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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON  
ATTORNEY GENERAL

September 23, 2002

The Honorable André Bauer  
Senator, District No. 18  
Post Office Box 142  
Columbia, South Carolina 29202

**Re: Your Letter of July 25, 2002  
City Of Union Sewer Lines**

Dear Senator Bauer:

In your above-referenced letter, you ask for an opinion concerning the use of private property by the City of Union for the purpose of installing sewer lines. By way of background, you indicate that a citizen of Union granted "an easement and right-of-way [to the city] for a sewer line to be installed ... ." You further indicate that City zoning officials have indicated that they cannot recognize or honor the deed and that "... the City wants to put a sewer line through another piece of property that would mean she would have to give up more land to the city." Given this background, you specifically ask "whether or not the city has to recognize this deed of property to the City of Union for the purpose of installing sewer lines."

Municipalities, such as Union, are authorized to acquire property for construction of sewage systems to promote the public health, comfort and welfare. The property may be acquired through agreement with the land owner or through condemnation. The exercise of eminent domain, or condemnation, is an inherent attribute of the sovereign, which the General Assembly has delegated to municipalities. See OP. ATTY. GEN. DATED OCTOBER 8, 1990.

S.C. Code Ann. § 5-7-50 provides in pertinent part that

Any municipality desiring to become the owner of any land or to acquire any easement or right-of-way therein for any authorized corporate or public purpose shall have the right to condemn such land or right-of-way or easement, subject to the general law of this State. ...

More specifically, Section 5-31-420 provides that "[i]n case the owner of ... any land desired by the [municipal] corporation for enlarging, extending, or establishing a sewerage system ... shall refuse

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to sell it, the municipal corporation may condemn the land in the manner provided in the Eminent Domain Procedure Act (Chapter 2 of Title 28)."

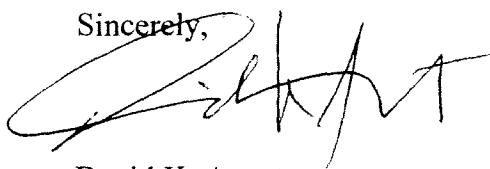
While a private property owner has the right to contest condemnation proceedings, the public body's determination that condemnation of a certain tract of land is necessary for public use is not subject to judicial review in the absence of fraud, bad faith, or clear abuse of discretion. See Sease v. City of Spartanburg, 242 S.C. 520, 131 S.E.2d 683 (1963); Cameron v. City of Chester, 253 S.C. 574, 172 S.E.2d 306 (1970). Further, it has been held that the power of eminent domain includes the discretion to select the location of the land to be taken. See Brannen v. Bulloch Cnty, 387 S.E.2d 395 (Ga. App. 1989); Father Flanagan's Boys' Home v. Millard School District, et al., 242 N.W.2d 637 (Ne. 1976); Canal Authority v. Miller, 243 So.2d 131 (Fla. 1970); and State v. Pacific Share Land Co., 269 F.2d 512 (Ore. 1954). The exercise of this discretion to determine the location of land to be taken is also not subject to review absent fraud, bad faith or clear abuse of discretion. Id.

Based on the above cited authority, it does not appear to be appropriate for this Office to question the location selected for the particular sewer line by the City of Union. This determination, however, does not mean that citizens, such as the one referenced in your letter, are left without possible avenues of recourse. For example, the owner of an easement may relinquish that easement by express or implied abandonment. Immanuel Baptist Church of North Augusta v. Barves, 274 S.C. 125, 264 S.E.2d 142 (1980). The intent to abandon "... can either appear by an express declaration of the owner, or be implied from his acts and conduct and the circumstances of the case." Id. An easement that is abandoned is lost to the owner of the easement. Carolina Land Company, Inc. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975).

The City's expression of intent to place the sewer line on a piece of property other than the granted easement and right-of-way may indicate that the City intends to abandon that easement. Perhaps the citizen referenced in your letter should seek an express declaration from the City of this intention. In the alternative, the citizen could seek judicial review.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,



David K. Avant  
Assistant Attorney General

DKA/an