

**PRESERVING THE HISTORIC HOUSE IN ITS SETTING
CHARLOTTESVILLE, VIRGINIA
June 9 - 12, 1988**

**An Update on Developments in the Virginia Law
on Historic and Open-Space Easements**

**by
George Clemon Freeman, Jr.**

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**Part I
Reconciling Open-Space Easements Held by Governmental
Bodies with other Public Uses**

One of the major questions recently resolved in Virginia's ongoing historic and open-space easements program is the scope of protection afforded by an easement against encroachments on the property for other governmental purposes. The Department of Transportation, the Historic Landmarks Board, and the Virginia Outdoors Foundation, all acting with the advice of the Attorney General's office, have agreed that the Virginia Open Space Land Act affords the exclusive mechanism for the release of open-space easements held by the Virginia Landmarks Board, the Virginia Outdoors Foundation, or any other "public body" as defined in that Act. This means that lands protected by easements held by these governmental bodies cannot be taken for highway or other public

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purposes by other state or local governmental entities unless the governmental agency holding the easement consents. Moreover, the agency's consent, while discretionary, can only be granted when the statutory criteria for release are met by the specific facts of the case. The relevant statutory criteria are found in Section 10-153(a) of the Virginia Code:

No open-space land, the title to or interest of right in which has been acquired under this chapter and which has been designated as open-space land under the authority of this chapter, shall be converted or diverted from open-space land use unless the conversion or diversion is determined by the public body to be (1) essential to the orderly development and growth of the urban area, and (2) in accordance with the official comprehensive plan for the urban area in effect at the time of conversion or diversion. Other real property of at least equal fair market value and of as nearly as feasible equivalent usefulness and location for use as permanent open-space land shall be substituted within a reasonable period not exceeding one year for any real property converted or diverted from open-space land use, unless the public body should determine that such open-space land or its equivalent is no longer needed. The public body shall assure that the property substituted will be subject to the provisions of this chapter.

Relevant definitions are set out in Section 10-156:

§ 10-156. Definitions. - The following terms whenever used or referred to in this chapter shall have the following meanings unless a different meaning is clearly indicated by the context:

(a) "Public body" means any state agency having present authority to acquire land for a public use, or any county or municipality, any park authority, public recreational facilities authority or the Virginia Recreational Facilities Authority.

(b) "Urban area" means any area which is urban or urbanizing in character, including semiurban areas and surrounding areas which form

an economic and socially related region, taking into consideration such factors as present and future population trends and patterns of urban growth, location of transportation facilities and systems, and distribution of industrial, commercial, residential, governmental, institutional, resort, and other activities.

(c) "Open-space land" means any land in an urban area which is provided or preserved for (1) park or recreational purposes, (2) conservation of land or other natural resources, (3) historic or scenic purposes, (4) assisting in the shaping of the character, direction, and timing of community development, or (5) wetlands as defined in § 62.1-13.2 of the Code of Virginia. (1966, c. 461; 1974, c. 348; 1986, c. 360.)

In its recent decision involving denial of a request by the Transportation Department for release of part (about 20 acres) of a perpetual easement on the Old Mansion in Bowling Green, the Historic Landmarks Board found that the existence of alternative routes for completion of the Bowling Green Bypass that did not encroach on the Old Mansion property precluded a finding that the Old Mansion route was "necessary" within the meaning of Section 153(a). The facts that the Old Mansion alternative would cost less and involve less "dislocation" than other proposed alternatives were thus immaterial. Moreover, the Board concluded that, as a matter of public policy within its discretion, the precedent set by release of a perpetual easement in the absence of demonstrable absolute necessity would break faith with the grantors of this and similar easements on historic landmarks held by the Board and undermine the ongoing momentum of its easement program.

The basic facts involved in the Old Mansion proceedings were:

First, the Old Mansion is one of the oldest houses in Virginia. It was built in the late 17th Century. It is located on about 110 acres of land located immediately south of Bowling Green in Caroline County. The site is listed as a historic landmark on both the Federal and the Virginia registers. The entire property is protected by a perpetual easement held by the Virginia Historic Landmarks Board. This easement is itself historic because it was the first easement (1969) granted to the Historic Landmarks Board after its creation in 1966.

Second, the Bowling Green Bypass is a highway project which was started in the early 1960's. Part of it was completed then with Federal funds. But because of its low priority, dwindling Federal funds for highway construction and, most important, the fact that the United States Secretary of Transportation did not and could not make the requisite finding under applicable Federal law for completion of the segment of the project across Old Mansion, construction of the remaining segment was continually delayed. Since the decisions of the U.S. District Court and the Fourth Circuit Court in the case involving Tuckahoe Plantation [Thompson v. Fugate, 347 F.Supp. 120 (E.D.Va. 1972), decided upon remand, 452 F.2d 57 (4th Cir. 1971)], it has been clear that the Federal requirements could not be avoided by "segmentation" (use of only Virginia funds to complete the Old Mansion segment). So it has been the position of Old Mansion's owners that completion

of the bypass through the property was not legally feasible under Federal law.

Third, when the Virginia Department of Transportation revisited the Bowling Green Bypass in the wake of the General Assembly's enactment of the recommendations of the Governor's Commission on Transportation in the 21st Century, the Department agreed that resolution of the question of the legal feasibility of the Old Mansion alternative under Virginia law was in the public interest. The question of Virginia law was separate and distinct from the question of legal feasibility under Federal law decided in the Tuckahoe litigation. The Federal law question would still have to be resolved in the Old Mansion situation if the easement posed no obstacle to the Old Mansion route under Virginia law. But resolution of the Virginia question might obviate the need to litigate the Federal question in the Federal courts because all agreed that if Virginia law barred the Old Mansion alternative, that was dispositive.

Finally, the question posed by Virginia law was directly relevant to the still ongoing deliberations of the Governor's Commission to Study Historic Preservation and its impending recommendations to the Governor and the General Assembly. All concerned agreed that resolution of the Virginia law question within the current Administration and avoidance of lengthy, costly, and unnecessary litigation was in the public interest. There was also a strong incentive for the Administration, and its supporters outside Virginia government, to avoid needless confrontation

between two main components of Governor Baliles' program for the "New Dominion": his now-in-place expedited transportation program and the impending report of his Commission to Study Historic Preservation. Fortunately, the existing law, enacted in 1966, afforded the means for reconciling transportation needs and historic preservation. In light of this agreement among the two concerned agencies as to the governing Virginia procedure, Senator Clive DuVal withdrew his earlier request to the Attorney General for a formal opinion on applicable Virginia law and whether the Thompson v. Fugate precedent precluding "segmentation" as a means of avoiding compliance with Federal requirements was still good law.

After the Landmarks Board's decision, the Department of Transportation held another public hearing on the Bowling Green Bypass. At that hearing the Department sought public views on the remaining alternatives proposed since the Old Mansion route was not legally feasible in light of the Historic Landmarks Board's denial of the request to release its easement on the property.

For your information I have attached the documents relevant to this decision to the text of this prepared statement. They include:

- My letter of February 10, 1988, to the Historic Landmarks Board on behalf of the Owners of Old Mansion (Appendix A);
- The Findings of the Virginia Historic Landmarks Board of February 16, 1988 (Appendix B);
- Excerpt from The Free Lance-Star, Fredericksburg, Virginia, February 17, 1988 (Appendix C);

- Excerpt from The Caroline Progress, Bowling Green, Virginia, February 24, 1988 (Appendix D); and
- My letter of May 24, 1988, to the Department of Transportation on behalf of the Owners of Old Mansion (Appendix E).

A more detailed "reasoned analysis" for my conclusions as to applicable Virginia law, which have now been accepted by the State agencies, appears in my opinion to the Piedmont Environmental Council on "Open-Space Easements and Highways," dated November 11, 1987 (Appendix F).

After the Old Mansion decision by the Virginia Historic Landmarks Board, the Department of Transportation followed this same procedure to seek release of a part of an open-space easement held by the Virginia Outdoors Foundation. In this instance the highway project was potentially far less intrusive. It involved widening an existing road. The Transportation Department, the landowner, and the Virginia Outdoors Foundation reached agreement on the desirability of the project and plans for completing it in a way that had minimal impact on the open-space values protected by the easement. An extract from the Commission's minutes making the findings required by § 10-153(a) and consenting to the requested release appears in Appendix G.

These precedents show that the State's open-space easement program, carried out primarily through these two key agencies the Historic Landmarks Board and the Virginia Outdoors Foundation, is working well and that a viable means exists for reconciling the program with the Governor's expanded Plan for Transportation in the Twenty-First Century.

These precedents should be kept in mind as private charitable foundations move forward with their own easement programs, whether aimed primarily at historic or open-space preservation, under Virginia's Conservation Easement Act, which becomes effective on July 1. An early draft of that contained a provision designed to address the problem of "condemnation for other public use" of easements held by private foundations patterned on the procedures provided in § 10-153(a) for open-space easements held by public bodies. However, this provision was deleted from the version of the bill introduced in the House by Delegate Diamonstein. Thus, open-space easements given solely to private foundations under the new Act will not have the protections against destruction or encroachment for highway and other public purposes afforded easements held by state or local "governmental bodies" under the Open Space Land Act. One possible solution to the problem posed is discussed below.

Part II The Virginia Conservation Easement Act

The Virginia Conservation Easement Act (Appendix I) authorizes conservation easements to be held by

a charitable corporation, charitable association, or charitable trust which has been declared exempt from taxation pursuant to 26 U.S.C.A. § 501(c)(3) and the primary purpose or powers of which include: (i) retaining or protecting the natural or open-space values of real property; (ii) assuring the availability of real property for agricultural, forestal, recreation or open-space use; (iii) protecting natural resources; (iv) maintaining or enhancing air or water quality; or (v) preserving the historic architectural or archeological aspects of real property.

The Act thus removes the questions as to the enforceability of open-space easements in gross held by such non-governmental entities discussed in my 1971 paper for the National Trust on "The Use of Easements for Historic Preservation" (Appendix H). Unfortunately, however, the Diamonstein Bill also omitted a provision which I had drafted for a possible Administration Bill (see Appendix J) that would have provided a means for validating and indexing open-space easements in gross held by such foundations prior to the effective date of the new Act. Thus, such easements remain under that cloud.

For this and other reasons discussed below, the bill, as enacted, represents an incomplete compromise between the two environmental organizations who were most active in seeking its enactment, The Chesapeake Bay Foundation and the Nature Conservancy, and the builders and developers who sought to thwart or undermine the perpetual easement concept. As a result, several other key provisions, that I had helped to work out in lengthy consultations among those two environmental groups and the Piedmont Environmental Council, the Lower James River Association and representatives of the Baliles' Administration, were not included in the Act. Those additional provisions were designed to block deliberate release or deliberate or inadvertent destruction of easements held by eligible private foundations where the easements by their terms are intended to be perpetual. The argument why these provisions are needed was set forth in my letter of February 19, 1988 to the Senate Agriculture Committee (Appendix

K). Unfortunately, while the Senate conferees supported inclusion of these provisions, the House conferees, with strong support from the builders and developers, were adamantly against them.

A last minute compromise designed to solve only one of the several means of potential abuse -- the creation of bogus or "front" charitable organizations -- was put forward by the House conferees. The environmental organizations split over whether to accept it, but the accession of The Chesapeake Bay Foundation and the representatives of the national office of the Nature Conservancy was decisive to acceptance of the compromise and enactment of this legislation.

Thus, while the new law offers greater opportunities for wider use of open-space easements in Virginia by their gift to qualifying private foundations, where the donor and the donee intend the easement to be perpetual, special problems exist that should be addressed at the time of creation of the easement.

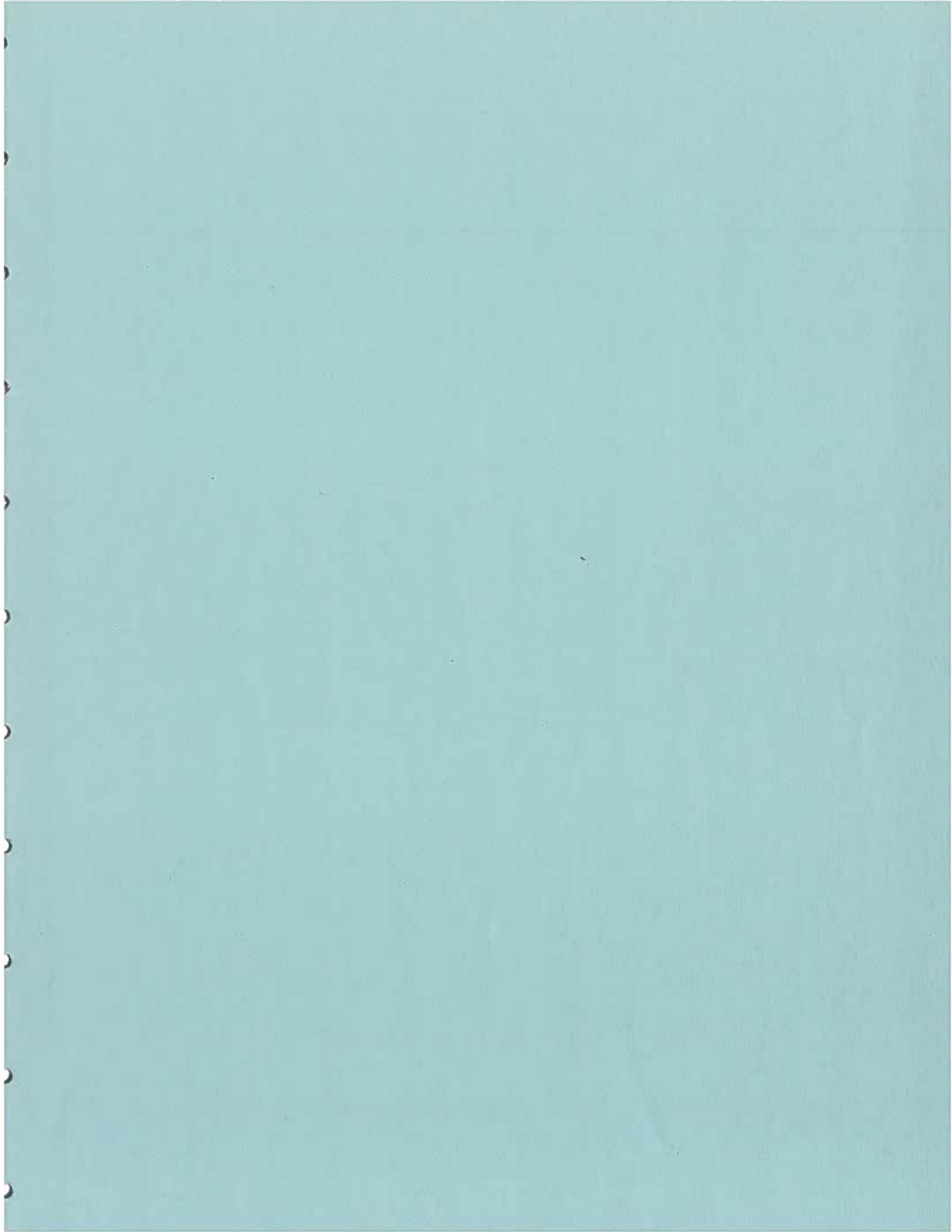
The first problem is the threat to deductibility of the easement for Federal income taxes. Unfortunately, in the last minute maneuvers over the "perpetuity" issue, the proponents of the compromise bill asked the Federal Internal Revenue Service how it handled this problem in states that had enacted the Uniform Model Open-Space Easement, which does not contain the protective provisions that many of us urged. The answer given was that "perpetual" easements were allowed as deductible when held by private charitable organizations under such acts. But since

then the Internal Revenue Service has had second thoughts and has indicated that it has reopened, on a nationwide basis, the question of deductibility of such easements where they are held by private foundations, as distinguished from state agencies, which unlike the former are politically accountable. The reason why a shadow of non-deductibility hovers over such easements was discussed long ago in my 1971 speech to the National Trust (Appendix H). The solution I offered then to the draftsmen of easements is still valid. It is to include in the text of the easement the language spelled out in Appendix H that is designed to prevent the easement's destruction through assignability, deliberate release, or merger.

The second problem is the protection of a perpetual easement held by private charitable donees from condemnation for other governmental purposes. I mentioned this earlier in Part I above. Here again the donor and his draftsmen can lessen the possibility by making either the Virginia Historic Landmarks Board, the Virginia Outdoors Foundation, or some other "public body" under the terms of the Virginia Open Space Land Act the co-donee of the easement along with the private charitable foundation. That, of course, requires the consent of such a governmental agency. But where that consent is given and the easement accepted, the procedural and substantive safeguards discussed in Part I above come into play.

Responsible charitable organizations which initiate their own historic or open-space easements programs should advise potential donors of these problems and the availability of these means for dealing with them.

June 10, 1988



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FILE NO.

DIRECT DIAL NO. 804 788- 8365

**Statement on Behalf of the
Owners of Old Mansion**

Dear Ladies and Gentlemen:

Summary

The Historic Landmarks Board should deny the request of the Transportation Department for release of its easement on the Old Mansion property to permit the Department to build a highway across the Old Mansion property. It should do so for two reasons. First, such a release would be bad public policy and leave a shadow over the Board's ongoing easement program. Second, the Board cannot make the requisite statutory findings under § 10-153(a) for release of the easement in light of the facts of the case.

Background

The Old Mansion is an historic landmark and registered as such by both the Federal and State Government. Moreover, the entire property is subject to a perpetual historic and open space easement given by its prior owner to the Virginia Historic Landmarks Commission. The original house dates back to 1670 and is one of the oldest surviving dwellings of the Colonial period in Virginia. Architecturally and historically it is one of the most significant landmarks in Virginia. The house and its lands also constitute the only legally protected scenic open space in the Bowling Green area. The easement on Old Mansion is also historic in that it was the first one given the Virginia Historic Landmarks Commission after the agency's creation by the General Assembly and thus it set the pattern that has been followed in subsequent gifts of such easements.

The Virginia Transportation Department has under consideration five alternative routes for the completion of the Bowling Green Bypass. See Attachment A. One of these alternatives (Line #2) would involve completion of the bypass across the Old Mansion property, the others would not. All five alternatives are technically feasible and all five are financially feasible, though the estimated costs involved vary substantially. The land

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acquisition costs of Line #2 are substantially less than land costs involved in other routes.

Broader Policy Considerations

1. Costs as a Factor. - In June of 1987, the Transportation Department estimated that the per acre acquisition costs of the alternatives were:

Line 1	\$10,900
Line 2	2,700
Line 3	5,700
Line 4	10,700
Line 5	5,700

These substantial variations are because, as the Department candidly admitted,:

It should be noted that the variances can be attributed to the types of lands within the acquisition areas on the different alternatives considered. A further explanation of this follows.

Line 1 is composed of commercial and farmland. All other alternatives are composed of residential and farmland with the exception of Alternative 2 which is composed of farmland and timberland.

In addition, Alternative 2 involves the Old Mansion property which will not have a more intense highest and best use because it is encumbered with an easement which restricts its useage and development.

Note, however, that this will always be the case where the lands of historic properties protected by easements are involved. Thus, if economics alone were to be determinative of where future highways are to go, the Board's easement program would in the long run be self-defeating for it would in fact preserve these properties for future highway development instead of historic preservation.

2. Local Public Opinions as a Factor. - The Transportation Department in all fairness, however, has not been led to favor Line #2 primarily for economic reasons, but instead because the prevailing sentiment as expressed at the public hearing of May

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14, 1987 was for Line #2. Again such public sentiment is understandable. The other four alternatives involve a greater disruption of friends and neighbors. But again consider the potential precedent. For the last 25 years Old Mansion, protected by its "perpetual" open space easement has provided a central open space case around which the broader Bowling Green community has grown. In similar situations in the future, it would always be less disruptive, and perhaps more popular, to encroach on a single property, the "protected" landmark. Once again, if public opinion of the day were allowed to prevail over a perpetual historic easement, both "perpetual" and "preservation" become a sham.

3. Litigation Costs (and Results) as a Factor. - The Board also should be aware that even if it were to find that it could and should release the easement, the Transportation Department could not proceed with the construction of Line #2. That is because there is no way under present Federal law that Line #2 could be completed across the Old Mansion Property. This is because:

(1) The Bowling Green Bypass was originally conceived of as a unitary federally funded project.

(2) Substantial Federal funds already have been spent in completing part of it.

(3) The U.S. Secretary of Transportation did not make the requisite statutory findings with regard to the proposed Old Mansion Bypass Project required by Federal law, 23 U.S.C. § 138. For example, 23 U.S.C. § 138 then and now provides that "the Secretary shall not approve any . . . project which requires the use of . . . any land from an historic site of national, State or local significance as determined by [Federal, State or local officials having jurisdiction thereof] unless (i) there is no feasible and prudent alternative to the use of such land and (2) such program includes all possible planning to minimize harm to such . . . historic site resulting from such use."

(4) Virginia cannot fill the void left by the Secretary's inaction by "segmenting out" the Old Mansion portion and only using state funds to complete it. This was definitely resolved by Judge Merhige's definitive decision in Thompson v.

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Fugate, 347 F.Supp. 120 (E.D. Va. 1972), a parallel situation involving Tuckahoe Plantation. See, also, No East-West Highway Committee, Inc. v. Whitaker, 403 F.Supp. 260, 279 (D.N.H. 1975); San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013 (5th Cir. 1971), cert. denied, 406 U.S. 933. Cf. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

(5) No decision has come down since in the Federal courts undermining these precedents.

(6) Therefore, there is no way Virginia alone can now proceed to elect to complete the bypass through Old Mansion whether or not it does an impact statement, and whatever that statement shows, and even if no federal funds are used on the Old Mansion segment.

In summary, only if the U.S. Secretary of Transportation actually made the findings on the record required by Federal law could the Old Mansion segment be constructed. And, on the facts here, the Secretary could not make the requisite finding, i.e., that "there is no feasible and prudent alternative" to Line #2. The fact that the Transportation Department has proposed four other alternatives that are technically feasible is conclusive of the matter.

If, however, the Board were to grant the Transportation Department's request or take no action to deny it and the Department were to proceed, the owners would challenge any efforts to proceed along Line #2 in Federal court in what would be a replay of the Tuckahoe litigation. Forcing the owners of a landmark subject to an easement to go to such expense to vindicate their rights under Federal law, would lessen the faith of landmark owners in the Board and our Virginia program and thus seriously handicap the Board's future solicitation of easements.

4. The Commonwealth's Commitment to Preservation as a Factor. - Release of the easement here would be contrary to the State's policy enunciated in Governor Baliles' Executive Order Number Thirty-Nine (87), creating the Commission to Study Historic Preservation: "State government is committed to the proper management of the Commonwealth's invaluable historic resources." Indeed, release of the easement would be a breach of the Board responsibilities as "steward of these irreplaceable resources that demand and deserve our careful attention."

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The Governing Statutory Criteria

But apart from these broader, longer run, abstract considerations of general policy as to whether it would be in the public interest to grant or deny the Transportation Department's request to release the easement to permit selection of Line #2, there are specific statutory provisions applicable to the Board's decision that preclude release of the easements on the facts of this case.

Section 10-153(a) of the Virginia Code is explicit that consent of the Historic Landmarks Board is essential before any part of the Old Mansion land now subject to the Board's open space easement could "be converted or diverted from open-space land use." To release the easement, the Board would have to find that the diversion of the property now protected by the easement was "essential to the orderly development and growth of the urban area." This statutory test poses two questions: Is completion of the bypass needed for the development of the Bowling Green urban area? And if it is, is the line through Old Mansion "essential"? The answer to the first question is debatable and highly doubtful. But it is not controlling since the answer to the second question is clear even if the first question could be answered yes. This is proven by the fact that the Transportation Department itself has posed four other viable alternative routes. Thus, the question posed for the Landmarks Board, "is it essential?", is substantially the same as that posed by 23 U.S.C. § 138 for the U.S. Secretary of Transportation: is there "no feasible and prudent alternative use of such land?" This is a finding that the Secretary has not and could not have made over the 20 some odd years this matter has been in dispute. Given its mission to protect historic sites, the Landmarks Board clearly should not venture where the U.S. Secretary of Transportation has steadfastly refused to tread.

Release of the Old Mansion lands would also be counter to the purposes for which the Open Space Land Act was enacted. Among them were "the provision and preservation of permanent open space land are necessary . . . to help provide and preserve necessary . . . historic and scenic areas." The act provides, but does not require, that the property rights of public bodies, such as the Landmarks Board, can be "perpetual." But when they are by their express terms "perpetual," clearly the legislature as well as the contracting parties (the Board and the landowners) intended them to remain perpetual so long as the easement was continuing to fulfill its stated purposes. Here that would be protection of Old Mansion and its surrounding lands that are subject to the easement. This interpretation is reinforced by reference to § 10-138(f) which gives the Landmarks Board power to "lease or

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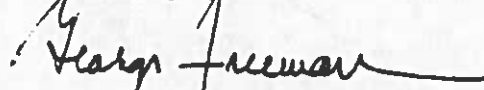
sell property [which includes all types of interests in property as well as the fee] acquired [by purchase, gift or lease]" but only "under conditions designed to ensure the proper preservation of the landmark or site in question." Construction of a four lane interstate across the Old Mansion property certainly would not be "proper preservation."

Lest anyone misconstrue the last clause in the last sentence of § 10-152, it was not put in to allow the provisions of § 10-153 to be evaded by allowing another "public body" to condemn the open space easement held by another public body. As the draftsman of this act, I know the sentence was added simply to deny public bodies that did not already possess the power of eminent domain to acquire the land in fee or an easement any new powers of eminent domain.

Conclusion

We respectfully ask that the Board take action under Virginia law and deny the Department's request for release of the easement on the Old Mansion lands that would be crossed by Line #2. Your denial will be dispositive of the issue. The Department of Transportation can then go back to the Bowling Green community and seek its views on which of the four other legally available alternatives is preferred. Then this matter which has festered for some 20 odd years can be put to rest once and for all. This will not only be fair to the owners of Old Mansion, it will remove a cloud that has long hovered over the Board's entire easements program and that has been the cloud of uncertainty as to the actual protections afforded by "perpetual" easements held by the Board against unwarranted highway encroachment.

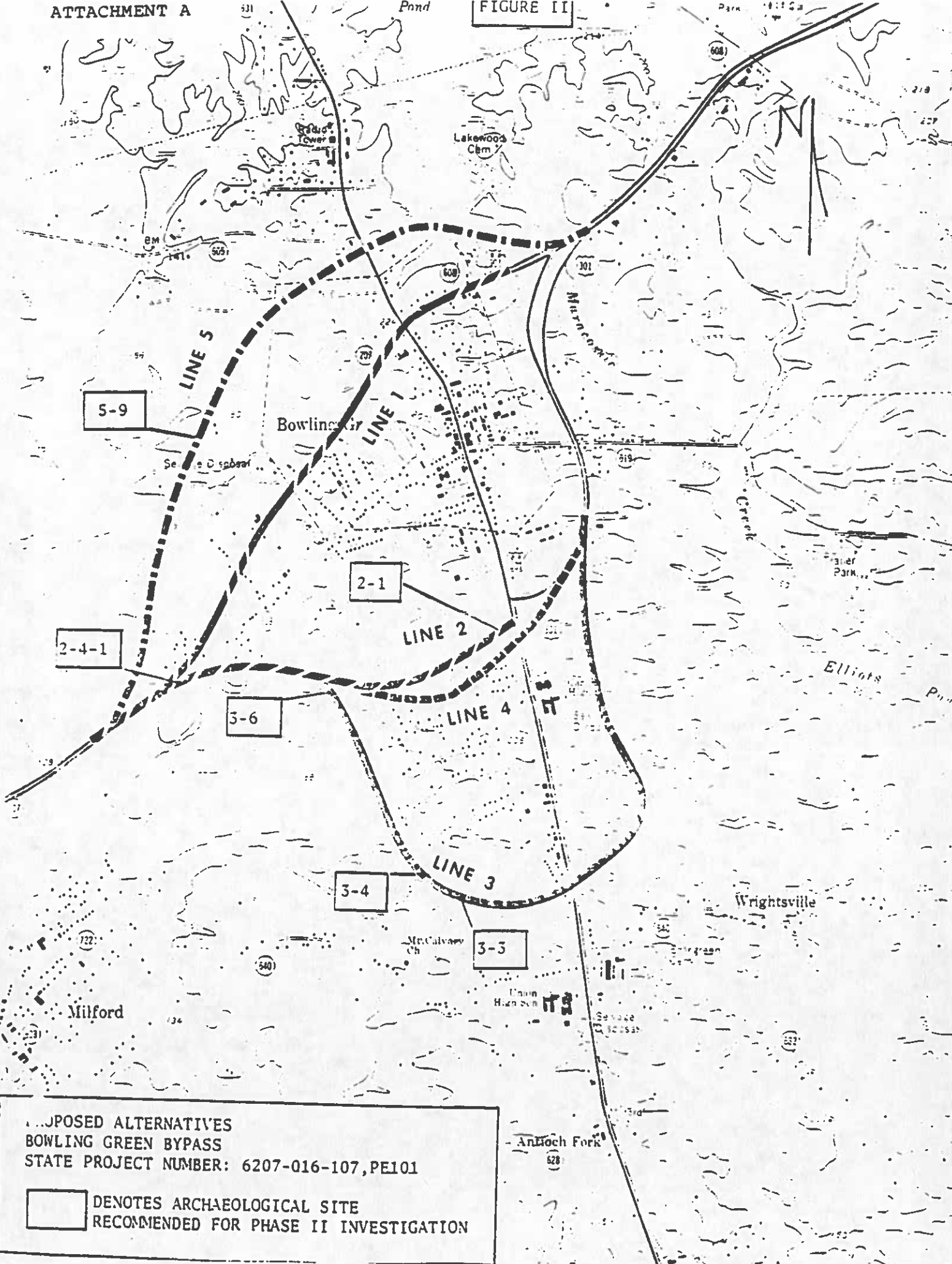
Sincerely yours,



George C. Freeman, Jr.

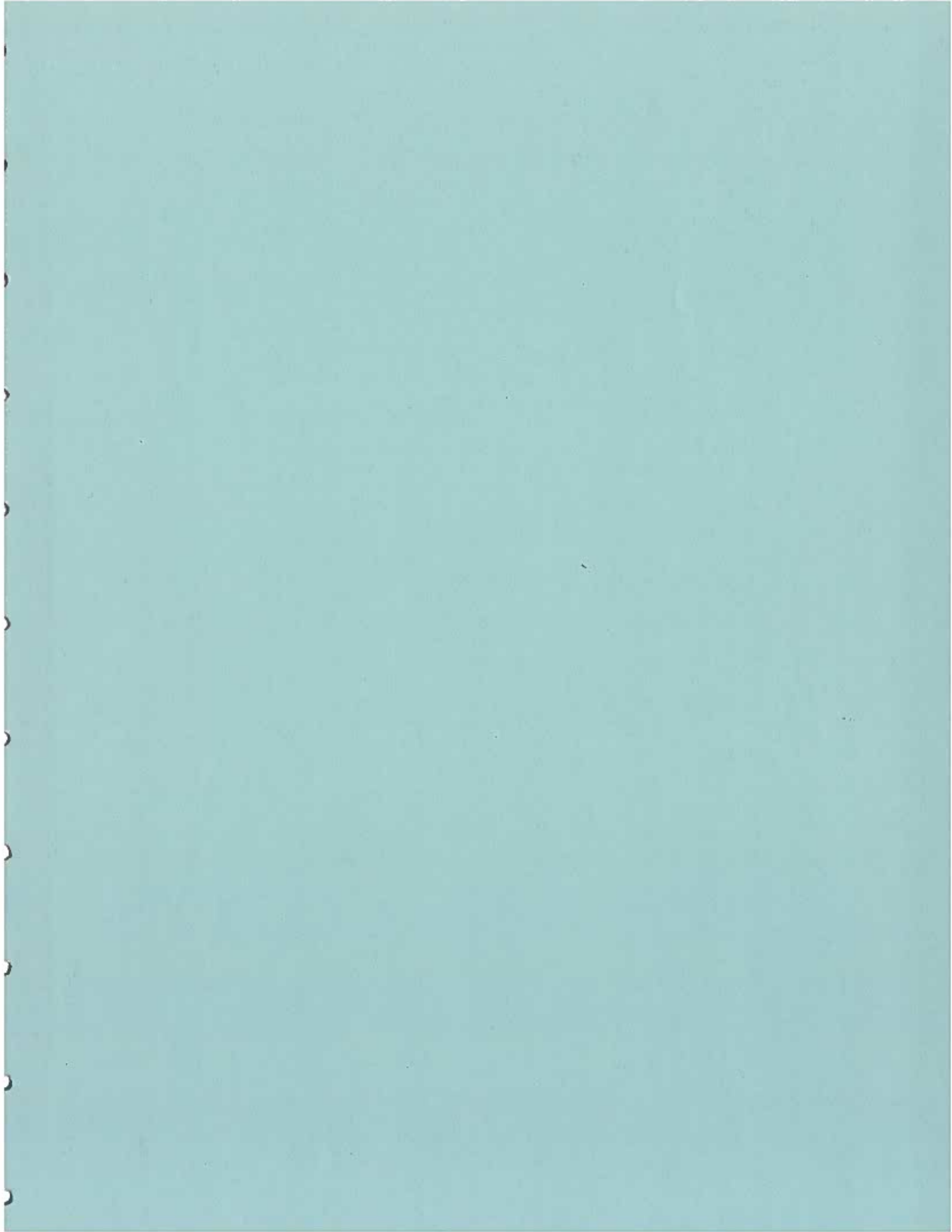
Virginia Historic Landmarks Commission
221 Governor Street
Richmond, VA 23219

GCF/jbk



PROPOSED ALTERNATIVES
 BOWLING GREEN BYPASS
 STATE PROJECT NUMBER: 6207-016-107, PE101

DENOTES ARCHAEOLOGICAL SITE
 RECOMMENDED FOR PHASE II INVESTIGATION



Divisions
 Historic Landmarks
 Litter Control
 Parks and Recreation
 Soil and Water Conservation

B. C. LEYNES, JR.
 Director



COMMONWEALTH of VIRGINIA

Department of Conservation and Historic Resources

Division of Historic Landmarks

H. Bryan Mitchell, Director

221 Governor Street
 Richmond, Virginia 23219
 Telephone (804) 786-3143

FINDINGS OF THE VIRGINIA HISTORIC LANDMARKS BOARD IN RESPONSE TO

THE VIRGINIA DEPARTMENT OF TRANSPORTATION'S PRESENTATION OF FEBRUARY 16, 1988
 RELATING TO THE OLD MANSION PROPERTY, BOWLING GREEN, CAROLINE COUNTY

At its February 1988 meeting the Historic Landmarks Board considered the Virginia Department of Transportation's (VDOT) request to release a portion of the land held under a conservation easement on the Old Mansion property for the construction of the Bowling Green bypass. VDOT had studied five alternatives for the bypass and had determined the alternative through Old Mansion was the preferred route.

The Old Mansion easement was granted to the Commonwealth in 1968 and was taken under the authority of both the Virginia Historic Landmarks Commission Act (Section 10-138) and the Open-Space Land Act (Section 10-151). As authorized by both acts, the easement, by its terms, is perpetual.

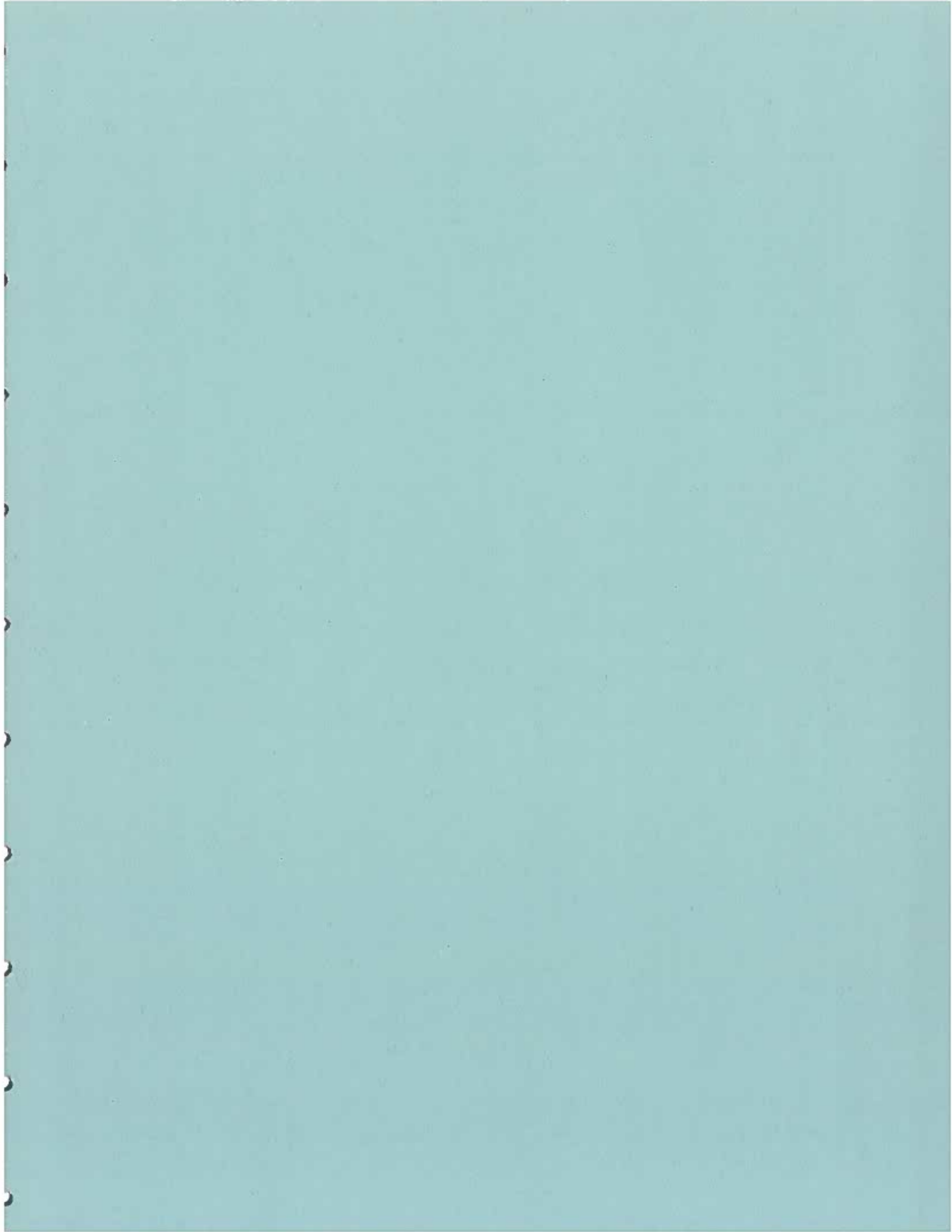
Thus, in considering VDOT's request to release a portion of the property, the Virginia Historic Landmarks Board was obligated to respect the basic intent of both acts that conservation easements, which by their terms are perpetual, can be released or modified only in one narrow instance. Such is provided for in Section 10-153 of the Open-Space Land Act which states:

"No open-space land, the title to or interest of right in which has been acquired under this chapter and which has been designated as open-space land under authority of this chapter, shall be converted or diverted from open-space land use unless the conversion or diversion is determined by the public body to be (1) essential to the orderly development and growth of the urban area, and (2) in accordance with the official comprehensive plan for the urban area in effect at the time of conversion or diversion."

The Board took the position that a case could not be made that releasing a portion of the Old Mansion property for the bypass was essential for the orderly development and growth of Bowling Green. Furthermore, while VDOT's studies demonstrated that a bypass was desirable for the community, the Board could not accept the violation of a historic property that it was charged with the responsibility to preserve in perpetuity as long as there were feasible alternative routes, in this case four. The Board did not question the need for the bypass and does not oppose it.

Because the Board took the position that it could not justify releasing a portion of the easement under the first provision of Section 10-153 it did not feel it was necessary to consider the second provision.

The Board recognized that while placing the bypass through the Old Mansion property may be less costly in terms of right-of-way acquisition, it was not permitted to take economic factors into consideration. The Board also determined that it would be setting a dangerous precedent if properties held by the Commonwealth under conservation easement were ever to be regarded as the most expedient locations for public works projects merely because they were open spaces. Releasing any portion of an easement property for such projects as long as there were feasible alternatives, even though they may be more costly, would be violating the Board's mandate to protect irreplaceable historic resources since such action, in the Board's opinion, would place all easement properties, present and future, at risk.



Bypass hits dead end

Historic easement blocks controversial project

By **AMY SATTERTHWAITE**
Staff Reporter

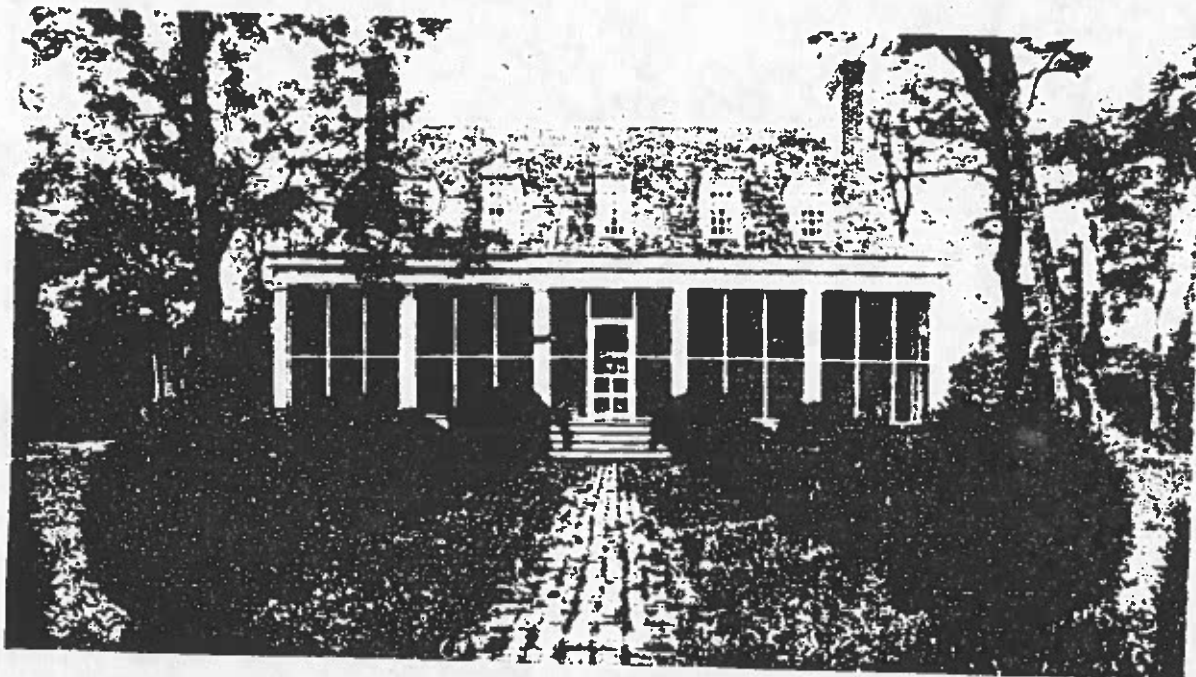
RICHMOND—In a landmark decision here yesterday, a board appointed to protect historic sites in Virginia refused to allow a strip of land belonging to the Old Mansion in Bowling Green to be paved for a highway that has been planned for 25 years.

The Virginia Historic Landmarks Board voted unanimously to keep the easement it has held on the oldest estate in Caroline County, dashing hopes of Transportation Department officials and many in Caroline who supported the "only prudent and feasible" location for a bypass that would ease traffic congestion in the town.

The vote, which came after more than an hour of speeches on both sides of the issue, marks the first time since the state began taking historical easements in 1969 that the rights to a protected property have been challenged. The Old Mansion was also granted the first of the state's 115 easements.

Plans for the bypass, which would link U.S. 301 northwest of Bowling Green with State Route 207 south of the town, began in 1963, said Jack Hodge, chief engineer with the transportation department. Half of the bypass was built, but then abandoned in 1969

Please see Mansion, page 20



The Bowling Green Bypass will not cross the Old Mansion site in Caroline County.

ROBERT A. MARTIN / Staff photographer

THE FREE

Mansion

from page 1

when funds dried up and the mansion owners threatened a lawsuit.

The Bowling Green Town Council and the Caroline County Board of Supervisors, as well as the majority of citizens who attended public hearings on the issue, have endorsed completing the bypass along its original route even though it would sever about one-fifth of the estate's 110 acres. They say increasing tractor-trailer traffic that comes down Main Street is noisy and dangerous.

However, merchants on Main Street, who were silent during the hearings, have said they are against the bypass because it would mean an end to the business from tourists on their way to King's Dominion, Richmond, or Washington.

"This town has been bypassed enough," the manager of the local Safeway store told a reporter last year.

Others, like Bowling Green resident Dan Curran, point to the "two deaths and innumerable accidents" that have occurred at the intersection of U.S. 301 and State Route 207. In December 1984, a truck spilled toxic chemicals, closing a section of U.S. 301 for two weeks.

Hodge must now consider four alternative routes to completing the bypass, none of which is popular with transportation officials or Caroline citizens. The options include:

- Widening the existing portion of U.S. 301.
- Extending the bypass so that it

skirts the mansion and other neighborhoods in two routes.

- Starting anew on a bypass around the opposite side of U.S. 301.

Hodge said the options are costly and, in all cases but one, involve displacing residents from their homes.

"I'll be back in Caroline putting the decision in front of the community and see what their feelings are," Hodge said following the vote. "I don't see what choice I have now."

Members of the Landmarks Board said they were left little choice but to reject the release of the historic easement protecting the Old Mansion. To give up the easement, they said, would render all future promises worthless.

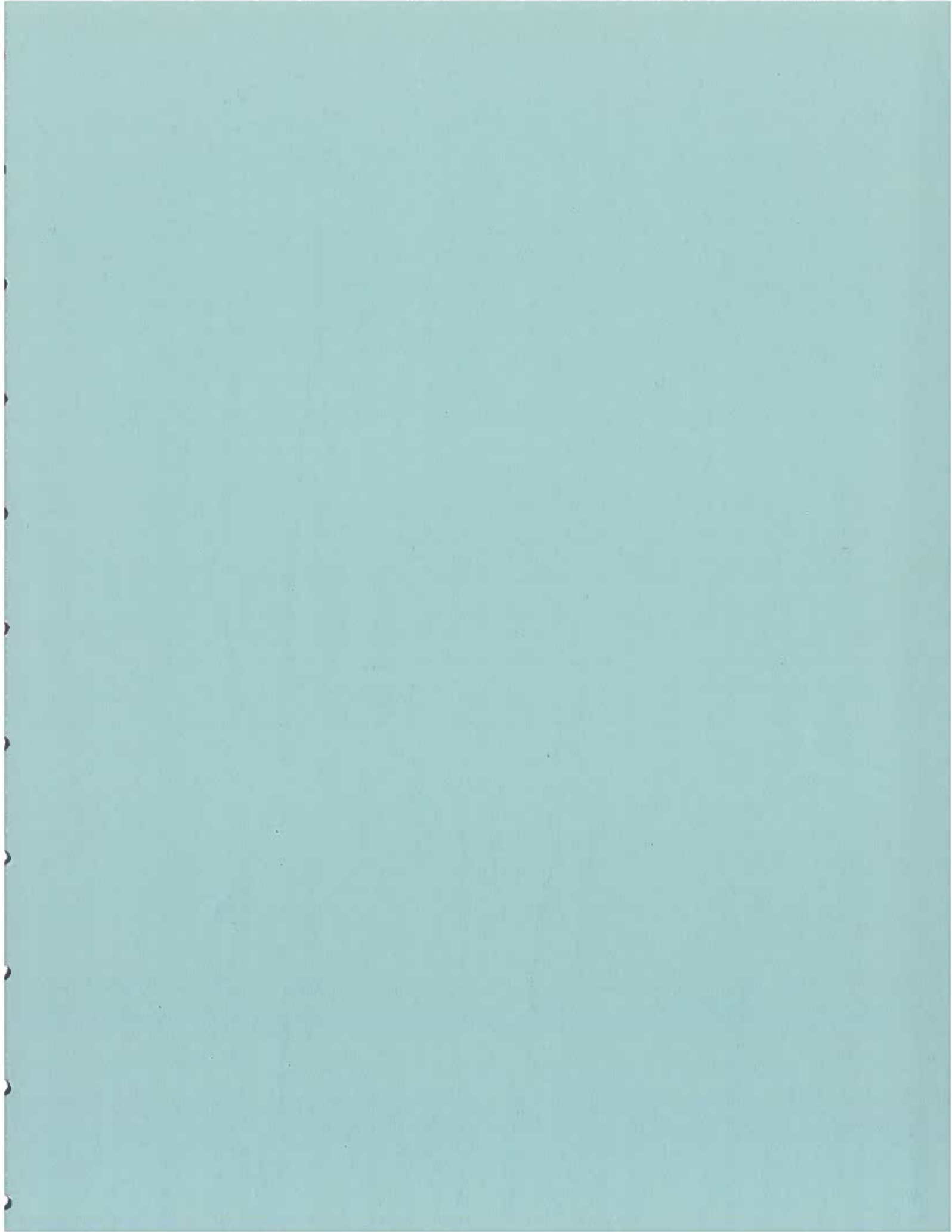
"Our integrity is at stake," said member Anne Worrell.

"I can't think of any serious-minded person who would trust us (with an easement) if we were to grant this," agreed member Jessie Brown.

Built about 1670, Old Mansion is "a blue chip architectural treasure . . . and the most outstanding example of the Chesapeake Bay area Colonial style," said Calder Loth, the state's senior architectural historian.

The house was originally called "Bowling Green," and its owners gave the name and much of the land to the town. George Washington and his troops camped there on the way to the Battle of Yorktown, Loth said, and were entertained at the mansion on their return.

Old Mansion is owned by four descendants of the original owner, none of whom live there. It serves as a bed-and-breakfast inn, operated by caretakers who often give tours to architectural enthusiasts and



Bypass plans sent back to drawing board

The fight to run the last leg of the ill-fated Bowling Green bypass through the property of the historic Old Mansion appears to be over.

The Virginia Historic Landmarks Commission last Tuesday denied a request to release an easement on the property that would have allowed the original bypass route to be constructed.

After meeting with the nine-member commission in Richmond Tuesday afternoon, officials with the Virginia Department of Transportation said that they would not push the issue any further and that a public hearing would be held some time next month in Bowling Green to discuss what alternative should be selected for the completion of the bypass.

"I can't build a road if I don't have an easement," said Jack Hodge, the chief engineer for the Virginia Department of Transportation.

Hodge said it would be up to the citizens of Caroline to push the issue now.

At tonight's Board of Supervisors meeting, Caroline County Administrator John Anzivino is expected to recommend that the board now take up the issue with the governor. Both the board and the Bowling Green Town Council have passed resolutions supporting the construction of the original route and a representative from each body was at the hearing last Tuesday.

The commission unanimously denied the request to build the highway through the Old mansion's property, saying that the integrity of the state's historic easement program would be in jeopardy if the request were granted.

The Historic Landmarks Commission has approximately 115 easements on more than 10,000 acres of land across the state. The owners of the Old Mansion were granted the state's first historic easement in 1969.

The bypass was abandoned after the easement was granted on 110

What are the other choices?

Virginia Department of Transportation officials are expected to hold a public hearing sometime next month in Bowling Green to discuss what route should now be selected for the completion of

See map on page 9

the Bowling Green bypass. Below is a brief review of the four remaining alternatives:

-Line 1 is the four laning of Route 207 from the western side of the town to the eastern side of town. This route is approximately 2.1 miles long and would cost approximately \$4.1 million to build.

According to an Environmental Overview prepared by VDOT officials last year, Line 1 would involve the acquisition of "small amounts" of land on either side of the corridor, but would not displace any families.

See Choices, page 9

acres of the Old Mansion's property and has sat half-finished since then. Plans for the bypass, which would link U.S. 301 northwest of Bowling Green with Route 207 south of town, began in 1963 in hopes of diverting heavy truck traffic around the center of town.

Completion of the bypass has long been discussed, but never vigorously pursued until recently. Last

See Bypass, page 9

Choices

Continued from page 1

The overview, however, said that safety and traffic problems "would likely be compounded" if this alternative were selected, particularly at the Route 2, 207 and U.S. 301 intersection.

Line 1 wouldn't remove heavy truck traffic from the intersection either, which is one of the main reasons for building the bypass.

-Line 3 is the southernmost route. It shares a common stretch of highway with Line 4 for about three-quarters of a mile then turns south and runs behind White Meadows subdivision before crossing U.S. 301 just above its intersection with Route 695. It then turns north and runs through undeveloped land behind Bowling Green Elementary school and finally ties back into the existing section of the bypass about three-tenths of a mile east of U.S. 301.

Line 3 is approximately 3.2 miles long and is estimated to cost \$15.9 million to build. Six families would be displaced by this alternative and the impact on wildlife habitats, forest land and archaeological sites would be significant, according to the overview.

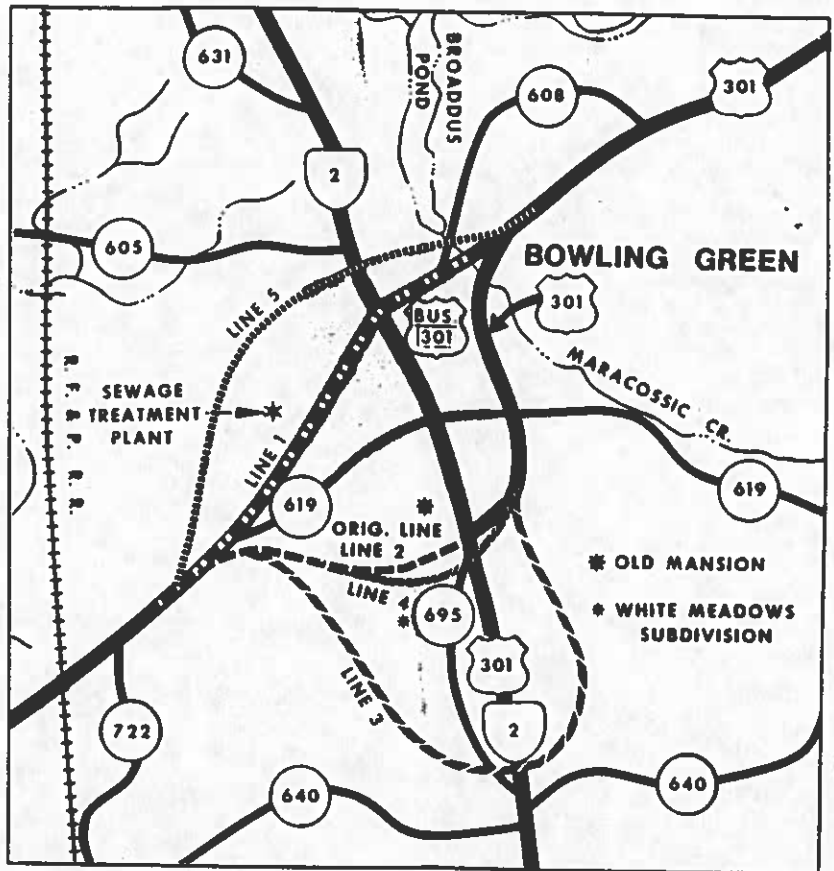
The study also cites that this route is the longest of all the alternatives and the most expensive.

-Line 4 is very similar to the original route. It begins where Route 207 changes from four lanes to two and runs southeast through undeveloped land for about three-quarters of a mile. It then turns south and runs through the northern section of White Meadows subdivision, almost parallel to the south property line of the Old Mansion property. The route then crosses U.S. 301 and ties into the existing section of the bypass about four-tenths of a mile from U.S. 301.

Line 4 is approximately 1.9 miles long and would cost approximately \$11.3 million to build.

Although this alternative would maximize the utilization of the right-of-way currently owned by the state and would avoid acquiring the right-of-way from the Old Mansion, 12 families would be displaced.

-Line 5 runs around the northern end of town. It would run north-easterly from Route 207 through forest and farm land and under Route 2. It would then cross Route 608 and tie into U.S. 301 where the existing section of the bypass be-



gins.

Line 5 is approximately 2.6 miles long and would cost approximately \$11.2 million to build.

Seven homes, one farm and the Caroline Community Club would all be affected by the northern route.

Approximately 16.5 acres of

prime agricultural land and 29 acres of forest land would be converted to highway if this route was selected. The overview also said that this route would also dissect farms in the corridor and "construction would probably result in significant traffic inconveniences."

Bypass

Continued from page 1

May, a public hearing was held in Bowling Green to discuss the five proposed routes. The selection of the original route, which cuts through about 22 acres of the Old Mansion's property, received the broadest support from county citizens and appeared to be the most feasible.

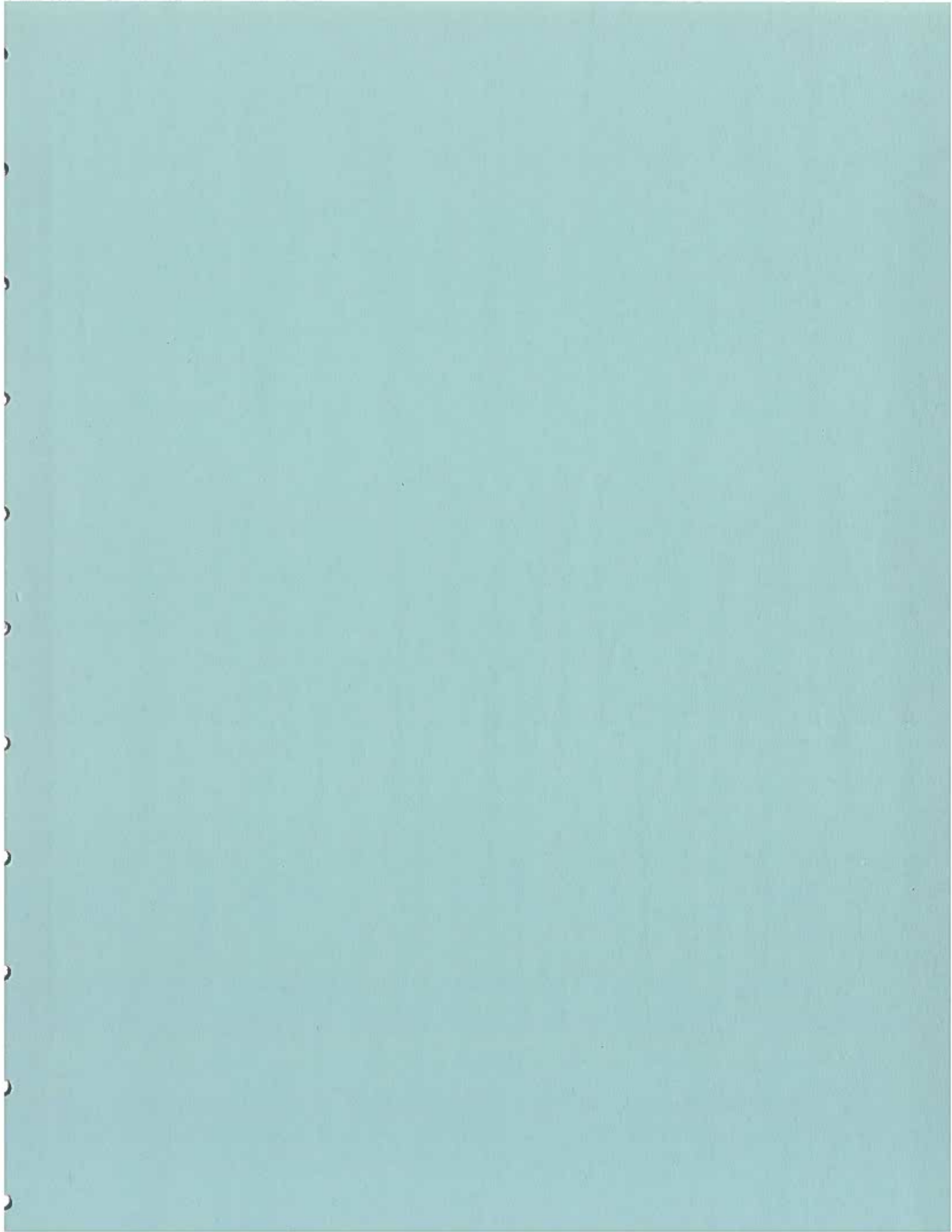
The attorney representing the owners of the Old Mansion, however, disagrees and last spring vowed to "exhaust every legal remedy possible to block the project" if the original route were selected.

Speaking before the commission Tuesday, George C. Freeman of the Richmond law firm of Hutton & Williams, stressed that there were other alternatives available and that unless the Department of Trans-

portation could prove that the completion of the bypass was essential to the development of the town the easement should not be released.

Many county and town officials believe that the bypass is essential to the development of the town, but some merchants in Bowling Green disagree, saying that the bypass will divert tourists away from the town, also.

The Old Mansion was built around 1670 and was described Tuesday as a "blue chip architectural treasure" by Caldor Loth, the state's senior architectural historian. Loth said that the highway could prove harmful to the structure of the house, and stressed that the road would be well within view of the mansion. The proposed route is within 1,100 feet of the house.



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TELEX 6844251

May 24, 1988

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FILE NO.

DIRECT DIAL NO. 804 788- 8365

Route 207

6207-016-107, PE101

Caroline County (Bowling Green Bypass)

Statement on Behalf of the Owners of Old Mansion

Dear Mr. Browder:

Thank you for giving me notice of the Transportation Department's hearing scheduled for May 26. Because of a conflict, I cannot attend. I do, however, request that you place this letter and its attachments in the record of the hearing as stating the position of the owners of Old Mansion.

The action of the Virginia Historic Landmarks Board on February 16, 1988 (Attachment A) in declining the Transportation Department's request to release the Commonwealth's perpetual open space easement on the Old Mansion property precludes completion of the Bowling Green By-Pass by selection of Alternative 2 across the Old Mansion Property as a matter of Virginia law. If the by-pass is to be completed, it must be by selection of one of the other alternatives. The acts of the General Assembly creating the Historic Landmarks Board and the Virginia Outdoors Foundation and authorizing them to accept gifts of perpetual open space easements express a clear policy choice that perpetual easements in fact remain perpetual. Only one narrow, express, exception is permitted. Section 10-153 of the Open Space Land Act sets forth the exclusive method and circumstances under which the Commonwealth's interest in an open space easement can be released.

The Historic Landmarks Board on February 16 unanimously found that the requisite statutory findings for release of the easements could not be made. Since the power given the Board in these matters is discretionary, its findings are not appealable and thus the completion of the By-pass through Alternative 2 has been definitively resolved in the negative under Virginia law as far as Old Mansion is concerned. To complete the record here, I also request that my letter to the Historic Landmarks Board, dated February 10, 1988 (Attachment C), be accepted.

HUNTON & WILLIAMS

May 24, 1988

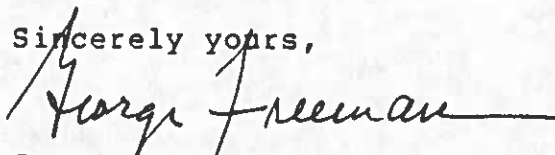
Page 2

The result under Virginia law is the same as that required by applicable federal law even if the Virginia result had been different. For the reasons given and authorities cited in my prepared statement at the May 14, 1987, hearing (Attachment B, attachments to it omitted) since federal funds have been utilized for the planning of the by-pass and construction of a portion of it, the requirements of federal law cannot be evaded by "segmentation" (i.e. using only state funds to complete Alternative 2 across Old Mansion). The U.S. Secretary of Transportation has not made, and could not on the facts presented here make, the findings required by 23 U.S.C. § 138.

In summary, Alternative 2 is not legally feasible under either Virginia or federal law and thus is no longer a viable alternative. The decision now before the Transportation Department is selection of one of the other alternatives or abandonment of the project.

In the event that you deem it appropriate to make copies of this letter available to those attending the hearing or the press, I enclose 25 additional copies.

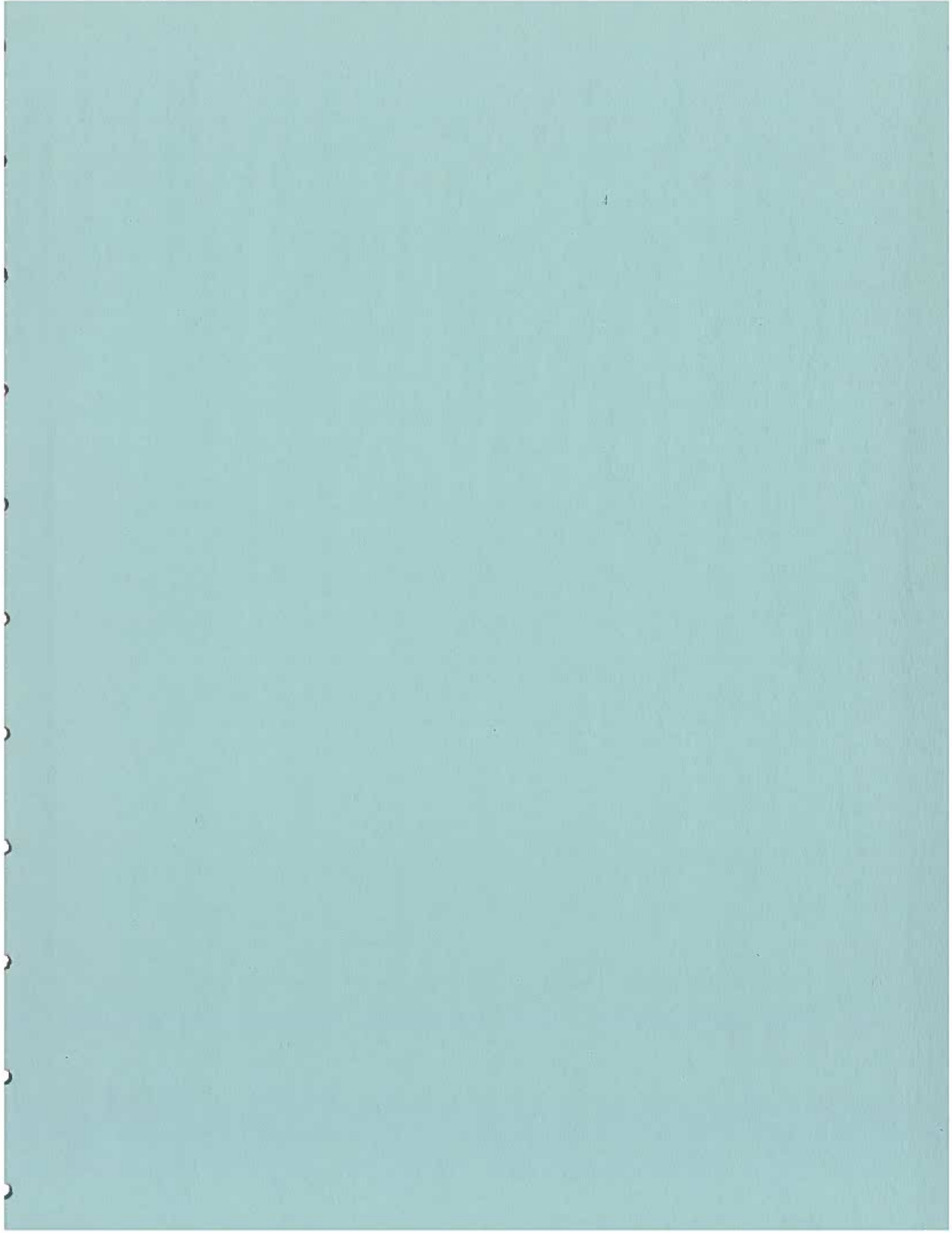
Sincerely yours,



George C. Freeman, Jr.

Mr. J. G. Browder, Jr.
Assistant District Engineer
Department of Transportation
Route 607, Deacon Road
Stafford County, VA 22405

Attachments



HUNTON & WILLIAMS

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November 11, 1987

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FILE NO.

DIRECT DIAL NO. 804 788-8365

Dear Ladies and Gentlemen:

You have requested our reasoned opinion on what legal protections, if any, against highway encroachment are afforded by an open-space easement in gross which by its terms is perpetual. In our opinion the principal protection afforded comes when such easements are held by a "governing body" as defined by section 10-156(a) of the Virginia Code:

"Public body" means any State agency having present authority to acquire land for a public use, or any county or municipality, or any park authority or public recreational facilities authority.

The Virginia Outdoors Foundation and the Historic Landmarks Board are "public bodies" since each is authorized to acquire land for a public use. Va. Code §§ 10-163(e) and 10-138(e). Section 10-152 authorizes "public bodies" to accept or purchase, but not condemn, easements on open space land. Such easements may be perpetual. "Open-space land" is defined as

any land in an urban area which is provided or preserved for (1) park or recreational purposes, (2) conservation of land and other natural resources, (3) historic or scenic purposes, (4) assisting in the shaping of the character, direction, and timing of community development, or (5) wetlands as defined in § 62.1-13.2 of the Code of Virginia.

Va. Code § 10-156(c) (emphasis added). "Urban area" is broadly defined as

any area which is urban or urbanizing in character, including semiurban and surrounding areas which form an economic and socially related region, taking into consideration such factors as present and future population trends and patterns of urban growth, location of transportation facilities and systems, and distribution of

HUNTON & WILLIAMS

November 11, 1987

Page 2

industrial, commercial, residential, governmental, institutional, resort, and other activities.

Va. Code § 10-156(b).

While the matter is not free from doubt, the better reading of the term "urban area" is not as a term of limitation evidencing a legislative intent to deny public bodies the power to acquire easements for open space preservation in "non-urban areas" (e.g., "rural areas"). Instead, the term should be understood as describing the broader contiguous region that is to be considered when a governing body decides, (1) whether, under section 10-152, to accept an easement or acquire property for open-space preservation, or (2) whether, under section 10-152, to designate property as open-space land, or (3) whether, under section 10-153, to convert or divert open space land to some other use, and, if so, (4) the area in which "other real property of at least equivalent usefulness and location for use as permanent open-space land" shall be substituted.

Based on the foregoing reasons, we are of the opinion that the general powers provisions and section 10-152 are both applicable whenever the land subject to an easement is received by either the Outdoors Foundation or the Historic Landmarks Board. But in any event, even if "urban area" were interpreted as not authorizing governing bodies to accept open-space easements under section 10-152 in some remote rural areas, this would not bar acceptance of easements in gross for such purposes in any such areas by the Virginia Outdoors Foundation, the Historic Landmarks Board or the Division of Conservation and Historic Resources under their respective general powers provisions. Va. Code §§ 10-163(e), 10-138(e), and 10-261. This conclusion is buttressed by reference to the "purposes" section for the Foundation, section 10-160, and the "construction of chapter" section for the Board, section 10-145. Because of an historic, pervasive hostility to long term restrictions on land use, easements in gross at common law were deemed personal property and did not, as easements appurtenant, run with the land. This meant that easements in gross could not be enforced against owners of the land holding title subsequent to the grantor. These broader "purposes" provisions, as well as the Open Space Land Act, have a common origin in the package of legislation adopted in 1966 upon the recommendations of the Virginia Outdoor Recreation Study Commission. Individually and collectively they evidence a legislative intent that

HUNTON & WILLIAMS

November 11, 1987

Page 3

restrictions on land use for purposes of open-space or historic preservation are no longer to be deemed contrary to public policy as at common law. Accordingly, easements in gross, as well as easements appurtenant and other interests in real property less than the fee, can be accepted by these agencies and be effectuated in accordance with their terms. In order to preserve these properties, the easements, whether in gross or appurtenant, must run with the land. Easements in gross for either open-space or historic purposes held by these agencies run with the land and are enforceable against grantors and their successors in title. Thus, the only practical result of having to rely exclusively upon these general powers sections for the authority to accept easements in remote rural areas would be to preclude their release under authority of section 10-153. That would produce the anomaly that a special act of the General Assembly would be required for release of an easement in those rural areas.

Where section 10-153(a) is applicable, a governing body can release an open-space easement only when it finds that conversion or diversion of the land from open-space use is "essential to the orderly development of the urban area." That determination involves specific questions that would depend upon local circumstances. The first question posed by a proposed highway is whether the planned route is related to orderly urban development. The second question is whether it is essential. It can be argued that "essential" has the same general meaning as in the test posed by 23 U.S.C. S 138 which is applicable to federally funded highway projects that would encroach on certified historic landmarks or public parks. Such encroachments are permissible only where the United States Secretary of Transportation finds that there is "no feasible and prudent alternative."

We should add that this question as to the effect and scope of section 10-153 has been certified to the Attorney General of Virginia in the context of the Department of Transportation's consideration of one alternative for the Bowling Green Bypass which would involve encroachment on the Old Mansion property that is protected by an open-space easement held by the Historic Landmarks Board. That opinion, and any developments that might follow in its wake, may afford further insights into these issues.

HUNTON & WILLIAMS

November 11, 1987

Page 4

Substantial additional protections against highway encroachment are afforded where an open-space easement also protects a certified historic landmark, a certified historic district or an archaeological site. In this regard, it should also be noted that where a certified landmark is involved, the landmark need not necessarily be on the particular parcel subject to an easement. Easements may be taken to protect the landmark's view, setting or approaches as well as preservation of the landmark itself. Section 10-138(f) of the Virginia Code gives the Historic Landmarks Board power to lease or sell property acquired by purchase, gift or lease but only "under conditions designed to ensure the proper preservation of the landmark or site in question." It could hardly be argued that, where an easement was given to ensure the preservation of the landmark or historic site, releasing the easement to permit construction of a highway across the land would ensure the landmark's "proper preservation."

As noted above, certified historic landmarks and public parklands, whether or not protected by easements must be avoided by highways if federal funding is involved and there are alternative routes available. Moreover, since Thompson v. Fugate, 347 F.Supp. 120 (E.D.Va. 1972), decided upon remand, 452 F.2d 57 (4th Cir. 1971), it is settled that neither the United States Secretary of Transportation nor the Virginia Department of Transportation can evade the requirements of 23 U.S.C. § 138 by "segmentation." "Segmentation" means using federal funds for construction of only a part of an integrated project and using only state or local funds for the part that would encroach on the landmark or park.

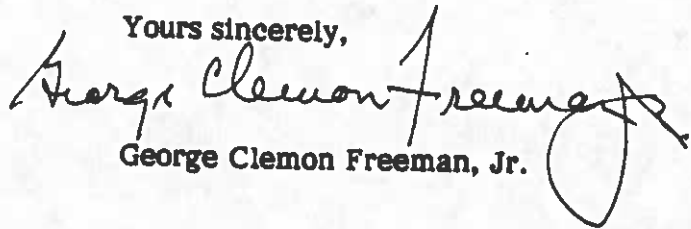
An argument could be made that by authorizing public bodies to accept easements that are by their terms "perpetual," the General Assembly intended them to remain as such in all instances without exception. Under this logic, if an easement by its terms is perpetual, then section 10-153(a) cannot be invoked to release it. Only an act of the General Assembly could release a perpetual easement. Such an interpretation is, however, unlikely to prevail where the criteria of section 10-153(a) are met and the governing body makes the findings for release of an open-space easement under the special circumstances described in that section quoted above.

HUNTON & WILLIAMS

November 11, 1987
Page 5

Finally, it should be noted that as a matter of public policy, rather than law, historic, scenic or archaeological areas are far more likely to be avoided early in the highway planning process if the lands are protected by perpetual open-space easements held by the Historic Landmarks Board or the Virginia Outdoors Foundation, rather than other state or private entities. This is because existing state procedures provide for the early consultation of these agencies by the Department of Transportation in the planning process for future highway locations.

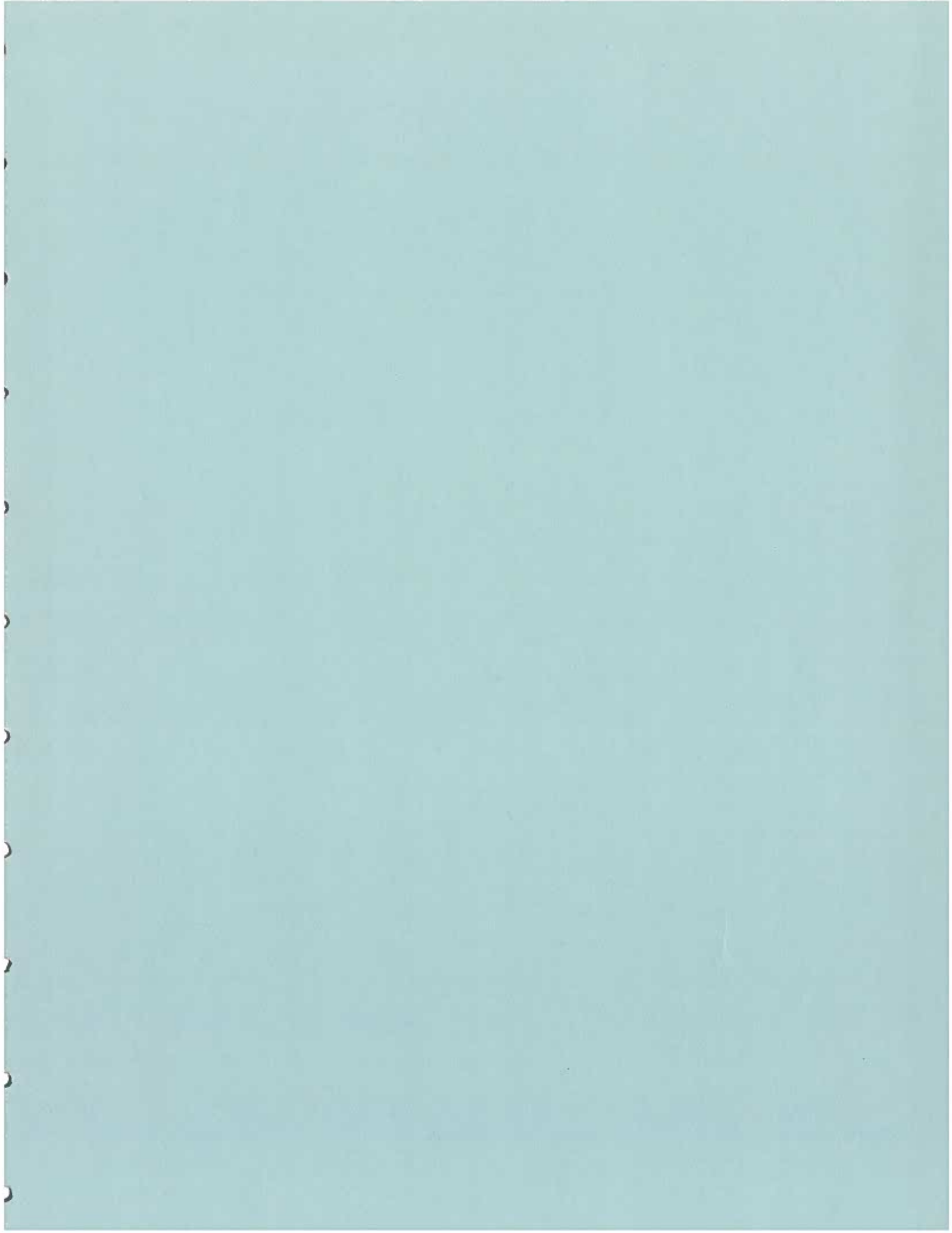
Yours sincerely,

A handwritten signature in cursive script that reads "George Clemon Freeman, Jr." The signature is written in dark ink and is positioned above the printed name.

George Clemon Freeman, Jr.

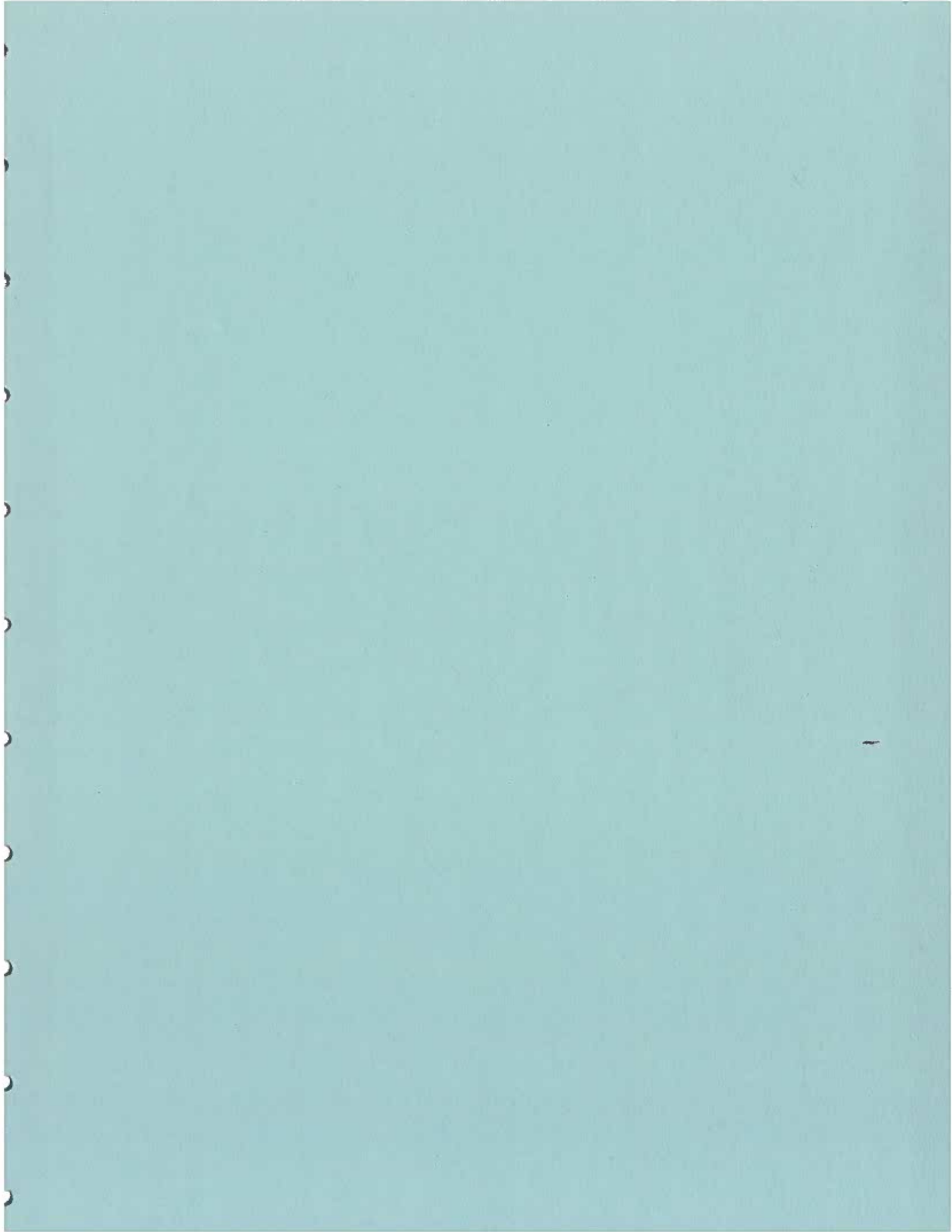
The Piedmont Environmental Council
28-C Main Street, Box 460
Warrenton, VA 22186

GCF/jbk

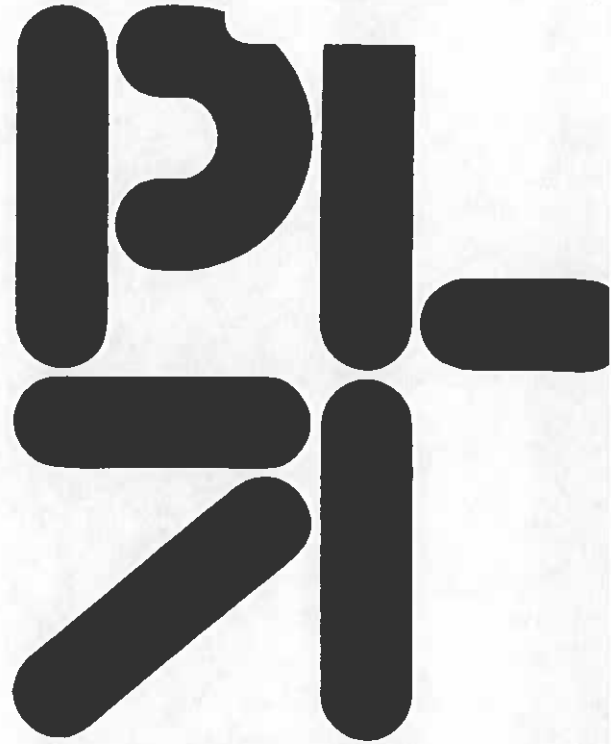


Excerpt from the Minutes of the Board of the
Virginia Outdoors Foundation of February 2, 1988

The Trustees heard a report by the Executive Director and Stephen Chapple, Assistant Attorney General, on the request of the Department of Transportation for a wider right-of-way on Route 622 through the Miller open-space easement in Rappahannock County. The Highway Department has negotiated with the property owner, Louise Miller, for several years to overcome her objections to the proposed project. The owner did not want to give a 50 foot right-of-way that would have caused the destruction of stone walls, orchard trees, and other amenities on the property. Mr. Norfleet asked that a reasonable necessity for the project be established, and that the grant of right-of-way be drawn to VOF specifications which would address VOF and the owner's concerns about the adverse effects of the proposal. Mr. Norfleet made a motion to grant the right-of-way if the above conditions are met and put into the deed by the Attorney General's Office. Seconded by Mr. Murry, the motion carried.



**Legal Techniques
in
Historic Preservation**



A paper from the Conference on Legal Techniques in Preservation sponsored by the National Trust for Historic Preservation, Washington, D.C., May 1971. Reprinted from the National Trust's companion volume to the summer 1971 special preservation issue of the Duke University School of Law journal, *Law and Contemporary Problems*. These publications are available from the National Trust Preservation Bookstore.

NOTE: The Federal Income Tax provisions applicable to the deductibility of easements cited in this paper have been changed in subsequent revisions of the Internal Revenue Code. In these changes the requirement of an easement's "perpetuity," as a condition of deductibility, however, remains unchanged.

G.C.F.
4/8/88

The Use of Easements for Historic Preservation

George C. Freeman, Jr.



The use of easements as a means of preserving historic structures and their settings is a relatively new development.

I EASEMENTS AS AN ALTERNATIVE TO FEE ACQUISITION

In the past, the principal means of preservation of historic property has been acquisition of property in fee, that is, acquisition of the entire property with the entire bundle of associated legal rights. The acquiring entity in almost every instance was a governmental agency or a private charitable organization that, at the time it acquired the property, either had or was given substantial funds in trust to provide for its continuing maintenance.

A number of historic sites have been preserved by fee acquisition. In the Washington area, Mount Vernon, Lee's home in Arlington and Oatlands, the National Trust property in Leesburg, are examples of historic properties preserved by this method. They are owned and maintained by the government or by private foundations with substantial assets.

Fee acquisition will continue to be a major weapon in the preservation arsenal. But it does have its limitations. First, substantial sums are usually required for the purchase of a historic landmark and surrounding property. Second, substantial sums must be provided to maintain it over the years. Third, acquisition by a nonprofit organization or the government results in complete removal of the property from local real estate tax rolls. And fourth, difficult problems sometimes are associated with day-to-day use of the property; for instance, when the choice must be made between continuing to use a historic house as a home or turning it into a museum.

Some of the difficulties encountered in fee acquisition can be lessened by the use of easements. Easements generally are far less costly than outright purchase, a situation that permits the effective spreading of scarce preservation dollars over a much larger area and increasing the likelihood of easement donations. Easements also generally leave the cost of maintenance with the property owner, and that is another important economic factor. Finally, easements allow the property to remain in productive use. People may continue to live in it. And the property remains on the tax rolls, although usually at a lower assessment value.

The use of easements in historic preservation parallels their growing use in the broader field of open-space conservation. Indeed, the easements now being used for historic preservation are basically a specialized adaptation of the scenic or open-space easements advocated several years ago by William

White in his imaginative article, "Securing Open Space for Urban America: Conservation Easements."¹ These open-space easements and their supporting covenants are discussed in detail in Russell Brenneman's landmark treatise, *Private Approaches to the Preservation of Open Land*.² Except for a few 1970 changes in the federal income tax laws, which will be pointed out later, this book represents the latest and best thinking on easements generally and is a good starting point in this field.

The type of easement most often used for historic preservation is the easement in gross.

An easement is a legal restriction imposed on the use of a parcel of land for the benefit of someone other than its owner. Easements are created by deed or by will. All easements can be classified as either easements appurtenant or easements in gross.

An easement is appurtenant if it is created for the benefit of an adjoining landowner and his successors in title. If, on the other hand, the easement is for someone other than an adjacent landowner and his successors, it is an easement in gross. In most instances, easements for historic preservation are granted to state agencies or private foundations that do not own adjoining land, so these easements will, by definition, be easements in gross.

There are a number of technical pitfalls involved in the use of easements in gross for historic preservation, and the legal draftsman must take great care to avoid them. Ironically, these pitfalls arise from the historic origins of this form of interest in real property.

Under English common law, while easements in gross are enforceable between the original parties to the deed creating them, they have two major deficiencies for historic preservation purposes: (1) they do not run with the land and (2) they cannot be assigned.

When an easement does not run with the land it does not bind persons who purchase or inherit the land from the original grantor. Thus, they take the fee free of its restrictions. Fortunately, however, most American jurisdictions do not follow the English rule with regard to the running of the burden.³ But the legal draftsman must be certain at the outset whether he is in one of these jurisdictions. Since easements in gross are the usual method of acquiring rights of way for utility transmission lines, he might well wish to start with legislation or decisions in that area.

The problem of assignability of easements—that is, whether the one holding an easement can transfer his rights to another—is somewhat more complex. Theoretically, assignments of easements in gross generally cannot be made.⁴ Realistically, one should be concerned with avoiding a situation where assignment is necessary. No practical problems should occur when the easement is granted to a state agency which presumably will hold it forever.

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Where the easement is granted to a private entity, however, potential problems arise. For example, although corporations usually have unlimited life, their existence may cease under certain circumstances. This cessation of being may be deliberate, as in the case of merger or consolidation;⁵ or it may be accidental, as in dissolution for failure to file required reports or pay required fees to the state of incorporation.⁶ Brenneman's work cited previously includes a thorough discussion of the problems of assignability and of some of the ways the legal draftsman can lessen or avoid this danger.⁷

Once one has an easement in gross that will run with the land, it must be safeguarded from destruction, not only through the pitfalls of attempted assignments, but also through the operation of the legal doctrine of merger. Stated simply, that doctrine provides that if the beneficiary of an easement also acquires the land in fee, these two bundles of legal rights in the property are thought to be merged by common ownership and the easement is thus terminated without regard to his actual intent.

As will be pointed out later in a discussion of tax consequences, it is crucial for federal income tax deduction purposes that the easement be perpetual. Where this is an important consideration to the donor of the easement, the draftsman should take steps to prevent the easement's being destroyed through assignability, deliberate release or merger.⁸ As protection against all these contingencies, some deeds granting easements to private foundations for historic preservation in Virginia carry this provision:

It is expressly recognized that the grantee may subsequently convey the easement hereby conveyed to some other charitable corporation or trust, or to the Virginia Historic Landmarks Commission, or some other governmental agency organized for the same general purposes, provided, however, that since it is the public policy of the Commonwealth of Virginia that such easements be perpetual, in no event shall the rights of the grantee be conveyed in any way to the grantor or his successors nor may the grantee quit claim or in any way release the restrictions hereby imposed. If the grantee (a) be dissolved, or in any other way cease its corporate existence, or for any other reason be unable to act to enforce the restrictions provided for herein, or (b) acquire fee title to the land subject to this easement, then all rights of the grantee in the foregoing easement, shall automatically vest in the Virginia Historic Landmarks Commission, an agency of the Commonwealth of Virginia.

II SUBSTANTIVE PROVISIONS OF PRESERVATION EASEMENTS

There is wide variation in the substantive provisions of easements used for historic preservation. Generally, they fall into two basic categories. The first involves restrictions on the use of the property by the fee owner. These are called prohibitions or restrictions and they are analogous to negative

covenants. The second involves affirmative obligations imposed on the fee owner.

Prohibitions and restrictions—negative provisions—are found in almost every easement for historic preservation.⁹ The imposition of affirmative obligations is far less common. As the Ten Commandments verify, it has long been thought easier to enforce a code of conduct by negative, rather than positive, commands. And enforceability of the easement is one of the important factors the draftsman must consider in selecting what specific provisions to include.

Many restrictive provisions are, for practical purposes, self-enforcing. The most obvious such restriction is on subdivision. A title examiner for any potential purchaser would warn his client not to acquire any interest in the property if he has subdivision in mind. Restrictions on alterations or additions to existing buildings or on construction of other buildings on the parcel are usually written to require the prior, written approval of the grantee. In areas where building permits are required, arrangements for enforcement between the grantee and local authorities should not be difficult.

Affirmative requirements are a different matter. Take, for example, a covenant to maintain or repair. Continuing failure by the grantee to enforce the terms of the easement might lead in time to extinguishment of the entire easement through the legal doctrines of cessation of purpose or abandonment. Parenthetically, a choice is usually available between making a state agency or a private entity the grantee of an easement. Where affirmative obligations are important to the easement, the state agency should be selected, because this may substantially reduce the odds against invalidation of the easement at some remote future date. Since long before the Tudors, the sovereign has had a special, privileged place in English property law, and that tradition persists in this country.

But regardless of who is to be the grantee of the easement, the draftsman should bear in mind the practicalities of enforcing the easement terms. Generally, the simpler the language the better. Where an easement is being sought through donation, keeping the restrictions to the absolute minimum and trying to express these restrictions in language that laymen can understand may substantially increase the chances of an easement's being given.¹⁰

III TAX CONSEQUENCES

A Valuation

Despite the exceptions that can be found, imposition of an easement for historic preservation usually has the immediate effect of reducing the fair market value of the property. This reduction can affect real estate taxes, federal and state income taxes and inheritance taxes.

Before considering these specific tax effects, let us briefly consider how this reduction in fair market value can be measured. At a minimum, most easements for preservation of historic houses prohibit demolition and severely restrict any exterior changes. Usually, they place restrictions on the use of sur-

rounding land. In both instances, the easements are essentially open-space easements, and the same techniques of evaluation evolving in that broader, general field are applicable here.

Let us first consider the prohibition of changes in the exterior of the building. The analogy to disposition of the air rights, or unused development rights, over the property should be immediately apparent. At present, while the air rights over a historic landmark in the Mojave Desert would be virtually valueless, those over a historic landmark in Manhattan might be worth millions. And indeed, New York City has made a major contribution to the techniques available for historic preservation by amending its zoning code to expressly authorize the owners of historic landmarks to sell air space above a landmark building to an adjacent lot owner.¹¹ The growing market for air space, or development rights, in New York may afford us some guide to appraising the reduction in value resulting from express or implied conveyance of air rights over historic landmarks in other congested urban areas where such rights may have substantial value.

Again, one should remember that even if the landmark occupies only that land on which the building actually rests, the easement is still an open-space easement because it preserves the vertical open space.

The second, and more frequent, way in which the value of the property is reduced through imposition of an easement for historic preservation is through restrictions on subdivision. In urban or urbanizing areas, where land is at a high premium, this limitation may result in a substantial reduction in value. Consider the case of a Georgetown house whose lands and gardens occupy half a block on which perhaps six additional townhouses could be built under existing zoning regulations. In this situation, if no easement were involved, the usual appraisal technique would be to place a value on the house alone, as if it were floating in air, and then to value the land separately, in terms of the maximum number of lots into which it could be divided under existing zoning. Imagine now that the seven potential building lots were merged into a single building lot by the gift of a perpetual easement. This single large lot would clearly be worth more than one or more of the smaller constituent lots. Still, a dramatic overall reduction in the value of the land would occur because of the prohibition placed by the easement on its further development.

In the absence of special restrictions that substantially impair the livability of a house, general restrictions on interior alteration should not significantly reduce the value of the house itself.

After using one or a combination of these techniques to measure the fair market value immediately before and after the imposition of an easement, one can determine what these figures might mean to the fee owner with regard to his taxes.

B Federal Income Tax Deductions

As far as federal income taxes are concerned, if the owner gives the easement to a state agency or to an organization qualifying as a charity under section 501(c)(3) of the Internal Revenue Code,¹² the

easement is deductible if it is *perpetual*. This deduction, which is crucial to a program of encouraging donations of these easements on a national scale, was almost inadvertently abolished by the adoption of the Tax Reform Act of 1969.¹³ Section 201(a) of that act added section 170(f)(3), "Denial of Deduction in Case of Certain Contributions of Partial Interests in Property," to the Internal Revenue Code.¹⁴

This section provides in pertinent part:

In the case of a contribution (not made by a transfer in trust) of an interest in property which consists of less than the taxpayer's entire interest in such property, a deduction shall be allowed under this section only to the extent that the value of the interest contributed would be allowable as a deduction under this section if such interest had been transferred in trust.

This section goes on to state two specific exceptions to the rule quoted. It provides that the rule shall not apply to contributions of a remainder interest in a personal residence or farm or of an undivided portion of the taxpayer's entire interest in any piece of property.¹⁵

The purpose of this amendment is well known. It was intended to end the tax deduction of a gift of a remainder interest, after reservation of a life estate, in personal property, for example, a Rembrandt painting. Prior to the tax code amendment, the donor could continue to hang the Rembrandt in his home and, through use of a charitable deduction and the carry-forward provisions, pay very little income tax for the next five years. The amendment was not intended to affect the granting of easements for open space or historic preservation.

But the broad sweep of its language went unnoticed by conservationists until the very last minute. Then by chance, in advising a potential donor to the Virginia Historic Landmarks Commission on income tax consequences of a gift, an attorney in Washington checked the bill that was pending before the joint House-Senate conference. He immediately advised the commission of the potential adverse consequences on the reduction of gifts of easements resulting from the broad language of section 170(f)(3). The commission alerted both Virginia Senators, advising them that unless Congressional intent was clarified by the House-Senate conference then in progress, the change might well undercut the entire conservation easement program in the United States.

Fortunately, they were able to get this message through to the conference, and in its report, following the comment on section 170(f)(3), this critical sentence appears: "The conferees on the part of both Houses, intend that a gift of an open space easement in gross is to be considered a gift of an undivided interest in property where the easement is in perpetuity."¹⁶

The communications of the Virginia Senators prompting the conference report comment made it clear that these easements were to be used for gifts to organizations for both conservation and historic purposes. That incident explains one of the reasons

for this paper's emphasis on why an easement in gross for historic preservation will almost always also be an open-space easement in gross.

Special problems are also presented by a proposed Internal Revenue regulation, section 1.170 A-1(f), "Contributions of Certain Easements."¹⁷ The language of that proposed regulation could be applied out of context in a very alarming way. It refers to the gifts of easements in connection with the Wild and Scenic Rivers Act.¹⁸ Section 14 of that act was clearly intended to apply only to federal income tax deductions for gifts of easements for wild and scenic rivers.¹⁹ But under the act, if one gives an easement and then takes the tax deduction, he has automatically made a contract with the United States government to the following effect: The donee, whether it be the United States or any other eligible organization, may acquire the fee estate at its fair market value as of the time the easement was donated, minus the value of the easement claimed and allowed as a charitable contribution or gift, if there is any violation of the easement at any time in the future.

This draconian enforcement provision is most unfortunate; it is doubtful that many lawyers are going to advise their clients to donate easements under that act. But in any event, the proposed regulations should be clarified to make it clear that this condition cannot be read into every other easement given throughout the United States for historic or open-space conservation. Otherwise, such donations may well cease.

Once it is established that an easement is tax deductible when it is given to a governmental agency or a charitable organization that meets the requirement of public financial support, the donor may offset the contribution against up to 50 percent of his adjustable gross income per year,²⁰ and he may carry forward any unused portions of the deduction for the next five years and use them over that period.²¹

C State Income Tax Deductions

Counsel should also consider state income tax effects. They often, but not always, parallel federal law.

D Real Estate Taxes

The constitutions or statutes of many states expressly require that all property of the same class be taxed equally. Some do not, however, and indeed a few constitutional or statutory provisions permit property to be taxed at different rates based on its current use. Doubts may arise as to the constitutionality of such tax differentials under the Fourteenth Amendment.²² But real estate tax differentials based on use alone are outside the scope of this paper. They are mentioned only to make certain that reductions based on use are not confused with the kind of reduction in real estate taxes, based on changes in fair market value, that should generally follow from the imposition of an easement for historic preservation in almost every state in the union.

Generally, real estate taxes are based on the fair market value of the property taxed. This is true

whether the actual tax assessment is at 100 percent of fair market value or at some lower percentage. It follows then that if imposition of an easement reduces the fair market value of the property, the assessed value of the property should be reduced accordingly. The word "should" is used advisedly because state or local laws and practices may leave local assessors considerable leeway as to when or whether adjustments should be made in tax assessments. It is for this reason that some states, in statutes creating state agencies empowered to accept open-space easements for historic preservation, have included express provisions for effecting an adjustment of the real estate tax assessment on the property. The provisions include (1) a statement that the value of the state's interest in the property is not to be taxed to the fee owner²³ and (2) a provision for certifying to the local assessor that a property has been subjected to easement restrictions.²⁴ Even where there are no such special provisions, the fee owner may seek redress through the courts, particularly where there are constitutional or statutory requirements for tax equality.

Landowners should be cautioned, however, that where fair market value is the basis of local real estate tax assessment, there is no guarantee that any temporary reduction in overall real estate tax payments will be permanent. If the property later is sold, the price paid for it will be the best indication of its fair market value and thus the basis on which it should be assessed for real estate tax purposes.

It is well to note also that while such easements may reduce annual local real estate tax revenues, they will generally save local governments much greater amounts in annual expenditures. This is particularly true where substantial high-density residential development is precluded by the easement. Several recent studies have indicated that such developments impose additional costs on local government well in excess of the additional real estate revenues they generate.

E Estate and Inheritance Taxes

The limitations on fair market value that usually result from imposition of easements may enable owners of historic properties to effect substantial reductions in estate and inheritance taxes.

IV A LOOK INTO THE FUTURE

Increasingly, easements are being used for historic preservation in many imaginative ways, particularly in those states that through legislation have expressly provided for their use for this purpose. Both Virginia and Maryland have taken this step.²⁵ Clarification of the federal tax laws and regulations in the near future should accelerate the donation of perpetual easements for historic preservation.

While state laws permitting different tax rates based on different uses and strengthened zoning laws may reduce the pressure for destruction of historic landmarks through urban renewal or sub-urban development, easements and fee acquisition

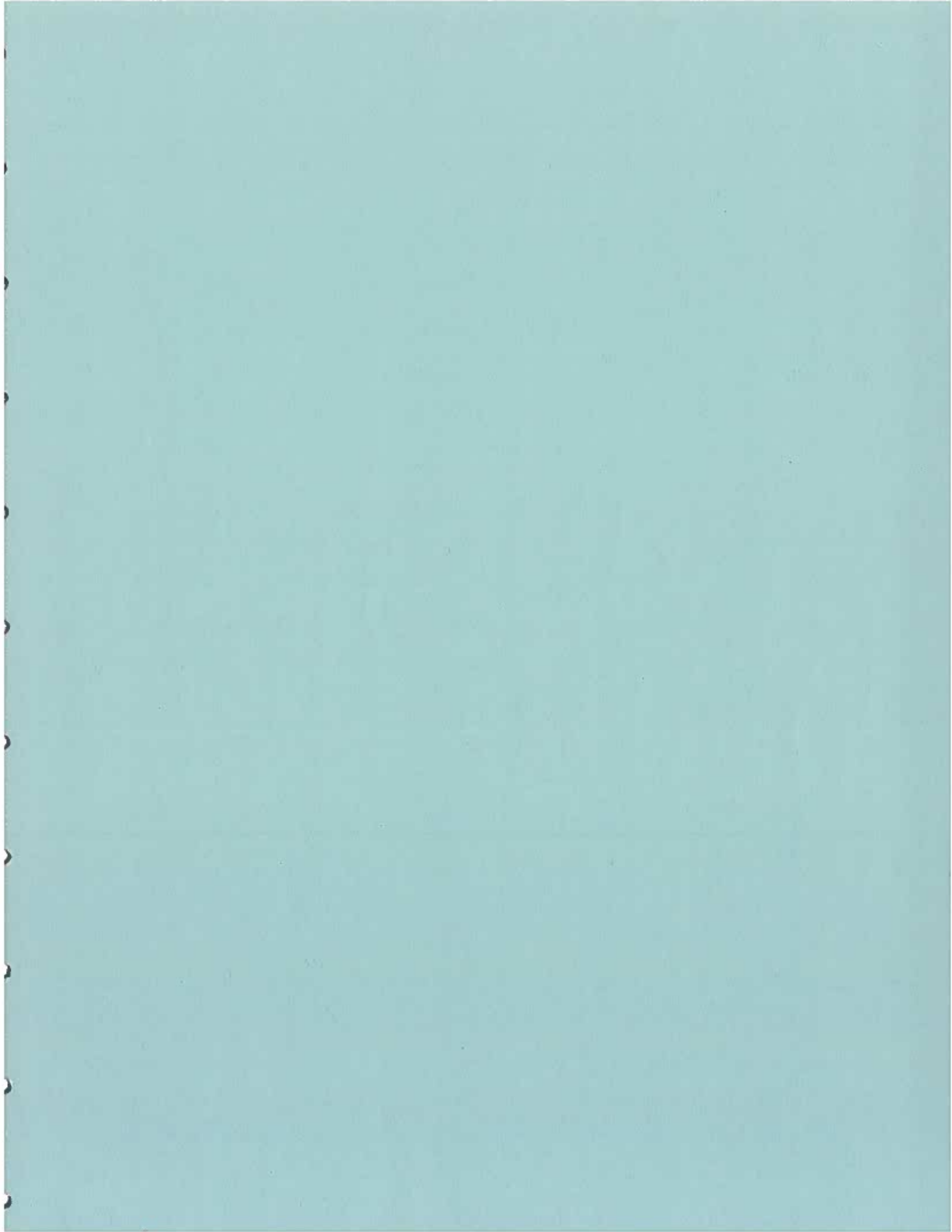
will remain the only techniques now available for assuring preservation of historic landmarks. Of these two techniques, easements offer the better way for accomplishing this purpose on the broadest scale

possible with the least social costs. Widespread knowledge and use of easements in the next few decades is essential to preservation of the tangible reminders of our national heritage.

FOOTNOTES

1. William White, "Securing Open Space for Urban America: Conservation Easements," Urban Land Institute Technical Bulletin no. 36 (Washington, D.C., 1959).
2. Russell Brenneman, *Private Approaches to the Preservation of Open Land* (New London, Conn.: Conservation and Research Foundation, 1967).
3. See Charles E. Clark, *Real Covenants and other Interests which Run with Land*, 2nd ed. (Chicago: Callaghan & Co., 1947), p. 69.
4. *Compare* Lester Coal Corp. vs. Lester, 203 Va. 93 122 S.E. 2d 901 (1961), with Va. Code Ann. § 55-6.
5. Model Bus. Corp. Act Ann. 2nd. § 76; Cal. Corp. Code Ann. §§ 4113, 4116, 4117; Del. Code Ann. Title 8, §§ 103, 251(a), 251(c), 259-61, 328; N.Y. Bus. Corp. Law § 906; Va. Code Ann. § 13.1-74.
6. Model Bus. Corp. Act Ann. § 94; Cal. Corp. Code Ann. § 4690; Del. Code Ann. Title 8 § 283; N.Y. Bus. Corp. Law § 1101; Va. Code Ann. §§ 13.1-91, 13.1-93.
7. Brenneman, note 2 *supra*, *passim*.
8. See R. C. Minor, *Real Property*, 2nd ed. (Charlottesville, Va.: Michie Co., 1928), § 90, and French vs. Williams, 82 Va. 462, 4 S.E. 591 (1886).
9. See, e.g., the form of easement used by the Virginia Historic Landmarks Commission in "Open-Space Easements" (Richmond, Va.: Virginia Historic Landmarks Commission, 1971).
10. See Virginia Historic Landmarks Commission pamphlet, note 9 *supra*, *passim*.
11. New York City Zoning Resolution, §§ 74-79, 74-791, 74-792, 74-973. For further discussion of development rights transfer, see John J. Costonis and Jared Shlaes, *Development Rights Transfer: A Solution to Chicago's Landmark Dilemma* (Chicago: Chicago Chapter, American Institute of Architects and National Trust, 1971) and Frank B. Gilbert, "Saving Landmarks: The Transfer of Development Rights," *HISTORIC PRESERVATION*, Vol. 22, No. 3 (July-September 1970): 13-17.
12. 26 U.S.C. § 501(e)(3).
13. Pub. L. No. 91-172 (Dec. 30, 1969), 83 Stat. 487, 26 U.S.C. § 1 *et seq.*
14. 26 U.S.C. § 173(f)(3).
15. 26 U.S.C. § 170(f)(3)(B).
16. 2 U.S. Cong. & Adm. News (1969) 2409.
17. Prop. Treas. Reg. § 1.17DA-1(f) (Apr. 2, 1971) (Prentice-Hall, *Federal Taxes*, Vol. 7, ¶ 65, 305).
18. 16 U.S.C. § 1271 *et seq.*
19. 16 U.S.C. § 1285.
20. 26 U.S.C. § 170(b)(1)(A).
21. 26 U.S.C. § 170(d).
22. See generally, 84 C.J.S., *Taxation*, §§ 30-31, and particularly § 30, footnotes 13-17 and text *thereat*.
23. See e.g., Va. Code Ann. § 10-139.
24. *Ibid.*
25. Va. Code Ann. §§ 10-135 *et seq.*, 10-158; Md. Code Ann. §§ 21-8A, 41-181A *et seq.*

The charitable contribution limit for a gift of an easement on property held for more than one year is now 30 percent of the donor's adjusted gross income unless a special election is made to reduce the value of the gift for deduction purposes by an amount equal to one-half of the gain that the donor would have recognized had he sold the easement rights, in which case his limit is 50 percent of his adjusted gross income. 26 U.S.C. § 170(b)(1)(C). The contribution limit for an easement on property held for less than one year is 50 percent of the donor's adjusted gross income, but the value of the gift is limited to the donor's basis. 26 U.S.C. § 170(e)(1)(A). Whether the gift is of an easement on long term or short term property, the donor may carry forward any unused portion of the deduction for the next five years and use it over that period until consumed. 26 U.S.C. § 170(d).



1988 SESSION

VIRGINIA ACTS OF ASSEMBLY - CHAPTER 72 0

An Act to amend the Code of Virginia by adding in Title 10 a chapter numbered 13.2, consisting of sections numbered 10-158.21 through 10-158.28, relating to conservation easements.

[H 799]

Approved APR 10 1988

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 10 a chapter numbered 13.2, consisting of sections numbered 10-158.21 through 10-158.28, as follows:

CHAPTER 13.2.

VIRGINIA CONSERVATION EASEMENT ACT.

§ 10-158.21. *Definitions.*—As used in this chapter, unless the context otherwise requires:

"Conservation easement" means a nonpossessory interest of a holder in real property, whether easement appurtenant or in gross, acquired through gift, purchase, devise, or bequest imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural or open-space values of real property, assuring its availability for agricultural, forestal, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural or archaeological aspects of real property.

"Holder" means a charitable corporation, charitable association, or charitable trust which has been declared exempt from taxation pursuant to 26 U.S.C.A. § 501 (c) (3) and the primary purposes or powers of which include: (i) retaining or protecting the natural or open-space values of real property; (ii) assuring the availability of real property for agricultural, forestal, recreational, or open-space use; (iii) protecting natural resources; (iv) maintaining or enhancing air or water quality; or (v) preserving the historic, architectural or archaeological aspects of real property.

"Public body" means any entity defined in § 10-156 (a).

"Third party right of enforcement" means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association or charitable trust which, although eligible to be a holder, is not a holder.

§ 10-158.22. *Creation, acceptance and duration.*—A. A holder may acquire a conservation easement by gift, purchase, devise or bequest.

B. No right or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.

C. A conservation easement shall be perpetual in duration unless the instrument creating it otherwise provides a specific time. Where an easement is perpetual, the holder shall (i) meet the criteria in § 10-158.21, and (ii) have had a principal office in the Commonwealth for at least five years.

D. An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it in writing.

E. No conservation easement shall be valid and enforceable unless the limitations or obligations created thereby conform in all respects to the comprehensive plan at the time the easement is granted for the area in which the real property is located.

F. This chapter does not affect the power of the court to modify or terminate a conservation easement in accordance with the principles of law and equity, or in any way limit the power of eminent domain as possessed by any public body. In any such proceeding the holder of the conservation easement shall be compensated for the value of the easement.

§ 10-158.23. *Taxation.*—Where the easement by its terms is perpetual, neither the interest of the holder of a conservation easement nor a third-party right of enforcement of such an easement shall be subject to state or local taxation nor shall the owner of the fee be taxed for the interest of the holder of the easement.

§ 10-158.24. *Notification.*—Whenever any instrument conveying a conservation easement is recorded after the date upon which this act becomes effective, the party responsible for recording it or his agent shall mail certified copies thereof, together with notice as to the date and place of recordation, to the local jurisdiction in which the real property subject

thereto is located, the Attorney General of the Commonwealth, the Virginia Outdoors Foundation and to any public body named in such instrument. Certified copies of the instrument creating such easement, together with information specifying the date and place of its recordation, shall be mailed to the local jurisdiction in which the real property subject thereto is located, the Attorney General of the Commonwealth, the Virginia Outdoors Foundation and to any public body named in such instrument. Whenever any conservation easement is on lands that are part of a historic landmark as certified, either by the United States or the Virginia Historic Landmarks Board, any notice required above shall also be given to the Virginia Historic Landmarks Board.

§ 10-158.25. Standing.—An action affecting a conservation easement may be brought by:

1. An owner of an interest in real property burdened by the easement;
2. A holder of the easement;
3. A person having an express third-party right of enforcement;
4. The Attorney General of the Commonwealth;
5. The Virginia Outdoors Foundation;
6. The Virginia Historic Landmarks Board;
7. The local government in which the real property is located; or
8. Any other governmental agency or person with standing under other statutes or common law.

§ 10-158.26. Validity.—A conservation easement is valid even though:

1. It is not appurtenant to an interest in real property;
2. It can be or has been assigned to another holder;
3. It is not of a character that has been recognized traditionally at common law;
4. It imposes a negative burden;
5. It imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;
6. The benefit does not touch or concern real property; or
7. There is no privity of estate or of contract.

Except as otherwise provided in this chapter, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.

§ 10-158.27. Conveyance to the Commonwealth.—Whenever any holder as defined in this chapter, or the successors or assigns thereof, shall cease to exist, any conservation easement and any right of enforcement held by it shall vest in the Virginia Outdoors Foundation, unless the instrument creating the easement otherwise provides for its transfer to some other holder or public body. In an easement vested in the Virginia Outdoors Foundation by operation of the preceding sentence, the Foundation may retain it or thereafter convey it to any other public body or any holder the Foundation deems most appropriate to hold and enforce such interest in accordance with the purpose of the original conveyance of the easement.

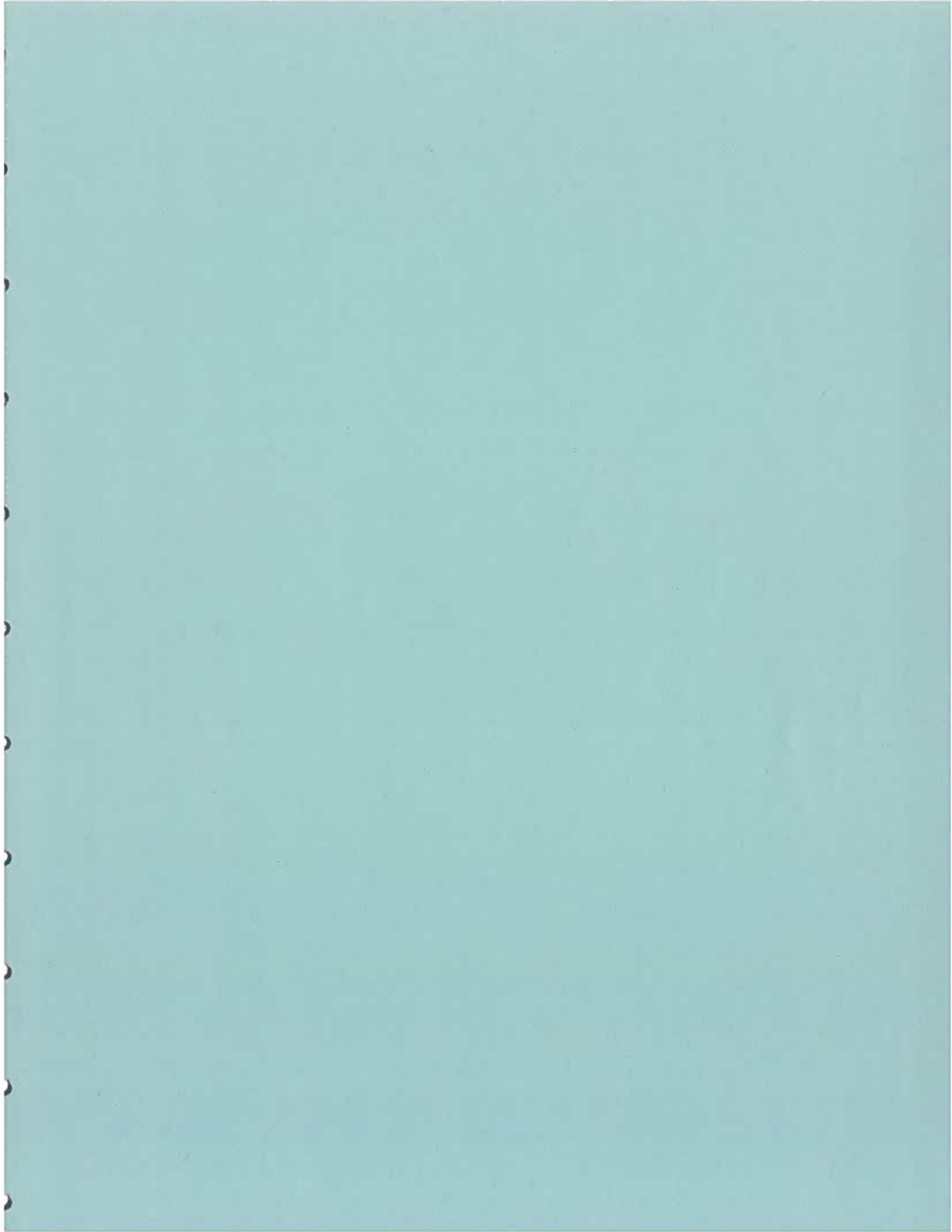
§ 10-158.28. Savings clause.—Nothing herein shall in any way affect the power of a public body under any other statute, including without limitation the Virginia Outdoors Foundation and the Virginia Historic Landmarks Board, to acquire and hold conservation easements or affect the terms of any such easement held by any public body.

Governor

Approved:

Speaker of the House of Delegates

President of the Senate



FREEMAN DRAFT
of October 30, 1987

A BILL to amend the Constitution of Virginia by adding in Title 10 a chapter number 13.1, consisting of sections numbered 10-158.1 through 10-158.10, establishing the Virginia Conservation Easement Act.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 10 a chapter numbered 13.1, consisting of sections 10-158.1 through 10-158.10 as follows:

CHAPTER 13.1.

VIRGINIA CONSERVATION EASEMENT ACT.

§ 10-158.1. Short title.--This chapter shall be known and may be cited as the "Virginia Conservation Easement Act."

§ 10-158.2. Purpose.--The purpose of the Act is to enable private parties to enter into consensual arrangements with charitable organizations for the purchase, gift, devise, or bequest of easements to protect land and buildings without the encumbrance of certain potential common law impediments. This chapter is also intended to provide the people of the Commonwealth with the continued diversity of history, scenery and natural resources of this Commonwealth for a minimum of expenditure of public funds. It also provides a means for compiling and keeping an up-to-date central governmental inventory of all lands within the Commonwealth subject to such easements.

§ 10-158.3. Definitions.--As used in this chapter, unless the context otherwise requires:

"Conservation easement" means a nonpossessory interest of a holder in real property, whether easement appurtenant or in gross, acquired through gift, purchase, devise, or bequest imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic or open-space values of real property; assuring its availability for agricultural, forestal, recreational, or open-space use; protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

"Holder" means a charitable corporation, charitable association, or charitable trust which has been declared exempt from taxation pursuant to 26 U.S.C.A. § 501(c)(3) and the primary purposes or powers of which include: retaining or protecting the natural scenic or open-space values of real property; assuring the availability of real property; assuring the availability of real property for agricultural, forestal, recreational, or open-space use, protecting the natural resources; maintaining or enhancing air or water quality; or preserving the historical, architectural, archaeological or cultural aspects of real property.

"Public body" means any entity defined in § 10-156(a).

"Third party right of enforcement" means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust which, although eligible to be a holder, is not a holder.

§ 10-158.4. Creation, Acceptance and Duration.

(a) A holder may acquire a conservation easement by purchase, gift, devise, or bequest.

(b) No right or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.

✓ (c) A conservation easement shall not, at the time of its acceptance by holder, be contrary to any official comprehensive plan of the local jurisdiction in which the real property is located.

(d) A conservation easement shall be perpetual in duration unless the instrument creating it otherwise provides a specific time.

(e) An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it in writing.

(f) A conservation easement, or a portion thereof, may be extinguished, contrary to its terms, only through the exercise

of the power of eminent domain for use of the fee for a governmental purpose, provided that the public body exercising eminent domain shall to the maximum extent feasible minimize the adverse effect on the state public purpose served by the conservation easement. Any public body seeking to exercise such power shall prepare an environmental impact statement meeting the requirements of statements set forth in § 10.17.08 of the Virginia Code and thereafter shall obtain specific authorization for the proposed condemnation from the Governor or his designee. In any such taking, the holder of the easement shall be paid the then current value of the easement, which shall be the difference in the fair market value immediately prior to condemnation of the fee encumbered by the easement and the fair market value of the fee for its highest and best use if unencumbered by the easement without any consideration of the condemnation. The proceeds received by such holder shall, within no more than two years thereafter, be used for the preservation of lands or buildings within the state of a nature similar to those sought to be protected by the original easement. No power to extinguish a conservation easement by eminent domain is created by this chapter, provided, however, this provision shall in no way limit the power of eminent domain as it was possessed by any public body prior to the passage of this chapter nor shall this provision in any way affect the application of § 10-153 to open-space lands or interests therein held by public bodies.

§ 10-158.5. Taxation.--(a) Where the easement by its terms is perpetual neither the interest of the holder of a conservation easement nor a third-party right of enforcement of such an easement shall be subject to state or local taxation nor shall the holder of the fee be taxed for the interest of the holder or such third party.

(b) Where the easement by its terms is less than perpetual, the land lying within the boundaries subject to the easement shall qualify for a use-value assessment on such land pursuant to Article 4 of Chapter 32 of Title 58.1, provided the requirements for such assessment contained therein are satisfied.

§ 10-158.6. Notification.--Whenever any instrument conveying a conservation easement is recorded, after the date upon which this act becomes effective, the clerk of the court recording it shall mail certified copies thereof, together with notice as to the date and place of recordation, to the local jurisdiction in which the real property subject thereto is located, the Attorney General of the Commonwealth, the Virginia Outdoors Foundation, and any public body named in such instrument. The holder of any conservation easement created prior to the date hereof that wishes to qualify such easement for the benefits provided under this chapter shall, within one year after the enactment of this chapter, file an affidavit

with the clerk of the court in which such easement has been recorded evidencing that at the time of its acceptance (1) the easement was not contrary to any official comprehensive plan of the local jurisdiction in which the real property subject thereto was located or (2) no such plan existed at such time. Certified copies of such affidavit, the instrument creating such easement, and the date and place of the recordation of both shall be mailed to the local jurisdiction in which the real property subject thereto is located, the Attorney General of the Commonwealth, the Virginia Outdoors Foundation and to any public body named in such instrument. Whenever any conservation easement is on lands that are part of a historic landmark as certified, either by the United States or the Virginia Historic Landmarks Board, any notice required above shall also be given to the Virginia Historic Landmarks Board.

§ 10-158.7. Standing.--(a) An action to enforce conservation easement may be brought by:

(1) an owner of an interest in real property burdened by the easement;

(2) a holder of the easement;

(3) a person having an express third-party right of enforcement;

(4) the Attorney General of the Commonwealth;

(5) the Virginia Outdoors Foundation;

(6) the Virginia Historic Landmarks Board;

(7) the local government in which the real property is located; or

(8) any other governmental agency or person with standing, express or implied, under other statutes or common law.

(b) Except as provided herein, this chapter does not intend to give courts a power, or to modify any power a court may have by other law, to modify or terminate a conservation easement.

§ 10-158.8. Validity.--A conservation easement is valid even though:

(1) it is not appurtenant to an interest in real property;

(2) it can be or has been assigned to another holder;

(3) it is not of a character that has been recognized; traditionally as common law;

(4) it may impose a negative burden;

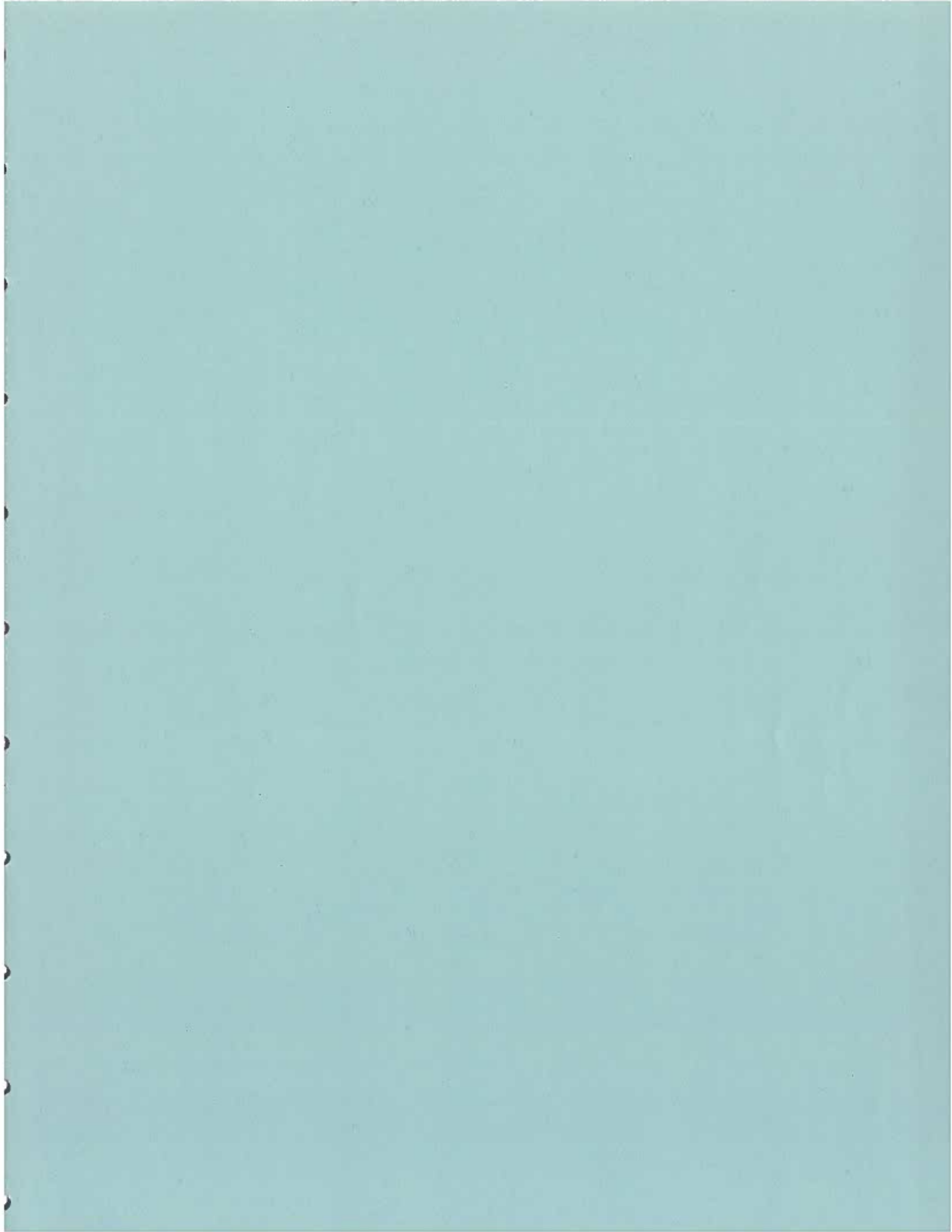
(5) it may impose affirmative obligations upon the owner of an interest in the burdened property or upon the holder;

(6) the benefit does not touch or concern real property; or

(7) there is no privity of estate or of contract.

§ 10-158.9. Escheat to the Commonwealth.--Whenever any charitable corporation, charitable association, or charitable trust as defined in this chapter or the successors or assigns thereof, shall cease to exist, any conservation easement and any right of enforcement held by it shall escheat to the Virginia Outdoors Foundation, unless the instrument creating the easement otherwise provides for its transfer to some other public body. If an easement is acquired by the Virginia Outdoors Foundation by operation of the preceding sentence, the Foundation may retain it or thereafter convey it to any other public body or charitable corporation, charitable association or charitable trust that the Foundation deems most appropriate to hold and enforce such interest in accordance with the purpose of the original conveyance of the easement.

§ 10-158.10. Savings Clause.--Nothing herein shall in any way affect the power of public body, including without limitation, the Virginia Outdoors Foundation and the Historic Landmarks Board, under any other statute to acquire, hold or release conservation easements or affect the terms of any such easement held by any public body.



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FILE NO.

DIRECT DIAL NO 804 788.

H.B. 799

Virginia Conservation Easement Act
 Technical Amendments Necessary to Preserve
the Original Intent and Effectiveness of the Bill

Gentlemen:

1. The current Virginia historic and environmental preservation statutes were enacted as a package in 1966. They created the Historic Landmarks Commission (now "Board") and the Virginia Outdoors Foundation and through the new Open Space Easements Act enabled those agencies and local governments to require open-space easements in gross for historic and open-space preservation. The 1966 legislation specifically contemplated that the easements would be perpetual. Prior to the enactment of this legislation, open-space easements in gross (as distinguished from "easements appurtenant" -- those held by adjoining landowners) were deemed to be personal property and they did not "run with the land" (the restrictions in the easement could not be enforced against successors in title to the burdened land). The 1966 legislation was silent as to whether such easements could be granted to private organizations or individuals. Thus, doubts remain as to whether any such easements held by non-governmental bodies would be enforceable.

2. Shortly after the 1966 legislation was adopted, Congress amended the federal income tax code. One of the provisions would have ended the charitable deduction for federal income of the gift on an open-space easement to our Virginia state agencies (the value being the difference in the fair market value of the property before and after the gift of the easement). In order to safeguard the fledgling conservation easement program of the two state agencies, Senators Byrd and Spong asked me to help them in drafting language for the Conference Report that saved the deductibility of easements given to the Virginia agencies. I did so. The conferences insisted, however, that such deductions be allowed only where easements are in fact "perpetual." That requirement is still in the federal law.

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3. H.B. 799 would authorize conservation easements to be acquired by certain charitable organizations. While there has been controversy between the organizations supporting the bill (e.g., the Chesapeake Bay Foundation, the Lower James River Association, the Nature Conservancy, and the Piedmont Environmental Council) and the builders as to whether the easements may be acquired by purchase, the builders have not objected to language in the bill permitting easements to be acquired by gift. Moreover, they have not in this, or earlier sessions of the General Assembly, sought to strike provisions like the current § 10-158.22, C (p. 1, lines 39-40), that permits easements to be "perpetual."

4. When, however, H.B. 799 was before the House, the builders were successful in obtaining several amendments to the bill. Two of these amendments could have the effect of undermining both acquisitions by gift and the perpetual concept. These amendments added Subsection F to § 10-158.28 (page 1, lines 47-48) and the "except" clause to § 10-158.26 (page 2, lines 34-35). Under these amendments, an easement that by its express terms is "perpetual" might be destroyed by (1) mutual consent of the landowner and the grantee of the easement (an argument can be made, however, that consent of all others with standing under § 10-158.25 would also have to be obtained) or (2) operation of the real property doctrine of "merger." Under the latter doctrine, when the holder of an easement acquires the land subject to the easement, the easement is destroyed. (An argument can be made, however, that the language added by the amendments conflicts with the language of § 10-158.22 permitting easements to be perpetual and this specific language still prevails over the more general provisions added by the builders' amendments).

5. But the resulting uncertainties created by these amendments raise substantial questions as to whether easements which by their terms are intended to be "perpetual" are really "perpetual." While they might eventually be resolved successfully by our Virginia Supreme Court, the most immediate consequence would be whether the IRS would rule that, because of these uncertainties, it will disallow deductions of the gift of such easements for federal income tax purposes. This uncertainty would pose a major cloud over gifts of such easements to charitable foundations and thus as to whether the bill will have any practical effect. Another consequence of this uncertainty would be to undermine the long term land use plans of local governments. The present bill, § 10-158.22, provides in subsection E (page 1, lines 44-46) that an easement must comply with the comprehensive plan of the local government at the time the easement is granted. If the easement by its terms is perpetual, local governments and other landowners in the planning district should be able to count on this and plan and act accordingly.

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6. To remove these uncertainties, in the House Committee I offered two amendments on behalf of the bill's sponsor Delegate Diamonstein, which were rejected by a divided vote. These amendments would have added the phrase "except where the easement by its terms is perpetual" at two places, what is now the beginning of § 10-158.22, F (page 1, line 47) and at the end of the "except" clause of § 10-158.26 (page 2, line 36). I respectfully urge your adoption of these amendments or their more precise equivalent set forth in 7 below.

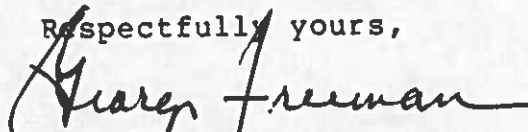
7. Such an equivalent would be to add the following to the end of § 10-158.22, C (page 1, line 40):

Where an easement is perpetual, it may be released or modified by consent only upon concurrence of all of the persons, organizations or agencies having standing under § 10-158.25, and, should the fee subject to the easement be acquired by the grantee or its successors or assigns, the easement shall vest in the Virginia Outdoors Foundation. If an easement vested in the Virginia Outdoors Foundation by operation of the preceding sentence, the Foundation may retain it or thereafter convey it to any other public body or any holder the Foundation deems most appropriate to hold and enforce such interest in accordance with the purpose of the original conveyance of the easement.

8. The first part of this language suggested in § 7 would prevent abuses of this legislation by setting up "sweetheart" private 26 U.S.C. § 501(c)(3) foundations that could essentially bank the land, free of higher local property taxes, until the optimum time for the land's development. This would be analagous to the "free ride" abuse that our current land use taxation district statute seeks to avoid by the tax recapture provisions.

9. The second prong of the language in section 7 avoids the "destruction through merger" problem and is parallel with § 10-158.27 of the Bill (page 2, lines 37-45) which is designed to prevent lapse of the easement through dissolution of the holder.

Respectfully yours,



George C. Freeman, Jr.

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Senate Agriculture Committee
Virginia General Assembly
State Capitol
Richmond, VA 23219

cc: Hon. Gerald L. Baliles
Delegate Alan Diamonstein
Hon. John Daniel