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ATTORNEY GENERAL

July 18, 1977

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ARIZONA ATTORNEY GENERAL

Mr. George Schneider
Commissioner
Arizona State Real Estate Department
1645 West Jefferson
Phoenix, Arizona 85007

Re: 77-152 (R77-128)

Dear Mr. Schneider:

We are writing in response to your request for our opinion of the following:

Has a property owner complied with A.R.S. § 32-2185.02, which requires permanent access to subdivided property, by providing access from his property to a road which is subject to an easement which can be revoked by the United States?

A.R.S. § 32-2185.02.A provides:

No subdivided land may be sold without provision for permanent access to the land.

The term "permanent access" is defined in A.R.S. § 32-2101(19):

"Permanent access," as required under Article 4 of this chapter, means permanent access from the subdivision to any federal, state or county highway. [footnote omitted]

It is our opinion, after reviewing the legislative history of the statute and the legislative intent as evidenced by the specific terms used in the statute, that a subdivider has complied with A.R.S. § 32-2185.02 if he has provided a permanent way or means of approach from the subdivision to an officially designated state highway, county highway, or federal-aid system highway.

In 1972, in response to the obvious need to provide safeguards for purchasers of subdivided land, the Arizona Legislature required that a subdivider provide access to the

Mr. George Schneider
July 18, 1977
Page Two

subdivision. Laws of 1972, Ch. 110, Sec. 38. This original act of the Legislature required that the subdivider provide "legal access" to the subdivision. In 1973, the phrase "permanent access" was substituted for "legal access". Laws of 1973, Ch. 129, Sec. 3. Finally, in 1974 the Legislature added the previously quoted definition of "permanent access" contained in A.R.S. § 32-2101. Laws of 1974, Ch. 135, Sec. 1.

In determining the meaning of the statutes on permanent access, as when interpreting any statute, the legislative intent must be examined. State ex rel Berger v. McCarthy, 113 Ariz. 161, 548 P.2d 1158 (1976). Of course, when the Legislature has included a definition of terms, as it has in the case of "permanent access", this definition is controlling. Enloe v. Baker, 94 Ariz. 295, 383 P.2d 748 (1963).

A review of the legislative history of the permanent access requirement of A.R.S. § 32-2185.02, and particularly the substitution of the phrase "permanent access" for "legal access", reveals that the Legislature intended to provide the purchaser of subdivided land with something more than a bare legal right to enter the property. Specifically, the Legislature, as evidenced by the definition added in 1974, intended that the purchaser of subdivided property obtain permanently enforceable access to a formally designated federal, state or county highway. Therefore, any "access" road constructed on a revocable easement over federal lands would not, by itself, constitute "permanent access to any federal, state, or county highway" within the meaning of A.R.S. § 32-2185.02.

On the other hand, if a revocable roadway over federal land is itself a "federal, state or county highway," permanent access to that road nevertheless would meet the requirements of A.R.S. § 32-2185.02.

It is presumed that when the Legislature enacts a statute it is aware of other statutes relating to the same subject matter. State v. Cassius, 110 Ariz. 485, 520 P.2d 1109 (1974), cert. dismissed, 420 U.S. 514 (1974). As was previously noted, the Legislature required that there be permanent access to any "federal, state or county highway." These are terms of limited meaning appearing in other statutes which existed when the Legislature added the subdivision access requirements.

Mr. George Schneider
July 18, 1977
Page Three

A "state highway" is defined in A.R.S. § 28-1801 and again in A.R.S. § 28-1861(A). A "state highway" is a state route which has formally been designated as a "state highway" by the Transportation Board. Similarly, a "state route" must be specifically designated as such by the Transportation Board. A.R.S. § 28-1861.A.

Although it has broader application than the term "state highway", the phrase "county highway" also has a specific and limited meaning. Initially, the "county highway" is defined as ". . . a public road constructed and maintained by a county". A.R.S. § 28-1801.3. A public road or highway is defined in A.R.S. § 28-1861.B as follows:

All highways, roads or streets which have been constructed, laid out, opened, established or maintained for ten years or more by the state or any agency or legal subdivision of the state prior to January 1, 1960, and which have been used continuously by the public as thoroughfares for free travel and passage for ten years or more, regardless of any error, defect or omission in the proceeding or failure to act to establish such highways, roads or streets, or in recording the proceedings, and all such highways, roads or streets are declared public highways.

Thus, the term "county highway" includes all roads described in A.R.S. § 28-1861 which were constructed and are maintained by a county.

Other roads in Arizona also constitute county highways. A.R.S. § 28-1863.B provides that all state routes not designated as "state highways" are "county highways". Finally, A.R.S. §§ 18-201, et seq. provide specific procedures for counties to create county highways.

In summary, "state highways" and "county highways" include all roads which have been designated as "state routes" (since "state routes" are either "state highways" or "county highways"), all "county highways" officially designated as such by the individual counties, and all roads described in A.R.S. § 28-1861.B constructed and maintained by any county. However, these are not all of the roads or highways located within the State of Arizona. Not included are the roads and highways constructed by the state itself but which have not been designated

Mr. George Schneider
July 18, 1977
Page Four

as "state routes" or "county highways". Also excluded are roads not within the the definition of "public highway". As stated in Territory of Arizona v. Richardson, 8 Ariz. 336, 339-340, 76 P. 456 (1904):

In contemplation of law, therefore, though commonly known and spoken of indiscriminately as public and private roads, many, if not a majority of the roads and ways running throughout all parts of the territory, and frequently in general public use, are neither public highways nor private ways, but are simply roads established without authority for the convenience of individuals and without a legal status either as public highways or private ways.

The addition in 1974 of A.R.S. § 28-1861.B, defining "public highways", did officially designate as "public highways" many of the highways referred to in The Territory of Arizona v. Richardson case, supra. However, there are still highways and roads "without a legal status".

Although there is no specific definition of "federal highway" in the Arizona statutes, Arizona's statutory scheme does lend some assistance in defining this term. First, it is apparent that the Legislature would not have required access to formally designated state and county highways, and not have demanded similar formalities before a roadway became a federal highway. Moreover, the Arizona statutes do recognize the existence of formally created and funded federal-aid highways. For example, A.R.S. § 28-1867 sets forth the manner in which county federal-aid secondary highways are to be constructed. A.R.S. § 28-112 grants the Department of Transportation authority to do whatever is necessary to secure federal transportation and highway construction funds, and A.R.S. § 32-1163 limits the applicability of Arizona's contractor licensing laws in situations involving federal-aid contracts.

Federal-aid highways are established pursuant to the provisions of 23 U.S.C. §§ 101, et seq., and particularly pursuant to 23 U.S.C. § 103 which gives the individual state highway departments authority to designate those roads which will be federal-aid highways. As stated in Road Review League, Town of Bedford v. Boyd, 270 F.Supp. 650, 653 (S.D.N.Y. 1962):

Mr. George Schneider
July 18, 1977
Page Five

The statute [23 U.S.C. § 103] contemplates that the roads shall be planned, constructed and owned by the State.

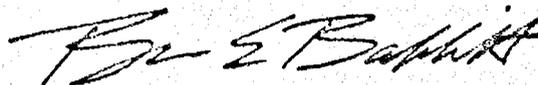
Thus, as in the case of "state highways", the Department of Transportation determines which roads merit the designation "federal-aid highway." It is unlikely that the Arizona Legislature intended any result other than that "federal highway" was to mean a federal-aid highway designated by the Department of Transportation, just as it intended that "state highway" was to include a state route designated by the Department of Transportation.

CONCLUSION

A subdivider must provide permanent public access from the subdivision to a formally designated "state highway", "county highway" or federal-aid highway. This interpretation of A.R.S. § 32-2101.19 gives a uniform meaning to the terms "state highway" and "county highway" as used throughout Arizona's statutes. Moreover, it is consistent with the legislative intent of requiring access to a recognized, formal highway, while holding as insufficient access to a roadway which the designated state or county authorities have not seen fit to include within any system of formal highways.

In answer to your specific inquiry concerning permanent access to revocable easements across federal land, no uniform rule can be given. Each road to which a subdivider provides access must be examined individually to determine whether it is a "state highway", "county highway" or federal-aid highway. The fact that the particular road to which a subdivision has access may be subject to a revocable easement is not relevant to that question. However, it must be kept in mind that a permanent roadway, while itself not constituting a formal "federal, state or county highway", under A.R.S. § 32-2101.19, can constitute permanent access to such a federal, state or county highway and thus be sufficient to meet the "permanent access" requirement of A.R.S. § 32-2185.02, whereas an informal and revocable roadway is insufficient to constitute permanent access.

Very truly yours,



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Attorney General

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