



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

February 19, 2016

Ms. Brett C. Glymph
Executive Director
Virginia Outdoors Foundation
39 Garrett Street, Suite 200
Warrenton, Virginia 20186

Dear Ms. Glymph:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether the Virginia Outdoors Foundation may award grants from the Open-Space Lands Preservation Trust Fund to cover the costs of baseline documentation reports and land surveys associated with the conveyance of open-space or conservation easements to the Foundation.

Applicable Law and Discussion

The Virginia Outdoors Foundation (“VOF”) is a body politic “established to promote the preservation of open-space lands and to encourage private gifts of money, securities, land or other property to preserve the natural, scenic, historic, scientific, open-space and recreational areas of the Commonwealth.”¹ As part of its mission, VOF administers the Open-Space Lands Preservation Trust Fund (the “Fund”). The purpose of the Fund is to facilitate the donation or sale of open-space or conservation easements to VOF.²

With respect to the use of monies in the Fund, § 10.1-1801.1(D) provides that “[t]he purpose of grants made from the Fund shall be to aid . . . persons conveying conservation or open-space easements with the costs associated with the conveyance of the easements, which may include legal costs, appraisal costs or all or part of the value of the easement.”³ Although the statute contains a list of items that clearly qualify as permitted costs, the inclusion of the phrase “may include” indicates the list is nonexclusive.⁴

¹ VA. CODE ANN. § 10.1-1800 (2012).

² See § 10.1-1801.1(D) (2012). If VOF consents, however, an easement may be conveyed to both VOF and a local co-holder, while still remaining eligible for grants from the Fund. See *id.* (setting forth the conditions under which a conveyance is eligible for grants from the Fund).

³ Section 10.1-1801.1(D). The aid is also available for “localities acquiring open-space easements” as co-holders with VOF. *Id.*

⁴ See *Gray v. Powell*, 314 U.S. 402, 416 (1941).

Thus, an item may be a permitted cost even if it does not constitute strictly legal costs (*e.g.*, the costs of drafting a conveyance and recording it), appraisal costs, or all or part of the value of the easement. The precise issue you present is whether the costs of baseline documentation reports and land surveys should be considered “costs associated with the conveyance of [an] easement” that are eligible for funding through grants made from the Fund.

In answering your inquiry, I first note that the chief object of statutory interpretation is “to ascertain and give effect to legislative intent.”⁵ Thus, “[a] statute must be construed with reference to its subject matter, the object sought to be attained, and the legislative purpose in enacting it; the provisions should receive a construction that will render it harmonious with that purpose”⁶ In keeping with this principle, the language of the statute governing use of the Fund must be interpreted consistently with the legislature’s purpose of promoting conservation by facilitating easement conveyances. Therefore, costs that are necessary or appropriate to facilitate a conveyance should generally be considered permissible.

As you relate, the preparation of a baseline documentation report (“BDR”) is considered essential for a land trust to accept the conveyance of an easement.⁷ A BDR is a detailed report of the condition of the property at the time the easement is conveyed. Generally, it includes maps, photographs, and other documents that are necessary to establish the existing status of all natural, scenic or historic resources sought to be protected by the easement. By documenting the condition of the property at the time of conveyance, the BDR provides a basis by which to measure a landowner’s compliance with the easement over time. This allows the holder of the easement to bring judicial proceedings, if necessary, to enforce the terms of the easement and to protect the conservation interests associated with the property.⁸

At the same time, preparation of a BDR also protects the interests of the landowner by documenting the conditions that predate the agreement to conserve the property, including the presence of any man-made improvements, existing damage to historic sites, or prior depletion of natural resources. Thus, in keeping with established best practices for land trusts, VOF historically has required preparation of a BDR prior to accepting any conveyance of an easement.⁹

Additionally, I note that preparation of a BDR typically is required for a person donating an easement to receive certain tax benefits designed to promote land conservation. For example, where a donor has retained any right in the property that may impair a protected conservation interest, a BDR is required prior to the conveyance for the donor to be eligible for a federal income tax deduction for a

⁵ Commonwealth v. Amerson, 281 Va. 414, 418-19 (2011) (quoting Conger v. Barrett, 280 Va. 627, 630 (2010)).

⁶ Esteban v. Commonwealth, 266 Va. 605, 609 (2003) (citing Stanley v. Tomlin, 143 Va. 187, 195 (1925)).

⁷ See, *e.g.*, JANE ELLEN HAMILTON, CONSERVATION EASEMENT DRAFTING AND DOCUMENTATION 207 (Land Trust Alliance ed., 2008).

⁸ See, *e.g.*, James L. Olmsted, *Climate Surfing: A Conceptual Guide to Drafting Conservation Easements in the Age of Global Warming*, 23 ST. JOHN’S J. C.R. & ECON. DEV. 765, 836 (“[A]dequate baseline documentation is a critical component of any easement holder’s stewardship program. In the absence of baseline documentation, the easement holder is legally hamstrung in the event of violation of the easement’s terms because there is no documentary or physical evidence to support the testimony of the parties as to the condition at the time the easement was created.”).

⁹ See HAMILTON, *supra* note 7, at 207. Generally, VOF assumes the task of preparing a BDR; however, qualified third-party contractors are sometimes used. For example, a landowner may opt to hire a qualified outside contractor to prepare the BDR.

“qualified conservation contribution,”¹⁰ as well as for tax credits under the Virginia Land Conservation Incentives Act.¹¹

Based on the foregoing, it is my opinion that the cost of a BDR should be considered a “cost associated with the conveyance of an easement” and therefore eligible for funding through grants made from the Fund.¹²

Second, with respect to land surveys, you indicate it is sometimes necessary, or prudent, for VOF to obtain a new survey prior to acceptance of an easement. This ensures that the boundaries of the easement are properly identified prior to conveyance. Often, an existing survey will suffice for purposes of identification. As you relate, however, obtaining a new survey is important in certain cases, such as those where no previous survey exists, or where an existing survey may contain antique, inaccurate, or disputed legal descriptions.¹³

As a written conveyance of an interest in real property, every written conveyance of an easement must contain a description of the land that is to be subjected to the easement with sufficient clarity to locate it with reasonable certainty.¹⁴ By obtaining new surveys when necessary or prudent, VOF ensures that all conveyances of easements conform to this legal standard. The practice also is in keeping with established best practices for land trusts, which direct that a land trust obtain a new survey in certain circumstances to ensure that each transaction is “legally, ethically and technically sound.”¹⁵ Based on the foregoing, it is my opinion that the cost of obtaining a survey, when necessary or prudent to do so, qualifies as a “cost associated with the conveyance of an easement” that is eligible for funding through grants made from the Fund.

Conclusion

Accordingly, it is my opinion that VOF may, in its sound discretion, award grants from the Open-Space Lands Preservation Trust Fund to cover the costs of baseline documentation reports and (where

¹⁰ See 26 C.F.R. § 1.170A-14(g)(5)(i) (providing, in relevant part, that “when [a] donor reserves rights the exercise of which may impair the conservation interests associated with the property, for a deduction to be allowable . . . the donor must make available to the donee, prior to the time the donation is made, documentation sufficient to establish the condition of the property at the time of the gift”); see also *Bosque Canyon Ranch LP v. Comm’r*, 110 T.C.M. (CCH) 48 (2015) (applying the baseline documentation requirements of 26 C.F.R. § 1.170A-14(g)(5)(i)).

¹¹ See VA. CODE ANN. § 58.1-512(C)(2) (Supp. 2015). The statute provides that a donation must meet the federal requirements for a “qualified conservation contribution” under I.R.C. § 170(h), and, by extension, all its implementing tax regulations, in order to qualify for the tax credits. Because the federal regulations implementing I.R.C. § 170(h) require preparation of a BDR (see 26 C.F.R. § 1.170A-14(g)(5)(i)), preparation of one also is necessary to receive state tax credits. However, in keeping with established best practices for land trusts, VOF requires preparation of a BDR for all easement conveyances, regardless of whether they are donations intended to qualify for federal or state tax benefits. See HAMILTON, *supra* note 7, at 218.

¹² This conclusion applies to the costs of VOF preparing a BDR, or, in the event one has been prepared by a third-party, VOF’s costs of reviewing the document. See *supra*, note 9.

¹³ See LAND TRUST ALLIANCE, LAND TRUST STANDARDS AND PRACTICES, Standard 9, Practice 9D: Determining Property Boundaries (rev. 2004).

¹⁴ See *Town of Vinton v. City of Roanoke*, 195 Va. 881, 892-93 (1954); see also *Glass v. Carnes*, 398 S.E.2d 7, 11 (Ga. 1990); *Machado v. Ryan*, 280 P.3d 715, 721 (Idaho 2012); *Highway Props., Ltd. P’ship v. Dollar Savs. Bank*, 431 S.E.2d 95, 98-99 (W. Va. 1993).

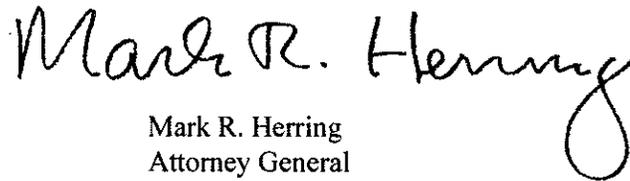
¹⁵ LAND TRUST ALLIANCE, LAND TRUST STANDARDS AND PRACTICES, Standard 9 (rev. 2004).

Ms. Brett C. Glymph
February 19, 2016
Page 4

appropriate) surveys associated with the conveyance of open-space or conservation easements to the Foundation.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Mark R. Herring". The signature is written in a cursive style with a large, looping "H" and a long, sweeping tail on the "g".

Mark R. Herring
Attorney General