



# COMMONWEALTH of VIRGINIA

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The Honorable Jennifer L. McClellan  
Member, Senate of Virginia  
Post Office Box 396  
Richmond, Virginia 23218

Dear Senator McClellan:

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 Article VII, § 9 of the Constitution of Virginia and § 15.2-2100 of the *Code of Virginia* prohibit the City of Richmond from granting a permanent easement to the Commonwealth of Virginia. The easement would be for the purpose of facilitating state construction, repair, and maintenance of a monument to the Emancipation Proclamation.

## Background

You relate that the City of Richmond (the "City") has agreed to convey fee simple title to certain real estate on Brown's Island, a public park, to the Commonwealth of Virginia (the "Commonwealth"). A commission of the General Assembly intends to construct the Emancipation Proclamation and Freedom Monument on the property. The only route by which the Commonwealth will have access to the property, for the purposes of constructing, repairing, and maintaining the Freedom Monument, will be across a portion of the public park. The Commonwealth seeks a permanent easement authorizing such access.

The question presented is whether constitutional and statutory restrictions on cities and towns conveying public property would apply to the proposed easement.

## Applicable Law and Discussion

The Constitution of Virginia, in Article VII, § 9, limits the ability of cities and towns to convey publicly owned real property:

No rights of a city or town 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 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.

No franchise, lease, or right of any kind to use any such public property or any other public property or easement of any description in a manner not permitted to the general public shall be granted for a longer period than forty years [ . . . ]. Before granting any such franchise or privilege for a term in excess of five years, except for a trunk railway, the city or town shall, after due advertisement, publicly receive bids therefor.<sup>[1]</sup>

Article VII, § 9 contains two related but different restrictions. First, a supermajority vote is required to convey a city or town's rights in and to its "public places" (the "supermajority requirement"). Second, no right to use public property in a manner not permitted to the general public shall be for a term longer than forty years, and the grant of any such right for longer than five years must be by competitive bids (the "term-limit and competitive-bid requirement"). Your inquiry necessarily invokes examining both of these requirements.

#### I. The supermajority requirement

Professor A. E. Dick Howard, the former Executive Director of the Virginia Commission on Constitutional Revision, explains that the context of these restrictions was a period in our history when public property was sometimes conveyed to private, for-profit interests, to the detriment of the public.<sup>2</sup> The restrictions reflect a desire to protect against such abuses:

Like the Corporations article, which came into [the] Constitution as a result of a fear of legislative willingness to knuckle under to special interests, [the restrictions] reflected a belief that municipal councils could not be counted on faithfully to safeguard the public interest when dealing with corporations and utilities. The malaise of American cities at the turn of the century is well known. [The restrictions] seem[] to have arisen out of a desire to keep unscrupulous municipal councils from disposing of property at a fraction of its worth, as had happened in certain cities.<sup>[3]</sup>

A prior opinion of this Office, relying on Professor Howard's reasoning, concluded that the supermajority requirement did not apply when Charlottesville proposed to convey park land to the Virginia Department of Transportation for construction of a highway that would later be deeded back to the City.<sup>4</sup> The reason for this conclusion was that the City's conveyance to a state agency would be "for the benefit of, and use by, the general public":

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

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<sup>1</sup> Va. CONST. art. VII, § 9 (quoted here in relevant part). Restrictions that parallel these are also imposed by statute. See VA. CODE ANN. § 15.2-2100 (2012). Any references herein to Article VII, § 9 shall also apply to this statute, and vice versa.

<sup>2</sup> See 2 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 854-55 (1974).

<sup>3</sup> *Id.* at 854 (citations omitted). Prior opinions of the Attorney General note that Article VII, § 9 seeks to prevent the permanent dedication of publicly owned property to private use, see 2008 Op. Va. Att'y Gen. 30, 32; 1999 Op. Va. Att'y Gen. 63, 64; 1989 Op. Va. Att'y Gen. 125, 126-27; and further state that the constitutional provision "attempts to ensure that private business interests are not favored over the public interests in a city or town's public property," 2001 Op. Va. Att'y Gen. 45, 47; 2000 Op. Va. Att'y Gen. 44, 45; *cf.* 1990 Op. Va. Att'y Gen. 43, 44.

<sup>4</sup> 2004 Op. Va. Att'y Gen. 38, 38-42.

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 . . . 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.*<sup>5]</sup>

## II. The Term-Limit and Competitive-Bid Requirement

The term-limit and competitive-bid requirement applies when a proposed grant involves the right to use public property for a term of years in a manner not permitted to the general public. When it applies, no easement may be granted for longer than forty years, and an easement may not be granted for a term longer than five years without advertisement and competitive bids.

The facts you have presented involve the grant of a permanent easement by the City of Richmond to the Commonwealth. Prior opinions of this Office have reached two conclusions that are directly relevant to the term-limit and competitive-bid requirement.

First, the conveyance of a permanent easement in the facts you present is the equivalent of conveying fee simple title for purposes of Article VII, § 9: it “effectively results in a permanent dedication of the public property involved” that is “tantamount to a sale of municipal property.”<sup>6</sup>

Second, because the permanent easement is to be treated as a fee simple conveyance for the purposes of the constitutional provision, the supermajority requirement may apply, but the term-limit and competitive-bid requirement does not: when a permanent easement is conveyed, “the provisions of Article VII, § 9, relating to the recorded three-fourths affirmative vote requirement for the sale of municipal property” may “apply to the grant in issue.”<sup>7</sup> As previously discussed, however, not even that limitation applies to the City's proposed conveyance of the permanent easement in question here, as the grant is to the Commonwealth in furtherance of continued public use.

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In summary, under the facts you have presented, where a permanent easement would be conveyed from a city to the Commonwealth for a manifestly public purpose, namely construction, maintenance, and repair of a public monument on public property, neither the supermajority-vote requirement nor the term-limit and bidding requirement for conveyances of municipal property imposed by Article VII, § 9 of the Virginia Constitution and § 15.2-2100 of the *Code of Virginia* apply.

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<sup>5</sup> *Id.* at 41-42 (emphasis added); *see also generally* 10 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 28.44 (3d ed. 1981) (“[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, or, as the rule is sometimes phrased, the statutes are not applicable to transfers among agencies representing the common interest, *i.e.*, the public.”).

<sup>6</sup> 2000 Op. Va. Att’y Gen. 44, 46; *see also* 2008 Op. Va. Att’y Gen. 30, 32.

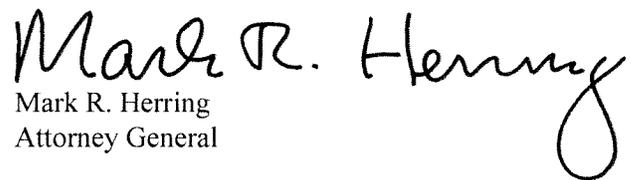
<sup>7</sup> *See* 2000 Op. Va. Att’y Gen. 44, 46.

**Conclusion**

For the foregoing reasons, it is my opinion that the City of Richmond's proposed conveyance to the Commonwealth of a permanent easement for the purpose of construction, maintenance, and repair of the Emancipation Proclamation and Freedom Monument is permitted; only a simple majority vote of City Council is required; and competitive bids are not required.

With kindest regards, I am

Very truly yours,

  
Mark R. Herring  
Attorney General