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MORANDUM

State of Alaska
Department of Law

Daniel Beardsley, SR/WA
Chief Right of Way Agent
Central Region
Department of Transportation
and Public Facilities

DATE August 1, 1989

FILE NO 661-89-0307

TEL NO 276-3550

SUBJECT Sterling Highway encroachments

Bruce Tennant
Assistant Attorney General
Transportation Section, Anchorage

You have asked us whether the state may be estopped from utilizing a portion of the Sterling highway right-of-way easement where that portion has been platted and a landowner has constructed valuable improvements on it.

The answer to your question is that it is too close to make a definitive call. There is a chance a court would find the state estopped from utilizing a portion of the right-of-way without the payment of just compensation. The outcome may depend upon the strength of the landowner's equitable claims of estoppel balanced against the laws governing disposal of state-owned rights-of-way and elements of unwritten public policy.

FACTS

The State of Alaska is the owner of a 300-foot easement (150 feet on either side of the centerline) for the Sterling Highway on the Kenai peninsula. The right-of-way width was established on September 16, 1956, by Departmental Order No. 2665, which designated the Sterling Highway as a through road having a 300-foot right-of-way easement. Subsequently, the land in question was entered for homestead purposes and made subject to the 300-foot right-of-way.

In 1978, the Kenai Peninsula Borough submitted a number of plats for comment by the Department of Transportation and Public Facilities, among which was plat No. 79-59, Fairway Estates Subdivision. On April 6, 1978, James E. Sandberg, Regional Right of Way and Land Acquisition Agent, sent a letter to the Borough stating in part that the Department had no objection to Plat No. 79-59. Exhibit A, attached. That plat showed the Sterling Highway right of way as being 200 feet wide (100 feet on each side of the centerline). No other representations were made by the state or any representative, nor

was any action taken to vacate, by Commissioner's deed, the 50 feet of right-of-way now in question.

In 1983, a portion of Fairway Estates Subdivision was replatted by Plat No. 83-259, Fairway Estates Subdivision No. 2. This plat also showed the Sterling Highway right-of-way at 200 feet. The state, by letter to the Borough dated June 24, 1983, objected to the plat and suggested that it be changed to reflect the correct 300-foot right-of-way width. Exhibit B, attached. No changes were made by the Borough, and the plat was filed as presented to the state. The lot in question, Lot 7, Block 2 (your parcel 18A), was not included in Plat No. 83-259.

In 1983 the owner of Lot 7 applied for and received a building permit from the City of Soldotna and subsequently constructed a commercial building on the lot. The building encroaches 10 feet into the 300-foot right-of-way and the parking lot for the building encroaches an additional 30 feet into the 300-foot right-of-way.

In addition to the encroachment of the building on lot 7, lots 4A and 6A, Plat No. 83-259 encroach on the easement by 50 feet and lots 1,2,3 and 4 of Plat 79-59 encroach upon the easement by 10 feet. None of these lots are improved with any structures.

DISCUSSION

As a general rule, the theory of estoppel does not extend to state governments. However, under certain circumstances, courts have applied the doctrine of equitable estoppel to the states.

The essential elements of the doctrine of equitable estoppel are:

1. Assertion of a position by conduct or words.
2. Reasonable reliance on that position by another.
3. Resulting prejudice to the relying party.

Merdes v. Underwood, 742 P.2d 245 (Alaska 1988).

The Alaska Supreme Court has, on several occasions, ruled on the application of equitable estoppel against governmental units. In State v. Simpson, 397 P.2d 288 (Alaska 1964), the court ruled that the state was not estopped to claim ownership of a portion of the right-of-way on which a dry-cleaning building had been built. The building was constructed by owners who had a mistaken belief in the extent of their lot.

The court said that permitting the existence of the building for many years and accepting taxes on the property were not actions which would support an estoppel. The court stressed that there had been no affirmative action by the state upon which the owners could have reasonably relied and that, even though the decision destroyed the value of the building, there was no basis for upholding the building owner's claim.

The Simpson decision was based upon earlier cases from Oklahoma and Oregon which held that the government could not, absent express, affirmative action, be estopped from exercising its interest in a street right-of-way. See Town of Chouteau v. Blankenship, 152 P.2d 379 (Okla. 1944); City of Molalla v. Coover, 235 P.2d 142 (Or. 1951) These cases proceeded from the theory that the government held the street rights-of-way in trust for the public, i.e., in its "governmental capacity," and that a different standard would apply if the claimed estoppel concerned property held in a "proprietary" capacity. Indeed, the court in Town of Chouteau questioned whether the application of equitable estoppel would ever be proper in the case of streets. 152 P.2d at 384.

In addition to the question of whether an estoppel would lie against the government as regards property held in its governmental capacity, the Oregon court discussed the necessity that government conduct which is presented as the basis of an estoppel claim "must have been such as to have caused the [party asserting the estoppel] reasonably to believe that it was the intention to abandon this strip of land for street purposes." 235 P.2d at 148. No such intent is evident in the conduct of the department in the case at question today.

The Simpson case and its predecessors must be contrasted with Mun. of Anchorage v. Schneider, 685 P.2d 94 (Alaska 1984). Although the Schneider case deals with a zoning dispute, the court's statements regarding the application of equitable estoppel, and the limits thereon, are important. The court began by stating the "traditional rule" that estoppel may not be invoked against a municipality which has erroneously issued a building permit in violation of its zoning ordinances. It then discussed how the rigid application of this rule often leads to inequitable results, and concludes that a municipality may be estopped if the elements of equitable estoppel are present and if the public will not be significantly prejudiced by the estoppel.

It is not clear from the facts before us how the Alaska courts would treat the difference in approaches between the street right-of-way cases and the zoning cases. It is clear that

the zoning cases are much more liberal in allowing governmental rights or powers to be estopped. However, the discussion in the Schneider case indicates that where the governmental interest is greater, the corresponding burden on a party attempting to prove an estoppel of that interest will also be greater. If we consider that the government title interest in highway rights-of-way is greater than police power interests in controlling zoning, then it would follow that a party attempting to estopp the state from exercising its interest in a highway right-of-way would bear a very heavy burden of proof. Whether the act of the state evidenced by the 1978 Sandberg letter would satisfy that burden would be the question for the court. We believe that we could make a strong case for the proposition that the proof would be inadequate.

In answer to the other questions set out in your June 20, 1989 memorandum, it would follow that if the state is not estopped from utilizing its right-of-way easement to its full extent, that no action need be taken regarding vacation of the overlapping right-of-way.

CONCLUSION

If the state elects to exercise its easement rights in the property in question, litigation is highly likely to ensue. The landowners would likely claim that the state is estopped from utilizing the easement without first paying just compensation for the private interests taken. With regard to all of the lots except Lot 7, we believe that the state would prevail against such a claim. With regard to Lot 7, we believe that the state would be able to put forth strong defenses to such a claim, but the state of the law is such that the outcome of such a lawsuit is difficult to predict.

If you have further questions concerning this matter, please do not hesitate to call me.

BT:sw

Attachments