The Honorable Wiley F. Mitchell, Jr.

Office of the Attorney General
September 7, 1984

1984-85 Va. Op. Atty. Gen. 249 (Va.A.G.), 1984-85 Va. Rep. Atty. Gen. 249, 1984 WL 184541

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Commonwealth of Virginia
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***1 REAL PROPERTY. CONSERVATION AND SCENIC EASEMENTS APPURTENANT MUST MEET CERTAIN CRITERIA. DOMINANT AND SERVIENT ESTATES NEED NOT BE CONTIGUOUS, BUT VALIDITY WILL TURN ON FACTS, INCLUDING GEOGRAPHICAL SEPARATION.**

*1 The Honorable Wiley F. Mitchell, Jr.
*1 Member
*1 Senate of Virginia

*1 You have asked whether a private conservation organization such as the Nature Conservancy may acquire perpetual and assignable conservation and scenic easements appurtenant over properties near, but not contiguous to, fee properties owned by that organization.

*1 Because your inquiry arises from a rather detailed letter from the Nature Conservancy, some background and clarification are in order.

*1 At common law, easements were of two general types—easements appurtenant and easements in gross. The Supreme Court of Virginia has described these precisely:

*1 "[T]here are two classes of easements. The first is known as a pure easement, or an easement appurtenant, which has both a dominant and a servient estate, and which is capable of being transferred and inherited. Such an easement passes with the land to which it is appurtenant. *Scott v. Moore,* 98 Va. 668, 675, 37 S.E. 342, 344. [Citation omitted.]

*1 The other class is termed an easement in gross, sometimes called a personal easement, which is not appurtenant to any estate in land, but in which the servitude is imposed upon land with the benefit thereof running to an individual. Such an easement cannot be transferred by the individual to whom it is originally given, nor can it pass by inheritance. *Stockes, Inc. v. Matney,* 194 Va. 339, 344, 73 S.E.2d 269, 271. [Citation omitted.]

*1 Thus, the distinguishing feature between these two classes of easements is that in the first there is, and in the second there is not, a dominant tenement. [Citation omitted.]

*1 The courts, in construing language granting an easement, seek to hold that the easement is appurtenant to land, if such can be fairly done. An easement is never presumed to be merely personal, and it will not be held to be in gross, unless it plainly appears that the parties so intended. *French v. Williams,* 82 Va. 462, 468, 4 S.E. 591. [Citation omitted.]

*1 An easement is appurtenant to land, and therefore not merely personal or gross, 'if it be in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing to show that the parties intended it to be a mere personal right...'" *Smith v. Garbe,* 86 Neb. 91, 124 N.W. 921, 923. [[Citation omitted.]

*1 *Coal Corporation v. Lester,* 203 Va. 93, 97, 122 S.E.2d 901, 904 (1961).

*1 Several Virginia statutes have modified the common law with respect to easements in gross. The latter may now be disposed of by deed or will and are thus perpetual under § 55-6 of the Code of Virginia. Legislation has created the Virginia Outdoors Foundation for the purpose of holding scenic and conservation easements in perpetuity. *See* Ch. 14, Title 10. All public bodies may do so under the Open-Space Land Act. *See* Ch. 13, Title 10. *See also* § 15.1-262. To date legislation authorizing private organizations to do so has not been enacted.

*2 Easements appurtenant, as noted above, have always been perpetual and assignable. It must be remembered that scenic easements and conservation easements vary greatly. Scenic easements are generally negative restrictions on use, whereas conservation easements may also impose affirmative obligations to protect land uses or to promote compatible public uses. *Powell on Real Property* ¶ 414(5) (1981). No effort will be made here to discuss or to compare all of the possible combinations or to evaluate specific provisions. [1]

*2 The majority rule at common law is that the dominant and servient estates need not be contiguous for the establishment of a valid easement appurtenant. [2] One exception is that an easement of right-of-way must have one terminus in the dominant estate. 25 Am.Jur.2d *Easements and Licenses* § 11 (1966); 76 A.L.R. 597, 600; 2 *Thompson on Real Property* § 303 (1980); Burby, *Real Property* 65 (3rd ed. 1965).

*2 Although the Supreme Court of Virginia has not considered the specific issue, from the authorities cited herein, certain criteria for the construction of easements appurtenant can be extracted:

*2 1. The easement over the servient estate must be of benefit to the enjoyment of the dominant estate.

*2 2. The two estates need not be contiguous.

*2 3. The intent of the parties to the easement is relevant, at least as to the question of appurtenance.

*2 I am unable to find judicial guidance regarding the specific geographical separation which is allowable between the dominant and servient properties. Each case apparently will turn upon its facts. Assuming that an easement granted to an organization such as the Nature Conservancy clearly states the intent of the parties to benefit land owned by the Conservancy, inquiry must necessarily be made as to the extent and nature of such benefit. It seems reasonable to conclude that some limits-both geographical and content—must apply. If they did not, the distinction between an easement in gross and an easement appurtenant would be greatly diminished.

*2 Because Virginia law (*see Coal Corporation, supra*) presumes that an easement is appurtenant and because the General Assembly has specifically approved only those conservation and scenic easements in gross held by public bodies, it is my view that the courts may be less likely to construe as appurtenant conservation and scenic easements. As the geographical separation between dominant and servient estate increases, so does the likelihood that the easement does not benefit the former. To the extent the expressed intention or effect of the easement becomes more “public” in nature, it is probable that its purpose to benefit the dominant estate will diminish. As the benefit to the dominant land fades, so does the characteristic of “appurtenance” and the probable validity of the easement.

*2 In summary, the law applicable to easements held by private conservation organizations is the same as that which applies to those held by other private organizations and individuals. While an easement appurtenant may be made assignable by its terms and the affected properties need not be contiguous, geographic separation and lack of demonstrable benefit to the dominant estate must be considered in determining whether the easement is appurtenant. Any significant change in the status of easements in Virginia would be appropriately brought about by the General Assembly.

*3 Gerald L. Baliles
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Footnotes

1 Scenic and conservation easements have certain implications under federal and State tax laws. This Opinion does not consider such implications.

2 Covenants or restrictions may, of course, run with land provided they are created by a conveyance establishing sufficient privity of estate between the parties. *Powell on Real Property, supra,* at 34. This requires common ownership between the dominant and servient properties and is rarely a practical tool for conservation organizations.

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