

00-090

COUNTIES, CITIES AND TOWNS: FRANCHISES, PUBLIC PROPERTY, UTILITIES.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT — EDUCATION.

Buildings owned and used as schools by City of Hopewell are "public places" that may not be sold without recorded three-fourths affirmative vote of all members elected to city council.

Mr. Edwin N. Wilmot|
City Attorney for the City of Hopewell
December 19, 2000

You ask whether Article VII, § 9 of the Constitution of Virginia (1971) and § 15.2-2100(A) of the *Code of Virginia*, which require a three-fourths vote of all members elected to the governing body to sell the rights to public property, apply to the sale of two buildings owned by the City of Hopewell.

You advise that the City of Hopewell is contemplating selling two buildings that previously have been used as school buildings. You relate that one of the buildings is vacant and has not been used for ten years. The other building is being used as an elementary school, but will become vacant upon completion of construction of a new elementary school. The current school building is also used as a polling place, as a meeting place for religious services, and as a place for other public functions. You state that, when both buildings no longer are used as schools and are vacant, the school board will relinquish both buildings to the city. Therefore, you ask how many of the seven-member city council are required to approve the sale of the buildings to a private party.

You advise that your research reveals no cases of the Supreme Court of Virginia or opinions of the Attorney General indicating whether a building used as a school constitutes a "public place" within the meaning of Article VII, § 9 and § 15.2-2100(A). Consequently, you conclude that it is not clear whether a three-fourths vote of the city council is required to approve the sale of these particular buildings.¹

Article VII, § 9 and § 15.2-2100 impose two distinct restrictions on cities and towns. First, property of certain enumerated classes that has been dedicated to public use may not be *sold* without "a recorded affirmative vote of three fourths of all members elected"² to the municipal council. A 1983 opinion of the Attorney General concludes that this requirement applies only to public places devoted to use by the public at large or by the municipality itself in carrying out its governmental functions.³ Second, the grant of any franchise, lease or right to use any of the enumerated classes of public property "or any other public property or easement of any description in any manner not permitted to the general public" is limited to forty years in duration.⁴

Prior opinions of the Attorney General repeatedly have noted that Article VII, § 9 seeks "to prevent 'the permanent dedication of publicly owned property to private use.'"⁵ Section 9 of Article VII is virtually unchanged from § 125 of the 1902 Constitution of Virginia.⁶ According to Professor A.E. Dick Howard's

Commentaries on the Constitution of Virginia, the concern which gave rise to this section was the "fear of legislative willingness to knuckle under to special interests, [and] a belief that municipal councils could not be counted on faithfully to safeguard the public interest when dealing with corporations and utilities."⁷ Professor Howard notes that, because of the concern that unscrupulous city councils might dispose of valuable public property at a fraction of its worth to such parties, the section attempts to ensure that private business interests are not favored over the public interests in a city or town's public property.⁸ Thus, this section requires "the recorded vote of an extraordinary majority"⁹ of council members when selling public property. In the case of franchising public property, § 9 places a limit on the time a franchise may tie down city or town property and provides for an advertising and bidding process so that notice is clearly provided to the public prior to the award of the franchise.¹⁰

The 1983 opinion considers whether the predecessor statute to § 15.2-2100(A) applies to properties purchased and sold by a city in administering its housing program.¹¹ The opinion notes that the term "public places" is not defined by the General Assembly in considering the applicability of the three-fourths vote requirement.¹² Therefore, the following definition of "public place" has been adopted:

"A place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public (e.g., a park or public beach). Also, a place in which the public has an interest as affecting the safety, health, morals, and welfare of the community. A place exposed to the public, and where the public gather together or pass to and fro."^{13]}

A 1988 opinion responds to an inquiry whether, after two of four members present at a council meeting have disqualified themselves, the remaining two members constitute a legal quorum to conduct the business of transferring town real property to the fire department.¹⁴ The opinion notes that the "supermajority requirement" of § 15.2-2100 "does not apply to all property owned by a city or town. Rather, the requirements of [§ 15.2-2100] apply only to the sale of property dedicated to public use."¹⁵ Finally, a 1989 opinion notes that "municipal property that has been dedicated to public use may not be sold without a three-fourths vote of all members elected to a municipal council."¹⁶ The opinion relies on the 1983 opinion in noting that the requirement "applies only to public places devoted to use by the public at large or by the municipality itself in carrying out its governmental functions."¹⁷

The General Assembly has not amended § 15.2-2100(A) in any manner to indicate that it disagrees with the definition of the term "public place" adopted by the Attorney General. The General Assembly is presumed to have had knowledge of the Attorney General's published interpretations of a statute, and its failure to make corrective amendments evinces legislative acquiescence in the interpretation.¹⁸ I must conclude that the prior opinions correctly state the definition to be used in responding to your inquiry.

The school buildings you describe clearly are public, rather than private, places. Further, the buildings clearly are devoted to use by the city in carrying out its governmental function of providing a free public education.¹⁹ In addition, the

public has a clear interest in such buildings that affects the safety, health, morals, and welfare of the community. Consequently, it is my opinion that the specific buildings in the City of Hopewell that you describe as being used as school buildings clearly are "public places" as that term is used in Article VII, § 9 and § 15.2-2100(A).

Consequently, it is also my opinion that Article VII, § 9 and § 15.2-2100(A), which require a three-fourths vote of all members elected to the governing body to sell the rights to public property, apply to the sale of the two described buildings owned by the City of Hopewell.

¹Section 2.1-118 requires that any request by a city attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."

²Art. VII, § 9; § 15.2-2100(A).

³See 1983-1984 Op. Va. Att'y Gen. 31.

⁴The quoted portion implements the first paragraph of Article VII, § 9, which provides: "No rights of a city or town in and to its ... public places ... shall be sold except by an ordinance or resolution passed by a recorded affirmative vote of three fourths of all members elected to the governing body." See § 15.2-2100 (enacting parallel statutory provisions); see *also* Stendig Development Corp. v. Danville, 214 Va. 548, 202 S.E.2d 871 (1974); 1989 Op. Va. Att'y Gen. 125 (concluding that constitutional limits are applicable to city's lease of property to state agency).

⁵1999 Op. Va. Att'y Gen. 63, 64 (quoting 1989 Op. Va. Att'y Gen. 125, 127).

⁶*Compare* Va. Const. art. VIII, § 125, *repealed by* Va. Const. art. VII, § 9. See 1999 Op. Va. Att'y Gen. 172, 174.

⁷2 A.E. Dick Howard, Commentaries on the Constitution of Virginia 854 (1974).

⁸*Id.*

⁹*Id.* at 853.

¹⁰*Id.* at 854.

¹¹1983-1984 Op. Va. Att'y Gen., *supra* note 3, at 31 (citing former § 15.1-307).

¹²*Id.*

¹³*Id.* at 32 n.6 (quoting Black's Law Dictionary 1107 (5th ed. 1979)).

¹⁴1987-1988 Op. Va. Att'y Gen. 223, 225.

¹⁵*Id.* at 231 n.3 (citing former § 15.1-307); see Art. VII, § 9; see *also* Stendig Development Corp. v. Danville, 214 Va. at 550, 202 S.E.2d at 873; 1983-1984 Op. Va. Att'y Gen., *supra* note 3, at 31.

¹⁶1989 Op. Va. Att'y Gen. 125, 128.

¹⁷*Id.*

¹⁸See *Lee Gardens v. Arlington County Board*, 250 Va. 534, 540, 463 S.E.2d 646, 649 (1995).

¹⁹Article VIII, § 1 of the Virginia Constitution mandates that all children of the Commonwealth be provided a "free" public education.