

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Patrick C. Fant, III, Circuit Court Judge

Case No. 2023-CP-23-04246
Appellate Case No. 2024-000999

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SC Court of Appeals

Anderson Laurens Road AA, LLC and Anderson
Laurens Road ZZ, LLC,

Appellants,

v.

Annacey Park Homeowners Association, Inc.
and the City of Greenville,

Respondents.

APPELLANTS' INITIAL BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
STANDARD OF REVIEW	4
I. DEDICATION.....	4
II. STATUTORY ROAD CLOSURE.....	4
FACTS	5
ARGUMENT.....	7
I. IN THE FACE OF THE CITY’S UNEQUIVOCAL DENIAL OF ANY PUBLIC INTEREST, THE CIRCUIT COURT ERRED BY FAILING TO CONFIRM TITLE ACCORDING TO THE PARTIES’ STIPULATIONS OF OWNERSHIP.....	7
II. NOTWITHSTANDING RESPONDENT’S FAILURE TO PROVE A PUBLIC INTEREST IN KELLETT DRIVE, THE LOWER COURT ERRED BY MISCONSTRUING THE “BEST INTERESTS” STANDARD SET FORTH IN S.C. CODE ANN. § 57-9-20.....	10
CONCLUSION.....	12

TABLE OF AUTHORITIES

	Page(s)
Cases	
<u>Anderson v. Town of Hemingway</u> , 269 S.C. 351, 237 S.E.2d 489 (1977).....	8
<u>Babb v. Harrison</u> , 220 S.C. 20, 66 S.E.2d 457 (1951).....	8
<u>Bethel M.E. Church v. City of Greenville</u> , 211 S.C. 442, 45 S.E.2d 841 (1947).....	11
<u>Burrell v. Kirkland</u> , 242 S.C. 201, 130 S.E.2d 470 (1963).....	8
<u>City of Greenville v. Bozeman</u> , 245 S.C. 306, 175 S.E.2d 211 (1970).....	10
<u>City of Rock Hill v. Cothran</u> , 209 S.C. 357, 40 S.E.2d 239 (1946).....	11
<u>Fanning v. Stroman</u> , 113 S.C. 495, 101 S.E. 861 (1919).....	8
<u>First Baptist Church of Mauldin v. City of Mauldin</u> , 308 S.C. 226, 417 S.E.2d 592 (1992).....	4, 10
<u>Helsel v. City of North Myrtle Beach</u> , 307 S.C. 24, 413 S.E.2d 821 (1992).....	8
<u>Hoogenboom v. City of Beaufort</u> , 315 S.C. 306, 433 S.E.2d 875 (Ct. App. 1992).....	7
<u>Horry County v. Laychur</u> , 315 S.C. 364, 434 S.E.2d 259 (1993).....	8
<u>Keowee Inv. Grp., LLC v. Pickens Cnty., S.C. Dep't of Transp.</u> , No. 2004-UP- 459, 2004 WL 6331837 (S.C. Ct. App. Aug. 30, 2004).....	4
<u>Ledford v. Pa. Life Ins. Co.</u> , 267 S.C. 671, 230 S.E.2d 900 (1976).....	4
<u>Mack v. Edens</u> , 320 S.C. 236, 464 S.E.2d 124 (Ct.App.1995).....	4, 8
<u>Shia v. Pendergrass</u> , 222 S.C. 342, 72 S.E.2d 699 (1952).....	9
<u>Town of Kingstree v. Chapman</u> , 405 S.C. 282, 747 S.E.2d 494 (Ct. App. 2013).....	4, 7
Statutes	
Freedom of Information Act.....	11
S.C. Code Ann. § 57-3-120(1).....	7
S.C. Code Ann. § 57-9-10 to 40.....	5
S.C. Code Ann. § 57-9-20.....	1, 10

Other Authorities

Asking What Legal Rights the County Has to Dirt Roads Which Have Not Been Acquired by the County by Easement or Dedication, Op. SC Att’y Gen. 2 (1997)7

SCRCP Rule 52.....10

SCRCP Rule 52(a)10

SCRCP Rule 52(b).....2, 3

SCRCP Rule 59..... 10

SCRCP Rule 59(e)2, 3

STATEMENT OF ISSUES ON APPEAL

- I. IN THE FACE OF THE CITY'S UNEQUIVOCAL DENIAL OF ANY PUBLIC INTEREST, DID THE CIRCUIT COURT ERR BY FAILING TO CONFIRM TITLE ACCORDING TO THE PARTIES' STIPULATIONS OF OWNERSHIP?

- II. NOTWITHSTANDING RESPONDENT'S FAILURE TO PROVE A PUBLIC INTEREST IN KELLETT DRIVE, DID THE CIRCUIT COURT ERR BY MISCONSTRUING THE "BEST INTERESTS" STANDARD SET FORTH IN S.C. CODE ANN. § 57-9-20.

STATEMENT OF THE CASE

On August 18, 2023, Appellants brought this action before the Greenville County Circuit Court seeking to foreclose any public rights in and to Kellett Drive and to confirm title in accordance with applicable reversionary interests. (*Appellants' Summons and Complaint*). Appellants named Annacey Park Homeowners Association, Inc., a South Carolina nonprofit corporation (the "HOA"), as a party defendant and reversionary interest holder. (*Id.*) Appellants also named the City of Greenville as the presumed custodian of any public interest in Kellett Drive. (*Id.*)

The HOA filed an Answer on September 20, 2023, containing general denials and no counterclaims. (*Answer of Annacey Park Homeowners Association, Inc.*) The City of Greenville filed its Answer on October 9, 2023, in which it disclaimed any interest in Kellett Drive apart from existing and planned public utility easements. (*Answer of the City of Greenville*).

On April 5, 2024, the parties entered a Stipulation of Facts as to the reversionary interests; thereby eliminating any questions of fact and points of law in respect of quiet title claims. (*Stipulation of Facts*). An evidentiary hearing took place on April 8, 2024, and on April 10, 2024, the Honorable Patrick C. Fant, III issued a Form 4 Order (the "Form 4 Order") denying Appellants' Petition for Statutory Road Closure. (*Form 4 Order dated April 10, 2024*). The Form 4 Order is two sentences in length, the first sentence being a statement of posture. (*Id.*) The second sentence concludes as follows: "...Petitioner's Petition is hereby DENIED because it is not in the best interest of all concerned that Kellett Drive be abandoned or closed." (*Id.*)

On April 19, 2024, Appellants filed a Motion to Alter or Amend Pursuant to Rule 52(b) or, in the alternative, for Reconsideration Pursuant to Rule 59(e). (*Rule 52/59 Motion*). Thereafter, on April 24, 2024, all parties were copied on an email from the Law Clerk to the Honorable Patrick C. Fant, III declaring that Judge Fant "...stands by his Order. However, Judge Fant requests that

Counsel for [the HOA] prepare an Amended Formal Order to include findings of fact and conclusions of law consistent with arguments in the written Motion, as well as argued orally at the April 8th, 2024 hearing.” (*Law Clerk’s Email dated April 24, 2024*). On or about June 4, 2024, the Honorable Patrick C. Fant, III issued a second Order (the “Second Order”). (*Order dated June 4, 2024*). The Second Order explicitly denies Appellants’ Motion to Alter or Amend Pursuant to Rule 52(b) or, in the alternative, for Reconsideration Pursuant to Rule 59(e). (*Id.*).

Appellants filed their Notice of Appeal with this Court on June 13, 2024.

STANDARD OF REVIEW

I. DEDICATION.

“The determination of whether a roadway has been dedicated to the public is an action in equity.” Mack v. Edens, 320 S.C. 236, 239, 464 S.E.2d 124, 126 (Ct.App.1995). As such, the appellate courts have jurisdiction “to find facts in accordance with [their] own view of the preponderance of the evidence.” Id. Town of Kingstree v. Chapman, 405 S.C. 282, 301–02, 747 S.E.2d 494, 504 (Ct. App. 2013).

II. STATUTORY ROAD CLOSURE.

Review of a trial court's decision on abandonment of public rights pursuant to the South Carolina road closure statute is subject to an abuse-of-discretion standard. First Baptist Church of Mauldin v. City of Mauldin, 308 S.C. 226, 229, 417 S.E.2d 592, 594 (1992) (finding that, in light of the evidence in the record supporting the road closing, the trial court properly considered the public's interest as required by statute and no abuse of discretion occurred). Abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. Ledford v. Pa. Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976). Keowee Inv. Grp., LLC v. Pickens Cnty., S.C. Dep't of Transp., No. 2004-UP-459, 2004 WL 6331837, at 2 (S.C. Ct. App. Aug. 30, 2004).

FACTS

Kellett Drive is a road approximately 25 feet wide and 250 feet long. (*Stipulation of Facts*). It intersects perpendicular with Laurens Road (aka the Greenville “Motor Mile”) in an area lined with busy automobile sales and service dealerships. (*Stipulation of Facts; Hrg. Transcript at 11-12*). For nearly its entire length, Kellett Drive is bound by the following two properties: (i) 2448 Laurens Road, Greenville, SC 29607 (TMS #: 0263.00-01-011.06) owned by Anderson Laurens Road AA, LLC, a South Carolina limited liability company (“Laurens Road AA”); and (ii) 2512 Laurens Road, Greenville, SC 29607 (TMS #: 0263.00-01-018.00) owned by Anderson Laurens Road ZZ, LLC, a South Carolina limited liability company (“Laurens Road ZZ”). (*Stipulation of Facts*). At the terminus of Kellett Drive, there is a breach in the perimeter fencing that bounds the Annacey Park. (*Stipulation of Facts; Hrg. Transcript at 11*). This breach is marked with HOA signage declaring the HOA property is private and no public access is allowed. (*Hrg. Transcript at 38-39*). Direct access to the HOA property is by way of Henderson Road. (*Stipulation of Facts; Hrg. Transcript at 30*).

Conservatively assuming that the City would claim Kellett Drive as a public right of way, Appellants followed the procedural requirements of a statutory road closure set forth in S.C. Code Ann. § 57-9-10 to 40. (*Appellants’ Complaint; Hrg. Transcript at 8-9*). In particular, Appellants published notice of intent to seek abandonment of public rights in *The Greenville News* for three consecutive weeks. (*Appellants’ Complaint; Hrg. Transcript at 9*). Appellants also provided certified mail notification to the HOA as an abutting owner and posted Kellett Drive with statutory signage. (*Appellants’ Complaint; Hrg. Transcript at 9*). Appellants’ assumptions as to the public character of the Kellett Drive proved to be false. The City of Greenville, averred in paragraph 3 of

its Answer: “Respondent City of Greenville admits the allegations of paragraph 5,¹ but denies that it claims an interest in Kellett Drive apart from existing and planned public utility easements. Accordingly, Respondent City of Greenville does not object to the closure of Kellett Drive, subject, however, to the aforementioned easement rights.” (*Answer of the City of Greenville*). At the final hearing, the City’s representative buttressed these averments, stating “We had legal do research, and they could not find any evidence of it ever being deeded to the City or the County at that time.” (*Hrg. Transcript at 44*). Further, the City confirmed no desire to take Kellett Drive into the public roads inventory on account of its poor condition. (*Hrg. Transcript at 44*).

The HOA argued singularly that its private interests were sufficient to support denial of the relief sought by Appellants. In particular, the HOA offered the expert testimony of Mr. James Kines, a retired police officer and former director campus safety at Anderson University. (*Hrg. Transcript at 24*). Mr. Kines admitted that Kellett Drive exclusively serves the private interests of Annacey Park residents. (*Hrg. Transcript at 31*). Likewise, the HOA offered the testimony of its President, Scott Johnson. Mr. Johnson confirmed the singular use of Kellett Drive is to serve the private interests of Annacey Park homeowners. (*Hrg. Transcript at 38-39*).

¹ Paragraph 5 of Appellants’ Complaint asserted the City’s status as a South Carolina municipality charged with maintaining public roads within its jurisdiction and with defending any claims adverse to such public rights of way.

ARGUMENT

I. IN THE FACE OF THE CITY'S UNEQUIVOCAL DENIAL OF ANY PUBLIC INTEREST, THE CIRCUIT COURT ERRED BY FAILING TO CONFIRM TITLE ACCORDING TO THE PARTIES' STIPULATIONS OF OWNERSHIP.

As a threshold matter in any road abandonment action, it must first be determined whether the subject road is, or is not, a public road. Town of Kingstree v. Chapman, 405 S.C. 282, 747 S.E.2d 494 (Ct. App. 2013)²; Hoogenboom v. City of Beaufort, 315 S.C. 306, 316–17, 433 S.E.2d 875, 883 (Ct. App. 1992), *adhered to on reh'g* (Apr. 29, 1993). In his June 20, 1997 opinion, South Carolina Attorney General, Charles Condon, reflects on how public roads are established. Asking What Legal Rights the County Has to Dirt Roads Which Have Not Been Acquired by the County by Easement or Dedication, Op. SC Att'y Gen. 2 (1997). Attorney General Condon identified statutory proceedings (e.g., condemnation or legislation), dedication or prescription as the possible origins of public entitlement. None of these bases for public rights in Kellett Drive were proved or even argued to the lower court; therefore, by declining to quiet or confirm title according to the parties' stipulations, the lower court would create a public interest in Kellett Drive where no such rights previously existed. In other words, the lower court would establish a public road by judicial fiat. Moreover, even if the HOA had attempted to prove a public interest in Kellett Drive, that effort would have failed due to the City's unequivocal disavowals.

As for statutory enactments or condemnation, the City's Engineer, Eddie Littleton, declared that the City Attorney researched the origins of Kellett Drive. (*Hrg. Transcript at 44*). While Appellants reject any obligation to prove the negative, surely the City's filed Answer

² *Town of Kingstree v. Chapman* lays bare the governing principle: Proof of dedication (or any public interest) must precede any finding for or against statutory abandonment because, without a prior finding of public rights, the public road closure statute is inapplicable. *See, also*, S.C. Code Ann. §57-3-120(1) "'Highway', 'street', or 'road' are general terms denoting a public way for the purpose of vehicular travel, including the entire area within the right-of-way, and the terms shall include roadways, pedestrian facilities, bridges, tunnels, viaducts, drainage structures, and all other facilities commonly considered component parts of highways, streets, or roads."

denying any interest in Kellett Drive and Mr. Littleton's testimony belie creation of public rights by legislation or condemnation. And, the HOA offered no suggestion that Kellett Drive became public by statutory proceeding.

The requirements to establish a right by prescription are: (1) the continued and uninterrupted use or enjoyment of the right for the 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. Babb v. Harrison, 220 S.C. 20, 66 S.E.2d 457 (1951). Permissive use of a road does not convert it into a public highway. Fanning v. Stroman, 113 S.C. 495, 101 S.E. 861 (1919). Additionally, the route must be used by the public generally and not by particular individuals. In other words, the use must not be by a limited community or class of people. Burrell v. Kirkland, 242 S.C. 201, 130 S.E.2d 470 (1963). Setting aside the City's unambiguous declarations refuting the public status of Kellett Drive (*Answer of the City of Greenville; Hrg. Transcript at 44*), the HOA admitted in testimony that present and historical use of Kellett Drive is indeed limited to discrete and minute class of people, not the general public (*Hrg. Transcript at 31, 38-39*).

Likewise, the HOA did not assert the creation of a public interest in Kellett Drive by dedication, but any effort to do so would have failed. Dedication requires two elements. First, the owner must express a positive and unmistakable intention to dedicate his or her property to public use. Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993). Second, there must be, within a reasonable time, an express or implied public acceptance of the dedicated property. Helsel v. City of North Myrtle Beach, 307 S.C. 24, 413 S.E.2d 821 (1992); Mack v. Edens, 320 S.C. 236, 239, 464 S.E.2d 124, 126 (Ct. App. 1995). "The burden of proof to establish dedication is upon the party claiming it." Anderson v. Town of Hemingway, 269 S.C. 351, 237 S.E.2d 489 (1977). "[D]edication is an exceptional mode of passing an interest in land, and the proof of dedication

must be strict, cogent, and convincing.” Shia v. Pendergrass, 222 S.C. 342, 72 S.E.2d 699 (1952).

Again, the City’s pleading is a dispositive denial of acceptance, but the City Engineer’s testimony is worth restatement on this point:

- Q. Okay. Thank you. So, while, while you're up there, maybe I can just confirm some of the conclusions that were set forth in, in your email that, that is the City's position that, that Kellett is not in the public road inventory presently.
- A. That is correct.
- Q. You couldn't find anything that, that demonstrated a dedication or acceptance?
- A. That is correct. We had legal do research and they could not find any evidence of it ever being deeded to the City or the County at the time.
- Q. And, and does it, does it continue to be your position that, that, that the City is opposed to accepting Kellett Drive into its public inventory?
- A. Yes, it is, it is engineering's stance that we would rather not maintain Kellett Drive because of the various reasons that you had mentioned.

(Hrg. Transcript, p. 43, lines 20-25 and p. 44, lines 1-10).

In sum, the record contains no evidence of statute, legislative act, prescription or dedication as the basis for a public interest in Kellett Drive. By contrast, the record contains clear and convincing evidence that the City -- as the obvious guardian of public interests -- disclaims Kellett Drive as a public road. The HOA failed to carry its burden of proving such a public interest; indeed, the HOA failed even to attempt such an effort. This failure obviates a ruling on statutory abandonment. As argued to the lower court “because of the denial in the City’s complaint, it, [this matter] is...just a quiet title action” (*Transcript p. 8, lines. 5-7*), and the lower court erred by not giving repose to the title interests in the land occupied by Kellett Drive according to filed Stipulations.

II. NOTWITHSTANDING RESPONDENT’S FAILURE TO PROVE A PUBLIC INTEREST IN KELLETT DRIVE, THE LOWER COURT ERRED BY MISCONSTRUING THE “BEST INTERESTS” STANDARD SET FORTH IN S.C. CODE ANN. § 57-9-20.

The Circuit Court’s Form 4 Order summarily concludes “Petitioner’s Petition is hereby DENIED because it is not in the best interest of all concerned that Kellett Drive be abandoned or closed.” Appellants protested to the lower court that Rule 52(a) requires “factual findings based on the evidence presented at the merits-hearing and that the [lower court should] set forth its conclusions of law.” The lower court’s subsequent Order (purporting to deny Appellants’ Rule 52 and Rule 59 Motions) does include findings of fact and conclusions of law (*Order dated June 4, 2024*), but critically, the lower court’s findings and legal conclusions in this subsequent Order are disconsonant:

During the hearing testimony was presented that Kellett Road was frequently used by the residents of Annecy Park subdivision. In fact, Kellett Road is essential for the residents of Annecy Park. Testimony was presented that stressed the importance of Kellett Road to provide, at least, secondary emergency services and access to Kellett Road. Therefore, based on the pleadings, the stipulations of the parties, and the testimony presented at trial, I find that it is in the best interest of all concerned that the Petitioners request to abandon the any public interest and permanently close Kellett Road be denied.

(Order dated June 4, 2024).

As stated in First Baptist Church of Mauldin v. City of Mauldin, 308 S.C. 226 229 417 S.E.2d 592, 593-4 (1992), “it must appear clearly that no consideration other than that of the public interest could have prompted the action.” The Court’s Order suggests an alternative standard whereby “all” parties in interest—private and public—must be served by a closure decree, but such an alternate standard is inconsistent with South Carolina precedents. The common law of South Carolina is replete with road closure decisions that distinguish between private and public interests. City of Greenville v. Bozeman, 245 S.C. 306, 175 S.E.2d 211 (1970) is a good example. The Court in Bozeman upheld a closure decision finding that the inconvenience of a small group

of people similarly situated (i.e., private interests) “seems insignificant and certainly outweighed by the advantages which would accrue to the City and the public generally by [closure and redevelopment].” *Id.* at 317. By contrast, in Bethel M.E. Church v. City of Greenville, 211 S.C. 442, 45 S.E.2d 841 (1947), the Court honored a private-interests petition, reversing a closure decision because there was an insufficient showing that the “public interests were subserved by [closure]....” City of Rock Hill v. Cothran, 209 S.C. 357, 40 S.E.2d 239 (1946) is also informative. In City of Rock Hill, the Court notes that precluding closure in the instance of an ancillary private benefit would entirely cut off the power to vacate. *Id.* at 367. There is always a private actor that benefits from closure. It must also be true that the existence of some private detriment or inconvenience cannot preclude closure. Only the interests of the larger public can prompt a closure decision.

In the present action, the only evidence offered as to the broader public interest was in support of closing Kellett Drive, and the HOA argued only its private convenience in response. Through a Freedom of Information Act request, Appellants acquired email correspondence by and between Clint Link (Director of Engineering Services – City of Greenville), Austin Rutherford (Senior Development Planner – City of Greenville), and Eddie Littleton (Assistant City Engineer – City of Greenville) dated February 14, 2023. (*City of Greenville Email dated February 14, 2023*). This Email was entered into evidence at the final hearing and its essence was broadly discussed. The City’s perspective set forth in the email is that: (i) Kellett Drive was always intended to be a private emergency access; (ii) pedestrian, bike and vehicular access would more safely utilize the signalized intersection of Henderson and Laurens Roads; (iii) Kellett Drive is a dead end that does not meet the City of Greenville’s standards; and (iv) Kellett Drive is not a road the City of Greenville wants to serve as a public right of way. In other words, the only evidence of a general

public benefit as would properly guide a statutory abandonment decision was decidedly in favor of closure. The HOA offered no evidence of how the general public would be served by Kellett Drive; rather, the HOA merely pointed to its private inconveniences. As such, it was error for the lower court to find that the general public was subserved by its decision.

CONCLUSION

For the reasons set forth above, Appellants respectfully request this Court reverse the judgment of the Circuit Court.

Respectfully submitted,

/s/ William B. Swent

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August 8, 2024

PROOF OF SERVICE

This is to certify that I have, this 8th day of August, 2024, served a true and correct copy of **APPELLANTS' INITIAL BRIEF** in the above-captioned action by U.S. mail and e-mail to:

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The Honorable Jenny Abbott Kitchings
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RE: Annacey Park Homeowners Association, Inc. and the City of Greenville v. Anderson
Laurens Road AA, LLC and Anderson Laurens Road ZZ, LLC
Appellate Case No. 2024-000999

Dear Ms. Kitchings:

Enclosed for filing is Appellants' Initial Brief along with our proof of service. By copy of this letter, copies of the same are being served upon counsel for Respondents.

Thank you for your assistance in this matter.

Sincerely,

Fox Rothschild LLP

/s/ William B. Swent

William B. Swent

WBS/ela

Enclosures

cc: Via U.S. Mail & e-mail (lbixler@bbdlawsc.com & pdollar@bbdlawsc.com) to A. Lyon Bixler, Esquire & Patrick O. Dollar, BIXLER AND DOLLAR, LLC, Attorneys for Respondent Annacey Park Homeowners Association, Inc.

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