

MEMORANDUM

To: Maurice Jones, Town Manager
From: Ralph Karpinos, Town Attorney
Date: November 16, 2018
Subject: Authority to Require Compensation for Closure of Right-of-Way

Introduction:

This memorandum responds to questions posed to you by a Council Member on November 5 regarding the proposed partial closure of a Town street in Southern Village.

The specific inquiry sent to you reads as follows:

“For the item on giving the right of way in Southern Village; does the town own this? Can we get remuneration for the right of way? This happened in Southern Village not long ago with the right of way in front of Southern Village, so we need to have some sort of policy about this. Either we can sell a right of way and we still need some way to evaluate whether we should, or we can’t, and then we definitely need some sort of policy on when we should or should not.”

Based on review of the applicable facts and law, it is my opinion:

1. The Town does not have the authority to seek remuneration for the closure of this right-of-way.
2. State law establishes the factors the Council is to weigh in deciding whether to close a street, but would not preclude Council developing further policy standards.

Background:

On November 7, 2018 the Council called a public hearing for December 5, 2018 to receive public comment on a proposed closure of a portion of right-of-way on Aberdeen Drive in Southern Village.

<https://chapelhill.legistar.com/LegislationDetail.aspx?ID=3717572&GUID=81E29AE2-7923-4CAA-A173-7EC69A420B5E&Options=&Search=>

This current closure is being requested by the developer of Southern Village and by the Lumina Theater, located adjacent to the right-of-way. If the right-of-way is closed, the Theater proposes removal of some on-street parking spaces, relocation of the public sidewalk, and an expansion of its facilities.

On November 16, 2015, the Town Council considered and approved a similar request to close a section of public right-of-way in Southern Village.

https://chapelhill.granicus.com/MetaViewer.php?view_id=21&clip_id=2548&meta_id=111441

Discussion:

1. *Introduction:*

The procedures required for closure of public right-of-way are different from the procedures for the sale of property owned by the Town. When the Town proposes to sell property it owns, several procedural routes are available. Some sale methods require that the Town only sell property, if at all, to the highest bidder. Other methods allow Town property to be sold to private parties, with or without compensation, based on the proposed use and public benefit resulting from the sale or the fact that the purchaser is another governmental agency. The Council has discussed policies and plans for the evaluation of various Town real property parcels and the possible sale thereof.

When the Town proposes to close public right-of-way, the procedures are limited and the results of closing public right-of-way are different. When public right-of-way is closed, the rights to the land revert automatically to the owner of the adjacent property and the Town cannot transfer those rights to another party.

2. *Facts of this case:*

In this particular case, a request has been made to close a portion of the public right-of-way. This right-of-way was dedicated to public use in 1999 and, upon completion of construction of the public improvements, was accepted for maintenance and control by the Town in connection with the development of Southern Village. The dedicating plat, recorded in Book 84 at Page 3 at the Orange County Register of Deeds office, is attached.

The land was not deeded to the Town but, rather, was dedicated as right-of-way. The Town does not “own” the underlying land, in contrast to a scenario where the Town builds a public road on property owned by the Town.

3. *Applicable law:*

- a. The standards the Town is required to consider when a street right-of-way is proposed to be closed are set out in N.C.G.S. Sec. 160A-299. If the Council is satisfied that the closing
 - i. is not contrary to the public interest; and
 - ii. would not deprive any individual owning property in the vicinity of reasonable means of ingress and egress

then the Council may adopt an order closing the street. (Statute attached, emphasis added)

Pursuant to this statute, if the Council does adopt such an order, title to the right-of-way will be vested on persons owning the adjacent parcels.

- b. The specific questions raised by the Council Member are the same as those posed and responded to in the attached excerpt from a book published by the UNC-CH Institute (now School) of Government. As explained in the attached excerpt, N.C.G.S. Sec. 160A-299 does

not authorize the Town to require compensation in exchange for the closing of public right-of-way. Courts that have considered this question have reached the conclusion that a municipality may not condition use of the street closure statute on payment.

Conclusion

1. The Council has discretionary authority to close a portion of this public street. The Council is not required to approve the closure, even if it does find that the statutory standards allowing the closure are met. However, the Council is not authorized by law to require compensation in exchange for approving a closure of right-of-way.
2. The street closing statute establishes two standards for Council to consider in evaluating a request to close a public street:
 - a. Is the Council satisfied that the closing is not contrary to the public interest?
 - b. Is the Council satisfied that no nearby property owner will be deprived of reasonable means of ingress and egress?

Each individual request to the Town for a street closing should be considered based on the specific facts and these statutory standards. The Council could discuss development of an overall policy as well.

Attachments: N.C.G.S. Sec. 160A-299

Plat

Local Government Property Transactions in North Carolina (Lawrence, UNC-CH Institute of Government 2000), pp 85-87

§ 160A-299. Procedure for permanently closing streets and alleys.

(a) When a city proposes to permanently close any street or public alley, the council shall first adopt a resolution declaring its intent to close the street or alley and calling a public hearing on the question. The resolution shall be published once a week for four successive weeks prior to the hearing, a copy thereof shall be sent by registered or certified mail to all owners of property adjoining the street or alley as shown on the county tax records, and a notice of the closing and public hearing shall be prominently posted in at least two places along the street or alley. If the street or alley is under the authority and control of the Department of Transportation, a copy of the resolution shall be mailed to the Department of Transportation. At the hearing, any person may be heard on the question of whether or not the closing would be detrimental to the public interest, or the property rights of any individual. **If it appears to the satisfaction of the council after the hearing that closing the street or alley is not contrary to the public interest, and that no individual owning property in the vicinity of the street or alley or in the subdivision in which it is located would thereby be deprived of reasonable means of ingress and egress to his property, the council may adopt an order closing the street or alley.** A certified copy of the order (or judgment of the court) shall be filed in the office of the register of deeds of the county in which the street, or any portion thereof, is located.

(b) Any person aggrieved by the closing of any street or alley including the Department of Transportation if the street or alley is under its authority and control, may appeal the council's order to the General Court of Justice within 30 days after its adoption. In appeals of streets closed under this section, all facts and issues shall be heard and decided by a judge sitting without a jury. In addition to determining whether procedural requirements were complied with, the court shall determine whether, on the record as presented to the city council, the council's decision to close the street was in accordance with the statutory standards of subsection (a) of this section and any other applicable requirements of local law or ordinance.

No cause of action or defense founded upon the invalidity of any proceedings taken in closing any street or alley may be asserted, nor shall the validity of the order be open to question in any court upon any ground whatever, except in an action or proceeding begun within 30 days after the order is adopted. The failure to send notice by registered or certified mail shall not invalidate any ordinance adopted prior to January 1, 1989.

(c) **Upon the closing of a street or alley in accordance with this section, subject to the provisions of subsection (f) of this section, all right, title, and interest in the right-of-way shall be conclusively presumed to be vested in those persons owning lots or parcels of land adjacent to the street or alley,** and the title of such adjoining landowners, for the width of the abutting land owned by them, shall extend to the centerline of the street or alley.

The provisions of this subsection regarding division of right-of-way in street or alley closings may be altered as to a particular street or alley closing by the assent of all property owners taking title to a closed street or alley by the filing of a plat which shows the street or alley closing and the portion of the closed street or alley to be taken by each such owner. The plat shall be signed by each property owner who, under this section, has an ownership right in the closed street or alley.

(d) This section shall apply to any street or public alley within a city or its extraterritorial jurisdiction that has been irrevocably dedicated to the public, without regard to whether it has actually been opened. This section also applies to unopened streets or public alleys that are shown on plats but that have not been accepted or maintained by the city, provided that this section shall not abrogate the rights of a dedicator, or those claiming under a dedicator, pursuant to G.S. 136-96.

(e) No street or alley under the control of the Department of Transportation may be closed unless the Department of Transportation consents thereto.

(f) A city may reserve a right, title, and interest in any improvements or easements within a street closed pursuant to this section. An easement under this subsection shall include utility, drainage, pedestrian, landscaping, conservation, or other easements considered by the city to be in the public interest. The reservation of an easement under this subsection shall be stated in the order of closing. The reservation also extends to utility improvements or easements owned by private utilities which at the time of the street closing have a utility agreement or franchise with the city.

(g) The city may retain utility easements, both public and private, in cases of streets withdrawn under G.S. 136-96. To retain such easements, the city council shall, after public hearing, approve a "declaration of retention of utility easements" specifically describing such easements. Notice by certified or registered mail shall be provided to the party withdrawing the street from dedication under G.S. 136-96 at least five days prior to the hearing. The declaration must be passed prior to filing of any plat or map or declaration of withdrawal with the register of deeds. Any property owner filing such plats, maps, or declarations shall include the city declaration with the declaration of withdrawal and shall show the utilities retained on any map or plat showing the withdrawal. (1971, c. 698, s. 1; 1973, c. 426, s. 47; c. 507, s. 5; 1977, c. 464, s. 34, 1981, c. 401; c. 402, ss. 1, 2; 1989, c. 254; 1993, c. 149, s. 1; 2015-103, s. 1.)

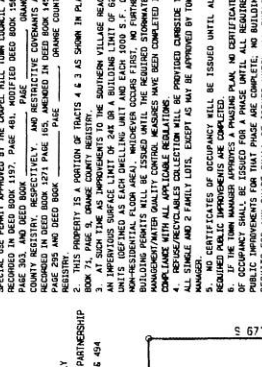
CURVE	ARC	RADIUS	CHORD LENGTH	CHORD BEARING
C1	98.37	66.50	87.89	S 24°22'56" E
C2	41.37	496.19	41.38	N 26°32'37" E
C3	4.71	3.00	4.72	S 62°48'06" E
C4	10.41	139.50	10.42	N 00°28'25" E
C5	25.84	472.19	25.85	S 65°12'56" E
C7	205.54	236.78	201.11	S 50°55'36" E

NOTES:
1. THIS PROPERTY IS INCUMBED BY A MASTER LAND USE PLAN AND A SPECIAL USE PERMIT APPROVED BY THE CHAPEL HILL TOWN COUNCIL AS RECORDED IN DEED BOOK 1597, PAGE 481. MODIFIED DEED BOOK 1598, PAGE 545.
2. THIS PROPERTY IS A PORTION OF TRACTS 4 & 3 AS SHOWN IN PLAT 1598. AT SUCH TIME AS IMPROVEMENTS TO THE SOUTHERN VILLAGE REACH AN IMPERVIOUS SURFACE LIMIT OF 24' ON A BUILDING LIMIT OF 60' FROM THE CENTERLINE OF MARKET STREET, THE SOUTH SIDE CURBSIDE PARKING AREAS SHALL BE REMOVED AND THE PORTIONS THEREOF NON-RESIDENTIAL VEHICLE STORAGE AREAS. ALL EXISTING BUILDING PERMITS WILL BE ISSUED UNTIL THE REQUIRED DRAINAGE IMPROVEMENTS ARE COMPLETED.
3. THIS PROPERTY IS A PORTION OF TRACTS 4 & 3 AS SHOWN IN PLAT 1598. AT SUCH TIME AS IMPROVEMENTS TO THE SOUTHERN VILLAGE REACH AN IMPERVIOUS SURFACE LIMIT OF 24' ON A BUILDING LIMIT OF 60' FROM THE CENTERLINE OF MARKET STREET, THE SOUTH SIDE CURBSIDE PARKING AREAS SHALL BE REMOVED AND THE PORTIONS THEREOF NON-RESIDENTIAL VEHICLE STORAGE AREAS. ALL EXISTING BUILDING PERMITS WILL BE ISSUED UNTIL THE REQUIRED DRAINAGE IMPROVEMENTS ARE COMPLETED.
4. REUSE/RECYCLES COLLECTION WILL BE PROVIDED COMPLETE IN ALL SINGLE AND 2 FAMILY LOTS, EXCEPT AS MAY BE APPROVED BY TOWN COUNCIL.
5. NO CERTIFICATES OF OCCUPANCY WILL BE ISSUED UNTIL ALL REQUIRED PUBLIC IMPROVEMENTS ARE COMPLETED.
6. CERTIFICATES OF OCCUPANCY SHALL BE ISSUED FOR A PHASE UNTIL ALL REQUIRED PUBLIC IMPROVEMENTS FOR THAT PHASE ARE COMPLETE. NO BUILDING PERMITS SHALL BE ISSUED FOR PHASES THAT DO NOT REQUIRE IMPROVEMENTS RESULTING IN PREVIOUS PHASES BE COMPLETED TO A POINT ADVANTAGE TO THE NEW PHASE.
7. ANY IMPROVEMENTS TO BE MADE SHALL BE RECORDED WITHIN THE RESOURCE CONSERVATION DISTRICT BOOK IN ACCORDANCE WITH THE DEVELOPMENT ORDINANCE OF CHAPEL HILL.

REFERENCES:
BOM 78-6
BOM 78-139
BOM 80-83
O.B. 1061-482/494

LEGEND:
● 100% PIPE FOUND
○ 75% PIPE SET
△ WALL FOUND
◻ WALL SET

NON OR FORMERLY
SOUTHERN VILLAGE LIMITED PARTNERSHIP
DEED BOOK 1061 PAGE 485 & 494



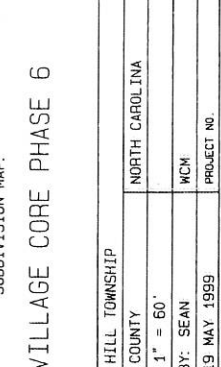
LINE	BEARING	DISTANCE
L1	N 22°11'53" W	67.00
L2	S 07°48'07" W	24.00
L3	S 62°48'06" E	22.36
L4	N 00°28'25" E	24.38
L5	S 65°12'56" E	24.38

TOTAL AREA IN SITE = 3.3624 ACRES
TOTAL R/W DEDICATION = 1.5795 ACRES
3 TRACTS = 1.8629 ACRES

JOYCE H. PEARSON
REGISTERED PLANNING
I.L.C.

9777-98-1035 (Polaris)
9787-05-2083 #8
9787-05-1861 #9
9787-05-2632 #10
9787-05-3703 Street
9787-05-1702 Alley

NOTES:
1. ALL DISTANCES ARE GIVEN IN FEET AND DECIMALS THEREOF.
2. ALL DISTANCES ARE HORIZONTAL UNLESS OTHERWISE NOTED.
3. DISTANCES ARE COMPUTED BY THE COORDINATE METHOD.
4. ALL CURVES ARE DEFINED BY CURVE DATA UNLESS OTHERWISE NOTED.
5. ALL DISTANCES ARE HORIZONTAL UNLESS OTHERWISE NOTED.
6. ALL DISTANCES ARE HORIZONTAL UNLESS OTHERWISE NOTED.
7. ALL DISTANCES ARE HORIZONTAL UNLESS OTHERWISE NOTED.



NOTARY PUBLIC
MAY COMMISSION EXPIRES _____ 19____

SULLIVAN SURVEYING
1143-D EXECUTIVE CIRCLE CARY, NC 27511
(919) 469-4738 FAX: (919) 469-8447

SOUTHERN VILLAGE LIMITED PARTNERSHIP
100 WESTGREEN DRIVE
CHAPEL HILL, NC 27540
D.B. 1061-482 & 494

OWNER:
CHAPEL HILL TOWNSHIP
ORANGE COUNTY
NORTH CAROLINA
SCALE: 1" = 60'
DRAWN BY: SEAN WCM
DATE: 19 MAY 1999
PROJECT NO. 84-11

VICINITY MAP - NOT TO SCALE
THIS MAP WAS PREPARED BY SULLIVAN SURVEYING, INC. ON THE BASIS OF THE SURVEY AND THE REFERENCE TO THE PLAT TO WHICH THIS MAP IS REFERRED. THE BOUNDARIES AND DISTANCES SHOWN ON THIS MAP ARE AS SHOWN BY THE SURVEY. THE BOUNDARIES AND DISTANCES SHOWN ON THIS MAP ARE AS SHOWN BY THE SURVEY. THE BOUNDARIES AND DISTANCES SHOWN ON THIS MAP ARE AS SHOWN BY THE SURVEY.

PLANNING DEPARTMENT
SEAL
L-6621
JOYCE H. PEARSON

OWNER'S CERTIFICATION OF DEDICATION
THE UNDERSIGNED OWNER(S) HEREBY FREELY DEDICATES(S) ALL RIGHTS-OF-WAY, EASEMENTS, STREETS, RECREATION AREA, OPEN SPACE, COMMON NEAR UTILITIES, AND OTHER IMPROVEMENTS TO PUBLIC OR COMMUNITY USE AND TO THE TOWN OF CHAPEL HILL. THE UNDERSIGNED SHALL BE RESPONSIBLE FOR THE MAINTENANCE AND CONTROL OF SAID IMPROVEMENTS UNTIL THEY ARE ACCEPTED FOR MAINTENANCE AND CONTROL BY THE TOWN OF CHAPEL HILL. THE UNDERSIGNED HEREBY REPRESENTS AND WARRANTS THAT THE SURVEY IS COMPLETE AND ACCURATE AND THAT THE SURVEYOR IS QUALIFIED TO MAKE A DEDICATION TO THE BEST OF HIS OR HER PROFESSIONAL ABILITY AS TO PROVISIONS CONTAINED IN THIS INSTRUMENT.
OWNER(S)
SULLIVAN SURVEYING, INC.
DATE OF CERTIFICATION: 5-11-99

NOTARY PUBLIC
MAY COMMISSION EXPIRES _____ 19____

STATE OF NORTH CAROLINA
COUNTY OF ORANGE
I, JOYCE H. PEARSON, REGISTERED PLANNING I.L.C., DO HEREBY CERTIFY THAT THIS MAP OR PLAT TO WHICH THIS INSTRUMENT IS REFERRED WAS PREPARED BY SULLIVAN SURVEYING, INC. AND THAT I AM A REGISTERED PLANNING I.L.C. IN THE STATE OF NORTH CAROLINA.
JOYCE H. PEARSON, REGISTERED PLANNING I.L.C.
DATE OF CERTIFICATION: 5-11-99

RECORDED IN ORANGE COUNTY BOOK 84 PAGE 3

The North Carolina courts do not appear to have addressed this question, either for trusts or for local governments.³⁹ One hopes that the North Carolina courts would, should the issue arise, follow those states that do not require special legislative authority for options.⁴⁰ The cases denying the power to option make very little sense. If it is important that local government officials be able to exercise their discretion when they convey government property, why is that discretion less properly exercised at the time an option is given than when title is actually transferred? That officials made a poor deal is normally not grounds for invalidating a transaction, and it should not be so here. Until the North Carolina courts or the General Assembly address the question, however, some small doubt will linger about the ability of this state's local governments to grant options.

C. Street Easements

G.S. 160A-299 sets out a procedure under which a city may vacate a city street or alley.⁴¹ Upon vacation, the city's property interest in the street or alley ends, and fee simple title is vested in the abutting owners.⁴² Occasionally questions arise about whether a city must use this statute when it wishes to end its property interest in a street or whether it may use alternative methods. First, may a city *sell* its interest, perhaps to only one of the abutters, without using the vacation statute at all? Second, if a city does use the vacation statute, may it impose a charge on the abutters as a condition of closing the street? The charge would amount to compensation for the city's interest in the property.

The answer to the first question is in most cases no, although it may be yes if the city owns the fee simple interest in the street. The answer to the second question is always no. These conclusions are based on the following policy and legal considerations.

³⁹ Some North Carolina appellate cases have involved options granted by local governments, but the litigants apparently did not question their validity. *E.g.*, *Watts v. Town of Valdese*, 65 N.C. App. 822, 310 S.E.2d 152 (1984).

⁴⁰ *E.g.*, *Siler v. City of Rossville*, 315 S.E.2d 898 (Ga. 1984); *Dahl v. City of Grafton*, 286 N.W.2d 774 (N.D. 1980).

⁴¹ Counties have similar authority under G.S. 153A-241. Counties, however, have no ownership interests in the streets involved, and therefore the questions raised in this section are irrelevant to them.

⁴² *Id.* §160A-299(c). This statutory procedure is examined in detail in DAVID LAWRENCE, *PROPERTY INTERESTS IN NORTH CAROLINA CITY STREETS* §§ 4.01 through 4.06 (Institute of Government 1985).

1. In most cases the city holds only an easement in the street. An easement is the interest acquired when the city's title arises either from dedication or prescription.⁴³ Even when they acquire the street by purchase or eminent domain, many cities still acquire only an easement. **If all the city holds is an easement for a public street, that is all it has to convey. Therefore once the city decides that no street is necessary, the city has nothing of value to sell.**
2. Even if the city holds the fee to the street, abutting property owners also have an easement of sorts in the street, entitling them to access to their property from the street system.⁴⁴ If a street provides the only access to the property, this private right of access survives vacation of the street,⁴⁵ further reducing what the city has to sell.
3. If these private rights of access do not survive, however (because alternative access exists), and if the city does hold fee simple title to the street, the city may have the choice of following the vacation procedure and thereby abandoning all title to the street or of ignoring the vacation procedure and treating the street as normal surplus property. Courts in other states have allowed cities holding fee title to streets to convey the streets as surplus property.⁴⁶
4. **The vacation statute includes no provision for payment for the vacated streets. In such a circumstance, case law from other states holds that a city may not condition use of the statute on payment, any more than other police power actions may be conditioned upon payments from benefited citizens.⁴⁷ The North Carolina courts would probably agree.**

Even though courts in some states support a city's right to sell a street it holds in fee, a city considering such a sale may still wish to obtain specific legislative authority to do so. The question is sufficiently unclear that the absence of legislation may create uncertainties about the title. The General Assembly can clearly enact such authority,⁴⁸ and it can enact authority per-

43. *White v. Northwestern N.C.R.R.*, 113 N.C. 611, 18 S.E. 330 (1893).

44. *Department of Transp. v. Harkey*, 308 N.C. 148, 301 S.E.2d 64 (1983).

45. *Mosteller v. Southern Ry.*, 220 N.C. 275, 17 S.E.2d 133 (1941).

46. *E.g.*, *Hoogenboom v. City of Beaufort*, 433 S.E. 2d 875 (S.C. Ct. App. 1992). *But see Walker v. Coleman*, 540 So. 2d 983 (La. Ct. App. 1989), in which the court held that a city that no longer wants a street right-of-way must proceed through the vacation procedure rather than the general authority to sell surplus property.

47. *Overton v. Scott Co.*, 356 So. 2d 134 (Ala. 1978).

48. In *Church v. Dula*, 148 N.C. 262, 61 S.E. 639 (1908), the North Carolina Supreme Court upheld statutory authority to sell city streets, granted in a local act of the General Assembly.

mitting a city to require some payment from abutters before vacating the right-of-way.⁴⁹

D. City Cemeteries

G.S. 160A-342 authorizes a city to convey a city cemetery, but only upon certain conditions. The sale must be to a religious organization or a cemetery licensed by the state. The grantee must agree to continue to use the property as a cemetery, must agree to maintain the cemetery, and must agree to use any perpetual care funds included in the conveyance only for cemetery maintenance. Apparently a city may not convey property used as a cemetery unless these conditions are met.

§ 507. Adverse Possession Against Local Government Property

Although inconsistent cases and incomplete statutes leave some residual doubt, North Carolina local government property, except for public streets and squares, apparently is vulnerable to adverse possession.⁵⁰ This state of the law is contrary to the general rule nationally, which excludes most government property from the normal doctrine of adverse possession.⁵¹

Two statutes are relevant to the question, although neither is decisive. G.S. 1-35 permits an assertion of title against the *state*, upon thirty years' adverse possession (or twenty-one years under color of title). Because the usual common law rule nationally is that there can be no adverse possession against a state,⁵² one might infer that this statute was enacted to overcome the common law rule; absent the statute, state property would not be subject to adverse possession. Because the common law nationally also excludes most local government property from adverse possession⁵³ and

49. *Cf. Parks v. Watson*, 716 F.2d 646 (9th Cir. 1980) (city's charter procedure requires just compensation from abutter; the court holds that the city is asking too much in this case but does not question the city's basic entitlement to compensation).

50. The elements of adverse possession are listed in the glossary, *infra*.

51. The general rule nationally is summarized in R. P. Davis, *Annotation, Acquisition by Adverse Possession or Use of Public Property Held by Municipal Corporation or Other Governmental Unit Otherwise Than for Streets, Alleys, Parks, or Common*, 55 A.L.R.2d 554 (1957).

52. *Id.* § 13.

53. *Id.* §§ 34, 46.