

**00-062**

**CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT.**

**COUNTIES, CITIES AND TOWNS: FRANCHISES, PUBLIC PROPERTY, UTILITIES — BUILDINGS, MONUMENTS AND LANDS GENERALLY.**

**City's grant of conservation easement to tax exempt nonprofit conservation organization, which effectively results in permanent dedication of public property to its current public use, is tantamount to sale of municipal property, requiring three-fourths affirmative vote of council and public hearing prior to sale.**

The Honorable Viola O. Baskerville  
Member, House of Delegates  
November 3, 2000

You ask whether a municipal corporation may grant a conservation easement, to be held in perpetuity, to a conservation organization exempt from income taxation under § 501(c)(3) of the Internal Revenue Code.

You relate that the City of Richmond is considering the possibility of granting conservation easements to several § 501(c)(3) nonprofit conservation groups to protect four of the city's parks and natural areas and to retain the natural character of these properties from future development. For the purposes of your inquiry, I shall assume that the terms of the grant provide for the continuation of the current public purpose of the property. You note that conservation easements may be held by these organizations in perpetuity pursuant to the Virginia Conservation Easement Act.<sup>1</sup> You inquire whether the franchise process contained in Article VII, § 9 of the Constitution of Virginia (1971), and implemented pursuant to §§ 15.2-2100 through 15.2-2107 of the *Code of Virginia*, must be engaged prior to such grant.

Article VII, § 9 requires an affirmative vote of three fourths of the members elected to a city governing body before a city may sell any rights "in and to its waterfront, wharf property, public landings, wharves, docks, streets, avenues, parks, bridges, or other public places, or its gas, water, or electric works." Furthermore, § 9 places restrictions on the rights of a city to create franchises, leases, or other rights to use public property, including a limit on the term of such franchise and a procedural requirement of advertising and public bidding prior to the granting thereof.<sup>2</sup>

Article VII, § 9 and § 15.2-2100 impose two distinct restrictions on cities. First, property of certain enumerated classes, such as parks and other public property, that has been dedicated to public use "may not be sold without a three-fourths vote of all members elected to the municipal council."<sup>3</sup> 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."<sup>4</sup>

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.'"<sup>5</sup> Section 9 of Article VII is virtually unchanged from § 125 of the 1902 Constitution of Virginia.<sup>6</sup> According to Professor A.E. Dick Howard's *Commentaries on the Constitution of Virginia*, the evil 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."<sup>7</sup> 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.<sup>8</sup> Thus, this section requires "the recorded vote of an extraordinary majority"<sup>9</sup> 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.<sup>10</sup>

The clear intent of the constitutional provision is to safeguard public property and ensure that it not be appropriated by private self-interests for an extended term to the detriment of the public without due consideration by council members. Accordingly, a 1990 opinion concludes that a city cannot grant an easement in perpetuity to a gas company so that the company could install a natural gas pipeline across city property.<sup>11</sup> The grant of such an easement permits the use of city property "in a manner not permitted to the general public."<sup>12</sup> Thus, the easement may not be granted in perpetuity but must be limited to the forty-year term prescribed in Article VII, § 9, and be subject to the advertising and bid provisions therein.<sup>13</sup> Unlike the circumstances presented in the 1990 opinion, the grant in question furthers the existing public purpose of the property. Additionally, the proposed grant does not benefit private business interests. Importantly, the use of the public property in issue remains the same and indeed benefits the public.<sup>14</sup> Consequently, the provisions of Article VII, § 9, relating to the franchising process, along with the parallel

provisions of § 15.2-2100(B), are not applicable to the conservation easement grant in this situation.<sup>15</sup>

The Article VII, § 9 requirement of an affirmative vote of three fourths of the members elected to a city governing body before a city or town may sell any rights "in and to its ... parks ... or other public places" and the parallel provisions of § 15.2-2100(A) are, however, applicable. A grant of an easement "in perpetuity"<sup>16</sup> is a grant of a prescribed use of certain real property<sup>17</sup> for an endless duration. As applied to the instant case, the grant in issue effectively results in a permanent dedication of the public property involved to the current public use of such property. It is my opinion that such a grant is tantamount to a sale of municipal property.<sup>18</sup> Accordingly, the provisions of Article VII, § 9, relating to the recorded three-fourths affirmative vote requirement for the sale of municipal property, as well as those of § 15.2-2100(A), which implement the constitutional provisions, apply to the grant in issue.<sup>19</sup> In addition, § 15.2-1800(B) requires that a public hearing be held prior to the sale of public property or a subordinate interest in such property.

<sup>1</sup>See Va. Code Ann. tit. 10.1, ch. 10.1, §§ 10.1-1009 to 10.1-1016. The Virginia Conservation Easement Act enables certain nonprofit § 501(c)(3) organizations to hold conservation easements in perpetuity. Nothing in this Act, however, addresses the authority of a city to grant an easement, conservation or otherwise.

<sup>2</sup>See 1999 Op. Va. Att'y Gen. 172, 173.

<sup>3</sup>1990 Va. Att'y Gen. 43, 44.

<sup>4</sup>*Id.* (emphasis in italics added) (citing Art. VII, § 9 and § 15.1-307, predecessor statute to § 15.2-2100); see also *Stendig Development Corp. v. Danville*, 214 Va. 548, 202 S.E.2d 871 (1974) (holding that Article VII, § 9 vote requirement is not limited to property dedicated to public use and does not proscribe city ordinance requiring three-fourths vote to sell *any* city property).

<sup>5</sup>1999 Op. Va. Att'y Gen. 63, 64 (quoting 1989 Op. Va. Att'y Gen. 125, 127).

<sup>6</sup>*Compare* Va. Const. of 1902 art. VIII, § 125, repealed by art. VII, § 9. See 1999 Op. Va. Att'y Gen., *supra* note 2, at 174.

<sup>7</sup>2 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 854 (1974).

<sup>8</sup>*Id.*

<sup>9</sup>*Id.* at 853.

<sup>10</sup>*Id.* at 854.

<sup>11</sup>See 1990 Op. Va. Att'y Gen., *supra* note 3, at 44.

<sup>12</sup>*Id.* (quoting Art. VII, § 9).

<sup>13</sup>*Id.*

<sup>14</sup>*Compare* 1994 Op. Va. Att'y Gen. 74 (concluding that Article XI, § 3, which affords special protection to certain natural oyster beds of the Commonwealth, does not allow private nonprofit organization to acquire ownership interest in beds, but does allow such organization to construct artificial reefs as long as purpose of reefs is to serve public interest).

<sup>15</sup>*See* 2 Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia, Held in the City of Richmond, June 12, 1901, to June 26, 1902, at 2033-34 (1906) (discussing constitutional amendment excepting trunk railways from advertising and bid provisions).

<sup>16</sup>Black's Law Dictionary 795 (7th ed. 1999) (defining "in perpetuity" to mean "[f]orever").

<sup>17</sup>*See* 1993 Op. Va. Att'y Gen. 7, 12 n.1 (noting that "easement in gross ... is right to use land of another" (quoting Black's Law Dictionary 510 (6<sup>th</sup> ed. 1990))).

<sup>18</sup>1989 Op. Va. Att'y Gen., *supra* note 5, at 128.

<sup>19</sup>*Compare* 1989 Op. Va. Att'y Gen., *supra* (concluding that dedication of city property as natural area preserve must be approved by recorded affirmative vote of three fourths of all members elected to city council).