sand Creek Properties. You asked “who is responsible for the upkeep and maintenance of the roads and culverts” in the subdivision within the 50 foot easement. As a way of background, you provided that a “subdivision named Sand Creek Properties was developed that included roads and sidewalks. The developer deeded a 50' right-of-way easement for the purpose of maintaining and improving the roadways to Fairfield County... . Subsequently, the Town of Winnsboro annexed Sand Creek Subdivision by Ordinance... . In the Ordinance it is annexing ‘... any improvements’” This opinion will address prior opinions of this Office and relevant South Carolina caselaw.

Law/Analysis

Generally, the owner in fee simple has all of the rights and responsibilities of maintaining property. However, when an easement is created, a small portion of the rights are given away by the grantor to the grantee. An easement is the “right to use the land of another for a specific purpose.” Steele v. Williams, 204 S.C. 124, 28 S.E.2d 644 (1944). The grantor or fee simple owner would be considered servient, and the grantee or easement owner would be considered dominant. South Carolina Jurisprudence explains the duties of each as follows:

In the absence of an agreement, the owner of the servient tenement is under no duty to maintain and repair and easement for the benefit of the dominant tenement. Ordinarily, the owner of the dominant tenement has the duty to keep the easement in repair. When both the owner of the dominant tenement and the owner of the servient tenement use the property subject to the easement, such as a gravel road, a court may equitably divide the responsibility for maintenance and repair, and may take into account such factors as the dominant

tenement's duty of maintenance and repair, the burden of the easement on the servient tenement, and the extent of the servient tenement's use.

12 S.C. Jur. Easements § 25.

In Hayes v. Tompkins, 287 S.C. 289, 337 S.E.2d 888 (Ct. App. 1985), the court found that apportionment of one third of the burden of maintenance and repair of the gravel road upon owner of the dominant tenement, which road served as easement, was equitable, considering the burden easement placed on the servient property and the benefit derived by the dominant landowner. The court held that “[o]wners of the servient tenement had no duty to maintain and repair easement for benefit of dominant tenement, absent agreement.” Hayes, 287 S.C. 289, 293 (1985). See also, Caper v. Fripp, 24 S.C.L. 224 (1839) (The court held that the one who uses the way must repair it, or bear the inconvenience).

In an opinion of this Office dated June 15, 1966, we stated as follows:

*2 In Leppard v. Central Carolina Telephone Co., [205 S.C. 1, 30 S.E.2d 155 (1944)], the Court stated ... “Whether an easement authorizes the use of land in a particular way depends upon the nature and extent of the easement.”

Op. S.C. Atty. Gen., June 15, 1966 (citing Leppard, 205 S.C. 1, 6 (1944)). The nature and extent of the easement created by Sand Creek Properties for Fairfield County is expressly articulated in the deed granting the easement.

The deed for a 50 foot easement was created on December 1, 1987. Sand Creek Properties, Inc. is the owner in fee simple, but for consideration of one dollar and by way of public dedication, paid by Fairfield County, a perpetual right-of-way easement was granted, bargained, sold, and released to Fairfield County **for the purpose of maintaining and improving a highway or roadway leading from Highway #213.**

On June 5, 1990, the Mayor and Council of the Town of Winnsboro ordained that the subdivision Sand Creek Properties would be annexed to and become part of the Town of Winnsboro.

Prior to June 5, 1990, the Sand Creek Properties subdivision would have been considered the servient tenement, but since the Town of Winnsboro annexed the subdivision, the Town of Winnsboro now serves the role as servient tenement. Fairfield County, as the owner of the easement, is the dominant tenement.

Chapter 29, Title 49 of the South Carolina Code of Laws of 1976 is the South Carolina Scenic Rivers Act. This Act does not specifically apply to easements created to improve a roadway, but S.C. Code § 49-29-20(6) defines “perpetual easement.” Here, a “perpetual right-of-way easement” was granted.¹ A “perpetual easement” is “a perpetual right in land of less than fee simple which ... obligates the grantor and his heirs and assigns to certain restrictions constituted to maintain the scenic qualities of those lands bordering ...” § 49-29-20(6).²

Conclusion

A court would likely find that Fairfield County, the grantee of the easement in question, is responsible for all, or at least an equitable portion, of the roads and culverts within the 50 foot easement. The intended purpose of the easement was to maintain and improve the roadway to Fairfield County; in fact, the actual deed expresses that the easement was created for the “purpose of maintaining and improving a highway or roadway.” Fairfield County was properly granted the easement. Therefore, Fairfield County will likely be held responsible for maintaining the area within the easement.³
Sincerely,

Henry McMaster
Attorney General
By: Leigha Blackwell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General

Footnotes

- 1 See December 1, 1987 deed
- 2 While the court would likely find that Fairfield County is responsible for the maintenance of the easement, the court may find that the Town of Winnsboro must maintain the rest of Sand Creek Properties subdivision as their annex.

