



COMMONWEALTH of VIRGINIA

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The Honorable R. Creigh Deeds
Member, Senate of Virginia
P.O. Box 5462
Charlottesville, Virginia 22905

Dear Senator Deeds:

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 § 15.2-5146 would permit the Commonwealth Transportation Commissioner, acting through the Department of Transportation, to grant permission to the Bath County Service Authority to install a water line serving the public within the confines of a “public road” for which the Commonwealth holds only a prescriptive easement for limited purposes.

Response

It is my opinion that the Commonwealth Transportation Commissioner may not permit installation of a water line along a road acquired by the Commonwealth by prescriptive easement when such road merely has been used as a public road. Unless the Commonwealth can establish evidence of continuous adverse prescriptive use of an easement for a public pipeline within the right-of-way of such public road, it is my opinion that installation of a water line creates an additional servitude or burden on the owner’s land outside the scope of the existing prescriptive easement. Therefore, it is my opinion that any use of the owner’s land for purposes of a water line must be examined in light of current eminent domain laws to determine whether a taking has occurred that requires just compensation.¹

Background

The road about which you inquire is State Route 687, a secondary highway or road which runs through portions of Bath County. You state that the Bath County Board of Supervisors has appropriated funds to the Bath County Public Service Authority (the “Authority”) for the purpose of expanding its public water system by installing a service line along and under portions of State Route 687. You note that the owner of certain adjoining property on both sides of the road, who owns fee title to the land,

¹See generally VA. CODE ANN. § 1-219.1 (Supp. 2007); VA. CODE ANN. §§ 15.2-1800, 15.2-1814 (Supp. 2007); VA. CODE ANN. § 25.1-108 (Supp. 2007).

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objects to the installation. You state that Route 687 has been maintained and used as a public road² for over 100 years, without permission of the present or former landowners. Further, the Department of Transportation (the “Department”) claims a thirty-foot prescriptive easement for the road pursuant to § 33.1-184. You indicate that the public land records do not disclose a grant or deed conveying fee title or an easement for the road to Bath County or the Department. You note that the Department is willing to permit installation of the water line.³

Therefore, you seek an opinion regarding the legal effect of the potential Department grant of permission for the water line to the Authority absent authorization from the owner of the fee title. Further, you ask whether such installation would constitute a taking of the owner’s property without just compensation contrary to Article I, § 11 of the Constitution of Virginia.⁴

Applicable Law and Discussion

Section 33.1-69 establishes the Department’s “control, supervision, management and jurisdiction over the secondary system of state highways.” Chapter 51 of Title 15.2, §§ 15.2-5100 to 15.2-5158, comprises the Virginia Water and Waste Authorities Act (the “Act”). Section 15.2-5146 provides, in part, that:

The Commonwealth hereby consents to the use of all lands above or under water and owned or controlled by it which are necessary for the construction, improvement, operation or maintenance of any ... water or waste system; except that the use of any portion between the right-of-way limits of any primary or secondary highway in this Commonwealth shall be subject to the approval of the Commonwealth Transportation Commissioner.^[5]

The broad statutory consent of the Commonwealth in § 15.2-5146 to use “all” its lands for purposes of a water system is subject to the qualification that when such system uses the right-of-way of a primary or secondary highway, the Commissioner’s approval is required. It is my understanding that such approval customarily is issued through the Department in the form of a written permit.

The permit or consent process provides the Department with the opportunity to review the engineering plans for the system and coordinate the plans with current highway design and anticipated changes. Additionally, the Department may consider traffic management issues and safety procedures to protect the public during construction. However, the statutory consent process is not intended to affect

²For purposes of this opinion, I will assume that the road has been in continual use for the 100-year period.

³I am advised that the Right-of-Way and Utilities Division in the Department’s Staunton District Office states that it would make any permit granted to the Authority expressly subject to the rights and interests of the current owner of fee title to the land underlying the road.

⁴Article I, § 11 provides that “the General Assembly shall not pass ... any law whereby private property shall be taken or damaged for public uses, without just compensation, the term ‘public uses’ to be defined by the General Assembly.” The General Assembly has defined the term “public uses” in the context of § 11. *See* § 1-219.1(A).

⁵*Compare* VA. CONST. art. VII, § 8 (requiring prior consent of city or town to use its streets or grounds for gas, water, or other utility uses).

the landowner's property rights. Although the purpose of a water system is to serve the public,⁶ I see no evidence that the General Assembly intends § 15.2-5146 to authorize the taking or damaging of private property contrary to Article I, § 11 of the Virginia Constitution.

Based on the facts you provide and for purposes of this opinion, I assume that State Route 687 is a public road pursuant to § 33.1-184, which provides that:

[W]hen a way has been regularly or periodically worked by road officials as a public road and used by the public as such continuously for a period of twenty years, proof of these facts shall be conclusive evidence that the same is a public road. In all such cases the center of the general line of passage, conforming to the ancient landmarks where such exist, shall be presumed to be the center of the way and in the absence of proof to the contrary the width shall be presumed to be thirty feet.^[7]

Assuming the criteria of § 33.1-184 are met and Route 687 conclusively is presumed to be a "public road," it is my opinion that the Commonwealth has acquired only a prescriptive easement to use the road for limited purposes reasonably consistent with the character and extent of use during the prescriptive period. "When ... an easement by prescription has been established, the width of the way and the extent of the servitude is limited to the character of use during the prescriptive period."⁸ However, "a reasonable increase in the degree of use may be permissible in such an easement."⁹ For example, creating a bridle path within an existing road easement was held to be of the same nature and character as the original use, the difference being in degree only¹⁰ and lowering the grade of a rural road as an improvement did not

⁶Section 15.2-5100 provides that the Act "shall constitute full and complete authority, without regard to the provisions of any other law for the doing of the acts herein authorized, and shall be liberally construed" to accomplish its purposes. Significantly, however, other provisions in the Act designed to further its purposes expressly grant broad authorization to an authority to acquire lands, or rights in land or water, through the exercise of the right of eminent domain. See § 15.2-5114(6) (Supp. 2007). "'Authority' means an authority created under the provisions of § 15.2-5102 or Article 6 (§ 15.2-5152 et seq.) of [Chapter 51] or, if any such authority has been abolished, the entity succeeding to the principal functions thereof." Section 15.2-5101 (Supp. 2007).

⁷Compare *Martin v. Moore*, 263 Va. 640, 561 S.E.2d 672 (2002) (noting requirements for establishing private easement by prescription). "The law applicable to establishment of prescriptive easements is settled. In order to establish a private right of way by prescription over property of another, the claimant must prove, by clear and convincing evidence, that the claimant's use of the roadway in question was adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land over which it passes, and that the use has continued for at least 20 years." *Id.* at 645, 561 S.E.2d at 675.

⁸*Willis v. Magette*, 254 Va. 198, 204; 491 S.E.2d 735, 738 (1997).

⁹*Id.*

¹⁰*Va. Hot Springs Co. v. Lowman*, 126 Va. 424, 101 S.E. 326 (1919). This case recites the general rule that a right-of-way acquired for one purpose cannot be used for another purpose not within the scope of the prescriptive use. *Id.* at 430, 101 S.E. at 328; see also, *Luther v. Jeffers*, 387 F. Supp. 182 (W.D.Va. 1974) (holding that prescriptive easement over servient tract for normal rural transportation cannot be converted for use by heavy coal trucks or heavy mining equipment).

constitute an additional servitude.¹¹ However, where the Commonwealth has acquired only the right to pass over and along a road, erection of telegraph poles and wires within the right-of-way or use as a railroad constitutes an additional servitude for which an owner would be entitled to compensation for such a taking.¹²

The scope of authorized public use of State Route 687 under the prescriptive easement includes the right to use the road in the same general manner in which it continuously has been used during the prescriptive period. For the public, this may include transportation by motor vehicles, horse and wagon, or foot traffic. Assuming Route 687 regularly or periodically has been worked by road officials, the Department would have the right to continue to maintain and improve the road to accommodate such modes of transportation. Thus, the facts evidencing the nature or character and extent of the continuous adverse public use of the road during the prescriptive period are critical to determine the scope of such use acquired by the Commonwealth. This is consistent with Virginia common law involving prescriptive easements.

Conclusion

Accordingly, it is my opinion that the Commonwealth Transportation Commissioner may not permit installation of a water line along a road acquired by the Commonwealth by prescriptive easement when such road merely has been used as a public road. Unless the Commonwealth can establish evidence of continuous adverse prescriptive use of an easement for a public pipeline within the right-of-way of such public road, it is my opinion that installation of a water line creates an additional servitude or burden on the owner's land outside the scope of the existing prescriptive easement. Therefore, it is my opinion that any use of the owner's land for purposes of a water line must be examined in light of current eminent domain laws to determine whether a taking has occurred that requires just compensation.¹³

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

1:1362; 1:941/07-047

¹¹Anderson v. Stuarts Draft Water Co., 197 Va. 36, 87 S.E.2d 756 (1955). *Anderson* involved a highway right-of-way in which an existing pipeline had to be relocated to accommodate a change in the road grade. *Id.* The *Anderson* court noted that a servitude for an urban street generally is considered more comprehensive than a servitude for a rural highway in the country. *Id.* at 41-42, 87 S.E.2d 760-61. In discussing the rights of the owner of the underlying fee, states that such owner has the right to convey to another the right to lay a pipeline under the bed of the road, provided the road is not obstructed. *Id.* at 41, 87 S.E.2d at 760.

¹²W. Union Tel. Co. v. Williams, 86 Va. 696, 703, 11 S.E. 106, 108 (1890).

¹³See *supra* note 1.