ALAN WILSON
ATTORNEY GENERAL

December 02, 2019

Mike Cochran, City Administrator
City of Hanahan
1255 Yeamans Hall Rd.
Hanahan, SC 29410

Dear Mr. Cochran:

Attorney General Alan Wilson has referred your letter to the Opinions section. The request letter reads as follows:

> In the City of Hanahan, we have multiple neighborhoods that are governed by covenants and restrictions (CCRs) that stipulate various rules and guidelines for those who live in the homes covered by those CCRs. ... The facts in the present situation are as follows:
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> Residents of Charleston Oaks all signed covenants and restrictions when they purchased their homes. At the time the CCRs were written, the roads in this subdivision were not public roads as the builder and then the homeowners association owned the roads. The roads were then inspected and approved to become part of the county roadway system, with the county being responsible for maintenance of the roads going forward. The county, Berkeley in this case, then is responsible for the roads, signage and maintenance going forward.
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> The CCRs stipulate that residents cannot park their vehicles on the street past 11pm or they would be towed. This rule has, heretofore, never been enforced. Recently, there was a situation where cars parked on the both sides of the roadway were parked such that less than 10 feet of space was left, thus impeding the access of an ambulance. The City of Hanahan has an ordinance that stipulates the minimum width required to be left when vehicles park on the street. This is enforced by the city police as necessary. The homeowner's board received communication that threatened them with legal action if they did not enforce the on-street parking prohibition from the CCRs.

This resulted in the erection of signage at the two entrances to the neighborhood and subsequent enforcement of their CCR parking after 11pm provision with vehicles being towed. (The neighborhood has approx. 600 homes and 4 miles of roadway.) In reviewing the relevant AGOs, the Cleary 02/05/2008 opinion speaks to the ability of a HOA to enforce laws and provisions on HOA owned 'private' roads. The issue with this case is that the covenants were written prior to the roads in the HOA area being accepted into the county road system. While the soil under the roads is still owned by the HOA, these are now county-maintained roadways making them public roads. Does the HOA have the legal authority to tow a vehicle that is in violation of the CCRs but is otherwise lawfully parked on a county-maintained roadway?

Law/Analysis

The request letter asks for this Office's opinion regarding a specific HOA and roads within a subdivision which may have been dedicated to Berkeley County. In order to address the issues raised, several questions of fact would need to be resolved. While this Office cannot investigate or determine facts in an opinion, we will provide you with relevant authorities which may assist in evaluating whether the HOA's restrictive covenants remain enforceable on roads that are maintained by the county. See Op. S.C. Att'y Gen., 1989 WL 508567, at 6 (July 17, 1989) (Fact-finding is beyond the scope of an opinion and is more appropriately reserved to "the province of the courts.").

The request letter states that residents in the HOA signed restrictive covenants when they purchased property within the subdivision, including a requirement that residents cannot park their vehicles on the street past 11 pm or the vehicles would be towed. It is further recounted that at some time after the covenants were drafted, the roads in the subdivision became "part of the county roadway system, with the county being responsible for maintenance of the roads going forward." The letter does not state how the maintenance and management of the roads in the subdivision became the responsibility of county. In light of the county maintenance and responsibility for such roads, the request letter asks whether the restrictive covenant regarding street parking is enforceable.

Ultimately, a court would likely scrutinize the method by which the county came to maintain and be responsible for the roads in the subdivision to determine whether the restrictive covenants are enforceable. Presumably, the roads were publicly dedicated to the county. "Dedication is the giving of land or an easement for the use of the public by the owner." Grady v. City of Greenville, 129 S.C. 89, 123 S.E. 494, 496 (1924). In Helsel v. City of N. Myrtle

Beach, 307 S.C. 24, 413 S.E.2d 821 (1992), the South Carolina Supreme Court described the process necessary for public dedication.

> Perfecting a dedication of property to public use involves two steps. First, an owner must express an intention to dedicate his property to public use in a positive and unmistakable manner. Boyd v. Hyatt, 294 S.C. 360, 364, 364 S.E.2d 478, 480 (Ct.App.1988). Second, there must be a public acceptance of the property offered for dedication. Id. at 365, 364 S.E.2d at 481.

307 S.C. at 26–27, 413 S.E.2d at 823. In Town of Kingstree v. Chapman, 405 S.C. 282, 301–02, 747 S.E.2d 494, 504 (Ct. App. 2013), the Court of Appeals explained that the owner's intention to dedicate and the public body's acceptance do not require formality.

> "As with intention to dedicate, no formal acceptance by a public authority is necessary to show public acceptance. Acceptance may be implied by the public or a public authority continuously using or repairing the property." Id. "The use, repair, and working of the streets by public authorities is a mode of acceptance." Tupper v. Dorchester Cnty., 326 S.C. 318, 326, 487 S.E.2d 187, 192 (1997). "The mere fact the County approved the plat does not constitute an acceptance of the proposed public dedication." Id. at 326–27, 487 S.E.2d at 192. "The nonassessment of taxes is a factor in the determination of dedication and acceptance. The payment of taxes on disputed property is evidence contrary to the intent to dedicate property to the public." Id. at 327, 487 S.E.2d at 192 (citation omitted).

405 S.C. at 303, 747 S.E.2d at 504; see also Helsel, 307 S.C. at 27–28, 413 S.E.2d at 824 ("Nonassessment of taxes on land may be considered in conjunction with other facts to show there has been a dedication and acceptance.").

> "A dedication must be made to the use of the public exclusively, and not merely to the use of the public in connection with a user by the owners in such measure as they may desire." Id. "[W]hile a landowner may dedicate land for a specific, limited, and defined purpose, he cannot retain discretion to alter or control future use of the property once it has been accepted by the public." Id. "[P]ublic dedications for a limited purpose are permissible, and ... where the dedicator's intended use of the property is clearly and specifically expressed, no deviation from such use may be permitted, no matter how advantageous the changed use may be to the public." Id.

405 S.C. at 304, 747 S.E.2d at 505.

Based on the description in the request letter, this Office cannot offer an opinion on whether the roads have been publicly dedicated. There is no description of the owner, presumably the developer of the subdivision, offering these roads to the county. The county maintenance and assumption of responsibility for the roads, as well as the incorporation of the roads into the county roadway system is a mode of acceptance identified in Chapman. In a subsequent discussion, it was additionally relayed that the roads do not appear to be subject to a taxation on at least one reporting system. This is a further factor in Chapman that weighs in favor of finding dedication and acceptance. While this Opinion cannot state that the roads are publicly dedicated, assuming the facts described are accurate, a court may well find that the county has accepted the dedication of the roads.

If it is determined that the roads have been dedicated to the county, the roads may still be subject to restrictions depending on whether the owner made any reservations in the conveyance.

> The historical disfavor of restrictive covenants by the law emanates from the widely held view that society's best interests are advanced by encouraging the free and unrestricted use of land. Courts tend to strictly interpret restrictive covenants and resolve any doubt or ambiguities in a covenant on the presumption of free and unrestricted land use. Thus, to enforce a restrictive covenant, a party must show that the restriction applies to the property either by the covenant's express language or by a plain unmistakable implication.
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> The rule of strict construction governing restrictive covenants does not preclude their enforcement. A restrictive covenant will be enforced if the covenant expresses the party's intent or purpose, and this rule will not be used to defeat the clear express language of the covenant. This restrictive covenant is a voluntary contract between the parties. Courts shall enforce such covenants unless they are indefinite or contravene public policy.

Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 893–94 (1987) (citations omitted). Whether a publicly dedicated road is subject to a restrictive covenant therefore turns on the clarity of the language and whether it complies with public policy. The following cases demonstrate how courts have dealt with conflicts arising from the application of restrictive covenants in developments and public dedication.

In Home Sales, Inc. v. City of N. Myrtle Beach, 299 S.C. 70, 382 S.E.2d 463 (Ct. App. 1989) the South Carolina Court of Appeals considered whether the City of North Myrtle Beach had the right to open a street which had been publicly dedicated to vehicular traffic and parking. Prior to the dedication, the road was part of a subdivision whose plat contained a legend stating in part, "The avenues may or may not be opened to the strand at the discretion of the owner." 299 S.C. at 73, 382 S.E.2d at 465. Afterwards, the developer "conveyed the avenues running from Ocean Boulevard to the beach and certain other property" to the city. Id. The deed to the city contained the following restrictive language:

> The GRANTORS reserve the right to open or not open the street ends aforesaid to the beach, and they have yet to so open any of the street ends. The GRANTORS so hereby grant to the GRANTEE the right to open the said street ends to the beach for pedestrian traffic, but the same shall not be opened to the beach for motor vehicle traffic. This restriction shall not be construed to prevent the GRANTEE from opening the said street ends and utilizing the same for the parking of motor vehicles or any other lawful public purposes.

299 S.C. at 74, 382 S.E.2d at 465 (emphasis added). Subsequently, the city opened the street to vehicular traffic and parking, and a property owner on the street sought an injunction. 299 S.C. at 72, 382 S.E.2d at 464. The Court held that the city was authorized to open the street to vehicular traffic and parking because the deed granted a fee simple to the city and the restrictions in the deed did not conflict with the use.

> [T]he deed from the Tilghmans is a valid deed and conveyed to the City of North Myrtle Beach a fee simple title to that part of Eighth Avenue which is the subject matter of this action. And we so hold. Accordingly, we hold that as a matter of law, the City had an absolute right to open Eighth Avenue for vehicular traffic and parking. Even assuming the language of reservation or restriction in the deed to be effective, the City's use of the property conforms.

299 S.C. at 78, 382 S.E.2d at 467–68. Therefore, if the dedication is in fee simple and otherwise conforms with applicable restrictive covenants, the public body may open the road to vehicular traffic and parking.

In contrast, in Jarmuth v Intern. Club Homeowners Ass'n, Inc., No. 2009-CP-26-3596, 2012 WL 10096357, at *13 (S.C.Com.Pl. Sep. 10, 2012), the Horry County Court of Common Pleas held that publicly dedicated streets with restrictive covenants authorized an HOA to tow or remove vehicles. The court described the conveyance and relevant restrictive covenant as follows:

> The streets and the roads in the Community were initially owned by the Developer. D.R. Horton conveyed Right of Way Easements for International Boulevard and Pickering Drive to Horry County by deed recorded on February 26, 2006. Currently all existing streets and roads in the Community, except in the Glens, the Villas, and the Cambridge, are maintained by Horry County. Horry County obtained Right of Way easements over the rest of the streets in the International Club, which dedicated the streets.

Id. at *2. "Section 7.25 of the Declaration specifically addresses parking on the streets and Common Area in the Community. This Section specifically authorizes the Defendant HOA to

tow or remove vehicles and enforce parking as it does assessments." Id. at *12. In finding that the publicly dedicated streets remained subject to Section 7.25, the Court explained:

> "If a dedication is made for a specific or defined purpose, neither the Legislature, a municipality, or its successor, nor the general public has any power to use the property for any other purpose than the one designated, whether such use be public or private, and whether the dedication is a common-law or a statutory dedication, and this rule is not affected by the fact that the changed use may be advantageous to the public." Id.
>
> "The party dedicating land...may impose certain restrictions or reservations." 77 Am. Jur. Proof of Facts 3d 1. "However, the dedicator cannot attach conditions or reservations that are inconsistent with the grant or which violate public policy." Id. "Various conditions and reservations have been judicially validated, such as conditions restricting the use of a street for pedestrians, or limiting the use of a road to specific time periods during a year." Id. "In order to create conditions or reservations, appropriate and specific language must be used." Id, See also, Olde Severna Park Improvement Ass'n v. Gunby, 402 Md. 317, 936 A.2d 365 (2007) (holding that a developer's notation on a plat reserving riparian rights served only to ensure that the riparian rights were not dedicated to the public or a governing body). "Generally, acceptance by the public body constitutes agreement to the condition or reservation." Id.

Id. Under Jarmuth, a publicly dedicated road may be subject to restrictive covenants and enforceable against property owners who have also accepted the covenants by purchasing property within the subdivision. The acceptance of the public dedication was apparently subject to these restrictions. The complaining property owner had also bound himself to these restrictions. Please note however that the Court did not address whether the restriction against street parking would be enforceable against someone that had not bought property in the subdivision subject to restrictive covenants.

This Office has not identified a South Carolina case directly addressing whether a restrictive covenant that applies to a publicly dedicated road would be enforceable against the public generally. There are cases in other jurisdictions which our courts may look to as persuasive authority. In Maryland Estates Homeowners' Ass'n v. Puckett, 936 S.W.2d 218, 219 (Mo. Ct. App. 1996), the Missouri Court of Appeals addressed whether a restrictive covenant against parking trucks or commercial vehicles "in streets, yards, or drive ways" in a subdivision was enforceable on streets which had been "dedicated to the City of Maryland Heights for public use forever." The issue raised was whether "because the streets have been dedicated to the public, the Association has lost the power to control their use." Id. The court held that the property owners in the subdivision were bound by the restriction against parking trucks or commercial vehicles on the publicly dedicated streets and issues an injunction against future violations. Id. In so holding, the Court explained, "The Indenture of Trust and Restrictions is a contract to which each homeowner becomes a party when acquiring property in the subdivision. By acquiring the property the owners agree to the terms of the restrictive covenants contained in

the Indenture." Id. (citations omitted). However, the Court mused in dicta whether contrary authority might dictate a different result "if the Association were attempting to restrict the accessibility of the streets to members of the public who are not residents of the subdivision." Id. (identifying City of Camdenton v. Sho–Me Power Corp., 361 Mo. 790, 237 S.W.2d 94 (1951) as authority that "dedicator cannot attach conditions or limitations inconsistent with the legal character of the dedication or which exclude public control of the property"). While the Court did not directly address the issue, the digression casts doubt on the enforceability of such restrictions against persons who had not agreed to be bound by purchasing property in the subdivision.

Finally, in Hardin v. City Wide Wrecker Serv., Inc., 232 Ga. App. 617, 502 S.E.2d 548 (1998) the Georgia Court of Appeals found a towing company liable for conversion for towing a vehicle at the request of a HOA from a street that had been dedicated to DeKalb County. The HOA entered into a contract with a towing company to remove and store cars "improperly parked" within the community. Id. at 617. A representative of the HOA called the towing company to remove a car that was parked along the side of Royal Path Court, a road in the community, not in a marked parking space. Id. The car's owner brought suit against the towing company for conversion and sought a declaratory judgement that the towing company had no authority to remove cars from the public street where she had parked. Id. The Court described the sequence of the developer's conveyance of property to the HOA and the streets to the county.

> In relevant part, the recorded plat states: "[Developer] ... hereby convey[s] all streets and rights-of-way shown hereon in fee simple to DeKalb County."
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> ... In the Declaration of Covenants, Conditions, and Restrictions, the Common Area of the subdivision, which is considered to be the property of [HOA], is defined as "all areas other than that in the bounds of a Townhouse Lot, includ[ing] but not limited to the sidewalks and parking area, the street islands, *but excluding the street area.*" (Emphasis supplied.) On June 17, 1982, DeKalb County notified [Developer] that the roads in the Towne Park subdivision were satisfactory for county maintenance, thereby implicitly accepting the original dedication.
>
> Based on these documents of conveyance, Royal Path Court must be considered a public street, having been dedicated to and accepted by DeKalb County. ...

Id. at 618. Because the Court held that Royal Path Court was a public street which had not been conveyed to the HOA, the HOA had no authority to have the car towed. Consequently, the Court found that the towing company, which acted as the HOA's agent, likewise did not have authority to tow the car and held it to be liable for conversion.

While these cases admittedly come to different results, they have commonality in that the authority of a HOA to regulate streets within the community after public dedication depends on the conveyance, namely whether the dedication contained a condition or reservation. Again, this

Office cannot offer an opinion on whether the subject HOA retains the power to tow vehicles based on a violation of the restrictive covenant against parking after 11 pm as that would require factual determinations.

Conclusion

The request letter asks for this Office's opinion regarding a specific HOA and roads within a subdivision which may have been dedicated to Berkeley County. In order to address the issues raised, several questions of facts would need to be resolved. While this Office cannot investigate or determine facts in an opinion, the authorities discussed above may assist in evaluating whether the HOA's restrictive covenants remain enforceable on roads that are maintained by the county.

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Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

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