



THE LAW OFFICE OF
Michele
Rosenfeld LLC

May 22, 2011

The Honorable Bruce Williams
City Council Members
City of Takoma Park
7500 Maple Avenue
Takoma Park MD 20912

RE: State Highway Administration Proposal for MD 410 (April 12, 2011)

Dear Mayor and Council:

My client, Historic Takoma, Inc., has asked that I review and provide comments to you on the recent request from the Maryland State Highway Administration (SHA) that the City (a) give a “prescriptive easement” in City-owned segments of the roadbed of Maryland 410 to SHA; and (b) give a “right of entry” to SHA in the City’s right-of-way along MD 410 for “necessary” work. (“SHA Proposal.”)

In summary, a prescriptive easement is unnecessary to achieve the mutual goals of the City and SHA of a properly maintained road. If the City grants a prescriptive easement to SHA, the City will lose the control that it now has over road and right-of-way improvements. The specific operational terms proposed in the SHA Proposal substantially erode City influence over the scope and nature of future road and right-of-way improvements.

Alternatively, the City and SHA can enter into a contractual agreement that gives SHA permission to undertake road repairs and maintenance subject to City review and approval, which will both leave the City’s current ownership of MD 410 intact and retain the City’s ability to protect its interest in the final design and construction of improvements to the road and adjoining right-of-way.

I. Introduction

The SHA Proposal proposes that SHA “claim a prescriptive easement” as a “solution” to a problem that is not identified anywhere in SHA’s Proposal. The SHA Proposal appears to recognize that the City owns all but small sections of MD 410 in the City (e.g., within intersections with other State roads).

Summary of SHA Proposal

SHA's Proposal generally allocates ownership and control of MD 410 and the adjoining right-of-way (e.g., sidewalks) as follows:

1. The City would acknowledge that SHA has a "prescriptive easement" over the MD 410 roadbed, while the City would continue to "own" the land, and SHA would assume responsibility for the road's maintenance and snow removal.
2. The City could advise SHA on operational matters involving the road (such as permitting, signage and signal timing issues).
3. The City would retain any ownership interest it has in the property beyond the curbline (generally speaking, the sidewalk area) and retain responsibility for maintenance of this area.
4. The City would grant SHA permission in the form of a "right of entry" for any "necessary" work to be performed outside of the curb. The only example of "necessary" work that SHA offered is the construction of ADA ramps.

At a November 8, 2010 public hearing before the City Mayor and Council, Neil Pederson (SHA's Administrator) testified that SHA has a policy against maintaining a State road not owned by SHA. I have not seen a written copy of this policy and, moreover, it does not appear to reflect SHA's authority under state law. While agency policies generally are internal guidelines reflecting agency preference, state law is the controlling standard with respect to an agency's operational authority.

State law expressly permits SHA and any political subdivision to agree to transfer responsibility for maintenance of any highway in public ownership to SHA. A prescriptive easement is not necessary to achieve this outcome. Inasmuch as MD 410 is a public highway owned by the City, the City and SHA have legal authority to enter into an agreement for just such a transfer of maintenance responsibility.

In contrast, a "prescriptive easement" conveys far more of the City's ownership interest to SHA than is necessary for SHA to undertake maintenance of MD 410 within the City's ownership. In addition to the fact that SHA does not legally require a prescriptive easement to undertake the maintenance responsibilities at issue, in my view this proposal disadvantages the City in at least three material ways:

1. From a governance perspective, the City becomes at best advisory to SHA with respect to permitting and other operational issues.
2. From a financial perspective, the fair market value of a roadbed encumbered by a prescriptive easement is nominal when compared with real property

unencumbered by such an easement. This makes it much easier -- financially -- for SHA to acquire the roadbed through eminent domain.

3. From a community protection perspective, it will be significantly more difficult for the City to protect the community from the impacts of road and right-of-way construction under the terms of the SHA Proposal. The SHA Proposal leaves the final decision on road and right-of-way improvements to SHA and not to the City. In addition, if SHA seeks to condemn the City's ownership of MD 410, the City's opposition to any such action will be significantly diminished if it already has conveyed a prescriptive easement to the SHA.

II. Municipal Control Issues

The City Charter says that "the City shall have control of all public ways in the City except such as may be under the jurisdiction of the State."¹ The operational terms proposed in the SHA Proposal relinquish virtually all of this control to SHA. For example, the SHA Proposal states that:

1. SHA would "work jointly" with the City on signal timing issues and any proposed changes to pavement markings and signage;
2. SHA would "address" the City's comments before issuing a permit;
3. SHA would allow the City to perform its own quality review [presumably of construction] and "share" with SHA;
4. SHA would take any and all "reasonable measures" to "address" the City's concerns before releasing a permit;
5. The City would grant a right of entry to SHA for "any *necessary* work" to be performed outside the curb. (Emphasis added.)

There are no provisions in the SHA Proposal for the City to override permit terms or impose a stop work order if SHA does not fully address City concerns – the City's role becomes merely advisory. Nor are many of these terms defined. For example, if SHA decides that it is "necessary" to widen MD 410, would that widening be permissible under SHA's right-of-entry authorizing "necessary" work outside of the curblines? The City's interests would be much better protected by a contract between the City and SHA that retains City governance over MD 410 with express permission to SHA to perform specific maintenance and repair work on a project-by-project basis.

¹ Takoma Park City Charter Chapter X § 1001.

III. SHA Can Maintain City-Owned Segments Of MD 410 Without Any Easement Interest

A. State Transportation Code Authorizes Transfer Of Maintenance To SHA Irrespective of Ownership

While somewhat convoluted, State law grants to the City and SHA the ability to contractually agree that SHA will maintain those portions of MD 410 owned by the City, and upon what terms. “The [State Highway] Administration and any political subdivision may agree to transfer . . . responsibility for maintenance of: (1) A county road to [the] State”²

A “county road” means any public highway that is titled in a public body and that is not a “State highway.”³ To qualify as a “State highway,” the highway must be owned by the State.

Under State law, therefore, it appears that MD 410 is not a “State highway” because it is not owned by the State. Accordingly, the City and SHA are expressly authorized under State law to enter into an agreement transferring **responsibility for maintenance** of MD 410 to SHA while at the same time the City retains title to the road. Notwithstanding the “policy” referenced by Mr. Pederson in his testimony against doing so, there does not appear to be a legal impediment to this outcome. Therefore, the parties can enter into a negotiated agreement that sets out terms acceptable to the City that allows SHA to maintain MD 410 while the City retains ownership and reasonable operational control.

B. SHA’s Prescriptive Easement Claim

A prescriptive easement is an implied dedication of property to public use. Generally, if property has been used by the public for more than 20 years for a public purpose (such as a road), then there is a presumption that the property has been dedicated to public use. The use must be long-term (generally a minimum of 20 years), and the use must have been uninterrupted, adverse (meaning there was no permission from the property owner for the use) and exclusive (meaning the one using the property had an independent right to do so, even if others were using it at the same time).⁴ If SHA cannot prove any one of these three factors, then it has not established its right to a prescriptive easement.

SHA said that it has used a prescriptive easement “where there is no clear title to the land on which a roadway is situated.” As a threshold matter, this statement begs the question as to why use of a prescriptive easement is the proper arrangement in this case when there appears to be little question that the City holds title to the land in question.

² MD. CODE ANN., TRANSP. § 8-304(a)(1). Alternatively, according to Mr. Pederson’s testimony SHA has the legal authority to transfer federal money to the City for maintenance.

³ MD. CODE ANN., TRANSP. § 8-101(a)(g).

⁴ See generally *Washington Land Company v. Potomac Ridge Development Corporation et al.*, 137 Md. App. 33, 767 A.2d 891 (2001).

Moreover, it does not appear that SHA has acquired a prescriptive easement in MD 410. From a legal point of view, I have found no legal authority to support the claim that one governmental entity can establish a prescriptive easement claim against another governmental entity. Generally speaking, an entity cannot acquire title to property owned by a municipal corporation that is in public use (e.g., a public road) through “adverse possession,”⁵ a concept very similar to a prescriptive easement.⁶

In my opinion SHA could not establish that it holds a prescriptive easement at this time in MD 410. Notably, it does not appear that SHA has enjoyed “adverse, exclusive and uninterrupted use” of these segments of MD 410 for the past 20 years. In fact, SHA has disclaimed *all* responsibility for maintenance and repair for more than a year, voiding its ability to claim “uninterrupted use.” In response to SHA’s total disclaimer of any maintenance and repair obligations over MD 410 within the City-owned segments, the City is exercising full and exclusive jurisdiction over permitting, maintenance and repair.

IV. Granting A Prescriptive Easement Devalues The Fair Market Value Of MD 410

There are two ways for SHA to obtain title to MD 410. First, SHA and the City can negotiate the transfer of title to MD 410 on terms that SHA and the City “agree to as reasonable and fair.”⁷ This allows the City to negotiate the *sale* of MD 410 to SHA, and the parties can agree on terms including compensation. (This is an alternative to the City retaining ownership and entering into a maintenance agreement with SHA.)

Second, SHA can exercise eminent domain authority over MD 410 if it chooses to do so,⁸ although in his testimony Mr. Pederson indicated SHA’s reluctance to do so over the objections

⁵ “Adverse possession is a method whereby a person who was not the owner of property obtains a valid title to that property by the passage of time.” Md. Civ. Pattern Jury Instr. 2:1 (MPJI-Civ.). Under Maryland law, to obtain title to property, the person claiming adverse possession must prove “actual, open, notorious and visible, exclusive, hostile and continuous possession of the claimed property for at least 20 years.” *Senez v. Collins*, 182 Md. App. 300, 319, 957 A.2d 1057, 1068 (2008) (citations omitted). Prescriptive easements mirror adverse possession (unlike adverse possession they do not convey title, but a right to use property). Prescriptive easement arise by implication “when one party makes adverse, exclusive and uninterrupted use of the real property of another for twenty years.” *White v. Pines*, 173 Md. App. 13, 917 A.2d 1129, 1138 (2007) (citations omitted).

⁶ SHA states that it has used prescriptive easements “elsewhere in the state where there is no clear title to the land on which a roadway is situated” but does not identify who the parties were. See SHA Proposal at 2.

⁷ MD. CODE ANN., TRANSP. § 8-303(c).

⁸ MD. CODE ANN., TRANSP. § 8-303(a).

of a municipality.⁹ If SHA condemns the property, it must pay “fair market value” for the land taken. “If the condemned property is subject to an existing easement in the public for highway purposes at the time of taking, Maryland courts have deemed a prescriptive easement to have no substantial monetary value and only nominal damages will be awarded.”¹⁰ In other words, by granting a prescriptive easement to SHA the City will effectively have conceded that the property has virtually no value for purposes of any future condemnation proceedings.¹¹ Of even greater concern, however, is that by conceding virtually all possessory interest in MD 410 to SHA, the City will at the same time lose its ability to exert control over such things as the scope of a project and its construction standards, permitting requirements and timing of work. This loss of control will compromise the City’s ability to protect the community from the impact of these construction projects – issues that are not necessarily SHA’s primary concern.

V. Recommended Contractual Relationship

The SHA Proposal is merely an offer proposing a means of transferring maintenance obligations for MD 410 from the City to SHA. In light of the drawbacks inherent in the City’s grant of “prescriptive easement” to SHA, the City would be better served by an agreement between the City and SHA that clearly specifies SHA’s maintenance and repair obligations and the City’s authority to review and approve maintenance and repair projects as they become necessary. A negotiated contractual agreement would enable the City and SHA to transfer maintenance of City-owned sections of MD 410 to SHA **and** allow the City’s oversight over that work. This would be preferable (from the City’s perspective) to the current SHA Proposal, which effectively renders the City’s role a purely advisory one in connection with MD 410 road improvements.

The City instead can negotiate an agreement that requires such things as City approval before a project can be bid or a permit can be issued and require contractors to repair work that the City deems defective under the SHA contract. In addition, rather than a blanket “right-of-entry” for sidewalk areas, SHA can negotiate a project-specific right-of-entry on an as-needed basis. This type of contractual arrangement will allow the City to retain its authority to control these issues, and through that control to continue to protect the community’s interest with respect to road and construction impacts within the City’s limits.

⁹ In fact, Mr. Pederson could not recall a single instance when SHA had exercised this authority over municipal objections, and one Council member pointed out the “political and media value” that the City would retain with continued ownership in MD 410 should SHA ever seek to acquire City-owned property. Notwithstanding Mr. Pederson’s repeated assurances during the November 8 public hearing that he did not foresee SHA widening MD 410, in response to Council questions he stated that SHA would not enter into a “legally binding agreement” affirming that SHA would not widen MD 410.

¹⁰ *Peck, et al. v. Baltimore County*, 41 Md. App. 323, 327, 397 A.2d 615, 618 (1979).

¹¹ This Memorandum does not opine on the fair market value of MD 410 without a prescriptive easement.

VI. Conclusion

In my opinion, the City and SHA can enter into an agreement that allows SHA to undertake maintenance of MD 410 within the City-owned portions of the road, yet allows the City to retain acceptable levels of control over the permitting and other operational elements of the road that are of vital concern to the City. A “prescriptive easement” is not required to achieve this goal. It has the unintended consequence of facilitating SHA’s acquisition of title to MD 410 in any future eminent domain proceeding and unnecessarily relinquishes City authority over the impact of SHA construction projects on City residents.

Sincerely,

/s/

Michele Rosenfeld

Cc: Diana Kohn, President, Historic Takoma, Inc.
Susan Silber, Esq.