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SIXTEENTH JUDICIAL CIRCUIT
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June 29, 2009

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Re: Coalition to Preserve McIntire Park, et. al., vs. City of Charlottesville et. al.
Case No. CL090000-84

Dear Counsel:

Enclosed is a copy of the opinion in this case. Please confer and agree upon the preparation of on Order consistent with the findings and rulings in the Opinion. Please submit the Order to the Court for my signature.

Very truly yours,

Jay T. Swett

Jay T. Swett
Judge Designate

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

COALITION TO PRESERVE MCINTIRE PARK,

NORTH DOWNTOWN RESIDENTS ASSOCIATION,

JOHN CRUICKSHANK,

PETER KLEEMAN,

STRATTON SALIDAS,

RICHARD COLLINS,

And

ROBERT FENWICK.

Plaintiffs,

Vs. CASE NO. CL 9000084-00

CITY OF CHARLOTTESVILLE

And

COMMONWEALTH OF VIRGINIA DEPARTMENT OF TRANSPORTATION

Defendants.

OPINION

This case arises out of the conveyance of an easement by the City of Charlottesville and the Charlottesville School Board to the Commonwealth of Virginia Department of Transportation related to the construction of a portion of what is known as the Meadow Creek Parkway. The plaintiffs are five individuals, a neighborhood association and an association

formed to preserve a Charlottesville park known as McIntire Park, a portion of which will be eventually crossed by the Meadow Creek Parkway if the construction is completed. In this action, the plaintiffs contend that the conveyance of a construction easement by the City of Charlottesville (hereafter "City") to the Commonwealth of Virginia Department of Transportation (hereafter "VDOT") was an unlawful sale of city property in violation of the Virginia Constitution. More particularly, plaintiffs contend that the City's ordinance authorizing the conveyance comes within the provisions of Article 9 Section VII of the Virginia Constitution thereby requiring a three-fourths vote of the members of City Council. In this case, the ordinance authorizing the granting of the easement was passed on a 3-2 vote, which would not satisfy the constitutional requirement of a supermajority vote should Article 9 Section VII apply to this conveyance.

The defendants contend that Article 9 Section VII does not apply as the conveyance is not a sale of city property or, in the alternative, if it is a sale of city property, this particular provision has no applicability to a conveyance by a city to an agency of the Commonwealth of Virginia. Both defendants also contend that none of the plaintiffs have standing to bring this action such that this court should dismiss the case without having to address the constitutional issue. VDOT also argues that the plaintiffs should be barred from proceeding based on the doctrine of laches in that their delay in bringing the suit and the resulting prejudice to the defendants should be an independent basis to dismiss the suit.

The facts underlying the case are not in dispute. The Meadow Creek Parkway has been part of a long range transportation plan between the City of Charlottesville, the County of Albemarle and VDOT. The concept behind the parkway is to provide an alternative traffic route to downtown Charlottesville from that portion of Albemarle County that lies to the north of the

City. At present, there are two main access routes to downtown Charlottesville from the north. One is south on Route 29 to its intersection with the Route 250 bypass, then eastbound on the bypass until exiting off one of the several intersecting roads to the downtown area. The other is exiting Route 29 and traveling southeast on Rio Road East, state route 631, and continuing until Rio Road becomes Park Street near where the road leaves Albemarle County and enters the City limits.

The Meadow Creek Parkway, in one form or another, has been on the drawing board for some time. It is safe to say there has been long standing opposition to the parkway from many citizens who have expressed a number of concerns over the impact of the proposed road. While not all inclusive, those concerns primarily include the amount of increased traffic, particularly its impact on those City neighborhoods closest to the parkway's southern termination point, and the road's impact on McIntire Park, as a portion of the proposed road will run through McIntire Park.

McIntire Park is located off the Route 250 bypass and is a portion of land donated in 1926 by Paul Goodloe Mcintire, a philanthropist who over the years made significant gifts to the Charlottesville community. Presently, McIntire Park is approximately 22 acres and contains a nine hole golf course, several athletic fields, picnic shelters, a wading pool and numerous nature trails and streams. The park is roughly divided in half by the CSX railroad tracks. The west portion contains the athletic fields, picnic areas and shelters, and most of the nature trails and streams. The east portion contains the golf course, wading pool and additional nature trails.

As previously stated, the Meadow Creek Parkway has been a work in progress over many years. In its final configuration, it is approximately two miles in length beginning at its northern end in Albemarle County at an intersection with Rio Road East running southeast for

approximately 1.4 miles to an intersection with Melbourne Road. The road continues past the Melbourne road exchange entering McIntire Park at its eastern edge and continuing to a planned intersection with the Route 250 bypass and McIntire Road. The City, the County of Albemarle and VDOT have divided the parkway into three segments. The first segment is the northern portion running from Rio Road East to Melbourne Road. The second is the portion from Melbourne Road through McIntire Park to the Route 250 bypass. The third is the interchange at the 250 bypass and McIntire Road. The three phases or segments of the parkway have separate construction schedules and funding sources. Only the first phase, the one running from Rio Road East to Melbourne Road, is at issue here.

The portion of the parkway in the first phase crosses land located exclusively in Albemarle County. However, as the road nears Melbourne Road, the path of the road comes onto property owned by the City, but which is located in Albemarle County. Melbourne Road, in the area of the parkway, is the boundary between the City and Albemarle County. The Charlottesville High School and related fields and facilities are in the immediate area of the proposed intersection of Melbourne road and the parkway. The land on which the high school and its related facilities are located is a portion of a larger tract given to the City in 1982. Along Melbourne Road, travelling in a northerly direction, to the west are the buildings and related facilities and fields comprising the high school. To the east of Melbourne Road are the high school football stadium and a small athletic field. This is the portion that is owned by the City, but which is located in Albemarle County. It is also the land that is at issue in this case.

The course of action chosen by the City and VDOT to accommodate the construction of the relatively small portion of the parkway to the east of Melbourne Road near the high school football stadium located on City owned property was to convey an easement to VDOT for the

construction of that portion of the parkway on City land east of Melbourne Road. On June 2, 2008, the Charlottesville City Council, by a vote of 3 to 2, passed on ordinance approving the granting of permanent and temporary construction easements to VDOT across the city owned property near Melbourne Road. The ordinance granted VDOT a permanent easement of 1.796 acres for a road right-of-way, a permanent easement of 2.561 acres for drainage, stormwater and slope management, 0.504 acres for utility easements and a temporary construction easement of 3.722 acres.

Prior to voting on the ordinance, City officials met with the Charlottesville School Board to obtain its approval for the construction easement. At a meeting on May 1, 2008, the Charlottesville School Board approved a request from the City and passed a resolution consenting to the conveyance of the construction easements by the City to VDOT. In its resolution, the School Board noted that, although the City was the record title holder of the property over which the easements would run, the property in question was used for public schools and, therefore, the Board's consent was required.

On October 1, 2008, a deed was signed by the City's mayor and the chair of the Charlottesville School Board conveying the various temporary and permanent easements to VDOT to construct that portion of the Meadow Creek Parkway that ran over the City's land located in Albemarle County. Construction of the portion of the parkway between Rio Road and Melbourne Road began in late January or early February of 2009. In early March of 2009, the Coalition to Preserve McIntire Park filed this action against the City and VDOT requesting a preliminary injunction to prohibit any further construction of the parkway over the City's land contending the City's ordinance approving the conveyance was unconstitutional. The Coalition argues the City's vote to approve the conveyance was not a three fourth's vote and therefore the

vote was in violation of Section 9 of Article VII of the Virginia Constitution. A hearing on the request for the temporary injunction was heard on March 18, 2009. This court denied the request for the preliminary injunction finding (1) that the plaintiff did not demonstrate a substantial likelihood that it would ultimately prevail on the merits, (2) that the plaintiff did not make an adequate showing of irreparable harm if the injunction were not granted, and (3) that the delay in bringing the request for the injunctive relief created a situation where defendant VDOT would experience considerable damage should the injunction be granted as compared to the threatened injury to the plaintiff. An expedited hearing was held on May 19, 2009. Prior to the hearing, with the consent of the defendants, six plaintiffs were added to the suit, namely the North Downtown Residents Association, John Cruickshank, Peter Kleeman, Stratton Salidas, Richard Collins and Robert Fenwick.

Standing of the Plaintiffs to Seek Relief

The City and VDOT contend that none of the plaintiffs have demonstrated sufficient standing to bring this suit. To address this contention, a brief review of the legal requirements for standing is appropriate.

The concept of standing in the law is founded upon the principle that the parties to a lawsuit must have a sufficient interest in a particular matter to ensure the parties will be actual adversaries and that the issues in the case will be fully and faithfully developed. *Andrews v. American Health & Life Ins. Co.*, 236 Va. 226 (1988). The inquiry has no relation to the substantive merits of the controversy, but is a preliminary jurisdictional matter that focuses solely on the status of the plaintiff or plaintiffs and whether they are the proper parties to proceed with the suit. *Cupp v Board of Supervisors of Fairfax County*, 227 Va. 580, 589, (1984). In

order to have standing, a party must "show an immediate, pecuniary, and substantial interest in the litigation, and not a remote or indirect interest." *Harbor Cruises, Inc. v. State Corp. Comm.*, 219 Va. 675, 676 (1979). The type of interest or injury necessary to have standing must be a one directly affecting the plaintiff. "[I]t is not sufficient that the sole interest of the [plaintiff] is to advance some perceived public right or to redress some anticipated public injury where the only wrong [the plaintiff] has suffered is in common with other persons similarly situated." *Virginia Beach Beautification Commission v. Board of Zoning Appeals of the City of Virginia Beach*, 231 Va. 415, 419 (1986).

Where the plaintiff is an organization as opposed to an individual, the organization may sue in its individual capacity or in a representative capacity. For an organization to have individual standing, it must show that it has been damaged by the actions of the defendant or that its rights were adversely affected by the defendant's conduct. For an organization to have representational standing, it must be shown that at least one member of the organization has standing to go forward with the claim in his or her own right. *Philip Morris USA Inc. v. Chesapeake Bay Foundation*, 273 Va. 564 (2007). Further, in a case where the claimed injury is one to the environment, it is not sufficient for the organization to allege that the defendant's conduct will harm the environment. Rather, the plaintiff must allege and prove that the government's actions directly impact on the plaintiff's use or enjoyment of the land or area at issue and are persons "for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Philip Morris, supra*, p.578, quoting *Friends of the Earth, Inc. v. Laidlaw Envtl Servs. (TOC), Inc.* 528 U.S. 167, 183 (2000). It is under these and other principles that this court must measure whether some of all the plaintiffs have standing in the context of this suit.

The Coalition to Preserve McIntire Park is an unincorporated association whose members include individuals and other organizations which seek to preserve "the historic, aesthetic, recreational, educational and natural attributes of open space in Charlottesville and the surrounding area."[1] The individual plaintiffs are members of the Coalition. The Coalition has actively been involved in various preservation and transportation matters impacting Charlottesville and opposes the Meadow Creek Parkway because its eventual path will run through a portion of McIntire Park.

Plaintiff John Cruikshank is the organizer and coordinator of the Coalition to Preserve McIntire Park. Mr. Cruikshank testified that the purpose of the Coalition is, as its title suggests, to preserve McIntire Park and to see the park improved and enhanced. The organization was formed after the City passed the June 2008 ordinance to grant VDOT the construction easement. He also owns two rental properties in the City. Neither rental property is located in close proximity to the land at issue in this case.[2] With regard to the land near Melbourne Road at issue here, Mr. Cruickshank testified he may have walked on the land sometime in the past.

Plaintiff Stratton Salidas is a member of the Coalition. He testified that in the past 10 years, he has hiked on the City's land near the Charlottesville High School and football field approximately nine times. He indicated he has taken his nephews to visit the area to enjoy the natural setting and wildlife in the area.

Plaintiff Peter Kleeman is a member of the Coalition and lives approximately a mile from the location where the Meadow Creek Parkway will intersect with Melbourne Road. He has walked or visited the land impacted by the construction easement on a number of occasions. He

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[1] Amended Complaint, p.2.

[2] Mr. Cruickshank testified that one of his rental properties had over the years decreased in value in the amount of $13,000, but offered no evidence that the decrease was attributable to any action by the City in passing the Ordinance to convey the construction easement to VDOT.

has seen deer, beaver, and a variety of birds and considers the area as having abundant wildlife. Dr. Kleeman has a doctoral degree in environmental science and engineering. He has been an active opponent of the City's decision to convey the construction easement having run for Charlottesville City Council unsuccessfully twice in an effort to vote against the easement.

Plaintiff Richard Collins is a member of the Coalition. He has been active in transportation issues in the local area for a long period. This interest in transportation has led to a designation of him as special consultant under the Natural Preservation Act with a special emphasis as a consultant regarding the Meadow Creek parkway. Dr. Collins testified that since he has opposed the Meadow Creek Parkway for a long time, that if the parkway is constructed, it would diminish and harm his role as a consultant and that his opinions would be "irrelevant" in the future. He also testified that the Rivanna Trail which runs near the area of the Charlottesville football field will be adversely affected by the parkway.[3]

Plaintiff Bob Fenwick is a member of the Coalition. Mr. Fenwick testified that several years ago, he used the athletic field next to the Charlottesville High School football field. That field will be lost when the parkway crosses the school property.[4] His last use of the field was 5 years ago. He testified he frequently uses McIntire Park and believes his use of the Park will be adversely affected if the road is permitted to cross McIntire Park.

Ms. Colette Hall is the President of the North Downtown Residents Association. The Association represents residents who live in the downtown area of Charlottesville in the vicinity where the Meadow Creek parkway will intersect with McIntire Road. She testified that the Association opposes the Meadow Creek parkway because of the anticipated increase in traffic in

[3] The Rivanna Trail is a walking and hiking trail that runs near Meadow Creek and near the proposed location of the parkway. The path of the Meadow Creek parkway is such that it crosses Meadow Creek. Under the arrangement between the City and VDOT, the Rivanna Trail will be rebuilt for use by hikers and bicycle riders.

[4] Under the agreement between the City and VDOT, any athletic fields lost will be replaced.

the neighborhoods close to the proposed interchange. As do all the plaintiffs, Ms. Hall views the road as a single project. Thus, her Association opposes this portion of the parkway even though it alone will have no immediate impact on traffic in the north downtown area.[5]

In evaluating the evidence presented, it is my conclusion that some, but not all the plaintiffs have met the applicable standards of standing to continue as plaintiffs in this case. The case law suggests that the analysis of the principles applicable to standing have different areas of focus depending on the nature of the interests asserted. Thus, in the situation where the case comes to a circuit court on a writ of certiorari from a board of zoning appeals, the applicable statute requires that the party seeking review is a "person" who is "aggrieved" by a decision of the board of zoning appeals.[6] In *Virginia Beach Beautification Commission, supra,* a commission whose purpose was to keep the city of Virginia Beach "beautiful" lacked standing to challenge on appeal a zoning board decision to grant a hotel a setback variance for a sign along the Virginia Beach expressway. 231 Va. at 419. The Supreme Court found that the Commission did not own property in proximity to where the sign would be erected nor did the Commission demonstrate a substantial interest in the board decision to grant the variance. *Id.* at 420.

In a suit for declaratory judgment, to have standing a plaintiff must show a "justiciable interest" in the subject matter of the suit such that its rights would be affected by the outcome of the case. *W.S. Carnes, Inc. v. Board of Supervisors of Chesterfield County,* 252 Va. 377, 383 (1996). In *W.S. Carnes, Inc., supra,* an association of home builders had no standing to challenge a decision by the Chesterfield Board of Supervisors which passed an ordinance to

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[5] As previously noted, the construction of the parkway is in three separate phases. The land that is the subject of this suit is part of the first phase which terminates at Melbourne Road. The second phase will run from Melbourne Road through McIntire Park to the 250 bypass. The third phase is the interchange of the parkway where it will intersect McIntire Road at the bypass. Thus any increase in traffic caused by the Meadow Creek parkway would not occur until the third phase is completed.

[6] Virginia Code Sec. 15.1-497.

impose a $125 increase in the permit fee charged for new residential construction since the association did not build houses in Chesterfield County nor had it paid for any residential building permits for new construction. *Id.*, at 383.[7]

In *Philip Morris USA Inc., v. The Chesapeake Bay Foundation Inc.*, 273. Va. 564 (2007), the Chesapeake Bay Foundation appealed to the Circuit Court of Chesterfield County a decision of the State Water Control Board granting the renewal of a discharge permit to Philip Morris to discharge waste water into the James River. The circuit court found that the Foundation lacked standing to challenge the Board's decision on the grounds it lacked individual and representational standing because there was no allegation of a "particularized injury" to the Foundation or to its members.[8] The Virginia Supreme Court reversed the circuit court on the issue of standing. The Supreme Court found that the Foundation's petition included allegations that the discharge permit would result in excessively high levels of nitrogen and phosphorus discharged into the James River causing injury to the Foundation and its members who use the James River for swimming, boating, and other recreational and educational pursuits. The Supreme Court further found that the Foundation alleged that the discharge permit failed to comply with federal and state regulations that protected uses of waterways such as the James River.[9] The Supreme Court found these allegations sufficient to give the Foundation representational and individual standing to challenge the State Water Control Board's decision to renew the discharge permit.[10] In its discussion of the applicable principles, the Court referred to several federal decisions noting that a general allegation of an injury to the environment is not

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[7] The Supreme Court in *W.S. Carnes, Inc.*, also found that the home builders association could not sue in a representative capacity, i.e., on behalf of its members, because there was no statute authorizing it to do so. 252 Va. at 383.

[8] 273 Va. at 571.

[9] 273 Va. at 579.

[10] The Court's analysis of the standing question was in the context of Article III of the United States Constitution because of the language of Va. Code Sec. 62.1-44.29 incorporating the Article III standard as was required federal Clean Air Act. Thus, the Court's analysis of the standing question is applicable here.

sufficient to have standing because it is not a legally protected interest. On the other hand, where plaintiffs "aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity", then there is an adequate claim of injury for purposes of standing. *Philip Morris USA Inc., supra,* quoting *Laidlaw and Sierra Club v. Morton,* 405 U.S. 727 (1972).

Guided by these decisions, my conclusion is that an objection to the City's decision to pass the June 2008 ordinance granting VDOT a construction easement because it is part of the Meadow Creek parkway where the objection is based on a belief, however strongly held, that the parkway may increase traffic in the downtown area or is contrary to the views held by persons with significant expertise in transportation issues is not a sufficiently particularized injury to have standing in this case. On the other hand, a claim that the use of the land at issue here will directly impact the future use and enjoyment of the land or that the path of the parkway will be detrimental to McIntire Park when the planned construction continues through a portion of McIntire Park is a sufficient claim of an injury and one that may or will be impacted or affected by the issues in this case. Thus this court concludes that plaintiffs Stratton Salidas, Peter Kleeman, Robert Fenwick, John Cruickshank and the Coalition to Preserve McIntire Park have standing to proceed as plaintiffs in this action. For the reasons stated, it is my conclusion that plaintiffs Richard Collins, and the North Downtown Residents Association have not alleged a sufficiently particularized injury and, therefore, do not have standing to continue as plaintiffs in this suit.

The Constitutionality of the Ordiance

At the heart of this case is Section 9 of Article VII of the Virginia Constitution. That provision is as follows:

> 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.
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> 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, except for air rights together with easements for columns of support, which may be granted for a period not exceeding sixty 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. Such grant, and any contract in pursuance thereof, may provide that upon the termination of the grant, the plant as well as the property, if any, of the grantee in the streets, avenues, and other public places shall thereupon, without compensation to the grantee, or upon the payment of a fair valuation therefor, become the property of the city or town; but the grantee shall be entitled to no payment by reason of the value of the franchise. Any such plant or property acquired by a city or town may be sold or leased or, unless prohibited by general law, maintained, controlled, and operated by such city or town. Every such grant shall specify the mode of determining any valuation therein provided for and shall make adequate provisions by way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates and the maintenance of the property in good order throughout the term of the grant.

This constitutional provision has been addressed only once by the Supreme Court of Virginia, but not in a manner helpful to the decision in this case.[11] In deciding how to construe this particular provision, a starting point is the language chosen by the drafters. Further, it is

[11] **In *Stendig Development Corp. v Danville,* 214 Va. 548 (1974), the Supreme Court held that an ordinance passed by the Danville City Council prohibiting the sale of any public property except by a three-fourths vote did not run afoul of the predecessor to Section 9 of Article VII. The Court held that the constitutional limitation applied only to the sale of property dedicated to public use whereas the Danville ordinance was broader and applied to any public property regardless of its use. 214 Va. at 550.**

incumbent on this court to construe the provision in such a way to address the intent of the framers, particularly where a provision is a limitation on the power on municipalities to act in a certain way.[12]

Section 9 of Article VII has two paragraphs. The first is a limitation on the right of a city to sell certain enumerated classes of municipal property as well as "other public places" except by a three-fourths vote of the governing body. The second paragraph in pertinent part limits a city's authority to grant a franchise, lease or other property right affecting public property or an easement unless it is limited to a certain number of years and is subject to a public bid process. The second paragraph does not require a three-fourths vote of the city's governing body. Its limitation on the city's power to encumber municipal property relates to those encumbrances that place a restriction or use on the property that is not permitted to the general public.

Although only the first paragraph of Section 9 of Article VII is at issue here, the two paragraphs should be read together to determine the meaning of the framers of this provision. The first paragraph is a limitation on the power of a city to sell certain types of municipal property. "No rights of a city ... shall be sold except by an ordinance..." passed by a three-fourths vote. The framers choice of the term "sold" should be given deference and the assumption is that the framers used this term for a specific purpose. If the framers meant that a sale also included any lease, easement or other encumbrance, then the framers presumably would have chosen to add those words in addition to the reference to a sale. This is particularly true in light of the purpose and choice of words in the second paragraph where the framers used such terms in limiting the length and manner in which a city can encumber municipal property.

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[12] Compare Section 8 of Article VII which confers a right on a city with Section 9 which is a limitation on a city's power.

The June 2, 2008 ordinance passed by the City grants to VDOT a permanent easement for a road right of way over a portion of City property that is used by the Charlottesville Public Schools and that is located in Albemarle County. The ordinance also grants easements for drainage, stormwater management, slopes and utilities related to the road right of way as well as a temporary construction easement to build the road and a public walking trail. The ordinance does not authorize a sale of this property to VDOT. The only testimony offered at trial regarding the ordinance was from the City's mayor who testified that there was no discussion about the conveyance of the easement constituting a sale.[13] In accordance with the ordinance, the City and the Charlottesville School Board conveyed by deed dated October 21, 2008 the same easements authorized by the ordinance.

To support their argument that the deed from the City and the school board to VDOT was a sale, the plaintiffs point to the fact that the deed cites the sum of $43,120.00 as consideration for the easements. However, the evidence from the City's mayor and a representative of VDOT was that the City sought no payment for the easement because it had obtained assurances from VDOT that VDOT would purchase other park land that would replace the park land lost due to the construction of the parkway. The amount stated in the deed was to reimburse the City and school board for certain costs incurred such as landscape screening and other "cost-to-cure" damages incurred by the City and school board.[14]

Each side in this dispute has referred the court to opinions of the Attorney General that appear to support their respective positions. The plaintiffs refer to a 2000 Opinion in which the issue was whether a city's grant of a perpetual conservation easement to a private nonprofit

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[13] **Testimony of David Morris who was the mayor of Charlottesville on the date the ordinance was passed.**
[14] **See Plaintiff Exhibit 1. March 31, 2008 letter from VDOT to City.**

group was permitted by Section 9 of Article VII.[15] The Attorney General believed that the franchise provisions of the second paragraph did not apply, but the grant of the perpetual conservation easement to a private nonprofit group was tantamount to a sale and thus required a three-fourths vote of the city. On the other hand, the City and VDOT refer to an opinion of the Attorney General requested by the City of Charlottesville. In that opinion, the Attorney General was asked whether the City could convey nine acres of McIntire Park to the Commonwealth for VDOT to construct the Meadow Creek parkway without a three-fourths majority vote.[16] In the opinion, the Attorney General refers to prior opinions of the Attorney General and states that Section 9 of Article VII "seeks to prevent the permanent dedication of publicly owned property to private use."[17] The opinion referred to the report of the proceedings pertaining to the adoption of the 1902 Constitution regarding Section 125, the prior version of Section 9 of Article VII. According to the Attorney General, the report states that the purpose of the limitation on a city's power 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."[18] The Attorney General noted that a conveyance to the Commonwealth is not a sale to a private business interest. The Attorney General also noted that under Section 33.1-89(B) of the Code of Virginia, the Commonwealth is authorized to acquire property for road construction if requested by the municipality. And, once the road is completed, the Commonwealth must convey the property back to the municipality. The Attorney General concluded that the three-

[15] 2000 Op. Va. Att'y. Gen. 62.
[16] This court is unaware of the arrangement or agreement between the City and VDOT on the proposed construction of that portion of the Meadow Creek parkway that would pass through McIntire Park. No evidence was presented on that issue.
[17] 2004 Op. Va. Att'y Gen, 4,5.
[18] Id.,

fourths vote requirement did not apply to a proposed sale of a portion of McIntire Park by the City to the Commonwealth.[19]

Applying these considerations to the facts of this case, the question is whether the City's conveyance of a construction easement to VDOT is the type of limitation on a city's authority envisioned by the framers of Section 9 of Article VII. In his Commentaries on the Constitution of Virginia, Professor A. E. Dick Howard discussed this provision and its history in the former constitution. Professor Howard noted that the predecessor to Section 9 originated out of a fear that municipal legislators would favor special interests and that unscrupulous city councils would dispose of municipal property at a fraction of its worth.[20] Further, the reported debates of the 1902 Constitutional Convention suggest that the limitations placed on cities by this provision was to prevent cities from giving away valuable interests in city property to corporations and utilities.[21]

Here, the property in question is part of a tract acquired by the City in 1982. The City built the Charlottesville High School on the property together with the associated athletic fields and related complexes for school use. Under applicable sections of the Virginia Code, the authority to care for and control school property rests with the school board even though legal title to the property remains with the city.[22] The City approached the Charlottesville School Board about the construction easement since it would go over school property. The Board approved the conveyance after obtaining certain concessions from VDOT and the City.[23]

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[19] **Id.,**
[20] ***Commentaries on the Constitution of Virginia, Volume II, p. 854 (1974), A.E. Dick Howard.***
[21] ***Debates of the Constitutional Convention of Virginia (1902)* at p. 1992-1996.**
[22] **Virginia Code Sections, 22.1-125, 22.1-126.1. See also Article VIII, Section Seven of the Virginia Constitution granting local school boards the authority to supervise the schools. This includes the decision to determine whether property is needed for school purposes. *Howard v. County School Board of Alleghany County*, 203 Va. 55, 58 (1961).**
[23] **City Exhibit 2.**

Another important consideration in assessing whether this is the type of conveyance requiring the special vote under Section 9 is that even though the property in question is located in Albemarle County, the City could have constructed this portion of the parkway on its own. Under Virginia Code Section 15.2-204, a city may construct or aid in the construction of a road to facilitate travel into or out of the city. This could have been accomplished by a simple majority vote of council. Here, the process undertaken by the City to participate in the construction of this small portion of the parkway by granting the easement to VDOT certainly benefits the City. The City does not incur the costs of building the road as it would if the City built the road itself. The cost to build and maintain the road will be paid by the Commonwealth. It is difficult to see how this conveyance to VDOT by the City is within the category of evils which the framers of the Virginia Constitution had in mind when Section 9 of Article VII was considered.

A final consideration worth noting is the Commonwealth's power to acquire by eminent domain or purchase easements needed for road construction including land or property owned by municipalities. Virginia Code Section 33.1-89. Thus, VDOT could have acquired this easement by eminent domain. Given the Commonwealth's inherent power relative to that of a municipality, it is a logical extension of the allocation of those powers that the framers of the Constitution would not have envisioned a supermajority of a city council required to convey a road easement to the Commonwealth.

In conclusion, it is my view that for all the reasons stated, under the facts of this case, a three-fourths vote of the Charlottesville City Council is not required to convey a road construction easement to the Commonwealth of Virginia. This is not the type of conveyance contemplated by the framers of the Constitution in adopting Section 125 of the 1902 Virginia

Constitution or Section 9 of Article VII of the Revised Constitution adopted in 1971.

Accordingly, the plaintiffs' request for a declaration that the June 8, 2008 ordinance passed by the City is unconstitutional is denied. The plaintiffs' request for an injunction against VDOT is denied. The plaintiffs' request for attorney's fees is denied as is their general request for other relief.

An Order will be entered consistent with the findings and rulings in this Opinion.

Jay Swett
Judge

June 26, 2009
Date