

OP. NO. 04-004

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (SALE OF PROPERTY AND GRANTING OF FRANCHISES BY CITIES AND TOWNS).

COUNTIES, CITIES AND TOWNS: FRANCHISES; SALE AND LEASE OF CERTAIN MUNICIPAL PUBLIC PROPERTY; PUBLIC UTILITIES.

HIGHWAY, BRIDGES AND FERRIES: COMMONWEALTH TRANSPORTATION BOARD, ETC.

Supermajority is not required for Charlottesville city council to pass ordinance authorizing sale of approximately 9.2 acres of McIntire Park to Commonwealth for purpose of constructing Meadow Creek Parkway.

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City Attorney for the City of Charlottesville
April 16, 2004

Issues Presented

You ask whether Article VII, § 9 of the Constitution of Virginia and § 15.2-2100(A) require the Charlottesville city council to pass, by three-fourths vote of all council members, an ordinance authorizing the sale of a portion of McIntire Park to the Commonwealth or, in the alternative, granting the Commonwealth an easement, for construction of a proposed parkway that has been requested by the City of Charlottesville.

Response

It is my opinion that the provisions of Article VII, § 9 and § 15.2-2100 are not invoked under the factual situation you describe. Therefore, a supermajority is not required for the Charlottesville city council to pass an ordinance authorizing the sale of approximately 9.2 acres of McIntire Park to the Commonwealth for the purpose of constructing a portion of Meadow Creek Parkway.

Background

You relate that in January 1978, the Charlottesville city council passed a resolution formally requesting that the Department of Transportation establish and fund an urban highway project within the corporate limits of the city. You further relate that the proposed highway will be known as Meadow Creek Parkway. In 1994, the city council unanimously approved the proposed location of the parkway as recommended by the city planning commission. The parkway will traverse McIntire Park, a city-owned and operated park that is devoted both to active and passive public recreational uses traditionally associated with municipal parks. The parkway will intersect approximately 9.2 acres of McIntire Park's 150 acres. The city's comprehensive plan includes the parkway, and the Department of Transportation has included the project in its six-year plan for financing and construction. I must assume that the six-year-plan to which you refer is that of Albemarle County, because no statutory authority provides for a

city in the Commonwealth to adopt such a plan.¹ I also note that the Commonwealth Transportation Board has authority only over roads outside cities.²

You advise further that a five-member council elected at large governs the City of Charlottesville. Three council members are willing to sell to the Commonwealth the portion of McIntire Park needed for construction of the parkway. In lieu of a sale, the three council members are willing to grant an easement of less than 40 years' duration to the Commonwealth to facilitate the road construction. Two council members support neither the sale nor the transfer of any property rights.

You advise that the city council has requested guidance concerning the process for either selling 9.2 acres of McIntire Park to the Commonwealth, or granting an easement to the Commonwealth for construction of the road.

Applicable Law and Discussion

Article VII, § 9 of the Constitution of Virginia and § 15.2-2100 impose two distinct restrictions on cities. First, a city may not *sell* a park without "a recorded affirmative vote of three fourths of all members elected to the governing body."³ This requirement applies to public places devoted to use by the public at large or by the municipality itself in carrying out its governmental functions.⁴ Second, the grant of any franchise, lease, or right to use city parks "or any other public property or easement of any description in a manner not permitted to the general public"⁵ is limited to forty years in duration.⁶

You also acknowledge that prior opinions of the Attorney General note that Article VII, § 9 seeks to prevent the permanent dedication of publicly owned property to private use.⁷ The provisions of Article VII, § 9 are virtually unchanged from § 125 of the 1902 Constitution of Virginia.⁸ Professor A.E. Dick Howard, Executive Director of the Virginia Commission on Constitutional Revision, notes that the concern, which gave rise to the 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."⁹ Professor Howard also 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.¹⁰ Thus, this section requires "the recorded vote of an extraordinary majority"¹¹ of council members when selling public property. In the case of franchising public property, § 9 also places a limit on the time a franchise may encumber city or town property and provides for an advertising and bidding process so that notice clearly is provided to the public prior to the award of the franchise.¹²

The construction of a constitutional provision by the General Assembly is entitled to consideration, and if the construction is contemporaneous with adoption of the constitutional provision, it is entitled to great weight.¹³ In addition, "[l]ong acquiescence in such an announced construction so strengthens it that it should not be changed unless plainly wrong."¹⁴ The report of the proceedings and debates pertaining to adoption of the 1902 Constitution, specifically § 125, contains a full discussion of the intent and purpose of this provision 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.¹⁵

Based on the foregoing, the clear intent of Article VII, § 9 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 the governing body.¹⁶ Accordingly, a 1990 opinion of the Attorney General concludes that a city may not grant an easement in perpetuity to a gas company to install a natural gas pipeline across city property.¹⁷ The grant of such an easement permits the use of city property "in a manner not permitted to the general public."¹⁸ Therefore, the City of Charlottesville may not grant an easement in perpetuity. Rather, the easement must be limited to the forty-year term prescribed in Article VII, § 9 and be subject to the advertising and bid provisions therein.

The General Assembly has not amended § 15.2-2100 in any manner that would indicate disagreement with the Attorney General's conclusion that the intent of the constitutional and statutory provisions is to ensure that private business interests are not favored over the public interests in a city's public property. The General Assembly is presumed to have knowledge of the Attorney General's published interpretations of a statute, and its failure to make corrective amendments evinces legislative acquiescence in the interpretation.¹⁹ I must conclude that the numerous prior opinions correctly state the intent of both this statutory and constitutional provision.²⁰

The facts you provide do not suggest that a private business interest is being favored over public interests in the proposed sale of city property to the Commonwealth for construction of the parkway. Section 33.1-89(A) authorizes the Commonwealth Transportation Commissioner to acquire property only for the purpose of "construction, reconstruction, alteration, maintenance and repair of the public highways of the Commonwealth." The acquisition of property for these purposes is a public purpose.²¹ The Commonwealth Transportation Commissioner ordinarily cannot take the land of one property owner for the sole purpose of constructing a road for the private use of another.²² "[W]here ... the public purpose is established, the necessity or expediency of a road is a legislative question which has been delegated to the [Department of Transportation]."²³ The determination whether a proposed road

is a public road or one merely for the benefit of a private individual is not tested by the fact that such an individual will receive a greater benefit than the public generally. The test is not the length of the road, or how many actually use it, but how many have the free and unrestricted right in common to use it. It is a public road if it is free in common to all citizens.^[24]

Public highways belong entirely to the public at large.²⁵ I am satisfied that the parkway will be a public road.

[A] transfer of municipal property to another public agency is not required to be made in strict compliance with statutes designed to regulate transfers generally of municipal property. As this rule is sometimes stated, the statutes are not applicable to transfers among agencies representing the common interest, i.e., the public.^[26]

I am advised that, as a matter of agency policy, the Department of Transportation requires title to property necessary for the construction of highways to be vested in the Commonwealth before it will begin a highway construction project. I am

also advised that this Department policy does not distinguish between land owned by a municipality of the Commonwealth or a private landowner.²⁷ The Commonwealth Transportation Commissioner is vested with the power to acquire property for the construction of highways "by purchase, gift, or power of eminent domain."²⁸ You indicate that in 1978 and 1994, the city desired to sell the property to the Department for construction of the parkway.

Section 33.1-89(B) provides:

The [Commonwealth Transportation] Commissioner is authorized to exercise the ... power [to acquire property for public highways] within municipalities on projects which are constructed with state or federal participation, if requested by the municipality concerned. Whenever the Commissioner has acquired property pursuant to a request of the municipality, he shall convey the title so acquired to the municipality, except that rights-of-way or easements acquired for the relocation of a railroad, public utility company, public service corporation or company, another political subdivision, or cable television company in connection with said projects shall be conveyed to that entity in accordance with § 33.1-96. The authority for such conveyance shall apply to acquisitions made by the Commissioner pursuant to previous requests as well as any subsequent request.

In responding to your inquiry, I must take this statutory language as written.²⁹ By enacting § 33.1-89, the General Assembly appears to contemplate the acquisition of property for public highways from private landowners. It is my view that the 1978 adoption of the resolution by the city council requesting that the Transportation Department establish and fund the parkway satisfies the statutory requirement of such a request by the municipality.³⁰ Furthermore, the Commonwealth Transportation Commissioner must convey title of the property acquired for construction of a public highway back to the city.³¹ The use of the word "shall" in a statute generally implies that the General Assembly intends its terms to be mandatory, rather than permissive or directive.³² Accordingly, when construction of the parkway on the approximately 9.2 acres of the park is complete, the Commissioner will transfer title to that property back to the City of Charlottesville.

In the specific facts you provide, there cannot be any suggestion that the city council is disposing of valuable public property at a fraction of its worth for private benefit, or that some private business interests are being favored over the public interests in the specific property of the city's public park property. Clearly, the city simply is changing the use of its park property to city highway property. Both of these uses are for the benefit of, and use by, the general public. Although you suggest that council members have argued that the conversion of the city property from park use to highway use will not benefit the public, I cannot conclude that the provisions of Article VII, § 9 and § 15.2-2100 are implicated in any manner in this specific factual context. Accordingly, I must conclude that an affirmative vote of three fourths of all members elected to the Charlottesville city council is not required for passage of an ordinance authorizing the sale of city park property to the Commonwealth for construction of a public road that will ultimately be deeded back to the city.³³

Conclusion

Accordingly, it is my opinion that the provisions of Article VII, § 9 and § 15.2-2100 are not invoked under the factual situation you describe. Therefore, a supermajority is not required for the Charlottesville city council to pass an ordinance authorizing the sale of approximately 9.2 acres of McIntire Park to the Commonwealth for the purpose of constructing a portion of Meadow Creek Parkway.

¹Section 33.1-70.01 permits a county in the secondary system of state highways to formulate, in cooperation with the Department of Transportation representative(s), "a six-year plan for the improvements to the secondary highway system in that county." The plan "shall be based upon the best estimate of funds to be available to the county for expenditure in the six-year period" encompassed by the plan, and the plan "shall list the proposed improvements, together with an estimated cost of each project so listed." Va. Code Ann. § 33.1-70.1 (LexisNexis Supp. 2003). Once the county and Department representative reach an agreement on the plan and the list, it is binding. See 1978-1979 Op. Va. Att'y Gen. 132, 133-34.

²See § 33.1-41.1 (LexisNexis Supp. 2003); § 33.1-42 (Michie Repl. Vol. 1996); § 33.1-44 (LexisNexis Supp. 2003).

³Va. Const. art. VII, § 9; see *also* Va. Code Ann. § 15.2-2100(A) (LexisNexis Repl. Vol. 2003) (parallel statutory provision).

⁴See 1983-1984 Op. Va. Att'y Gen. 31.

⁵Va. Const. art. VII, § 9.

⁶The quoted portion implements the first paragraph of Article VII, § 9, which provides: "No rights of a city or town in and to its ... parks ... or other 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(A) (parallel statutory provision); see *also* Stendig Dev. Corp. v. City of Danville, 214 Va. 548, 202 S.E.2d 871 (1974) (holding that city may adopt ordinance imposing three-fourths vote limitation on resolution to sell any of its property, i.e., all property owned by city and not just property set aside for public use); 1989 Op. Va. Att'y Gen. 125 (concluding that constitutional limits are applicable to city's lease of property to state agency).

⁷Op. Va. Att'y Gen.: 2001 at 45, 47; 2000 at 62, 63; see *also* Op. Va. Att'y Gen.: 1999 at 63, 64 (stating intent of Article VII, § 9 and § 15.2-2100); 1989, *supra* note 6, at 126-27 (noting intent of § 15.1-307, predecessor statute to § 15.2-2100).

⁸*Compare* Va. Const. art. VIII, § 125, *repealed by* Va. Const art. VII, § 9. See 1999 Op. Va. Att'y Gen. 172, 174-75.

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

¹⁰*Id.*

¹¹*Id.* at 853.

¹²*Id.* at 854-55.

¹³*City of Roanoke v. James W. Michael's Bakery Corp.*, 180 Va. 132, 21 S.E.2d 788 (1942).

¹⁴*Dean v. Paolicelli*, 194 Va. 219, 227, 72 S.E.2d 506, 511 (1952).

¹⁵See 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 2033-40 (1906).

¹⁶2001 Op. Va. Att'y Gen., *supra* note 7, at 47.

¹⁷See 1990 Op. Va. Att'y Gen. 43, 44.

¹⁸*Id.* (quoting Va. Const. art. VII, § 9).

¹⁹*Lee Gardens Arlington Ltd. P'ship v. Arlington County Bd.*, 250 Va. 534, 540, 463 S.E.2d 646, 649 (1995).

²⁰See *supra* note 7, and accompanying text.

²¹Section 33.1-89(F) authorizes the Commonwealth Transportation Commissioner "to reasonably control the use of public highways so as to promote the public health, safety and welfare."

²²See *Foster v. Bd. of Supvrs.*, 205 Va. 686, 688-89, 139 S.E.2d 65, 67 (1964).

²³*Stewart v. Fugate*, 212 Va. 689, 692, 187 S.E.2d 156, 159 (1972).

²⁴*Id.* at 692, 187 S.E.2d at 159 (citing *Heninger v. Peery*, 102 Va. 896, 899, 47 S.E. 1013, 1014 (1904)). "To be public, a use must be one in which the terms and manner of its enjoyment are within the control of the governing body. The public interest must dominate any private gain." *Town of Rocky Mount v. Wenco of Danville, Inc.*, 256 Va. 316, 322, 506 S.E.2d 17, 21 (1998).

²⁵*Richmond v. Smith*, 101 Va. 161, 166, 43 S.E. 345, 346 (1903).

²⁶10 Eugene McQuillin, *The Law of Municipal Corporations* § 28.44, at 154 (3d ed. 1999).

²⁷I assume that the Department of Transportation premises its policy on the protection of the interests of the Commonwealth in the expenditure of funds for construction of the parkway. Outright ownership of the subject property guarantees to the Commonwealth absolute control over the property and removes the potential that a private property owner will benefit or profit from continued ownership of the property improved by the construction of the parkway.

²⁸Section 33.1-89(A) (LexisNexis Supp. 2003).

²⁹"[T]ake the words as written' and give them their plain meaning." *Birdsong Peanut Co. v. Cowling*, 8 Va. App. 274, 277, 381 S.E.2d 24, 26 (1989) (quoting *Brown v. Lukhard*, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985)), *quoted in* *Adkins v. Commonwealth*, 27 Va. App. 166, 169, 497 S.E.2d 896, 897 (1998).

³⁰The powers to adopt ordinances to preserve police and order, to regulate streets and other public areas, and to impose fines and taxes are governmental powers incident to the sovereignty of the Commonwealth. 1985-1986 Op. Va. Att'y Gen. 97, 97. The General Assembly may, by general law or special act, delegate such powers to local governments, except as restricted by the Constitution of Virginia. See 2 Howard, *supra* note 9, at 810. Such delegated governmental powers generally are vested in local governing bodies. See § 15.2-1401 (LexisNexis Repl. Vol. 2003). The Constitution requires that "[t]he governing body of each county, city, or town shall be elected by the qualified voters of such county, city, or town in the manner provided by law." Va. Const. art. VII, § 5.

³¹See § 33.1-89(B).

³²See *Andrews v. Shepherd*, 201 Va. 412, 414-15, 111 S.E.2d 279, 281-82 (1959) (discussing intention of legislature in using words "shall" and "may"); see also *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that word "shall" in statute generally is used in imperative or mandatory sense); Op. Va. Att'y Gen.: 1998 at 56, 58; 1996 at 178, 178; 1991 at 238, 240; 1989 at 250, 251-52; 1985-1986 at 133, 134.

³³Since I conclude that Article VII, § 9 and § 15.2-2100 are not applicable to the facts you present, there is no need to respond to your additional questions: (1) Whether an affirmative vote of three fourths of all members elected to the members elected to the Charlottesville City Council required for passage of an ordinance that authorizes the conveyance of an easement of less than 40 years duration across municipal park property to the Commonwealth for construction of a public road; and (2) If not, and the easement in question may be authorized by a simple majority vote of the city council, is the city required to follow the advertisement and bid procedures of Article 7, § 9 where the easement is to be granted to the Commonwealth for construction of a public road.

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