

Monday, August 10, 2009

Re: Easement Question

Dear Sir,

I hope this writing finds you well. Following is my response to your recent inquiry regarding easements.

### **Facts**

The following is assumed for purposes of this opinion.

The Planning Commission and Board of Commissioners recently approved a development plan for new additions to a church facility. All elements of the plan are compliant with the city's ordinances. During the approval process, the church accepted a number of conditions. One of these conditions requires the Church to grant an easement to the city for construction of a stone fence. The proposed stone fence, similar to others in the vicinity, would lie alongside two busy thoroughfares but outside the city's right-of-way. A new sign for the church is to be built within the stone fence. The costs of constructing the fence and the sign are to be split between the city and the church.

### **Question**

Is the agreement where the city and the church share in the costs of constructing the stone fence and sign legal?

### **Answer**

The expenditure of city funds on construction of the fence and the sign are likely in violation of Article II § 29 of the Tennessee Constitution, specifically its public purpose doctrine.

### **Analysis**

Article II, § 29, of the Tennessee Constitution provides that "The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for County and Corporation purposes, respectively..." From this clause the courts have developed the public purpose doctrine, which dictates that public funds can be used only for public purposes. Courts have reasoned that as taxes can be levied for only corporation or public purposes, expenditures can legally be made for only those same purposes. A public purpose that will justify the expenditure of public funds generally means an activity that serves as benefit to the community as a whole and at the same time is directly related to a function of government. Pack v. Southern Bell Tel. & Tel. Co. 387 S.W.2d 789 (1965). Incidental benefit to an individual or individuals will not invalidate an expenditure, but the primary purpose must be to benefit the public. City of Chattanooga v. Harris, 223 Tenn. 51, 442 S.W.2d 602 (1969).

What is and is not a public purpose is determined on a case-by-case basis. Smith v. City of Pigeon Forge, 600 S.W.2d 231 (1980). The test of a public purpose is whether the expenditure confers a direct benefit of reasonably general character to a significant part of the public, as distinguished from a remote or theoretical benefit. McQuillin, *Law of Municipal Corporations* § 39.19 (3rd. Ed. 1993). In our situation the public benefit is, at best, aesthetic improvement. And while courts have ruled that using public funds to beautify blighted areas is acceptable, that is clearly not the case here. Southern v. Beeler, 195 S.W.2d 857 (1946). The intersection in question is well kept and pleasing to the eye. While a visual improvement to the church may also improve the sightlines of the surrounding area, this benefit is incidental. The primary beneficiary of this expenditure is the church and any claim to the contrary is tenuous at best.

The mere fact that the fence lies in an easement does not change this. In fact, I see no use in this easement other than creating a pretense for the expenditure of public funds. In any other situation where a fence is built on private property an easement to the local government would never be considered. Generally, an easement onto private property serves to benefit the public. Common examples are walking trails, sidewalks, paths for utility lines, etc. I see no such public use here.

Imagine if this rationale was opposite and the construction of such a fence and sign were public purpose by merely improving the look of a particular street corner. No doubt every property owner on every street in every town would insist upon a public expenditure to improve their storefront or repave their parking lot.

It is my contention that the proposed expenditure mentioned above is in violation of the Tennessee Constitution and creates unnecessary liability for the city. Surely, other avenues can be explored that meet the needs of the city and the private property owners involved.

While not mentioned in the original opinion request, I think it worthy to consider the other looming issue presented in this set of facts - the possible violation of the Establishment Clause of the U.S. Constitution. I will not attempt to answer this question as it was not asked and such an undertaking would require more facts and more time. However, I do believe the issue should be addressed if this agreement is entered into.

I hope this information serves you well and assists you in your endeavor. If I can be of any further assistance, please do not hesitate to contact me.

Yours,

Josh Jones

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