

**01-003**

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

**COUNTIES, CITIES AND TOWNS: FRANCHISES, PUBLIC PROPERTY, UTILITIES.**

**Supermajority vote requirement does not apply to sale of right-of-way in Virginia Beach that does not constitute "public place."**

The Honorable Kenneth W. Stolle  
Member, Senate of Virginia  
February 2, 2001

You ask whether § 15.2-2100 of the *Code of Virginia*, which requires a three-fourths vote of all members elected to the governing body to sell the rights to certain public property, applies to the sale of a portion of the right-of-way for the extension of Ferrell Parkway, from El Camino Real Drive to Sandbridge Beach, in the City of Virginia Beach.

You advise that, in 1990, the City of Virginia Beach acquired by condemnation the right-of-way for the extension of Ferrell Parkway, from El Camino Real Drive to Sandbridge Beach ("Ferrell Parkway Phase VII"). You relate that the city is considering selling portions of Ferrell Parkway Phase VII to a third party. You note that § 15.2-2100 provides that no city shall convey an interest in and to its streets, avenues or other public places except as authorized by a vote of at least three-fourths of all members elected to city council, notwithstanding any other provision of law.

You relate further that you are advised that the city is considering not adhering to the three-fourths affirmative vote requirement, because the right-of-way has never been used as a street. You provide with your request (1) a copy of an ordinance adopted by the city council on February 26, 1990, authorizing the city attorney to negotiate the acquisition of property for the right-of-way; (2) copies of Plaintiff's Response to Defendant's Motion to Dismiss in the case of *City of Virginia Beach v. Sandbridge Development Company*, Law No. CL90-3160, in the Circuit Court of the City of Virginia Beach; (3) a copy of the 1968 plat showing the easement dedication to the city; (4) and a copy of the June 22, 1999, resolution adopting the Ferrell Parkway Phase VI and VII alignments from General Booth Boulevard to Sandbridge.<sup>1</sup> Finally, you advise that Ferrell Parkway Phases VI and VII have been on the city's

master street and highway plan, and the city plans to continue maintaining the public utilities along this portion of the right-of-way for Phase VII.

Sections 15.2-2100 and 15.2-2107<sup>2</sup> implement the provisions of Article VII, § 9 of the Constitution of Virginia. Article VII, § 9 requires an affirmative vote of three fourths of the members elected to the city governing body before a city may sell any rights "in and to its ... streets, avenues, ... 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 to the municipal council.<sup>3</sup> Article VII, § 9 and § 15.2-2100 impose two distinct restrictions on cities. First, property of certain enumerated classes, such as streets, avenues 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>4</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>5</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>6</sup> Section 9 is virtually unchanged from § 125 of the 1902 Constitution of Virginia.<sup>7</sup> According to Professor A.E. Dick Howard, Executive Director of the Virginia Commission on Constitutional Revision, the concern 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>8</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>9</sup> Thus, this section requires "the recorded vote of an extraordinary majority"<sup>10</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>11</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>12</sup> The grant of such an easement permits the use of city property "in a manner not permitted to the general public."<sup>13</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>14</sup>

The terms "street" and "avenue" are not defined in either the constitutional or the statutory provision. Consequently, the terms must be given their common, ordinary meanings used at the time of their adoption in the 1971 Constitution.<sup>15</sup> At the time of adoption, the term "street" was defined as

[a]n urban way or thoroughfare; a road or public way in a city, town, or village, generally paved, and lined or intended to be lined by houses on each side. It includes all urban ways which can be and are generally used for travel, and normally does not include service entrances or driveways leading off from the street onto adjoining premises.<sup>[16]</sup>

The term "avenue" was defined to mean "[a]ny broad passageway, bordered on each side by trees."<sup>17</sup>

You note that § 15.2-2100 authorizes a city to convey an interest in and to its streets, avenues or other public places subsequent to the three-fourths affirmative vote of all members elected to council, notwithstanding any other provision of law, and suggest that the Ferrell Parkway Phase VII right-of-way is a street, avenue or other public place. You provide no facts, however, to support a conclusion that the described right-of-way falls within the common, ordinary meaning of the terms "street" and "avenue." Consequently, I am unable to conclude that the Phase VII right-of-way is either a street or an avenue. You do relate, however, that the right-of-way has never been used as a street.

From the facts and documents provided for review, it is also not clear whether the Ferrell Parkway Phase VII right-of-way is a "public place." A 1983 opinion of the Attorney General considers whether the predecessor statute to § 15.2-2100 applies to properties purchased and sold by a city in administering its housing program.<sup>18</sup> The opinion notes that the term "public places" is not defined by the General Assembly in considering the applicability of the three-fourths vote requirement.<sup>19</sup> Therefore, the following definition of "public place" has been adopted:

"A place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather

than private, a place visited by many persons and usually accessible to the neighboring public (e.g., a park or public beach). Also, a place in which the public has an interest as affecting the safety, health, morals, and welfare of the community. A place exposed to the public, and where the public gather together or pass to and fro."<sup>20]</sup>

A 1988 opinion responds to an inquiry whether, after two of four members present at a council meeting have disqualified themselves, the remaining two members constitute a legal quorum to conduct the business of transferring town real property to the fire department.<sup>21</sup> The opinion notes that the "'supermajority requirement' [of § 15.2-2100] does not apply to all property owned by a city or town. Rather, the requirements of [§ 15.2-2100] apply only to the sale of property dedicated to public use."<sup>22</sup> Finally, a 1989 opinion notes that municipal property that has been dedicated to public use may not be sold without a three-fourths vote of all members elected to a municipal council.<sup>23</sup> The opinion relies on the 1983 opinion in noting that the requirement applies only to public places devoted to use by the public at large or by the municipality itself in carrying out its governmental functions.<sup>24</sup>

The General Assembly has not amended § 15.2-2100 in any manner to indicate that it disagrees with the definition of the term "public place" adopted by the Attorney General. 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.<sup>25</sup> I must conclude that the prior opinions correctly state the definition to be used in determining whether municipal property is a "public place" for the purposes of § 15.2-2100.

The ultimate determination, however, regarding whether the Ferrell Parkway Phase VII right-of-way is a "street, avenue or public place" subject to the three-fourths affirmative vote requirement in Article VII, § 9 and § 15.2-2100(A) depends on a complete and detailed set of facts. Review of the documents provided with your request leads me to conclude that the property comprising the subject right-of-way has never been devoted to use by the public at large or by the city in carrying out its governmental functions. Furthermore, such property does not meet the definition of "public place."

Therefore, it is my opinion that the documents provided for review do not support a conclusion that the subject property comprising the right-of-way constitutes a public place requiring the three-fourths vote of all members of the city council to be sold. I am, therefore, required to conclude that § 15.2-2100 does not apply to the sale of a portion of the Ferrell Parkway Phase VII right-of-way.

<sup>1</sup>For the purposes of this opinion, after reviewing all documents forwarded with your request, I must assume that such right-of-way is either vacant or bare real property that the city has not improved. The documents provided for review contain no indication that the City of Virginia Beach has improved the subject right-of-way property.

<sup>2</sup>Section 15.2-2107 provides that persons occupying or using streets, avenues, or any other public places, contrary to law, "shall be guilty of a Class 4 misdemeanor."

<sup>3</sup>See 1999 Op. Va. Att'y Gen. 172, 173.

<sup>4</sup>1990 Op. Va. Att'y Gen. 43, 44.

<sup>5</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>6</sup>1999 Op. Va. Att'y Gen. 63, 64 (quoting 1989 Op. Va. Att'y Gen. 125, 127).

<sup>7</sup>*Compare* Va. Const. art. VIII, § 125, *repealed by* Va. Const art. VII, § 9. See 1999 Op. Va. Att'y Gen., *supra* note 3, at 174.

<sup>8</sup>2 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 854 (1974).

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

<sup>10</sup>*Id.* at 853.

<sup>11</sup>*Id.* at 854.

<sup>12</sup>See 1990 Op. Va. Att'y Gen., *supra* note 4, at 44.

<sup>13</sup>*Id.* (quoting Va. Const. art. VII, § 9).

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

<sup>15</sup>See *Anderson v. Commonwealth*, 182 Va. 560, 565, 29 S.E.2d 838, 840 (1944); Op. Va. Att'y Gen.: 1997 at 202, 202; *id.* at 72, 73; 1993 at 210, 213.

<sup>16</sup>*Black's Law Dictionary* 1590-91 (4<sup>th</sup> ed. 1968) (citations omitted).

<sup>17</sup>*Id.* at 171.

<sup>18</sup>1983-1984 Op. Va. Att'y Gen. 31 (citing former § 15.1-307).

<sup>19</sup>See *id.*

<sup>20</sup>*Id.* at 32 n.6 (quoting *Black's Law Dictionary* 1107 (5<sup>th</sup> ed. 1979)).

<sup>21</sup>1987-1988 Op. Va. Att'y Gen. 223, 225.

<sup>22</sup>*Id.* at 231 n.3 (citing former § 15.1-307); see Va. Const. art. VII, § 9; see also *Stendig Development Corp. v. Danville*, 214 Va. at 550, 202 S.E.2d at 873; 1983-1984 Op. Va. Att'y Gen., *supra* note 18, at 31.

<sup>23</sup>1989 Op. Va. Att'y Gen., *supra* note 6, at 128.

<sup>24</sup>*Id.* (citing 1983-1984 Op. Va. Att'y Gen., *supra* note 18, at 31).

<sup>25</sup>See *Lee Gardens v. Arlington County Board*, 250 Va. 534, 540, 463 S.E.2d 646, 649 (1995).

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