1978 S.C. Op. Atty. Gen. 59 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-35, 1978 WL 22518

Office of the Attorney General

State of South Carolina
Opinion No. 78-35
February 22, 1978

***1** TO: Paul W. Cobb
Chief Commissioner

QUESTION

1. Does the Department of Highways and Public Transportation have the authority to allow the owners of outdoor advertising devices to enter the rights of way of the Interstate Highway System and cut trees and shrubs for the purpose of exposing these billboards to the motoring public?

2. If the answer to question one is in the negative, may the Department through its own maintenance forces cut trees and shrubs within the rights of way of the Interstate Highway System for the purpose of exposing billboards to the view of the motoring public and charge the cost of such work to the owners of the outdoor advertising devices?

AUTHORITIES

Constitution of South Carolina, Art. X § 9 (1895 as amended) Code of Laws of South Carolina (1976):
§ 57–3–610

§ 57–5–350

§ 57–5–600

§ 57–7–10

§ 57–23–20

§ 57–25–110, et seq.

§ 58–9–2020

§ 58–27–130

Act No. 219, 60 Acts and Joint Resolutions 564 (1977)

Rupp v. Hiveley, 94 C.A. 667, 271 P. 768 (1928)

Santa Barbara Co. v. More, 175 Cal. 6, 164 P. 895 (1917)

Murphy, Inc. v. Town of Westport, 131 Conn. 292, 40 A. 2d 177 (1944)

  

Yale University v. City of New Haven, 104 Conn. 610, 134 A. 268, 47 A.L.R. 667 (1926)

Gen. Outdoor Advertising Co. v. Dept. of Pub. Wks., 289 Mass. 149, 193 N.E. 799 (1935)

Chesapeake & Potomac Telephone Co. v. Goldsboro, 125 Md. 666, 94 A. 322 (1915)

New York State Thruway Authority v. Ashley Motor Court, Inc. 10 N.Y. 2d 151, 218 N.Y.S. 2d 640, aff'd, 10 N.Y. 2d 814, 221 N.Y.S. 2d 518 (Ct. App. 1961)

Pearlmutter v. Green, 259 N.Y. 327, 182 N.E. 5 (1932)

Ankrim v. South Carolina Highway Dept., 251 S.C. 42, 159 S.E. 2d 911 (1968)

Antonakas v. Anderson Chamber of Commerce, 130 S.C. 215, 126 S.E. 34 (1924)

Atl. Coast Line R.R. Co. v. South Carolina Pub. Service Comm'n, 245 S.C. 229, 139 S.E. 2d 911 (1965)

Bailey v. Gary, 53 S.C. 503, 31 S.E. 354 (1898)

Baring v. Heyward, 12 S.C. Rep. (2 Speers) 553 (1844)

Benton v. Yarborough, 128 S.C. 481, 123 S.E. 204 (1924)

Bethel Methodist Episcopal Church v. City of Greenville, 211 S.C. 442, 45 S.E. 2d 841 (1947)

Chapman v. Greenville Chamber of Commerce, 127 S.C. 173, 120 S.E. 584 (1923)

Charleston Rice Milling Co. v. Bennett & Co., 36 S.C. Rep. (18 S.C.) 254 (1882)

Cooper v. South Carolina Pub. Serv. Authority, 264 S.C. 332, 215 S.E. 2d 197 (1975)

Haesloop v. City of Charleston, 123 S.C. 272, 115 S.E. 596 (1923)

Lay v. Rural Electrification Authority, 182 S.C. 32, 188 S.E. 368 (1936)

Leppard v. Cent. Carolina Tel. Co., 205 S.C. 1, 30 S.E. 2d 755 (1944)

Momeier v. Koebig, 220 S.C. 124, 66 S.E. 2d 465 (1951)

Peoples Nat'l Bank of Greenville v. South Carolina Tax Comm'n, 250 S.C. 187, 156 S.E. 2d 769 (1967)

Riley v. South Carolina State Highway Dept. 238 S.C. 19, 118 S.E. 2d 809 (1961)

***2** Sammons v. City of Beaufort, 225 S.C. 490, 83 S.E. 2d 153 (1954)

Schroeder v. O'Neill, 179 S.C. 310, 184 S.E. 679 (1936)

Sloan v. City of Greenville, 235 S.C. 277, 111 S.E. 2d 573, 76 A.L.R. 2d 888 (1959)

  

South Carolina Highway Department v. Allison, 246 S.C. 389, 143 S.E. 2d 800 (1965)

South Carolina Highway Department v. Metts, Case No. 20585 (S.C. Filed Jan. 18, 1978)

Kelbro, Inc. v. Myrick, 113 Vt. 64, 30 A. 2d 524 (1943)

Opinion No. 1226, 1961 Op. Atty. Gen. 168

Opinion No. 1656, 1964 Op. Atty. Gen. 91

Opinion No. 2604, 1968 Op. Atty. Gen. 327

Opinion No. 2725, 1969 Op. Atty. Gen. 186

39 Am. Jur. 2d Highways (1968)

Annot., 145 A.L.R. 1356 (1943)

Annot., 76 A.L.R. 2d 888 (1961)

39A C.J.S. Highways (1976)

E. McQuillin, Municipal Corporations (1966)

Nichols, Law of Eminent Domain, Sackman, ed. (3d ed. 1966)

Wilson, Billboards and the Right to be Seen From the Highway, 30 Georgetown L. J. 723 (1942)

DISCUSSION

You have requested the opinion of this Office as to the authority of the Department of Highways and Public Transportation to allow the owners of outdoor advertising devices adjacent to Interstate Highways to come onto the rights of way of the Interstate System and cut trees and shrubs which obstruct billboards from the view of the motoring public. These billboards are subject to the requirements of the Highway Advertising Control Act. Code of Laws of South Carolina § 57–25–110, et seq. (1976). It is the understanding of this Office that your question is only with reference to signs which are legal and conforming as those terms are used with reference to the Act. Further, your request specifically excludes analysis of the obligations imposed by federal statute and regulation as to such uses of Interstate Highways.

For a number of years following the commencement of the construction of the Interstate System, the Department followed an affirmative policy of retaining wooded areas within and along the margin of the Interstate rights of way. Additionally, with the assistance of Federal-aid monies, the Department planted thousands of seedlings in areas where the vegetation was primarily grass. It appears from the files of the Department that the purpose of this program was in part aesthetic and in part to reduce maintenance cost by eliminating the need to cut grass in the wooded areas. At least for the latter reason, the Department clearly had the authority to plant the trees, and thus the question is not one of correcting prior acts of the Department in excess of its authority. Code of Laws of South Carolina § 57–3–610 (1976); cf. Rupp v. Hiveley, 94 C.A. 667, 271 P. 768 (1928); Santa Barbara Co. v. More, 175 Cal. 6, 164 P. 895 (1917); Chesapeake & Potomac Telephone Co. v. Goldsborough, 125 Md. 666, 94 A. 322 (1915). The Department now seeks advice as to the legality of this vegetation and the authority of the Department to allow it to be destroyed by the owners

of outdoor advertising devices or in the alternative the authority of the Department to cut the vegetation and charge the Department's cost to the owner of the outdoor advertising device.

***3** Generally, the opinion requested requires an examination of the right of abutting owners, or those holding through them, to make use of the right of way in a manner that is uncommon with its ordinary use by the general population. [1] Since rights of way for the Interstate System were acquired both by easement and in fee simple, and since the degree of interest held by the Department may affect the rights of the abutter, this opinion considers each circumstance separately, and in part III considers the authority of the Department to cut trees and shrubs with its maintenance forces and charge the cost to the owner.

I

Those who own property adjacent to highway rights of way enjoy two distinct kinds of rights in the public way: First are those which are common to all citizens and second are those private prescriptive or equitable rights which arise from ownership of adjacent property. For example, under some circumstances abutting owners may enjoy a right of access, South Carolina Highway Department v. Allison, 246 S.C. 389, 143 S.E. 2d 800 (1965), or a right to lateral or subjacent support. Momeier v. Koebig, 220 S.C. 124, 66 S.E. 2d 465 (1951); see generally 39 Am. Jur. 2d Highways § 163 (1968); 39A C.J.S. Highways § 141(1) (1976); 10 E. McQuillin, Municipal Corporations § 30.54 (1966). In some states, such rights include light, air, view and access. [2]

However, the South Carolina Supreme Court does not recognize any prescriptive right to light or view. Bailey v. Gray, 53 S.C. 503, 31 S.E. 354 (1898); Schroeder v. O'Neill, 179 S.C. 310, 184 S.E. 679 (1936). Our Supreme Court would undoubtedly adhere to the reasoning of the Supreme Judicial Court of Massachusetts, which in considering the asserted right of view by owners of billboards wrote:
'. . . [T]he [sign owners] are not exercising a natural right; they are seizing for private benefit an opportunity created for a quite different purpose by the expenditure of public money in the construction of public ways and the acquisition and improvement of public parks and reservations . . .. [I]ts main feature is the super added claim to use private land as a vantage ground from which to obtrude upon all the public traveling upon highways, whether indifferent, reluctant, hostile or interested, an unescapable propaganda concerning private business with the ultimate design of promoting patronage of those advertising.' Gen. Outdoor Advertising Co. v. Dept. of Pub. Wks., 289 Mass. 149, 193 N.E. 799 (1935); see also, New York State Thruway Authority v. Ashley Motor Court, Inc., 10 N.Y. 2d 151, 218 N.Y.S. 2d 640, aff'd, 10 N.Y. 2d 814, 221 N.Y.S. 2d 518 (Ct. App. 1961).

Thus, we conclude that there is no right of billboard owners in this State to the benefit of unobstructed view from the Interstate highways. [3]

Since no right of view exists for these outdoor advertising structures, we must next examine the statutory law of this State to determine whether the Department has the authority to permit the cutting of trees and shrubbery. As a statutory agency of the State, every power asserted by the Department must flow from some statutory grant. Riley v. South Carolina State Highway Dept., 238 S.C. 19, 118 S.E. 2d 809 (1961).

***4** When the fee of the highway is in the state, the state may use the highway for any public purpose not prejudicial with the use for highway purposes. Pearlmutter v. Green, 259 N.Y. 327, 182 N.E. 5 (1932). For example, although the use of rights of way has been given to certain public utilities by the General Assembly, see eg., Code of Laws of South Carolina §§ 58–9–2020, 58–27–130 (1976), the use of rights of way for commercial advertising has been limited to the erection of informational signs in the vicinity of interchanges, Code of Laws of South Carolina § 57–25–170 (1976), and that statute does not address the issue here.

  

The only statute to which the attention of this office has been invited which might arguably support such a power is Code of Laws of South Carolina § 57–5–600 (1976), which provides:
Abandonment of right-of-way. Whenever the State Highway Department shall determine that any property previously acquired for right-of-way is not required for either right-of-way or departmental purposes, it may expressly abandon that right-of-way or property or any portion thereof, or may grant written permits to encroach thereon under such rules and regulations as the Highway Department may establish. *Provided*, no city street may be closed under this section without concurrence of the governing body of the municipality, except for interstate routes or controlled-access highways.

The bestowal of a permit as provided in this section undoubtedly constitutes the conferment of a substantial benefit upon the permittee. [4]

We conclude that this provision will not support theauthority sought to be exercised. First, the cases hold that property held by public agencies or subdivisions and which are devoted to a special public use, may be disposed of only under express legislative authority. Haesloop v. City of Charleston, 123 S.C. 272, 115 S.E. 596 (1923); cf. Cooper v. South Carolina Pub. Serv. Authority, 264 S.C. 332, 215 S.E. 2d 197 (1975). Such statutes are narrowly construed. Annot., 76 A.L.R. 2d 888 (1961); 39 Am. Jur. 2d Highways § 275 (1968). Second although the General Assembly may authorize encroachments which would otherwise be deemed nuisances, Chapman v. Greenville Chamber of Commerce, 127 S.C. 173, 120 S.E. 584 (1923), the authority of the General Assembly is limited in the exercise of this police power to those things necessary to promote public health, safety, morals and general welfare. Atl. Coast Line R.R. Co. v. South Carolina Pub. Service Comm'n, 245 S.C. 229, 139 S.E. 2d 911 (1965); Antonakas v. Anderson Chamber of Commerce, 130 S.C. 215, 126 S.E. 34 (1924). Finally, public property may not be donated to strictly private use, since that would constitute a palpable breach of the trust upon which it is held. Sloan v. City of Greenville, supra; Haesloop v. Charleston, supra. Since it is a fundamental principle of statutory interpretation that statutes are not to be impressed with interpretations which render them unconstitutional, Peoples Nat'l Bank of Greenville v. South Carolina Tax Comm'n, 250 S.C. 187, 156 S.E. 2d 769 (1967), we believe that the permit authority found in § 57–5–600 must be limited to public uses and is inapplicable to the circumstances of this case.

II

***5** Next, we examine the respective rights and powers of abutting land owners and the Department in those circumstances where the abutter also owns fee simple title to the right of way. Here, the abutting owner owns the fee subject to the public easement. Leppard v. Central Carolina Telephone Co., 205 S.C. 1, 20 S.E. 2d 755 (1944); Charleston Rice Milling Co. v. Bennett & Co., 36 S.C. Rep. (18 S.C.) 254 (1882). He may use the property in any manner not inconsistent with the public easement. Baring v. Heyward, 12 S.C. Rep. (2 Speers) 553 (1844); compare Opinion No. 2604, 1968 Op. Atty. Gen. 327 with Opinion No. 2725, 1969 Op. Atty. Gen. 186.

In various cases, the courts have concluded that the owner of the fee could take soil and other material, minerals, grass and herbage, plant and harvest trees, and install cellars, pipes and conduits. See generally 39 Am. Jur. 2d Highways § 163, et seq., 39A C.J.S. Highways § 138; Annot., 145 A.L.R. 1356 (1943); 10 E. McQuillin, supra, § 30.54, et seq. The principle is stated in Nichols, Law of Eminent Doman, Sackman, ed. § 5.81 (3d ed. 1966) as follows:
The trees and herbage in a public highway are the property of the owner of the fee. He has the right to use any portion of the way not needed for public travel, for growing grass, crops, or trees, either for their produce or for improving the appearance and enhancing the comfort of his premises . . ..

The owner's rights in the trees and herbage are, however, like all his rights within the limits of the way, subordinate to the rights of the public. When the trees or herbage interfere with the proper exercise of the highway easement, they must give way. For this reason trees may be cut down or trimmed in order to widen the wrought portion of the highway, or

  

to accommodate rails and wires laid by public service corporations in the highway, for any purpose which is classed as within the highway easement, without compensation to the owner of the fee.

As indicated, the use by the owner of the fee is always subservient to the public easements, Ankrim v. South Carolina Highway Department, 251 S.C. 42, 159 S.E. 2d 911 (1968), and to proper exercise of the police power. Atlantic Coast L. R. Co. v. S.C. Public Service Comm'n, supra; Sammons v. City of Beaufort, 225 S.C. 490, 83 S.E. 2d 153 (1954).

Defining the public easement then becomes central to the determination of the rights of the fee simple title holder. The best definition of a public easement is often that given by public use. A highway is a way over which the public at large have a free right of passage. It is constructed and maintained in their interest. This liberty of passage may always be exercised in such a manner as may, at the time, be customary and reasonable, having in view both the convenience of the public and the proprietary rights of the owners of the soil. As to what is reasonable under these limitations, every age, speaking by its common law, must of necessity judge by its own standard.

***6** Yale Univ. v. City of New Haven, 104 Conn. 610, 134A. 268, 47 A.L.R. 667 (1926)

Thus, it is necessary to examine the nature of the Interstate System with regard to the utility to the public of this vegetation.

The Interstate Highways constitute a limited access highway system with divided medians, designed for safe and efficient high speed travel. The rights of way are largely fenced and are designed so that the edge of the right of way extends far beyond the edge of the roadway. This margin of the right of way is maintained exclusively by the State through the Department. Under these circumstances, the public easement could extend to the growth of trees and shrubs along this margin, as the Department has done in the past for an improvement to the aesthetic qualities of the Interstate System as well as to reduce the cost of maintenance. In this circumstance abutting owners would have no right to cut trees or shrubs. This is because property once acquired for highway purposes may have added burdens and limitations within the category of public purposes, even though a private detriment to the abutting owner might result. Leppard v. Central Carolina Telephone Co., supra; Lay v. State Rural Electrification Authority, 182 S.C. 32, 188 S.E. 368 (1936); cf. South Carolina Highway Department v. Metts, Case No. 20585 (S.C. filed Jan. 18, 1978); see generally, 39A C.J.S. Highways § 142 (1976); 10 E. McQuillin, supra, § 30.54.

On the other hand, the Department might conclude that the retention of this growth does not fairly serve the interest of the public easement or the Department. In this circumstance, these trees and shrubs would no longer constitute part of the public easement, and could be harvested at the desire of the land owner and without regard to the placement of outdoor advertising devices. [5] It should be noted at this juncture that such a finding cedes the right to cut vegetation and does not grant authority to cut; where the Department does not own fee simple title to the right of way, it has no authority to authorize uses beyond street or public purposes. Sloan v. City of Greenville, supra; Bethel Methodist Episcopal Church v. City of Greenville, 221 S.C. 442, 45 S.E. 2d 841 (1947). In short, such a finding by the Department would be in recognition of the general rule that 'subject to valid police regulation, the abutter, if the owner of the fee, may use the street in front of his property, provided he does not interfere with the paramount right to the use of the streets by the public.' 10 E. McQuillin, supra, § 30.54 p. 758.

In the second circumstance, the Department could make reasonable regulations for the harvesting of timber or grass to preserve the safety of the motoring public. The Department could not discriminate between the motivation of the fee simple title holder, be it to expose an outdoor advertisement, harvest timber or otherwise. Finally, it should be noted that these rights, if they exist, belong to the owner of the fee simple title to the right of way and not necessarily to any sign owner. The sign owner would have to obtain permission of the owner of the fee, cf. Benton v. Yarborough, supra

and although apparently not decided in this State, the general rule is that the owner of premises abutting on a public street cannot use the premises for private profit by letting the privilege to another. 10 E. McQuillin, supra, § 30.70.

III

***7** Finally, you have inquired as to the authority of the Department to use its own maintenance crews to clear trees and shrubs in order that these billboards might be made more visible. I am attaching a copy of the opinion of this Office dated April 27, 1961, 1961 Op. Atty. Gen. 168, rendered to the Secretary-Treasurer of the Department which is self explanatory.

The fact that the Department charges the owners of the outdoor advertising devices the actual cost to the Department has no effect on this opinion.

The current appropriations act for the Department contains the following entry:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
Act No. 219, 60 Acts and Joint Resolutions 564, 757 (1977)

Under the Constitution of this State, the funds set forth in the Appropriation Act must be applied to the purpose for which they are appropriated and they cannot be constitutionally diverted from such purpose without statutory authorization. See Opinion No. 1656, 1964 Op. Atty. Gen. 91.

We can find no authority for a diversion of these funds for the purpose which you suggest, and in any event, funds received by the Department pursuant to such an arrangement would be required to be deposited with the State Treasurer for subsequent appropriation. Constitution of South Carolina Art. X § 9 (1895 as amended)

CONCLUSION

I

The South Carolina Department of Highways and Public Transportation is without authority to allow abutting owners to enter rights of way for Interstate highways held in fee simple by the Department, for the purpose of cutting trees and shrubs in order that billboards situate on the abutting property may be exposed to the motoring public.

II

If 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.

III

The Department of Highways and Public Transportation may not use its own maintenance forces to cut trees and shrubs for the purpose of exposing commercial outdoor advertising devices.

Marvin C. Jones

  

Assistant Attorney General

Footnotes

1 At first blush, the right to enter the rights of way and cut timber and brush for the purpose of exposing outdoor advertising devices may seem to be so unobtrusive that it would not constitute an encroachment or purpresture. However, in this State a purpresture has been defined as that circumstance 'when one encroacheth and makes that serviceable to himself which belongs to many.' Sloan v. City of Greenville, 235 S.C. 277, 111 S.E. 2d 573, 76 A.L.R. 2d 888 (1959). On further consideration, it will appear that such activity may well constitute a more obtrusive encroachment than the cutting of a drainage ditch, placing of underground pipe or encroachment within the airspace of the right of way by bay windows, balconies and similar structures over the street. In any event, in this State it would appear that a purpresture is a public nuisance per se.

2 Indeed, some cases have held that this right or easement of view includes the right to display and enjoy the benefits of exposure of outdoor advertisements, both advertising on premise activities, Kelbro, Inc. v. Myrick, 113 Vt. 64, 30 A. 2d 524 (1943), and display of activities or business activities foreign to the premises. Murphy, Inc. v. Town of Westport, 131 Conn. 292, 40 A. 2d 177 (1944); but see Wilson, Billboards and the Right to Be Seen From the Highway, 30 Georgetown L. J., 723 (1942). Whether in those states a right or easement of view exists in the unique circumstance of the Interstate-type limited access highway is not decided.

3 It should be noted that there is a distinction between a prescriptive or equitable easement of view, as discussed herein, and the States control of outdoor advertising asserted principally through the Highway Advertising Control Act, Code of Laws of South Carolina § 57–25–10, et seq. (1976). Nothing in that Act prohibits the owners of outdoor advertising devices which are legal and conforming from elevating those billboards above the elevation of the vegetation.

4 Since the Department is specifically prohibited from leasing any portion of the right of way of a controlled access highway facility for commercial enterprise activities, Code of Laws of South Carolina § 57–5–350 (1976), it is not possible to impose a quid pro quo, allowing the characterization of a permit as a lease.

5 Subject however to the limitation of Code of Laws of South Carolina § 57–23–20 which under certain circumstances prohibits the cutting of trees along segments of highways which have been specifically beautified. It should be noted that Code of Laws of South Carolina § 57–7–10 (1976) declares that 'any person who shall negligently, willfully or wantonly damage . . . trees or shrubs on a highway shall be guilty of a misdemeanor . . ..' We view this statute as only prohibiting the cutting of trees on the right of way which are within the public easement. Cf. Rupp v. Hiveley, 94 C.A. 667, 271 P. 768 (1928).

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