

Special Called Meeting: August 30, 2011 - Attachment
August 29, 2011

Ms. Sally Oglesby
City Recorder
City of Crossville
99 Municipal Avenue
Crossville, Tennessee 38555-4477

Dear Ms. Oglesby:

The Oakes family granted a permanent utility easement and a temporary construction easement to the City of Crossville on September 22, 2009. The easement provides that:

Said permanent easement shall be the perpetual right for the City of Crossville and its agents to enter from time-to-time to install, construct, operate, repair, maintain, relocate, and replace utilities located within the easement. Said temporary construction easement shall be the right for the City of Crossville and its agents to enter to install utilities in conjunction with the State of Tennessee, Department of Transportation Project No. 18038-3236-14 to reconstruct State Route 101, Lantana Road. *The City of Crossville may grant other utility entities the right to utilize this utility easement.* This easement shall run with the land forever.

That easement obviously contemplates two separate easements, one permanent and one temporary, and that conclusion is supported by the survey of the easement that accompanied your letter. Presumably the transmission towers at issue are on the permanent easement.

Even though the permanent easement allows the city to allow other utilities to use the utility easement, Volunteer Energy Cooperative constructed prominent electric power transmission towers on the easement without the consent or knowledge of the city.

The question is, do the property owners who granted the easement have any remedy against the City of Crossville? In answering that question, I will unavoidably address some questions about the liability of Volunteer Electric Cooperative to the city and to the owners of the property through which the easement passes.

In n connection with those questions, it is important to note that the Oakes and Sharion K. Mercer signed the easement in question, which clearly and plainly provided that the City of Crossville could let other utilities use the utility easement. Because the City of Crossville provides only water and sewer service, it will be shown below that the term "utility" in that easement contemplates electrical utilities.

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Volunteer Energy Cooperative (VEC) is apparently an electrical cooperative organized under the Rural Electric and Community Services Cooperatives Act (RECSCA) found at Tennessee Code Annotated, § 65-25-101 et seq. As its title implies, electrical cooperatives have broad authority to provide electrical power and telecommunication service, and to do other things associated with those functions. Among the powers of electrical cooperatives are the powers to:

... construct, maintain, and operate electric and/or other telecommunications facilities along, upon, under and across streets, alleys, bridges, and causeways, and upon, under, and across all publically owned lands; *provided that the respective authorities having jurisdiction thereover shall consent thereto; provided however that such consent shall not be unreasonably withheld or conditioned or withheld or conditioned for the purpose of enabling such an authority to gain competitive advantage with respect to the rendition by itself or any other entity of service which the cooperative also has a right to tender....* [Tennessee Code Annotated, § 65-25-205(a)(11)]

Condemn either the fee or such other right, title, interest or easement in and to property as the board may deem necessary and such property or interest in such property may be so acquired, whether or not the same is owned or held for public use by corporations, associations, cooperatives or persons having the power of eminent domain....*provided that no property which is owned or held for public use, nor any interest therein, shall be condemned if in the judgment of the court, the condemnation of such property or interest therein will obstruct, prevent, burden, interfere with, or unduly inconvenience the continued use of such property for the public use to which it is devoted at the time the same is sought to be condemned....* [Tennessee Code Annotated, § 65-25-205(12)(C)]

Two things stand out with respect to those two powers: of electrical cooperatives under the RECSCA:

- The city could not have "unreasonably" withheld from VEC the right to build electric power transmission facilities in the easement in question.
- The VEC had the power of condemnation of the property over which the easement ran even though the easement had been granted to the City of Crossville for public purposes, assuming that a court would have found that the condemnation of the property probably would not "obstruct, prevent, burden, interfere with, or unduly

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inconvenience the continued use of such property for the public use to which it [was]
devoted at the time it [was] sought to be condemned.”

While I undoubtedly do not have a detailed knowledge of the facts behind the city's acquisition of the permanent easement, and VEC's construction of its infrastructure inside the easement without permission from the city, I have learned that the only utility the city has in the easement are water lines, and that the transmission towers are sufficiently separated from the transmission towers so that they do not interfere with the city's use of the easement. For that reason, it sounds doubtful to me that it would have been reasonable for the city to withhold its agreement from the VEC to use the easement to install the transmission towers, or that a court would have found that the use of the easement for power transmission lines would burden the city's use of the easement for its water lines.

The question of whether the easement granted the city contemplated electric power lines, appears to be answered by *Cello Partnership v. Shelby County*, 172 S.W.3d 574 (Tenn. Ct. App. 2004). That case says,

As with other instruments, “in the construction of instruments creating easement, it is the duty of the court to ascertain and give effect to the intention of the parties.” 28A C.J.S. Easements § 57 (1966). Generally “[w]here the language is unambiguous, other matters may not be considered, as an easement specific in its terms is decisive of its limits.” 18A C.J.S. Easements § 57 (1996); see also *Foshee v. Brigham*, 174 Tenn. 564, 129 S.W.2d 207, 208 (1939). (“If the easement is claimed under a grant, the extent of the easement is determined by the language in the grant.”). [At 594-95]

In the same case, a property owner had granted an easement to Shelby County for the purpose of the county building a water tower on the property. A question in that case was whether Shelby County could grant a telecommunications company the right to attach telecommunications equipment on the water tower. The court, citing *Black's Law Dictionary* 1544 (7th Ed. 1999) declared that, “A utility has been defined as a company that provides necessary services to the public, such as telephones, electricity, and water.” That definition of utility fit the telecommunications equipment Shelby County allowed to be placed on the water tower. Surely, in the case of the easement presently at issue, the term “utilities” contemplates the electric power transmission lines and facilities, it containing no restrictions on what utilities are allowed in the easement.

With respect to the unhappiness of the property owners who granted the city the easement over what they apparently claim is the higher level of electric in the easement on their property, the unreported case of *Rollins v. Electric Power Board of Metropolitan Government of Nashville and Davidson County*, 2004 WL268431 (Tenn. Ct. App.) involves a case where NES failed to give notice to the plaintiff of its intent to cut trees in the utility easement on their property that were literally interfering with the transmission of electricity as required by its own

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policies, and that NES cut down the trees rather than using one of several alternatives the plaintiffs would have suggested, that would have required taking down two electrical conductors, moving a transformer and meter, and running underground service (the latter of which the plaintiffs claimed they would have paid). The plaintiff's sued the city under the Tennessee Governmental Tort Liability Act.

The court's response was that, "Under the circumstances of this case, the only choices which the Rollins claim they would have presented to NES involve its [NES's] adjustment of its own easement rights in order to preserve three trees located directly within the prescriptive easement and interfering therewith." [At 4] That essentially turned easement law on its head, continued the court. Citing among various authorities, including 25 Am.Jur.2d Easement and Licenses, § 101:

The owner of the fee may use the property through which the easement runs in any manner he desires, but he may not interfere with the plaintiff's [the holder of the easement] enjoyment of the pipe line. *Panhandle Eastern Pipeline Co. v. State Highway Commission*, 294 U.S 613, 545 S.Ct. 563, 70 L.Ed. 1090. An easement is an interest in real property. It is expressed not in terms of possession or occupancy but in terms of use. Therefore, the property of the owner of an easement is taken from him not necessarily when the adverse party occupies the land, but only when it prevents or interferes with the owner's use of the easement. *When that occurs there has been a taking of property from the owner of the easement just as much as if an adverse party had taken real estate which another owned in fee.* [Citations omitted by me.] [Emphasis is mine.]

In balancing the rights of the servient estate to the use of his land against the rights of the dominant tenant holding easement rights in this case, overriding consideration must be given to the nature of the use or which the easement exists. The very nature of electricity dwarfs other considerations. It is the supplier of electricity who is charged with the heightened duties for public safety not the servient estate.... [At 6]

Finally, said the court about the failure of NES to notify the Rollins about the cutting of the trees in Ned's easement:

Second, in recognition of the ability of any utility easement holder to secure the safe exercise of its right, whether those rights are obtained by prescription or grant, the Rollins must present proof that the failure of NES to inform, rather than the danger posed by the trees to the safe use of the

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easement, was the cause of the removal. The Rollins present no such proof. The only showing in the record is a speculation on the part of the landowner as to options which they might have taken had NES agreed to change the nature of its easement. This Court cannot disregard the elementary provisions of our common law regarding easements and apply a theory of negligence which lacks the key elements: the breach of a recognized duty which causes injury to the plaintiff. See *McClenahan v. Cooley*, 806 S.W.2d 767, 774 (Tenn. 1991). The trial court found that NES reasonably maintained its easement, and the proof of the record does not preponderate against that fact. [At 6]

Rollins, above, says to me that NES owned the easement at issue, and that NES was not obligated to consult with the plaintiffs about the best facilities or ways to provide electricity inside the easement; to have held otherwise would have been to give the rights to the servient estate which under easement law belonged to the dominant estate [the easement holder]. Rollins also said that NES's failure to notify the Rollins that it intended to cut the trees in the easement was not negligence on its part. It had done what needed to be done in the easement to safely provide electricity.

Although the facts in Rollins are not precisely the same as in the City of Crossville's situation, that case is instructive on the nature of easements. It seems to point to the propositions that the City of Crossville owns the easement at issue, and that nothing it did in the easement interfered with any rights of the property owners in which the easement lay, or caused them damage under the Tennessee Governmental Tort Liability Act. VEC did not have permission from the city to use the easement, but had VEC asked for such permission, neither the city (nor probably VEC) would have been required to notify the property owners that such permission had been granted. Although they certainly could have done so, it is highly unlikely that either of those parties would have been legally required to bargain with the property owners about how the easement should be used to provide electricity.

Presumably, the city could refuse to grant VEC permission to use the easement, but if the construction of the power transmission facilities is an accomplished fact, that would probably be an ultimately a futile gesture, especially given the limitation on the right of the city to refuse electric cooperatives permission to use public ways and places for electric power transmission facilities, and the right of electric cooperatives to condemn property already owned by the public and used for public purposes.

Sincerely,

Sidney D. Hemsley
Senior Legal Consultant