

Memorandum

To: Board of Trustees
Fr: Staff Template Committee
Re: Public Infrastructure
Dt: 5-25-10

Sound land-use planning principles suggest that in many cases expanding existing public infrastructure, even when it is to be located on property under easement, is a more efficient use of land than construction of new public infrastructure on unaffected adjacent or neighboring land, and it helps to control sprawl. However, there is often an inherent conflict between the need for expanded or enhanced public infrastructure on, under, or over such property and the desire to protect conservation values through restrictions on property placed under easement, because a portion of the land being protected and the land required for the public infrastructure are the same.

In order to minimize ever-increasing collisions between these two publicly beneficial objectives and in order to enable staff to handle requests for construction of public infrastructure on land under easement sensibly and efficiently, it would be helpful for the template and the cookbook to contain provisions that facilitate the placement of public infrastructure on such property, in appropriate circumstances, in ways that nevertheless preserve the conservation values being protected on the property.

In certain circumstances, such as the construction of a new road or electric transmission line through property under easement or a significant expansion of an existing road or electric transmission line on property under easement, the placement of such infrastructure on the property would have such a deleterious impact on the conservation values of the property or portions thereof, that it should not be accommodated. In such cases, the public or private entity seeking to place public infrastructure on, over, or under the property under easement would have to resort to an application for conversion or diversion of the property from open-space land use under Virginia Code Section 10.1-1704. In addition, in the event that staff has knowledge of a major public infrastructure project being planned for property on which an easement is proposed, it may be advisable for staff to forego the taking of the easement or at least postpone the taking of the easement until all the particulars of the project are known and their impact on the conservation values to be protected by the easement are clear.

The types of public infrastructure that most often impact property under easement and that staff might consider accommodating on a property under easement, in order of frequency encountered, are roads, utility lines, and rail lines. Currently the template contains an optional provision addressing roads required for subdivided parcels and a provision that enables staff to approve utility lines, depending upon the visibility and other impacts of such lines on the conservation values being protected.

Set forth on the following pages are recommendations for provisions to be set forth in the current template or cookbook to facilitate the placement of public infrastructure on properties under easement in appropriate circumstances. These recommendations derive from meetings and conference calls of the staff public infrastructure committee and the staff template committee.

RECOMMENDATIONS – New Easement Provisions for Roads

1. A new road through the property or major realignment of a road through the property.

VDOT or a locality that constructs its own roads would have to comply with Virginia Code Section 10.1-1704 in diverting or converting land from open-space use.

2. For minor improvements to existing roads it is recommended that template language be added for insertion in all easements at the end of the Section II Paragraph 1 Division.

The acquisition of a *de minimis* portion of the Property adjacent to Route(s) _____ for improvement of the road(s) shall not be considered a division or subdivision of the Property and shall not be prohibited by this Easement, provided that Grantee approves such conveyance or taking, which approval may be contingent upon the project including all reasonable actions, such as landscaping and/or topographic improvements, to minimize the project's impact on the Property and its conservation values. Grantee shall not be entitled to any compensation for the conveyance or taking of such land for such purpose. Grantor reserves its separate rights to approve such acquisition. Use of the Property for such a project is limited to the improvement of Route(s) _____ and does not include the addition of new travel lanes. [*This paragraph is not intended to permit widening of existing roads or addition of new lanes. It is restricted to acquisition of a portion of the eased property for maintenance, restoration, correction, or upgrading of existing public road improvements, such as the addition or renovation of ditches, box culverts, drainage swales, side slopes, curbing, regrading, etc.*]

3. For widening of roads or adding of a lane when such road projects are in the VDOT 6-year plan it is recommended that the following optional (Cookbook) highway expansion paragraph be inserted at the end of Section II Paragraph 1 Division. This is language that has been previously agreed upon by VDOT and VOF.

The parties acknowledge that the Virginia Department of Transportation may undertake the widening or improvement of Route _____, which may require the use of a portion of the Property. Such use, and any sale of needed land to the Virginia Department of Transportation, shall not be considered a subdivision and shall not be prohibited by this easement provided that (i) such project includes all reasonable action, which may include landscaping and other topographic improvements, to minimize harm to the Property resulting from such use, and (ii) the parties are consulted in planning such actions to minimize harm to the Property. Grantee shall not be entitled to any compensation for the conveyance or taking of such land for such purpose. Grantor reserves its separate rights to approve such acquisition. Use of the Property for such a project is limited to the improvement of Route _____.

4. For widening of roads or adding of a lane for road projects set forth in VDOT long-range plans or requested by the locality in which the easement is located it is recommended that the following optional (Cookbook) highway expansion paragraph be considered for insertion at the end of Section II Paragraph 1 Division. Even with the highway expansion language in the deed such a project could not proceed unless and until it obtains VOF approval at the time that it is proposed for construction, subject to any conditions imposed by VOF to protect the conservation values of the Property.

The parties acknowledge that the widening or improvement of Route ____ may be necessary and may require expansion of the Virginia Department of Transportation's (VDOT's) current right-of-way over a portion of the Property. Any acquisition of needed land by VDOT for such purpose shall not be considered a division or subdivision of the Property and shall not be prohibited by this easement, provided that Grantee approves such conveyance or taking, which approval may be contingent upon the project including all reasonable actions, such as landscaping and/or topographic improvements, to minimize its impact on the Property and its conservation values. Grantee shall not be entitled to any compensation for the conveyance or taking of such land for such purpose. Grantor reserves its separate rights to approve such acquisition. Use of the Property for this public road project is limited to [*Select appropriate option: (1) the widening or improvement of Route ____ to a total right-of-way width of 50 feet, or (2) the addition of one lane of travelway, or (3) insert other language appropriate to the project.*]

5. Byrd Act Roads. (A Byrd Act Road is a road in which VDOT only owns an easement for road purposes over the entire road right-of-way, and the landowners on either side of the road own the fee simple up to the center line. For all practical purposes, the fee simple ownership is theoretical, because the VDOT easement controls the use of the property.). For widening of a Byrd Act Road (usually required/necessary to bring road up to state secondary road standards), it is recommended that the following optional (Cookbook) highway expansion paragraph be considered for insertion at the end of Section II Paragraph 1 Division. Even with the highway expansion language in the deed such a project could not proceed unless and until it obtains VOF approval at the time that it is proposed for construction, subject to any conditions imposed by VOF to protect the conservation values of the Property.

The parties acknowledge that the widening or improvement of Route ____ may be necessary and may require acquisition by the Virginia Department of Transportation of a portion of the Property. Any acquisition of needed land by VDOT for such purpose shall not be considered a division or subdivision of the Property and shall not be prohibited by this easement, provided that Grantee approves such conveyance or taking, which approval may be contingent upon the project including all reasonable actions, such as landscaping and/or topographic improvements, to minimize its impact on the Property and its conservation values. Grantee shall not be entitled to any compensation for the conveyance or taking of such land for such purpose. Grantor reserves its separate rights to approve such acquisition. Use of the Property for this public road project is limited to any portion of the Property within 25 feet of the center line of the road.

RECOMMENDATIONS – New Easement Provisions for Utility Lines

I. For new utilities or realignment of utilities through the property the utility company would have to obtain approval of such utilities from VOF pursuant to the following template provision or, if not approved by staff, comply with Virginia Code Section 10.1-1704 in diverting or converting land from open-space use. In the event that the SCC approves the route for an electric transmission line through a property under easement, the board of trustees could take into consideration whether such SCC approval would suggest that the line had met the requirement of Section 10.1-1704 that the line is “essential to the orderly development and growth of the locality”. Set forth below is the current template provision governing approval of public or private utilities on the property with suggested modifications:

(e) **Utilities.** Public or private utilities to serve permitted buildings or structures [*If applicable:* and public or private utilities to serve parcels created by (the) permitted division(s) of the Property]. Public or private utilities to be constructed in whole or in part to serve other properties shall not ~~eross~~ **be constructed on, under, or over** the Property unless Grantee determines that the construction and maintenance of such utilities will not impair the conservation values of the Property and gives its prior written approval for such construction and maintenance, ~~which~~ **Approval or rejection** of such construction and maintenance shall take into consideration the visibility and any other adverse impact of such utilities on the conservation values of the Property. Grantor reserves its separate rights to approve such public or private utilities.

2. Widening of utility line adjacent to or traversing the property as an optional (Cookbook) utility expansion paragraph to be inserted at the end of Section II Paragraph 1 Division in appropriate circumstances. Widening of a utility line, such as an electric transmission line, could have a significant impact on the conservation values of a property going under easement. Such a provision for a pending easement project would be submitted to the board of trustees on a case-by-case basis. (Example set forth below is for electric transmission lines only.)

Property of _____ (“the power company”) traverses the Property (*Add something here showing the general location of the right of way.*) The provisions of this Easement shall not prohibit the power company, or its successors, from acquiring and using a portion of the Property immediately adjacent and parallel to its current right-of-way to increase the number of towers and power lines it needs to serve the public with electrical power (which acquisition and use shall not constitute a division or subdivision of the Property), provided that Grantee determines that the proposed expansion of the right-of-way includes all reasonable actions, such as landscaping, topographic improvements, or restrictions on tower height or width, necessary to minimize harm to the Property and its conservation values resulting from such use. Use of the Property for power line rights-of-way is limited to the widening or improvement of the existing power line right-of-way described in instrument(s) of record in the Clerk’s Office of the Circuit Court of _____ County in Deed Book _____, page _____. Grantee shall not be entitled to any compensation for the conveyance or taking of such land for such purpose. Grantor reserves its separate rights to approve such acquisition.

RECOMMENDATIONS – New Easement Provisions for Rail Lines

1. For a new rail line or realignment of a rail line through the property

The railroad company would have to comply with Virginia Code Section 10.1-1704 in diverting or converting land from open-space use.

2. Widening or improvement of rail line adjacent to or traversing the property as an optional (Cookbook) rail expansion paragraph to be inserted at the end of Section II Paragraph 1 Division, when recommended by the Department of Rail and Public Transportation. When a rail line is adjacent to or traverses the Property, the recommendation of the Department of Rail and Public Transportation is solicited by staff. Recommendations from the Department vary from stating that no widening will be necessary in the future to allowing for a strip of various widths (not exceeding 60 feet) for regrading, adding of a parallel track, or other improvement to the line.

This Property is bordered by property of _____ (“the railroad”). [*Optional language:* Property of _____ (“the railroad”) traverses the Property.] The provisions of this Easement shall not prevent the railroad, or its successors, from acquiring and using a portion of the Property for the improvement or expansion of its rail line (which acquisition and use shall not constitute a division or subdivision of the Easement), provided that (i) the portion of the Property taken does not exceed a ___-foot strip (*the width can vary depending upon the current right of way, but 60 feet is the maximum width allowed*) parallel and adjacent to the current rail line, (ii) the Virginia Department of Rail and Public Transportation certifies that there is no prudent and feasible alternative to using a portion of the Property for such rail line improvement or expansion, and (iii) Grantee determines that the proposed rail line improvement or expansion includes all reasonable actions, such as landscaping and/or topographic improvements, necessary to minimize harm to the Property and its conservation values resulting from such use. Grantee shall not be entitled to any compensation for the conveyance or taking of such land for such purpose. Grantor reserves its separate rights to approve such acquisition.

**VIRGINIA OUTDOORS FOUNDATION RESOLUTION ADOPTING THE POLICY
AND CERTAIN DEED PROVISIONS SET FORTH IN THE MAY 25, 2010 STAFF
MEMORANDUM TO THE BOARD OF TRUSTEES INVOLVING ACCOMODATING
PUBLIC INFRASTRUCTURE IMPROVEMENTS WHILE
PROTECTING CONSERVATION VALUES**

WHEREAS, the Staff Template Committee presented to the Board of Trustees a memorandum dated May 25, 2010 (the "Memorandum"), attached to and made a part of this Resolution, involving reconciling the necessity of protecting and preserving conservation values of property being put under open-space easement and the occasional need for infrastructure improvements involving the use or taking of small strips or portions of property under easement; and

WHEREAS, the Board of Trustees has determined that adoption of the general policy set forth in this Memorandum will facilitate the mission of the Virginia Outdoors Foundation (VOF) and help coordinate its relationship with other public agencies and entities and public utility companies; and

WHEREAS, the deed provision for minor improvements to existing roads as set forth on page 2 of the Memorandum should be inserted into the VOF deed templates, and the other deed provisions set forth in the Memorandum should be considered for insertion in deeds of easement in appropriate circumstances; now, therefore, be it

RESOLVED, by the Virginia Outdoors Foundation Board of Trustees this 25th day of June 2010, That the general policy set forth in the May 25, 2010 Memorandum is hereby adopted; and, be it

RESOLVED FURTHER, That an addition to the VOF easement templates for minor improvements to existing roads shall be made to read essentially as set forth on page 2 of the Memorandum; and be it

RESOLVED FINALLY, That the remaining deed provisions set forth in the Memorandum should be considered for insertion in deeds of Open-space easement in appropriate circumstances, subject to approval of the Board of Trustees on a case-by-case basis.

ADOPTED by a vote of ____ in favor and ____ against

ATTEST:

G. Robert Lee, Executive Director

VIRGINIA OUTDOORS FOUNDATION RESOLUTION AUTHORIZING RECOVERY OF COSTS IN EDUCATING NEW LANDOWNERS ABOUT THE TERMS OF AN EASEMENT AND ITS APPLICABILITY TO PROPERTY UNDER EASEMENT

WHEREAS, upon notice of or acquisition of knowledge of transfer, there are costs in staff time and materials in educating new landowners about the terms of easements and their applicability to properties under easement; and

WHEREAS, the Board of Trustees has determined that the costs described above should be recovered from landowners transferring such interests in all or a portion of the property under easement to new parties; and

WHEREAS, the costs paid by landowners should correspond to the costs in staff time and materials, as they may vary from time to time; and

WHEREAS, the mechanism for such cost recovery should be set forth conspicuously in deeds of easement accepted by the Virginia Outdoors Foundation; and

WHEREAS, according to the VOF Stewardship Division the current estimated average cost of educating new landowners about the terms of an easement and its applicability to property under easement is \$150.00; now, therefore, be it

RESOLVED, by the Virginia Outdoors Foundation Board of Trustees this 25th day of June 2010, That an addition to the VOF easement templates shall be made to read essentially as set forth in the sheet, attached hereto and made a part of this Resolution.

ADOPTED by a vote of ____ in favor and _____ against.

ATTEST G. Robert Lee, Executive Director Date

Attachment to VOF Board of Trustees Resolution adopted 6-25-10

SECTION V

New Paragraph

At such time as any interest in all or any portion of the Property is conveyed (except for conveyances such as deeds of trust or mortgages, access easements, utility easements, or boundary line adjustments) and before title is passed, Grantor shall be required to pay \$150.00 to Grantee for recovery of the costs of educating a new owner about the terms of this Easement and their applicability to any interest in all or any portion of the Property. The amount set forth above may be modified from time to time by Grantee's Board of Trustees based on changes in staff and material costs.