

Memorandum

To: Board of Trustees
Fr: Staff Template Committee
Re: Public Infrastructure Expansion (PIE)
Dt: 8-12-10

Staff recommends that major road, utility line, and rail line projects come to staff and board as a conversion or diversion of the property under Section 10.1-1704 and that no language should be inserted in the template or the cookbook to accommodate such projects as permitted uses. This recommendation would be applicable to new roads, new transmission lines and new rail lines not constituting an expansion of an existing road, transmission line, or rail line, as well as road widening projects not permitted under one of the PIE provisions set forth below.

The VOF Guidelines approved by the board contain the following excerpt used to evaluate whether to accept an easement project and whether to insert provisions involving roads or rails to forestall conflicts between an anticipated or planned public infrastructure project and the easement -

“In deciding whether an easement can be accepted, VOF considers whether an easement may interfere with any anticipated or planned public works project. In doing so VOF weighs the importance of conservation values of the property which may be compromised against the importance of the public works project, the extent to which planning for the public works project has been finalized, and the practicality and availability of other options for achieving the purpose of the public works project. It may insert provisions in the deed of easement to forestall a conflict between the public works project or may decide not to accept the easement.”

Set forth below are the optional (cookbook) provisions involving roads and rail lines discussed, but not formally approved, at the April and June 2010 board meetings.

If the recommended road and rail provisions below are approved, they would be included in the cookbook as optional provisions, facilitating the widening of roads or rail lines in appropriate circumstances. Many of these provisions have been used in selected easements previously approved by the board.

Approval is still on an easement-by-easement basis on these public infrastructure projects, as on all easement projects. Note that the provisions suggested below for road projects, except for road projects in the 6-year plan, require that VOF approve (or disapprove) the anticipated project at such time as more detailed plans are known and allow VOF to impose conditions on approval, if needed to protect the conservation values of the property. In the suggested rail provision, DRPT must first certify the necessity for any expansion and that there is no alternative, and then VOF must determine whether satisfactory actions will be taken in construction of the rail infrastructure to minimize harm to the conservation values of the property.

RECOMMENDATIONS – Optional Easement Provisions for Roads

1. 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.

The parties acknowledge that the Virginia Department of Transportation (“the Department”) may undertake the widening or improvement of Route _____ pursuant to the Department’s current six year road improvement plan [*Add date:* (“_____Six Year Plan”)] which may require the use of a portion of the Property. Such use, and any sale of needed land for such use, shall not be considered a division or subdivision of the Property 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 prevent harm to the Property resulting from such use, and (ii) the parties are consulted in planning such actions to prevent harm to the Property. Grantor reserves its separate rights to approve such acquisition. Use of the Property for such a project is limited to the improvement of Route _____ as described in the _____ Six Year Plan.

2. For widening of roads or adding of a lane when such road projects are in the locality’s comprehensive plan or transportation plan it is recommended that the following optional (Cookbook) highway expansion paragraph be inserted at the end of Section II Paragraph 1 Division.

The parties acknowledge that [*Select one:* the City of _____, _____ County, *or* the Virginia Department of Transportation] may undertake the widening or improvement of Route _____ pursuant to [*Select one:* the City of _____’s *or* _____County’s] current [*Select one:* comprehensive plan *or* transportation plan], which may require the use of a portion of the Property. Such use, and any sale of needed land for such use, 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 prevent harm to the Property and its conservation values. 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 ___ feet, *or* (2) the addition of one lane of travelway, *or* (3) [*Insert other language appropriate to the project.*]

3. For widening of roads or adding of a lane for road projects set forth in VDOT long-range plans (such as the VTRANS 2035 plan, Rural Regional Long Range Plans, or other state highway plans), 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, and, of course, some may never be realized.

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. Such use, and any sale of land for such use, 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 prevent harm to the Property and its conservation values. 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 ___ feet, or (2) the addition of one lane of travelway, or (3) insert other language appropriate to the project.*]

4. 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. Such use, and any sale of land for such use 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 prevent harm to the Property and its conservation values. Grantor reserves its separate rights to approve such acquisition. Use of the Property for this public road project is limited to the portion of the Property no further than 25 feet from the center line of the road.

RECOMMENDATIONS – New Easement Provisions for Rail Lines

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 that have been received 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 solely for the improvement or expansion of its rail line or the addition of a parallel 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 railroad property, (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 or addition of a parallel rail line includes all reasonable actions, such as landscaping and/or topographic improvements, necessary to prevent harm to the Property and its conservation values. Grantor reserves its separate rights to approve such acquisition.

Included in the June board memo dated 5-25-10, but excluded here are –

1. Major road, utility line and rail line projects (such as a new road, a new transmission line or a new rail line) that would come to staff and board as a conversion or diversion of the property under Section 10.1-1704; and
2. Utility language that is already in the template.; and
3. Transmission line widening projects. Staff has decided that such projects should continue to be presented to the board on a case-by-case basis because of their potential for significant impact on the land. Such projects are typically of a scale that necessitates the current right-of-way width to substantially increase or even double. The staff will identify existing utility lines on proposed easement properties and request a written response from the utility company regarding future expansion plans or needs. The written response from the utility company will be included in the agenda materials for board review.

Minor road improvements;

The provision for spot improvement to roads, the language for which was approved at the June meeting has been reworked as a result of suggestions made for its modification. It is set forth below with the recommended changes highlighted:

The acquisition of a *de minimis* portion of the Property adjacent to Route(s) _____ for **minor road** improvements ~~of the road(s)~~ shall not be considered a division or subdivision of the Property and **neither the acquisition of such a *de minimis* portion of the Property nor the use of the portion of the Property so acquired** 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 **prevent harm to** 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) _____ **as they/it exist(s) on the date of this Easement including, but not limited to, maintenance, correction, repair or upgrading of existing public road improvements such as the addition or renovation of ditches, box culverts, drainage swales, side slopes, curbing, regrading or enhancements such as pull-offs, bike lanes, and restoration projects. For the purpose of interpreting this paragraph "minor road improvements" and do 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. [This paragraph is not applicable if the Property has no road frontage.]~~

The modifications made above are intended to ensure (1) that the road improvements permitted are minor, (2) that harm to conservation values or destruction of significant conservation interests is prevented as required by the Treasury regulations (even though there would necessarily be a certain impact on the Property), (3) that for clarity the improvements permitted are specified in the text and not in the guidance language as in the previous draft, and (4) that the paragraph is not inserted in projects in which the Property has no road frontage.