

1978 S.C. Op. Atty. Gen. 76 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-48, 1978 WL 22530

Office of the Attorney General

State of South Carolina

Opinion No. 78-48

March 10, 1978

***1 Re: Authority of State Highway Department to Permit Private Individual or Company to Construct Pedestrian Walkway Facility Above and Across State Highway**

Mr. E. S. Coffey
State Highway Engineer
S. C. State Highway Dept.
P. O. Box 191
Columbia, South Carolina 29202

Dear Mr. Coffey:

Reference is made to recent telephone conferences, concerning an inquiry from one of the Highway Commissioners as to whether the Highway Department has the authority to issue a permit to a private individual or company for the erection of a pedestrian passageway above and across a State highway. For the purpose of this opinion, it is assumed that the Highway Department acquired right of way through easement from a private landowner for the construction of the highway in question, or that the right of way was acquired through condemnation purposes, with the underlying fee still owned by the landowner. It is further assumed that the erection of the pedestrian passageway would cause no obstruction or encroachment in the traffic movement area of the highway in question.

I enclose herewith copy of the Supreme Court's decision in [Sloan v. City of Greenville, et al.](#), 235 S.C. 277, 111 S.E.2d 573, which case involved a suit by a taxpayer to enjoin the City of Greenville and certain of its officers from issuing a building permit for the construction of a parking building which would overhang two public streets. The Supreme Court held that where the City, or its predecessor, ?? land dedicated for street purposes, the City was without the authority to change the use or to apply the property to some other use inconsistent with the dedication. The Court ruled that the City had no discretionary power to devote the dedicated property to private use of parties attempting to construct the private parking garage. Please note therein the Court's discussion to the effect that an obstruction placed anywhere within the street limits, even though not on the part of the street ordinarily used for travel, or placed in the air over the street, may constitute a nuisance. Although the [Sloan](#) case did not rest on a nuisance theory, the Court further recognized the nature of the encroachment as a purpresture, which is defined to be an encroachment upon lands or rights and easements incident thereto, belonging to the public. The Court noted that the public right goes to the full width of the street, and extends 'indefinitely upward and downward as far at least as to prohibit encroachment on such limits by any person, by any means, by which the enjoyment of such public right is, or may be, in any manner hindered or obstructed or made inconvenient or dangerous.' 235 S.C. at 284.

In my opinion, the attached Supreme Court decision in the [Sloan](#) case raises considerable doubt whether the Highway Department could authorize the private construction of a pedestrian walkway across a State highway, regardless of whether the Highway Department owned the underlying fee or acquired the right of way by easement or condemnation. We also note the constitutional prohibition against the use of public property for private use. In this connection, the Legislature has authorized the use of highway rights of way for public utilities, which serve the general public in the area of electrical transmission, sewer lines, telephone lines, and similar types of services. However, in the instant situation, the use of the public highway right of way would basically be for a private purpose, as well as possibly constituting a prohibited purpresture, within contemplation of the [Sloan](#) case. I am very hesitant in recommending that the Highway

Department approve any application for a permit to construct a private pedestrian passageway across a State highway, in light of the Sloan case and the previous discussion of the constitutional prohibition against private use of public property. However, I am available to discuss this matter further with you or with your interested Commissioner as you may direct. Yours very truly,

*2 Victor S. Evans
Deputy Attorney General

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