

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

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

Article VII, § 9 of Virginia Constitution and § 15.2-2100 apply to request to reconfigure and relocate easement located within and owned by City of Lexington in perpetuity. Supermajority vote of City Council is necessary to approve transaction. [Page 31]

Laurence A. Mann, Esq. Attorney for the City of Lexington

December 1, 2008

### ISSUE PRESENTED

You ask whether Article VII, § 9 of the Constitution of Virginia and § 15.2-2100 apply to a request between Cornerstone Bank and the City of Lexington to exchange property, which would reconfigure and relocate an easement held in perpetuity by the City and located within the City. You further ask whether such exchange would require the affirmative vote of three-fourths of the members elected to the City Council (“supermajority vote”).

### RESPONSE

It is my opinion that Article VII, § 9 of the Constitution of Virginia and § 15.2-2100 apply to an exchange of property, which would reconfigure and relocate an easement held in perpetuity by the City of Lexington on property located within the City. It further is my opinion that a supermajority vote of the City Council is necessary to approve the exchange.

### BACKGROUND

You advise that Cornerstone Bank has requested that the City Council for the City of Lexington (the “City”) consider a relocation and reconfiguration of the easement that the City holds in perpetuity,<sup>1</sup> which is known as Lot One. Lot One includes a decorative stone wall, plantings, a recreation of the original plat of the City, and a commemorative plaque. You express the view that the easement is intended for public use and benefit. You also advise that the easement is a significant element of the central intersection of the City.

You advise that the general law concerning relocation of easements is well settled. If both parties agree and the party making the request picks up all relocation costs, you believe the easement may be moved. You state that the current easement is comprised of 569.75 square feet. Cornerstone Bank has offered to exchange property for Lot One that contains slightly more square footage than the current easement. The Bank has proposed to keep the plat and plaque on Main Street while moving a portion of the plantings to another area to screen the parking area, which currently is screened by the stone wall and plantings. You believe that Cornerstone presents a good argument that the reconfigured easement will continue to meet the public purpose test. You also note that the issue is one of a private benefit and requires a determination of whether the request to reconfigure and relocate the easement by an exchange of property amounts to a sale as contemplated by the Virginia Constitution and *Code*.<sup>2</sup>

### APPLICABLE LAW AND DISCUSSION

Under the Dillon Rule of strict construction, municipal corporations possess and may exercise only those powers expressly granted by the General Assembly, powers necessarily or fairly implied from such express powers, and those powers that are essential and indispensable.<sup>3</sup> Article VII, § 9 of the Virginia Constitution and [Page 32] § 15.2-2100 impose two distinct restrictions on cities. First, a city may not *sell* a park or other public places without “a recorded affirmative vote of three fourths of all members elected to the governing body.”<sup>4</sup> 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.<sup>5</sup> 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”<sup>6</sup> is limited to forty years in duration.<sup>7</sup> Prior opinions of the Attorney General note that Article VII, § 9 seeks to prevent the permanent dedication of publicly owned property to

private use.<sup>8</sup>

A 2000 opinion of the Attorney General (the “2000 Opinion”) notes that “[a] grant of an easement ‘in perpetuity’ is a grant of a prescribed use of certain real property for an endless duration” and effectively results in the permanent dedication of property.<sup>9</sup> The 2000 Opinion concludes that 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” applicable to a grant of an easement in perpetuity because the granting of an easement in perpetuity is tantamount to a sale of property.<sup>10</sup>

The applicable rule of statutory construction requires that words be given their ordinary meaning, given the context in which they are used in a statute.<sup>11</sup> A sale is “[t]he transfer of property or title for a price.”<sup>12</sup> Furthermore, a sale of land is a “transfer of title to real estate from one person to another by a contract of sale. A transfer of real estate is often referred to as a conveyance rather than a sale.”<sup>13</sup> Finally, a conveyance is “[t]he voluntary transfer of a right or of property.”<sup>14</sup>

The situation you describe involves City-owned property, which is comprised of an easement in perpetuity. Cornerstone Bank seeks the release of such perpetual easement and a conveyance of the property, known as Lot One, to construct a bank building on the site for its private use. In consideration for release of the Lot One easement, Cornerstone Bank offers to grant an easement in perpetuity of property that it owns, which has a slightly greater square footage than Lot One. The Bank's property is located in the same general area as Lot One. It is my opinion that such a transaction is a transfer of property or title for a price. The price paid by Cornerstone Bank is the property it owns, which it offers to Lexington as an easement in perpetuity to replace Lot One. You also advise that the portion of Lot One being exchanged for other land owned by Cornerstone Bank, which is intended to serve the same purpose as Lot One, will involve a transfer or conveyance of land by deed. I must conclude that the transaction you describe constitutes the sale of a park or other public place within the meaning and intent of Article VII, § 9 and § 15.2-2100. Thus, an affirmative vote of three fourths of the members elected to the City Council will be required to approve the transaction.

### CONCLUSION

Accordingly, it is my opinion that Article VII, § 9 of the Constitution of Virginia and § 15.2-2100 apply to the request to reconfigure and relocate an easement held by the [Page 33] City of Lexington in perpetuity on property located within the city limits. It further is my opinion that a supermajority vote of the City Council is necessary to approve the transaction.

### FOOTNOTES

<sup>1</sup> The term “perpetuity” means “[t]he state of continuing forever.” Black's Law Dictionary 1177 (8th ed. 2004).

<sup>2</sup> Section 2.2-505(B) requires that an opinion request from a city attorney “shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions.”

<sup>3</sup> *Norton v. City of Danville*, 268 Va. 402, 408 n.3, 602 S.E.2d 126, 129 n.3 (2004); *Arlington County v. White*, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000); *Bd. of Supvrs. v. Countryside Inv. Co.*, 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999); *County of Fairfax v. S. Iron Works, Inc.*, 242 Va. 435, 448, 410 S.E.2d 674, 682 (1991).

<sup>4</sup> Va. Const. art. VII, § 9; *see also* Va. Code Ann. § 15.2-2100(A) (2008) (parallel statute) (providing that city may not sell park or other public places without “recorded affirmative vote of three-fourths of all the members elected to the council”).

<sup>5</sup> *See* 1983-1984 Op. Va. Att'y Gen. 31, 31, 83-84 Va. AG 31, 31 (interpreting Article VII, § 9 and § 15.1-307, predecessor to § 15.2-2100).

<sup>6</sup> Va. Const. art. VII, § 9; § 15.2-2100(B) (parallel statute).

<sup>7</sup> *See id.*; *see also Stendig Dev. Corp. v. City of Danville*, 214 Va. 548, 551, 202 S.E.2d 871, 874 (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, 1989 Va. AG 125 (concluding that constitutional limits are applicable to city's lease of property to state agency).

<sup>8</sup> See Op. Va. Att'y Gen: 2004 at 38, 39, 2004 Va. AG 38, 39; 2001 at 45, 47, 2001 Va. AG 45, 47; 2000 at 62, 63, 2000 Va. AG 62, 63; *see also* Op. Va. Att'y Gen.: 1999 at 63, 64, 1999 Va. AG 63, 64 (stating intent of Article VII, § 9 and § 15.2-2100); 1989, *supra* note 7, at 126-27 (noting intent of § 15.1-307).

<sup>9</sup> See 2000 Op. Va. Att'y Gen. 44, 46, 2000 Va. AG 44, 46 (footnotes omitted).

<sup>10</sup> *Id.* (alterations in original).

<sup>11</sup> *Va. Beach v. Bd. of Supvrs.*, 246 Va. 233, 236, 435 S.E.2d 382, 384 (1993).

<sup>12</sup> Black's Law Dictionary, *supra* note 1, at 1364. "Price" means "[t]he amount of money or other consideration asked for or given in exchange for something else." *Id.* at 1226.

<sup>13</sup> *Id.* at 1366.

<sup>14</sup> *Id.* at 357.