

ARTICLE

CONDEMNING OPEN SPACE: MAKING WAY FOR NATIONAL INTEREST ELECTRIC TRANSMISSION CORRIDORS (OR NOT)

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I. INTRODUCTION

The Energy Policy Act of 2005 (EPAct) added a new section to federal law pertaining to the siting of interstate electric transmission facilities.² That new section, referred to hereinafter as “SIETF,” directs the Secretary of Energy (Secretary) to periodically conduct a nationwide study of electric transmission congestion.³ SIETF also requires the Secretary to consult with affected states when conducting these studies and provide interested parties with an opportunity to offer alternatives and recommendations.⁴ Following consideration of such alternatives and recommendations, the Secretary is required to issue a report that “may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor.”⁵

Once the Secretary designates a national interest electric transmission corridor (National Corridor), SIETF grants the Federal Energy Regulatory Commission (FERC) the authority to issue permits to public utilities to construct or modify electric transmission facilities in the corridor in certain circumstances, including where a state has withheld approval for the construction or modifi-

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² Energy Policy Act of 2005 § 1221(a), Pub. L. 109-58, 119 Stat. 594 (codified at 16 U.S.C.S. § 824p (2008)) (adding Section 216 to the Federal Power Act).

³ See 16 U.S.C.S. § 824p(a)(1) (2008).

⁴ See *id.* § 824p(a)(2).

⁵ *Id.*

cation of such facilities for more than one year, or has “conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.”⁶ A FERC permit empowers its holder to exercise the right of eminent domain to acquire the necessary rights-of-way to construct or modify the needed facilities in the National Corridor.⁷ SIETF thus could operate to preempt a state’s control over the siting of electric transmission facilities within its borders.⁸ In apparent deference to states’ rights, however, SIETF also provides that the power of eminent domain granted to the holder of a FERC permit does not extend to “property owned by . . . a State.”⁹

In August of 2006, the Secretary issued the Department of Energy’s initial congestion study.¹⁰ The study identified a number of congestion areas, including two that were classified as critical—the Southern California area and the Atlantic coastal area from New York City to northern Virginia.¹¹ In April of 2007, the Secre-

⁶ See *id.* § 824p(b).

⁷ See *id.* § 824p(e)(1).

⁸ See U.S. DEP’T OF ENERGY, NATIONAL ELECTRIC TRANSMISSION CONGESTION REPORT AND FINAL NATIONAL CORRIDOR DESIGNATIONS: FREQUENTLY ASKED QUESTIONS 1-2 (2007), available at http://nietc.anl.gov/documents/docs/FAQs_re_National_Corridors_10_02_07.pdf [hereinafter FINAL NATIONAL CORRIDOR DESIGNATIONS] (explaining that “. . . the designation of a National Corridor is a necessary first step in providing the federal government—through the Federal Energy Regulatory Commission—siting authority that supplements existing state authority. The Energy Policy Act of 2005 provides a potential siting venue at FERC for transmission facility proposals within a National Corridor. In practice, this will mean that if an applicant does not receive approval from a State to site a proposed new transmission facility within a National Corridor, the applicant may then apply to FERC for a permit and authorization to construct the facility. If FERC accepts the application, before it would issue a permit, it would conduct a full National Environmental Policy Act review and consider alternatives. Such a federal permit would empower the project developer to exercise the right of eminent domain to acquire necessary property rights to build the facilities.”).

⁹ See 16 U.S.C.S. § 824p(e)(1) (2008).

¹⁰ National Electric Transmission Congestion Study, 71 Fed. Reg. 45,047 (Aug. 8, 2006). See Press Release, Office of Public Affairs, U.S. Dep’t of Energy, DOE Marks First Anniversary of EAct & Releases National Electric Transmission Congestion Study (Aug. 8, 2006), available at <http://nietc.anl.gov/documents/docs/1221a-press-release-8-8-06.pdf>. See also U.S. DEP’T OF ENERGY, NATIONAL ELECTRIC TRANSMISSION CONGESTION STUDY (2006), available at http://www.oe.energy.gov/DocumentsandMedia/Congestion_Study_2006-9MB.pdf [hereinafter 2006 CONGESTION STUDY].

¹¹ The study identified: (i) two “Critical Congestion Areas” (i.e. areas where it is critically important to remedy existing or growing congestion problems because the current or projected effects of congestion are severe)—southern California and the Atlantic coastal area (from metropolitan New York through northern Virginia), (ii) four “Congestion Areas of Concern” (i.e. areas where a large-scale congestion problem exists or may be emerging, but more information and analysis appear to be needed to determine the magni-

tary issued two draft National Corridor designations: (i) the proposed Southwest Area National Corridor, which included counties in California, Arizona, and Nevada, and (ii) the proposed Mid-Atlantic Area National Corridor, which included counties in Ohio, West Virginia, Pennsylvania, New York, Maryland, and Virginia, and all of New Jersey, Delaware, and the District of Columbia.¹² Six months later, after considering additional comments from the affected states, regional entities, and the general public, the Secretary formally designated the Mid-Atlantic Area National Corridor and the Southwest Area National Corridor, with the only change from the draft designations being that the Southwest Area National Corridor no longer included any land located in Nevada.¹³

tude of the problem and the likely relevance of transmission expansion and other solutions)—New England; the Phoenix-Tucson area; the Seattle-Portland area, and the San Francisco Bay area, and (iii) a number of “Conditional Congestion Areas” (i.e. areas where there is some transmission congestion at present, but significant congestion would result if large amounts of new generation resources were to be developed without simultaneous development of associated transmission capacity)—including Montana-Wyoming; Dakotas-Minnesota; Kansas-Oklahoma; Illinois, Indiana, and upper Appalachia; and the Southeast. See 2006 CONGESTION STUDY, *supra* note 10, at viii-ix.

¹² See Office of Electricity Delivery and Energy Reliability, Draft National Interest Electric Transmission Corridor Designations, 72 Fed. Reg. 25,838 (May 7, 2007); Press Release, Office of Public Affairs, U.S. Dep’t of Energy, DOE Issues Two Draft National Interest Electric Transmission Corridor Designations (April 26, 2007), available at <http://nietc.anl.gov/documents/docs/press-release-04-26-07.pdf>.

¹³ National Electric Transmission Congestion Report, 72 Fed. Reg. 56,992 (Oct. 5, 2007) (providing that the designations will remain in effect for a period of twelve years unless the U.S. Department of Energy rescinds or renews the designation after notice and opportunity for comment). See Press Release, Office of Public Affairs, U.S. Dep’t of Energy, DOE Designates Southwest Area and Mid-Atlantic Area National Interest Electric Transmission Corridors (Oct. 2, 2007), available at http://nietc.anl.gov/documents/docs/NIETC_Designation_News_Release.pdf. In January of 2008, eleven regional and national environmental organizations filed suit in District Court challenging the Department of Energy’s final designation of the Mid-Atlantic Area National Corridor on the grounds that the Department violated the National Environmental Policy Act and the Endangered Species Act by failing to study the potential harmful impacts of the corridor on air quality, wildlife, habitat, and other natural resources. See Kimberly Hefling, *Environmentalists sue DOE*, BOSTON.COM, Jan. 14, 2008; Piedmont Env’tl. Council, Department of Energy Challenged over Transmission Corridor Designations, <http://www.pecva.org/anx/index.cfm/1,215,916,0,html/Department-of-Energy-Challenged-over-Transmission-Corridor-Designations>. In February of 2008, fourteen U.S. Senators requested Senate oversight hearings on the designation of the National Corridors, noting that “citizens, elected officials, public utilities commissions, and groups representing historic, land, and environmental interests have filed petitions in opposition to DOE’s NIETC designation process” and “Congressional oversight is needed now.” See Press Release, Senator Robert P. Casey, Jr., Casey Urges Energy Committee to Hold Hearings on Power Line Corridor (Feb. 12, 2008).

The Mid-Atlantic Area National Corridor includes fifteen counties in Virginia,¹⁴ and some of the land in those counties is encumbered by conservation easements.¹⁵ Conservation easements restrict the development and use of the land they encumber for the purpose of preserving the natural, open space, scenic, historic, or ecological features of the land. Such easements are generally conveyed by landowners to charitable conservation organizations (typically referred to as land trusts¹⁶) or government entities to be held and enforced for the purposes stated therein for the benefit of the public.¹⁷ Most conservation easements are granted “in perpetuity,” which means they are intended to restrict the development and use of the land they encumber “forever,” or at least until circumstances change so profoundly that the continued protection of the land for conservation or historic purposes becomes impossible or impractical.¹⁸

Virginia has encouraged the use of conservation easements to protect the conservation and historic values of privately-owned lands within its borders for over forty years. In 1966 the Virginia General Assembly enacted the Open-Space Land Act, which

¹⁴ Those counties are: Arlington, Clarke, Culpeper, Fairfax, Fauquier, Frederick, Loudon, Madison, Page, Prince William, Rappahannock, Rockingham, Shenandoah, Stafford, and Warren. See FINAL NATIONAL CORRIDOR DESIGNATIONS, *supra* note 8, at 11, 15. The Mid-Atlantic Area National Corridor also includes the following seven independent cities in Virginia: Alexandria, Harrisonburg, Fairfax, Falls Church, Manassas, Manassas Park, and Winchester. *Id.* at 16.

¹⁵ For example, the Virginia Outdoors Foundation, discussed in Part II.B. *infra*, reports that as of September 2007, it held conservation easements encumbering 62,578 acres in Fauquier County, 24,792 acres in Rappahannock County, 21,305 acres in Loudon County, and 14,930 acres in Clarke County. See Va. Outdoors Found., VOF Easements/Acres by Locality, http://www.virginiaoutdoorsfoundation.org/VOF_pub-bycounty.php (last visited Jan. 9, 2008). As of September 2007, the Virginia Outdoors Foundation held one easement encumbering 115 acres in the City of Winchester. *Id.*

¹⁶ The Land Trust Alliance, the umbrella organization for the nation's land trusts, reports that in 2005 there were 1667 land trusts operating in the United States. LAND TRUST ALLIANCE, 2005 NATIONAL LAND TRUST CENSUS REPORT 2 (2005), available at http://www.lta.org/census/2005_report.pdf [hereinafter LTA CENSUS REPORT].

¹⁷ For general information about land trusts and conservation easements, see ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK (2d ed. 2005), and Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 *ECOLOGICAL Q.* 673 (2007).

¹⁸ See McLaughlin, *supra* note 17, at 675-76 (discussing the meaning of perpetuity in the conservation easement context and noting that the bias in favor of perpetual conservation easements is due, in part, to the fact that many conservation easements are donated either in whole or in part as charitable gifts, and donors are eligible for federal and, in many cases, state tax benefits only if the easements are expressly perpetual). See also *infra* note 60 and accompanying text (discussing the perpetuity requirements of federal tax law and their incorporation by reference into the Virginia tax incentive provisions).

authorizes the creation and enforcement of conservation easements held appurtenant or in gross by certain public bodies (referred to hereinafter as “open-space easements”).¹⁹ In that same year, the General Assembly also created the Virginia Outdoors Foundation (the VOF), a state entity that acquires and administers most of the open-space easements conveyed in Virginia.²⁰ In 1988, the General Assembly enacted the Virginia Conservation Easement Act, which authorizes the creation and enforcement of conservation easements held appurtenant or in gross by certain charitable organizations, such as The Nature Conservancy (referred to hereinafter as VCEA easements).²¹ And since 2000, “to further encourage the preservation and sustainability of Virginia’s unique natural resources, wildlife habitats, open spaces and forested resources,” Virginia has offered generous state income tax credits to landowners who donate either open-space easements to public bodies or VCEA easements to charitable organizations (open-space easements and VCEA easements are referred to here-

¹⁹ See *infra* Part II.A. (discussing the Open-Space Land Act).

²⁰ See *infra* Part II.B. (discussing the Virginia Outdoors Foundation).

²¹ See *infra* Part II.C. (discussing the Virginia Conservation Easement Act). Government entities and land trusts typically hold conservation easements “in gross,” which means they do not hold the easements in connection with or “appurtenant to” parcels that are benefited by the easements. Traditional servitudes doctrines raised potential difficulties for both the creation and long-term validity of restrictions on the development and use of land held in gross. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.6 cmt. a (2000). Accordingly, to facilitate the use of conservation easements as a land protection tool, all fifty states and the District of Columbia have enacted some form of “easement enabling statute.” See Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 426 (2005). The enabling statutes remove any potential common law impediments to the creation and long term validity of conservation easements, provided, in general, that the easements are conveyed: (i) to a government entity or charitable conservation organization and (ii) for one or more of the conservation purposes specified in the statute. See *id.* But conservation easements held in gross may be valid and enforceable even in the absence of enabling statutes. In 2005, the Supreme Court of Virginia held that an easement in gross conveyed for conservation and historic preservation purposes to a nonprofit organization fifteen years before the enactment of the Virginia Conservation Easement Act was nonetheless valid and enforceable, noting, *inter alia*, the strong public policy in Virginia in favor of land conservation and preservation of historic sites and buildings. See *United States v. Blackman*, 613 S.E.2d 442 (Va. 2005). See also *Bennett v. Comm’r of Food & Agric.*, 576 N.E.2d 1365, 1367 (Mass. 1991) (in declining to apply common law real property rules to invalidate a restriction in a conservation easement that did not conform precisely to the definition of a conservation easement in the enabling statute, the court explained: “Where the beneficiary of the restriction is the public and the restriction reinforces a legislatively stated public purpose, old common law rules barring the creation and enforcement of easements in gross have no continuing force.”); RESTATEMENT (THIRD) PROPERTY: SERVITUDES § 1.6, Reporter’s Note (2000) (“Although many conservation servitudes are created pursuant to statute, common-law conservation servitudes are also recognized”).

inafter collectively as “conservation easements”).²² Virginia is also one of the few states in the nation that permits a landowner donating a conservation easement to sell or otherwise transfer any unused state income tax credit to other Virginia taxpayers, thus extending the benefit of the credit to “land rich, cash poor” farmers and other landowners who do not have sufficient Virginia income tax liability to fully absorb the credit.²³

These statutes and incentives are effective in promoting the use of conservation easements as a land protection tool in Virginia. Although figures for the total acreage encumbered by conservation easements in Virginia are not readily available, the VOF, which holds most of the easements conveyed in the state,²⁴ reports that as of October 2007, it held 2217 open-space easements encumbering 409,383 acres of land in Virginia (or more than 1.5 percent of the total acreage of the state).²⁵ Moreover, the number of open-space easements conveyed to the VOF and the number of acres encumbered by such easements more than tripled during the seven year period in which the state income tax credits have been available.²⁶

Questions have been raised in Virginia regarding the extent to which public utilities can exercise the power of eminent domain to condemn land encumbered by conservation easements to make way for the construction or modification of electric transmission facilities. Some worry that land encumbered by conservation easements, which by definition is largely undeveloped, will be a natural target for condemnation because of the political difficulties associ-

²² See VA. CODE ANN. §§ 58.1-510 to -513 (2006). For a description of the federal and state tax incentives offered to landowners who donate conservation easements in Virginia, see Virginia Outdoors Found., Tax Benefits of Conservation Easements, http://www.virginiaoutdoorsfoundation.org/VOF_land-taxbenefits.php (last visited Jan. 9, 2008); Piedmont Env'tl. Council, Introduction to Conservation Easements, <http://www.pecva.org/anx/index.cfm/1,112,0,0,html/Introduction-to-Conservation-Easements> (last visited Jan. 9, 2008).

²³ See VA. CODE ANN. §§ 58.1-510 to -513 (2006).

²⁴ See G. Robert Lee, *Letter From the Executive Director: Preserving Virginia's "Uncommon Wealth"*, VA. OUTDOORS FOUND. NEWSLETTER (Va. Outdoors Found., Richmond, Va.), Spring 2007, at 3 (“VOF easements constituted 84% of all easements recorded in Virginia in 2006”).

²⁵ See Va. Outdoors Found., VOF Easements/Acres by Year, http://www.virginiaoutdoorsfoundation.org/VOF_pub-byyear.php (last visited Jan. 9, 2008) [hereinafter VOF Easements/Acres by Year] (figures in the text are based on the author's calculation of the total number of easements and total acreage using the annual numbers provided). For the total acreage in each state as of fiscal year 1997, see U.S. Gen. Serv. Admin., Comparison of Federally Owned Land with Total Acreage of States, <http://www.blm.gov/natacq/pls98/98PL1-3.PDF> (last visited Jan. 9, 2008).

²⁶ See VOF Easements/Acres by Year, *supra* note 25 (statements in the text are based on the author's calculations using the annual numbers provided).

ated with locating large and unsightly steel towers supporting high voltage transmission lines in populated areas. Others believe that encumbering land with a conservation easement can insulate the land from condemnation, and there are reports of landowners in Virginia donating conservation easements encumbering land within the proposed path of the transmission facilities in an attempt to preclude condemnation. This outline discusses the extent to which public utilities may or may not have the right under Virginia or federal law to condemn conservation easements.

Questions regarding whether a public utility must condemn a conservation easement in whole or in part before constructing electric transmission facilities on the encumbered land,²⁷ and the compensation that should be payable to the owner of the encumbered land and the holder of the conservation easement upon such condemnation are explored in a separate article.²⁸

II. LEGISLATION FACILITATING THE ACQUISITION OF CONSERVATION EASEMENTS IN VIRGINIA

Virginia has two statutes that authorize the creation and enforcement of conservation easements: the Open-Space Land Act and the Virginia Conservation Easement Act.²⁹ Some of the particulars of those acts, as well as the statute creating the VOF, are relevant to a public utility's power (or lack thereof) to exercise eminent domain with respect to land encumbered by a conservation easement.

²⁷ See Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. DAVIS L. REV. 101, 159-61 (2008) (explaining that the construction of steel towers to support high-voltage transmission lines and the type of clearing and ongoing maintenance that would be necessary to prevent interference with the towers and lines would likely violate both the terms and purpose of a conservation easement, at least with respect to the strip of land subject to the right-of-way, thus requiring condemnation of the easement in whole or in part). For examples of conservation easement terms and purposes, see BYERS & PONTE, *supra* note 17, and Va. Outdoors Found., VOF Easement Template, http://www.virginiaoutdoorsfoundation.org/VOF_documents.php (last visited Jan. 9, 2008) [hereinafter VOF Easement Template] (download link entitled "VOF Easement Template").

²⁸ See McLaughlin, *supra* note 27 (explaining that the total compensation award payable upon the taking of a right-of-way to construct electric transmission facilities should be determined as if the land were *not* encumbered by a conservation easement, and that total award should then be apportioned between the owner of the encumbered land and the holder of the easement in accordance with the value of their respective rights at the time of the condemnation).

²⁹ Cf. *supra* note 21 (explaining that conservation easements held in gross may be valid and enforceable even in the absence of such enabling statutes).

A. *The Open-Space Land Act*

The Open-Space Land Act authorizes the creation and enforcement of open-space easements conveyed to certain public bodies.³⁰ Open-space easements can be either appurtenant or in gross, but their purposes must 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.³¹ The public bodies to which open-space easements can be conveyed are: state agencies that have authority to acquire land for a public use, counties, municipalities, park authorities, public recreational facilities authorities, soil and water conservation districts, community development authorities, and the Virginia Recreational Facilities Authority.³²

The Open-Space Land Act says nothing directly about whether existing open-space easements can be condemned (i.e., taken and extinguished) through the exercise of eminent domain, thereby freeing the underlying land to be used for purposes formerly restricted by the easement.³³ The Open-Space Land Act does, however, provide that no land encumbered by an open-space easement can be “converted or diverted” from open-space land use unless: (i) the public body holding the easement determines that certain threshold tests are met, (ii) property of at least equal fair market value and of greater conservation value is substituted for the land converted or diverted, and (iii) such substitute property is subject to the provisions of the Open-Space Land Act.³⁴ The Open-Space Land Act also provides that “insofar as the provisions of [the Act] are inconsistent with the provisions of any other law, the provisions of [the Act] shall be controlling.”³⁵

³⁰ See VA. CODE ANN. §§ 10.1-1700 to -1705 (2006). The Open-Space Land Act also authorizes public bodies to acquire fee title to “open-space land.” See *id.* §§ 10.1-1701 to -1702.

³¹ See *id.* § 10.1-1700. Open-space easements can be perpetual, but must be of at least five years’ duration. See *id.* § 10.1-1701.

³² See *id.* § 10.1-1700.

³³ The Open-Space Land Act precludes public bodies from *imposing* (i.e., creating) open-space easements on land through the exercise of eminent domain. See *id.* § 10.1-1701.

³⁴ See *id.* § 10.1-1704. See also *infra* Part III.A.1 (discussing the conversion or diversion provision in more detail).

³⁵ See VA. CODE ANN. § 10.1-1705 (2006).

B. *The Virginia Outdoors Foundation*

The VOF was created by statute in 1966 “to promote the preservation of open-space lands and to encourage private gifts of money, securities, land or other property to preserve the natural, scenic, historic, scientific, open-space and recreational areas of the Commonwealth.”³⁶ The VOF is described in the statute as a “body politic,” and is governed and administered by a board of seven trustees appointed by successive Governors of Virginia for four-year terms.³⁷ In 1995, the Virginia Attorney General opined that the VOF constitutes a public body for purposes of the Open-Space Land Act and is authorized to exercise the powers granted to public bodies by that Act.³⁸ Although the VOF is thus authorized to acquire both open-space land and open-space easements, it seeks to accomplish its purpose primarily through the acquisition of open-space easements.³⁹ The statute creating the VOF directs all state officers, agencies, commissions, departments, and institutions to cooperate with and assist the VOF in carrying out its statutory purpose.⁴⁰

C. *The Virginia Conservation Easement Act*

The Virginia Conservation Easement Act authorizes the creation and enforcement of conservation easements conveyed to certain qualified holders.⁴¹ Conservation easements authorized by the act—i.e., VCEA easements—can be either appurtenant or in gross, but must be created for the same purposes as open-space easements noted above.⁴² The qualified holders to which VCEA easements can be conveyed are charitable corporations, charitable associations, and charitable trusts that meet certain criteria.⁴³

³⁶ See *id.* §§ 10.1-1800 to -1804.

³⁷ See *id.* § 10.1-1800.

³⁸ See 1995 Va. Op. Att’y Gen. 39 (Jan. 24, 1995).

³⁹ See Va. Outdoors Found., Land Conservation, http://www.virginiaoutdoorsfoundation.org/VOF_land-overview.php (last visited Jan. 9, 2008). See also VOF Easements/Acres by Year, *supra* note 25 and accompanying text (noting the number of open-space easements held by the Virginia Outdoors Foundation and the number of acres encumbered by such easements).

⁴⁰ See VA. CODE ANN. § 10.1-1804 (2006).

⁴¹ See *id.* §§ 10.1-1009 to -1016.

⁴² See *id.* § 10.1-1009. A VCEA easement is treated as perpetual in duration unless the instrument creating it provides otherwise. See *id.* §10.1-1010.C.

⁴³ See *id.* § 10.1-1009. To be a qualified holder of a VCEA easement, the charitable entity must: (i) have been declared exempt from taxation pursuant to Internal Revenue Code § 501(c)(3); (ii) include in its primary purposes or powers the purposes for which a VCEA can be created, and (iii) either (a) have had a principal office in the Commonwealth

Unlike the Open-Space Land Act, the Virginia Conservation Easement Act directly addresses the question of whether existing VCEA easements can be condemned through the exercise of eminent domain, at least by public bodies. The Act expressly provides that it “does not . . . in any way limit the power of eminent domain as possessed by any public body,” and that “in any such proceeding the holder of the conservation easement shall be compensated for the value of the easement.”⁴⁴

III. DELEGATION OF EMINENT DOMAIN POWER TO PUBLIC UTILITIES

Both the Virginia Code and EPA Act delegate the right to exercise the power of eminent domain to public utilities for the purpose of constructing or modifying electric transmission lines. As explained below, however, these delegated powers are exercisable only with respect to property owned by certain persons or entities.

Before analyzing the powers of eminent domain delegated to public utilities under state and federal law, a brief note about the rules of construction is in order. It is well-settled that delegations of the right to exercise the power of eminent domain are strictly construed against the grantee. As one commentator explains:

Even when the power of eminent domain has been expressly granted, the grant must be construed strictly against the grantee. The grantee will not be allowed to take the lands of another unless such right comes clearly and unmistakably within the limits of the authority granted. Whatever is not plainly given is to be construed as withheld.⁴⁵

The use of the eminent domain power is also generally scrutinized more closely when it is exercised by a private party, such as a public utility, than when it is exercised by a governmental entity.⁴⁶

for at least five years or (b) be a national organization that has been in existence for at least five years, has an office in the Commonwealth, and has registered and is in good standing with the State Corporation Commission. *See id.* §§ 10.1-1009, -1010.C.

⁴⁴ *See id.* § 10.1-1010.F. Public body is defined by reference to the Open-Space Land Act. *See id.* § 10.1-1009. *See also supra* text accompanying note 32 (providing the definition of public body under the Open-Space Land Act).

⁴⁵ JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN 1A-3, § 3303[6][b] (3d ed. 2004) [hereinafter NICHOLS ON EMINENT DOMAIN]. *See also, e.g.*, 26 AM. JUR. 2D *Eminent Domain* § 1 (2007) (“The power and the obligation of eminent domain plays a critical role in constitutional governance, and courts are obligated to carefully monitor its exercise. Courts take a restrictive view of the power of eminent domain because it is in derogation of the right to acquire, possess, and defend property”).

⁴⁶ *See* NICHOLS ON EMINENT DOMAIN, *supra* note 45, 1A-3, § 3.03[11][a]. This section of the treatise cites *Columbia Gas Transmission Corp. v. Natural Gas Storage Easement*, 688

A. Delegation Under Virginia Law

Va. Code Ann. Section 56-49 grants public utilities (referred to as “public service corporations”) the power to exercise eminent domain in Virginia.⁴⁷ While public utilities proposing to construct or enlarge electric transmission facilities must generally obtain a certificate from the Virginia State Corporation Commission (SCC) indicating that “public convenience and necessity” require such construction or enlargement,⁴⁸ and the SCC can issue a certificate for overhead transmission lines of 150 kilovolts or more only after assessing the environmental and other impacts of the proposed project,⁴⁹ a public utility’s power to exercise eminent domain under Virginia law derives from Section 56-49. This Section grants public utilities the power “. . . to acquire by the exercise of the right of eminent domain any lands or estates or interests therein . . . of any person, which are deemed necessary for the purposes of construction, reconstruction, alteration, [etc.] of its lines, facilities or works”⁵⁰ The term “person” is defined to include: (i) individuals; (ii) partnerships; (iii) limited liability companies; and (iv) all corporations created by acts of the General Assembly of Virginia, created under the general incorporation laws of the Commonwealth, or doing business in the Commonwealth *other than* municipal corporations, other political subdivisions, and public institutions owned or controlled by the Commonwealth.⁵¹

F. Supp. 1245, 1249 (N.D. Ohio 1988), which states that “the power of eminent domain is a special and limited power” and “the use of the power should be scrutinized more closely when exercised by a private party rather than a governmental entity.” *Id.*

⁴⁷ See VA. CODE ANN. § 56-49 (2006); *id.* § 56-1 (defining “public service corporation” to include, *inter alia*, gas, pipeline, electric light, heat, power, and water supply companies).

⁴⁸ See *id.* § 56-265.2.

⁴⁹ See *id.* § 56-46.1 (requiring the SCC to consider the impact electrical facilities and transmission lines would have on the environmental and historic assets of the affected areas, and granting interested parties the right to notice and a hearing before the SCC when transmission line siting decisions are pending). This provision was enacted to effectuate the environmental protection policy set forth in the constitution adopted by Virginia in 1971. See VA. CONST. art. XI, § 1 (“. . . it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings . . . [and] to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth”); Amy Leigh Sheridan, *Siting Power Lines in Historic Areas of Virginia*, 29 RICH. L. REV. 381 (1995).

⁵⁰ VA. CODE ANN. § 56-49.2 (2006) (emphasis added).

⁵¹ See *id.* § 56-1. See also *id.* §§ 1-202, 1-224 (defining municipal corporation to mean a city or a town).

1. Open-Space Easements

There is little need to consider whether Section 56-49 grants public utilities the power to condemn open-space easements held by one or more of the public bodies described in the Open-Space Land Act.⁵² Even if a public utility were deemed to have been implicitly delegated such power,⁵³ the Open-Space Land Act should be construed to preclude its exercise.

The Open-Space Land Act provides that no land encumbered by an open-space easement can be “converted or diverted” from open-space land use unless three requirements are satisfied.⁵⁴ The public body holding the easement must determine that the conversion or diversion is “essential to the orderly development and growth of the locality” and in accordance with the locality’s official comprehensive plan.⁵⁵ There must be substituted other real property that is: (i) of at least equal fair market value, (ii) of greater value as permanent open-space land than the land converted or

⁵² See *id.* § 10.1-1700; see also *supra* text accompanying note 32 (providing the definition of public body under the Open-Space Land Act).

⁵³ The term “person” as used in Section 56-49 of the Virginia Code is defined to “include” and, thus, to not be limited to individuals, partnerships, limited liability companies, and the corporations described in Part III.A. See VA. CODE ANN. § 1-218 (2006). Accordingly, one might argue that public utilities are implicitly granted the right to exercise the power of eminent domain with regard to the property of a broader category of persons, including one or more of the public bodies to which open-space easements may be granted. But such an expansive interpretation of the use of the word “include” would not be appropriate. As noted in the introduction to Part III, delegations of the right to exercise the power of eminent domain are strictly construed against the grantee, and this rule generally applies with particular force when the grantee is a private party, such as a public utility, rather than a governmental entity. See 1 MICHIE’S JURISPRUDENCE OF VIRGINIA & WEST VIRGINIA § 7, *Eminent Domain* (2007) (“ . . . every reasonable doubt is to be resolved adversely to the right . . . unless both the spirit and letter of the statute clearly confer the power, it cannot be exercised”); see also *Alexandria and Fredericksburg Ry. Co. v. Alexandria and Washington R.R. Co.*, 75 Va. 780 (1881) (“There is no rule more familiar or better settled than this, that grants of corporate powers being in derogation of common right, are to be strictly construed; and this is specially the case where the power claimed is a delegation of the right of eminent domain, one of the highest powers of sovereignty pertaining to the State itself, and interfering most seriously, and often vexatiously, with the ordinary rights of property”). Moreover, the category of “corporations” against which a public utility may exercise its delegated right of eminent domain is defined to expressly exclude public bodies organized as corporations—i.e., municipal corporations (cities and towns), other political subdivisions, and public institutions owned or controlled by the Commonwealth. See Part III.A. Accordingly, it is reasonable to assume that the General Assembly did not intend by the mere use of the word “include” to implicitly grant public utilities the right to exercise the delegated power of eminent domain against public bodies not organized as corporations, such as state agencies.

⁵⁴ See VA. CODE ANN. § 10.1-1704.A (2006). This provision also applies to open-space land held by public bodies. See *id.*

⁵⁵ See *id.*

diverted, and (iii) of as nearly as feasible equivalent usefulness and location for use as permanent open-space land as the land converted or diverted.⁵⁶ And the public body must assure that the property substituted will be subject to the provisions of the Open-Space Land Act, including the limitations on its conversion or diversion from open-space land use.⁵⁷

More to the point, however, the Open-Space Land Act also provides that insofar as the provisions of the act are inconsistent with the provisions of *any other law*—which should include any state law delegating the power of eminent domain to a public utility—the provisions of the Open-Space Land Act shall be controlling.⁵⁸ Accordingly, even if a public utility were deemed to have been implicitly delegated the power under Section 56-49 to exercise eminent domain with respect to the property of certain public bodies, the provisions of the Open-Space Land Act should preclude the exercise of that power with regard to open-space easements.

One of the drafters of the Open-Space Land Act explained that open-space easements were simply not intended to be subject to condemnation under state law.⁵⁹ Rather, it was intended that land encumbered by such easements could be converted or diverted from open-space use to some other public use only upon satisfaction of the conditions set forth in the Open-Space Land Act. In other words, the mechanism for extinguishing open-space easements to accommodate development and growth was built into the Open-Space Land Act rather than the eminent domain laws of the state.

In the case of an open-space easement conveyed to a public body in perpetuity as a charitable gift, however, unless the easement provides that it can be extinguished upon satisfaction of the conditions in the Open-Space Land Act *alone* (in which case the grantor of the easement presumably would not have been eligible for federal or state tax incentives⁶⁰), the public body holding the easement

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *id.* § 10.1-1705.

⁵⁹ Telephone interview with George C. Freeman, Jr., Senior Counsel, Hunton & Williams, in Richmond, Va. (Oct. 2007).

⁶⁰ A landowner donating an open-space easement is eligible for federal tax incentives only if the easement is, *inter alia*: (i) transferable only to another government entity or charitable organization that agrees to continue to enforce the easement and (ii) extinguishable by its holder only in what essentially is a *cy pres* proceeding—i.e., in a judicial proceeding, upon a finding that the continued use of the encumbered land for conservation purposes has become “impossible or impractical,” and with the payment of a share of the proceeds from the subsequent sale or development of the land to the holder to be used for

may not be permitted to agree to its extinguishment without also receiving court approval in a *cy pres* or similar equitable proceeding, in which it must be established that the charitable purpose of the easement has become impossible or impractical due to changed conditions.⁶¹ The National Conference of Commissioners on Uniform State Laws recently provided support for this position by approving amendments to the comments to the Uniform Conservation Easement Act that clarify its intention that conservation easements be enforced as charitable trusts.⁶² In addition, the VOF's template conservation easement now reflects this position, providing, in pertinent part: ". . . should an attempt be made to extinguish this Easement, such extinguishment can be carried out only by judicial proceedings and only if in compliance with [the conversion

similar conservation purposes. See Treas. Reg. §§ 1.170A-14(c)(2), -14(g)(6) (2006); McLaughlin, *supra* note 17, at 688-89 (describing these requirements). And a landowner donating an open-space easement is eligible for the Virginia state income tax credit only if the federal tax incentive requirements are satisfied. See VA. CODE ANN. § 58.1-512.C.2 (2006).

⁶¹ See generally McLaughlin, *supra* note 17 (discussing the support for the application of charitable trust principles, including the doctrine of *cy pres*, to conservation easements). Virginia adopted the Uniform Trust Code in 2006 and its provisions are applicable to all trusts created before, on, or after July 1, 2006. See VA. CODE ANN. § 55-551.06.A.1. Section 544.14 of the Virginia Uniform Trust Code allows for the modification or termination of certain "uneconomic" trusts, but paragraph D of that section specifically provides that the section "does not apply to an easement for conservation or preservation"—thereby implying that other UTC sections (including those applicable to charitable trusts) do apply to such easements in appropriate circumstances. See *id.* §55-554-14. In their commentary, the drafters of the Uniform Trust Code explained:

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the "trustee" could constitute a breach of trust.

See UNIF. TRUST CODE § 414 cmt. (amended 2005).

⁶² See UNIF. CONSERVATION EASEMENT ACT § 3 cmt. (amended 2007) [hereinafter UCEA] (" . . . because conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose—i.e., the protection of the land encumbered by the easement for one or more conservation or preservation purposes—the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements"). For a brief discussion of how charitable trust principles might apply to the amendment (as opposed to the wholesale extinguishment) of conservation easements, see LAND TRUST ALLIANCE, AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES app. B (2007), available at http://www.lta.org/publications/amendment_report.htm.

or diversion provisions of the Open-Space Land Act] and IRC Section 170(h) and applicable Treasury Regulations.”⁶³

2. VCEA Easements

Although charitable corporations, charitable associations, and charitable trusts are authorized to hold VCEA easements under the Virginia Conservation Easement Act, the primary grantees of VCEA easements are charitable corporations, typically referred to as land trusts.⁶⁴ The land trusts operating in Virginia generally fit within the category of “corporations” subject to the power of eminent domain delegated to public utilities under Section 56-49 of the Virginia Code because they either were created under the general incorporation laws of the state or are doing business in the state.⁶⁵ Accordingly, Section 56-49 appears to expressly grant public utilities the power to exercise eminent domain with respect to land or interests therein held by land trusts operating in Virginia. And because VCEA easements are interests in land,⁶⁶ public utilities appear to be expressly granted the power to condemn (i.e., take and extinguish) such easements, thereby freeing the underlying land to be used in manners formerly restricted by the easements.⁶⁷

Curiously, however, the Virginia Conservation Easement Act provides that it “does not . . . in any way limit the power of eminent domain as possessed by any public body,” and defines the term public body by reference to the Open-Space Land Act to mean state agencies, counties, municipalities, and certain other public

⁶³ See VOF Easement Template, *supra* note 27 (emphasis added). See also *supra* note 60 (explaining that pursuant to the Internal Revenue Code and Treasury Regulations, a tax-deductible conservation easement must be extinguishable by its holder only in what essentially is a *cy pres* proceeding).

⁶⁴ See generally BYERS & PONTE, *supra* note 17; LTA CENSUS REPORT, *supra* note 16; McLaughlin, *supra* note 17 (all discussing land trusts).

⁶⁵ See VA. CODE ANN. § 56-1. See also *id.* §§ 1-202, -224; *supra* text accompanying note 51. For a list of the land trusts operating in Virginia, see Land Trust Alliance, Find a Land Trust, <http://www.ltanet.org/findlandtrust> (last visited Jan. 9, 2008).

⁶⁶ The Virginia Conservation Easement Act defines a conservation easement as an interest in real property. See VA. CODE ANN. § 10.1-1009 (2006). Black’s Law Dictionary defines “real property” as “Land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land. . . .” BLACK’S LAW DICTIONARY 1254 (8th ed. 2004).

⁶⁷ See RESTATEMENT (THIRD) PROPERTY: SERVITUDES § 7.8 cmt. a (noting that “extinguishment [of a servitude] may take place either as a direct result of the condemnation, or as the result of release or merger after the government has acquired the property benefited by the servitude. As the owner of a servitude benefit, a governmental body may use any of the means available to a private owner to extinguish the servitude”).

entities.⁶⁸ Whether the Virginia Conservation Easement Act is intended to limit the power of eminent domain possessed by entities *other* than public bodies, such as public utilities, is unclear. There are, however, a number of reasons why such an interpretation would not be unreasonable. First, the easement-enabling statutes in numerous other states provide that they do not limit the power of eminent domain exercisable by *any* person or entity, whether public or private,⁶⁹ and the Virginia Conservation Easement Act could easily have been drafted in a similar fashion. Moreover, it would be consistent with Virginia's strong public policy in favor of the use of conservation easements as a land protection tool to preclude the condemnation of VCEA easements by entities other than public bodies absent express legislative authorization of such condemnations. The General Assembly might well have determined that since land encumbered by a VCEA easement is already devoted to an important public use—i.e., the protection of conservation or historic values of land within Virginia's borders—only public bodies should have the power to exercise eminent domain to convert or divert such land to a different public use. Since public bodies are organized and operated solely to serve the public interest, while private corporations are motivated in large part by a desire to maximize profits, the General Assembly might reasonably have determined that only public bodies are capable of objectively weighing the public benefits to be derived from continuing to enforce a VCEA easement against the public benefits to be derived from extinguishing the easement and devoting the underlying land to a different public use.

Despite the foregoing, the Virginia Conservation Easement Act does not explicitly limit a public utility's exercise of its eminent domain power under Section 56-49, and public utilities may be deemed to have the right under Virginia law to condemn VCEA easements held by land trusts. If public utilities are deemed to have such a right, land trusts holding VCEA easements could attempt to defend those easements on the basis that the easements (and the

⁶⁸ See VA. CODE ANN. §§ 10.1-1009, -1010.F (2006).

⁶⁹ See, e.g., ARIZ. REV. STAT. ANN. § 33-272.A (2006) ("This article neither limits nor enlarges the power or purposes of eminent domain. . . or any right of condemnation under the laws of this state."); MASS. GEN. LAWS ch. 184, § 32 (2006) ("Nothing in this [statute] shall diminish the powers granted by any general or special law to acquire by purchase, gift, eminent domain or otherwise to use land for public purposes."); W. VA. CODE ANN. § 20-12-5(c) (2006) ("Nothing in this article may be construed to limit the lawful exercise of the right of eminent domain or the power of condemnation by any person or entity having such power. . .").

lands they encumber) are already devoted to a public use.⁷⁰ Although charitable organizations have limited success asserting this defense, Virginia courts may be open to it in this context because of Virginia's strong public policy in favor of the use of conservation easements as a land protection tool and the fact that easement-encumbered land, which is largely undeveloped, is likely to be a target for condemnation.⁷¹

B. Delegation Under Federal Law

As explained in the Introduction, once the Secretary of Energy formally designates a National Corridor, SIETF authorizes FERC to issue permits to public utilities to construct or modify electric transmission facilities in the corridor in certain circumstances, such as when a state withholds its approval of the proposed construction or modification for more than a year. A FERC permit empowers

⁷⁰ In *Texas E. Transmission Corp. v. Wildlife Preserves*, 225 A.2d 130 (N.J. 1966), the court held that although a natural gas company had the power to condemn a right of way across a charitable organization's wildlife preserve, the organization was entitled to a plenary trial of its claim that a satisfactory alternate route was available. The court explained:

. . . [the charitable organization's] devotion of its land to a purpose which is encouraged and often engaged in by government itself gives it a somewhat more potent claim to judicial protection against taking of its preserve or a portion of it by arbitrary action of a condemner. . . The difference is not in the principle but in its application; that is, the quantum of proof required. . . to show arbitrariness. . . should not be as substantial as that to be assumed by the ordinary property owner who devotes his land to conventional uses. Existence of an alternate route for a pipeline which will reasonably serve the utility's purpose, and which if utilized will avoid visiting on the condemnee's land the significantly disproportionate damage which the originally intended route would cause, is a matter which rationally relates to the issue of arbitrariness.

Id. at 137.

In a later appeal, however, the court affirmed the trial court's finding that the right of way sought by the company represented a reasonable exercise of judgment. *Texas E. Transmission Corp. v. Wildlife Preserves*, 230 A.2d 505 (N.J. 1967). *See also* Phillip E. Hassman, Annotation, *Eminent Domain: Right to Condemn Property Owned or Used by Privae Educational, Charitable, or Religious Organization*, 80 A.L.R. 3d 833 (1996) ("Property belonging to, or used by, a private educational or charitable organization has occasionally been found to be property devoted to a public use, and for that reason is not subject to being taken under an eminent domain power without legislative authority either express or implied.").

⁷¹ *Cf.* *United States v. Blackman*, 613 S.E.2d 442 (Va. 2005), discussed *supra* note 21, where, in holding that a non-statutory conservation easement held in gross was valid and enforceable, the Supreme Court of Virginia noted the strong public policy in Virginia in favor of land conservation and preservation of historic sites and buildings. The public investment in VCEA easements is substantial. This investment includes the provision of federal and state tax benefits to VCEA easement donors, the grant of tax-exempt status to land trusts that acquire such easements, and state attorney general and court oversight of the administration and enforcement of such easements on behalf of the public.

the public utility to exercise the right of eminent domain to acquire the necessary rights-of-way in the National Corridor, but in apparent deference to states' rights, this eminent domain power does not extend to "property owned by the United States or a State."⁷² In its report and order designating the Mid-Atlantic and Southwest Area National Corridors, the U.S. Department of Energy (DOE) explained:

The right of eminent domain would not apply to property owned by the United States or a State. Thus, if FERC were to issue a permit for a transmission facility across Federal or State property, the permit holder would still need to reach agreement with the Federal or State agency responsible for managing that property in order to obtain a right-of-way across that property.⁷³

It is not clear from SIETF if the term "property" as used in the phrase "property owned by . . . a State" is limited to land owned in fee, or also encompasses partial interests in land such as conservation easements. It also is not clear if the phrase "property owned by . . . a State" is limited to property owned by a state itself, or also encompasses property owned and managed on behalf of a state by one of its agencies, instrumentalities, or political subdivisions. The DOE provides only limited guidance regarding its interpretation of the meaning of the phrase "property owned by the United States or a State." As indicated in the quoted language above, the DOE considers "Federal or State property" that is managed by a federal or state agency to be exempt from the power of eminent domain delegated to a public utility under a FERC permit, and in informational materials on its website, it offers national and state parks as nonexclusive examples of such property.⁷⁴

Part III.B.1. below explains that the term "property" as used in the phrase "property owned by . . . a State" should be interpreted

⁷² See 16 U.S.C.S. § 824p(e)(1) (2008) ("In the case of a permit. . . for electric transmission facilities to be located on property *other than property owned by the United States or a State*, if the permit holder cannot acquire by contract, or is unable to agree with the owner of the property to the compensation to be paid for, the necessary right-of-way to construct or modify the transmission facilities, the permit holder may acquire the right-of-way by the exercise of the right of eminent domain. . .") (emphasis added).

⁷³ National Electric Transmission Congestion Report, 72 Fed. Reg. 56,992, 56,993 (Oct. 5, 2007).

⁷⁴ FINAL NATIONAL CORRIDOR DESIGNATIONS, *supra* note 8, at 2 ("[while] a federal permit would empower the project developer to exercise the right of eminent domain to acquire necessary property rights to build the facilities . . . that authority . . . would not apply to property owned by the United States or a State, such as a national or State park.").

to encompass partial interests in land such as conservation easements. Part III.B.2. then explains that open-space easements held by certain public bodies—namely, state agencies and entities that function as state agencies, such as the VOF—should be treated as “owned by . . . a State.” Accordingly, open-space easements held by state agencies and entities that function as state agencies, such as the VOF, should be treated as “property owned by . . . a State” and thus as exempt from the power of eminent domain delegated to a public utility under a FERC permit.

1. Conservation Easements as “Property”

There are a variety of compelling reasons to treat the term “property” used in the phrase “property owned by . . . a State” as encompassing not only land owned in fee (as is typically the case with respect to state parkland), but also conservation easements, which are partial interests in land.⁷⁵ First, there is nothing in SIETF suggesting that the term “property,” which is generally defined broadly to encompass all manner of rights and interests in land, is intended to be construed narrowly in this context to encompass only land owned in fee.⁷⁶

Second, courts have determined that conservation easements constitute property for other purposes. In *United States v. Welte*, for example, the U.S. District Court for the District of North Dakota held that a conservation easement granted to the United States for the maintenance of a tract of land as a waterfowl production area

⁷⁵ In forty-nine states and the District of Columbia conservation easements are defined by statute as interests in real property or land. *See, e.g.*, COLO. REV. STAT. ANN. § 38-30.5-102 (2006) (defining a conservation easement in gross as an interest in real property); VA. CODE ANN. § 10.1-1700 (2006) (defining an open-space easement as an interest in real property); VA. CODE ANN. § 10.1-1009 (2006) (defining a VCEA easement as an interest in real property). Illinois defines a conservation easement in its case law as a property interest distinguishable from the underlying fee that the legislature may give a condemning body the right to acquire. *See Libertyville v. Connors*, 185 Ill. App. 3d 317, 331 (1989).

⁷⁶ *See, e.g.*, BALLENTINE'S LEGAL DICTIONARY AND THESAURUS 531 (1995) (defining property as “[t]he right of a person to possess, use, enjoy, and dispose of a thing without restriction, i.e., not the material object itself, but a person's rights with respect to the object In the more common sense, real property and personal property; tangible property and intangible property; corporeal property and incorporeal property . . . Anything that can be owned”) BLACK'S LAW DICTIONARY 1252 (8th ed. 2004) (defining property as “[t]he right to possess, use, and enjoy a determinate thing. . . . In its widest sense, property includes all a person's legal rights, of whatever description. . . . Real property can be either corporeal (soil and buildings) or incorporeal (easements).”); 8 OXFORD ENGLISH DICTIONARY 1471 (1933) (defining property as “[t]he condition of being owned by or belonging to some person or persons . . . the right (esp. the exclusive right) to the possession, use, or disposal of anything. . .”).

constituted “property” of the United States for purposes of the section in the United States Code that provides that “no person shall knowingly disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States”⁷⁷ And in *Hardesty v. State Roads Commission*, the highest court in the state of Maryland held that a state agency’s creation of a scenic easement through condemnation involved the taking of “property” for which the owner of the burdened land was entitled to compensation.⁷⁸

Third, as noted in the introduction to Part III, it is well-settled that delegations of the power of eminent domain are strictly construed *against the grantee*, and this rule of construction generally applies with particular force when the power is granted to a private party, such as a public utility. Strictly construing the delegation of eminent domain power under SIETF *against a public utility grantee* means construing the term “property” broadly to encompass the variety of interests in real property that may be owned by a state, thus protecting those interests from the utility’s exercise of the federal power of eminent domain in the absence of express Congressional intent to subject them to such power.

Finally, from a policy perspective, there is little reason to treat state park land as “property owned by a State” and, thus, as exempt from a public utility’s exercise of the federal power of eminent domain under a FERC permit, but to deny the same protection to conservation easements when they are similarly owned by a state. Indeed, open-space easements held by the VOF and other public bodies appear to be no less important to Virginia than its park lands. The State is increasingly relying on such easements to protect the conservation and historic values of land within its borders.⁷⁹ It is also investing significant public funds in such easements

⁷⁷ *United States v. Welte*, 635 F. Supp. 388, 389 (D. N.D. 1982).

⁷⁸ *Hardesty v. State Roads Comm’n*, 343 A.2d 884, 877 (Md. 1975). For a detailed explanation of why conservation easements should be treated as compensable property for eminent domain purposes, see McLaughlin, *supra* note 27.

⁷⁹ See, e.g., VOF Easements/Acres by Year, *supra* note 25 and accompanying text (noting the number of open-space easements held by the VOF, the number of acres encumbered by such easements, and how such numbers have more than tripled over the last seven years). In his 2007 State of the Commonwealth Speech, Virginia Governor Tim Kaine stated:

In 1612, reflecting on the phenomenal natural beauty of Virginia, Captain John Smith said: ‘[H]eaven and earth never agreed better to frame a place for man’s habitation’. . . One of our greatest responsibilities is to protect our natural heritage so that our children and our grandchildren can look on these places with the same awe and wonder we feel. In honor of our 400th anniver-

through both the state income tax credit program (the cost of which was reported to be 231 million dollars as of May 2007⁸⁰) and the acquisition, monitoring, and enforcement of open-space easements by the VOF and other public bodies.

2. Property “Owned by a State”

Property “owned by . . . a State,” which is exempt from a public utility’s exercise of the federal power of eminent domain under a FERC permit, should be interpreted to include both: (i) property owned by a state but managed by one of its agencies or instrumentalities, and (ii) property owned and managed on behalf of the state by one of its agencies or instrumentalities. This is effectively acknowledged by the DOE in the informational materials on its website, which include state parks as one example of “property owned by . . . a State.” It can be assumed that the DOE is aware that a state’s control over its park land is normally exercised through a subsidiary instrumentality, and that ownership of the land is sometimes taken in the name of the state and sometimes in the name of the instrumentality.⁸¹

a. Open-Space Easements

(i) Open-Space Easements Held by State Agencies

In Virginia, all interests in property acquired by a state agency are taken in the name of the Commonwealth and are considered to be the property of the Commonwealth.⁸² And as explained by the

sary, I have made it a goal to protect 400,000 acres of open space by 2010. Together, we will reach that goal. Since January of 2006, we have conserved 93,000 acres, the vast majority of which has been preserved through the Virginia Outdoors Foundation—for whom this has been a record year.

See Va. Outdoors Found., History of the Virginia Outdoors Foundation, http://www.virginiaoutdoorsfoundation.org/VOF_about-history.php (last visited Jan. 9, 2008).

⁸⁰ Larry Durbin, Assistant Comm’r, Customer Service Dep’t of Va. Dep’t of Taxation, Presentation at Piedmont Environmental Council Easement Appraisal Seminar (May 20, 2005).

⁸¹ See RICHARD R. POWELL, POWELL ON REAL PROPERTY 1-10 (Michael Allan Wolf ed., 2003). Control over national parks is similarly exercised through a subsidiary instrumentality or agency of the federal government, the Department of Interior. See 43 U.S.C.S. § 1457 (2008). The National Park Service was created within the Department of the Interior to promote and regulate the use of the federal areas known as national parks. See 16 U.S.C. § 1 (2006).

⁸² See VA. CODE ANN. § 2.2-1148.B (2006) (“All conveyances of any interest in property to or from . . . any state department or agency. . . shall be in the name of the Commonwealth and shall designate the department, agency or institution in control or possession of the property in the following manner: ‘Commonwealth of Virginia, Department of (name of department, agency or institution, or other appropriate name).’ All interests in property

Virginia Attorney General, a state agency or instrumentality is “a mere agency of the sovereign . . . it serves as a subordinate or auxiliary body to provide a means toward the fulfillment of a state purpose.”⁸³ In other words, state agencies acquire and manage property on behalf of the state and for state purposes. Accordingly, property acquired and managed by state agencies in Virginia should be treated as property “owned by the State” and thus exempt from a public utility’s exercise of the federal power of eminent domain under a FERC permit.

For the reasons noted in Part III.B.1. above, open-space easements should be considered “property” for purposes of the phrase “property owned by . . . a State” used in SIETF. Accordingly, open-space easements that are acquired and managed by state agencies in Virginia, such as the Department of Conservation and Recreation (DCR),⁸⁴ should be treated as “property owned by . . . a State” and, thus, as exempt from a public utility’s exercise of the federal power of eminent domain under a FERC permit. If a public utility wishes to acquire a right-of-way to construct or enlarge transmission facilities on land encumbered by an open-space easement held by a state agency, it should be required to first obtain the consent of that agency.⁸⁵ In addition, as discussed in Part III.A.1, the state agency could grant such consent only upon satisfaction of the conversion or diversion requirements of the Open-Space Land Act and, in appropriate circumstances, the requirements applicable to fiduciaries under charitable trust principles.

(ii) *Open-Space Easements Held by the Virginia Outdoors Foundation*

The VOF is, in substance, an agency or instrumentality of the state of Virginia and should therefore be treated in a manner simi-

conveyed to any department, agency or institution of the Commonwealth, whether past or future, is and shall be the property of the Commonwealth.”).

⁸³ See 1979-1980 Va. Op. Att’y Gen. 5 (Jan. 30, 1980).

⁸⁴ See VA. CODE ANN. §§ 10.1-200 to -205 (2006). See *id.* § 2.2-600 (defining Departments as independent administrative agencies within the executive branch); *id.* § 56-46.1.H (referring to DCR as an “agency of the Commonwealth”). See also BLACK’S LAW DICTIONARY 68 (8th ed. 1999) (defining “state agency” as an executive or regulatory body of a state, including state offices, departments, divisions, bureaus, boards and commissions).

⁸⁵ Given that the construction and maintenance of steel towers to support high-voltage transmission lines would likely violate both the terms and purpose of an open-space easement, at least with respect to the strip of land subject to the right-of-way, the public utility could not proceed without acquiring the necessary rights from the holder of the easement and paying just compensation for the taking of those rights and any incidental injury or damages to the easement holder’s remaining rights. See *supra* notes 27, 28.

lar to a state agency. Although not a formal Department within the government of Virginia, as the Attorney General of Virginia explained in a 1995 Opinion, the VOF has many of the characteristics of a state agency.⁸⁶ The VOF is governed and administered by a board of trustees appointed by the Governor,⁸⁷ and it is required to submit an annual report on its activities to the Governor and the General Assembly.⁸⁸ Gifts to the VOF, whether personal or real property, are deemed gifts to the Commonwealth and therefore exempt from state and local taxes,⁸⁹ and such gifts are regarded as the property of the Commonwealth for the purposes of all tax laws.⁹⁰ The VOF has perpetual succession until dissolved by the General Assembly, in which event its properties pass to the Commonwealth.⁹¹ The VOF is authorized to promulgate regulations in accordance with the Administrative Process Act.⁹² The Virginia Attorney General's office handles the VOF's legal affairs, and in the deeds of gift conveying open-space easements to the VOF, the VOF identifies itself as "an agency of the Commonwealth of Virginia."⁹³ Moreover, the VOF fits within the Virginia Attorney General's definition of an agency or instrumentality of the State, in that it "serves as a subordinate or auxiliary body to provide a means toward the fulfillment of a state purpose"⁹⁴—i.e., the preservation of natural, scenic, historic, scientific, open-space, and recreational areas throughout the Commonwealth.⁹⁵ In other words, the VOF acquires and manages open-space easements on behalf of the state and for state purposes.

Interpreting the phrase "property owned by . . . a State" to include property owned by the VOF would also be consistent with the well-settled rule of construction that delegations of the power

⁸⁶ See 1995 Va. Op. Att'y Gen. 39 (Jan. 1995) (opining that the Virginia Outdoors Foundation is a "public body" for purposes of the Open-Space Land Act in part because it has many characteristics of a state agency). See also 1979-80 Va. Op. Att'y Gen. 5 (1980) (discussing the characteristics of a state agency as compared to a political subdivision).

⁸⁷ See 1995 Va. Op. Att'y Gen. 39 (Jan. 1995) (citing VA. CODE ANN. § 10.1-1800).

⁸⁸ See *id.* (citing VA. CODE ANN. § 10.1-1802).

⁸⁹ See *id.* (citing VA. CODE ANN. § 10.1-1803).

⁹⁰ See VA. CODE ANN. § 10.1-1803 (2006).

⁹¹ See 1995 Va. Op. Att'y Gen. 39 (Jan. 1995) (citing VA. CODE ANN. § 10.1-1801(1)).

⁹² See *id.* (citing VA. CODE ANN. § 10.1-1801(3) and explaining that the Administrative Process Act defines an agency as any "board or other unit of state government empowered by basic laws to make regulations").

⁹³ See VOF Easement Template, *supra* note 27.

⁹⁴ See 1979-1980 Va. Op. Att'y Gen. 5 (Jan. 30, 1980); see also *supra* text accompanying note 83.

⁹⁵ See VA. CODE ANN. § 10.1-1800-04 (2006) (stating the purpose of the VOF); see also *supra* text accompanying note 36.

of eminent domain are strictly construed *against the grantee*, and that such rule generally applies with particular force when the power is granted to a private party, such as a public utility.⁹⁶ Strictly construing the delegation of eminent domain power under SIETF *against a public utility grantee* means construing the phrase “property owned by . . . a State” broadly to encompass not only property owned by the State and its formally designated agencies, but also property owned on behalf of the State by entities that effectively function as agencies or instrumentalities of the State, such as the VOF. To do otherwise would be inconsistent with Congressional intent to exempt state property from a utility’s exercise of the federally-delegated power of eminent domain.

Open-space easements held by the VOF should therefore be exempt from a public utility’s exercise of the federal power of eminent domain under a FERC permit. A public utility wishing to acquire a right-of-way to construct or enlarge transmission facilities on land encumbered by such an easement should be required to obtain the consent of the VOF’s governing board, and that consent could be granted only after satisfaction of the conversion or diversion requirements of the Open-Space Land Act, and, in appropriate circumstances, the requirements applicable to fiduciaries under charitable trust principles.⁹⁷

(iii) *Open-Space Easements Held by other Public Bodies*

Whether open-space easements held by public bodies other than state agencies or the VOF—i.e., counties, cities, towns, park authorities, public recreational facilities authorities, soil and water conservation districts, community development authorities, and the Virginia Recreational Facilities Authority—should be treated as property “owned by the State” depends upon the circumstances. If one or more of those public bodies effectively functions as an agency or instrumentality of the state, then its open-space easements, like those of the VOF, should be exempt from the exercise of such condemnation power.

There also is some authority for the proposition that property under the care and control of a political subdivision of a state, such as a county, is held by such entity in trust for the benefit of the people of the entire state and, thus, as an agent of the state.⁹⁸ This

⁹⁶ See *supra* introduction to Part III.

⁹⁷ See *supra* Part III.A.1.

⁹⁸ See *County of Marin v. Superior Court of Marin County*, 349 P.2d 526, 530 (Cal. 1960):

would seem to be the case with respect to open-space easements, the conservation and historic benefits of which tend to benefit the public generally, rather than just the inhabitants of the locality in which the encumbered land is located.⁹⁹ In addition, strictly construing the delegation of eminent domain power *against a public utility grantee* arguably means construing the phrase “property owned by . . . a State” broadly to encompass any property owned by or on behalf of the State, whether such ownership is direct or through a state agency, instrumentality, *or* political subdivision. On the other hand, another provision of the Federal Power Act,¹⁰⁰ which relates to the development of water power and resources, illustrates that when Congress wishes to exempt both property owned by a state *and* property owned by the state’s political subdivi-

. . . all property under the care and control of a county is merely held in trust by the county for the people of the entire state. The county is merely a political subdivision of state government, exercising only the powers of the state, granted by the state, created for the purpose of advancing ‘the policy of the state at large. . .’ The county holds all its property, therefore, not just highway easements, as agent of the state.

Cf. 1 McQUILLIN MUNICIPAL CORPORATIONS § 2.09 (3d ed. 2004):

The purposes of municipal corporations. . . are twofold: the one to assist in the government of the state as an agent of the state, often referred to as an arm of the state, and to promote the public welfare generally; the other to regulate and to administer the local and internal affairs of the territory which is incorporated, for the special benefit and advantage of the urban community embraced within the corporation boundaries. . . When acting in their public or governmental capacity, municipal corporations are an agency of the state for conducting the affairs of government. . . in their public or governmental capacity they act as the agent of the state for the benefit and welfare of the state as a whole, but when acting for the peculiar and special advantage of their inhabitants they act in a private or proprietary capacity. When acting in their private or proprietary character, they are a separate entity acting for their own purposes, and not a subdivision of the state.

⁹⁹ For example, the protection of agricultural lands, wildlife habitat, scenic views, and watersheds can result in widespread benefits to the public. *See, e.g.,* Gretchen C. Daily, *Introduction: What Are Ecosystem Services?*, in *NATURE’S SERVICES, SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS* 3-4 (Gretchen C. Daily ed., 1997) (describing “ecosystem services” as the conditions and processes through which natural ecosystems, and the species that make them up, sustain and fulfill human life). In addition, conservation easements protecting historic buildings and sites typically grant the general public limited access to the property. *See, e.g.,* Va. Dep’t of Historic Res., *Historic Preservation Easements: Terms and Conditions*, http://www.dhr.virginia.gov/easement/easement_terms.htm (last visited Jan. 9, 2008).

¹⁰⁰ SIETF is also a provision of the Federal Power Act. *See* Energy Policy Act of 2005 § 1221(a), Pub. L. 109-58, 119 Stat. 594 (codified at 16 U.S.C.S. § 824p (2008)) (adding Section 216 to the Federal Power Act).

visions from the exercise of a federally delegated power of eminent domain, it will state so expressly.¹⁰¹

Even if an open-space easement held by a public body is deemed to be subject to the federal power of eminent domain delegated to a public utility under a FERC permit, however, the prior public use doctrine (sometimes referred to in the context of federal condemnation proceedings as the rule of implied necessity) may operate to preclude its condemnation. In *Davenport v. Three-Fifths of An Acre of Land*, the court described this doctrine as follows:

[I]f the condemner to whom the power of eminent domain has been delegated, such as a municipality or a private corporation . . . seeks to exercise the power with respect to property already devoted to a public use, the general rule is that where the proposed use will either destroy such existing use or interfere with it to such an extent as is tantamount to destruction, the exercise of the power will be denied unless the Congress has authorized the acquisition either expressly or by necessary implication. Such an acquisition cannot be made under a general delegation of the power of eminent domain from the Congress unless it can be clearly inferred from the nature and situation of the proposed work, and from the impracticability of constructing it without encroaching on land already used by the public, that the Congress intended to authorize such property to be taken.¹⁰²

Open-space easements are a species of property already devoted to a public use—the protection of the conservation or historic values of the encumbered land for the benefit of the public. In addition, in many cases a public utility's proposed use of land encumbered by an open-space easement will either destroy such existing use or interfere with it to such an extent as to be tanta-

¹⁰¹ Pursuant to 16 U.S.C.S. § 814 (2008), the Secretary of Energy can delegate to certain parties the right to acquire property necessary for the construction and maintenance of dams and reservoirs through the use of eminent domain. However, this eminent domain power cannot be used to acquire property that before October 24, 1992, was “owned by a State or a political subdivision thereof” and was part of a public park, recreation area, or wildlife refuge established under State or local law. Property owned by a State or political subdivision thereof that is part of a public park, recreation area, or wildlife refuge established under state or local law on or after October 24, 1992, may be acquired by eminent domain only after the holding of a public hearing and a finding that the taking will not interfere or be inconsistent with the purpose for which such property is owned.

¹⁰² *Davenport v. Three-Fifths of An Acre of Land*, 147 F. Supp. 794, 800 (S.D. Ill. 1957). See also *Camden County v. Union Elec. Light & Power Co.*, 42 F.2d 692 (C.D. Mo. 1930). See generally NICHOLS ON EMINENT DOMAIN, *supra* note 45, 1A-2, § 2.17 (describing the prior public use doctrine).

mount to destruction, at least with respect to the strip of land subject to the right-of-way.¹⁰³ Accordingly, the delegation of the federal power of eminent domain to a public utility under a FERC permit may not be deemed exercisable with respect to land encumbered by an open-space easement unless it can be clearly inferred from the nature of the proposed transmission facilities and the impracticability of constructing those facilities without encroaching on such land that Congress intended to authorize the taking of such land.¹⁰⁴

b. VCEA Easements

While VCEA easements should be treated as “property” for the reasons discussed in Part III.B.1. above, because such easements are acquired and managed by charitable corporations rather than state agencies or entities that function as state agencies, they are not property “owned by. . . a State.” Accordingly, such easements may be subject to a public utility’s exercise of the federal power of eminent domain under a FERC permit. As noted in Part III.A.2, however, land trusts holding VCEA easements could attempt to defend those easements on the basis that the easements (and the lands they encumber) are already devoted to a public use.

¹⁰³ See McLaughlin, *supra* note 27. See also *Minnesota Power & Light Co. v. State*, 224 N.W. 164 (Minn. 1929), which involved a power company’s proposed taking of a strip of land running through a state park for electric transmission facilities. The strip was to be fifty feet wide and three-fourths of a mile long; all trees, shrubs, and brush were to be removed from the strip; four or five tower structures carrying a power line were to be erected on the strip; timber outside of the strip within falling reach of the line was to be removed; guy wires at the towers were to extend beyond the strip and timber was to be cleared away for such wires; and power company employees were to be given the right to access the strip for all necessary construction, repairs, maintenance, and inspection of the line. *Id.* at 166-167. The court determined that the proposed line would be inconsistent with the purpose of maintaining the land as a park; materially interfere with the use of the park, especially in view of the careful provisions made by the legislature for preserving the park land from injury or interference; and would detract from the beauty and usefulness of the park and destroy trees, shrubs, and plants therein. *Id.* at 167. Accordingly, the court applied the prior public use doctrine and determined that there was no express or implied statutory authority for the proposed taking. *Id.*

¹⁰⁴ In *Minnesota Power*, the court noted: “as interference with parks, cemeteries, public buildings and property segregated and devoted to the use of public institutions can generally be avoided by a deviation in route, authority to encroach upon such property will not be implied.” *Id.* at 166. See also NICHOLS ON EMINENT DOMAIN, *supra* note 45, 1A-2 § 2.17[1] (“Since tracts used for parks, public buildings, cemeteries and [other] public purposes can usually be avoided by a slight deviation from the desired course, authority to encroach upon such property will not be inferred from a general grant of the power of eminent domain for the purpose of laying out ways For the same reasons, power to take land for purposes other than ways will not be construed so as to justify the taking of ways or tracts used for any other public purposes”).

IV. SUMMARY

The following table summarizes the extent to which public utilities should and should not be deemed to have the right to exercise the power of eminent domain delegated to them under state or federal law to condemn conservation easements in Virginia.

	Open-Space Easements Held by Public Bodies	VCEA Easements Held by Land Trusts
Virginia Law	Public utilities should not be deemed to have the right to exercise the power of eminent domain delegated to them under state law to condemn open-space easements held by any public body. ¹⁰⁵	Public utilities may have the right to exercise the power of eminent domain delegated to them under state law to condemn VCEA easements held by land trusts. ¹⁰⁶
Federal Law	Public utilities should not be deemed to have the right to exercise the power of eminent domain delegated to them under SIETF to condemn open-space easements held by state agencies or entities that function as state agencies, such as the VOF. ¹⁰⁷	Public utilities may have the right to exercise the power of eminent domain delegated to them under SIETF to condemn VCEA easements held by land trusts. ¹⁰⁸

V. CONCLUSION

The public is investing substantial financial and other resources in conservation easements and the significant and often unique and irreplaceable conservation and historic values they protect. At the

¹⁰⁵ As discussed in *supra* Part III.A.1, the Open-Space Land Act should preclude the condemnation of open-space easements under state law, and such easements should be extinguishable only upon satisfaction of: (i) the conversion or diversion requirements of the Open-Space Land Act and (ii) in appropriate circumstances, the requirements applicable to fiduciaries under charitable trust principles.

¹⁰⁶ See *supra* Part III.A.2 (discussing the ambiguous eminent domain provision in the Virginia Conservation Easement Act and a possible basis on which to defend against condemnation).

¹⁰⁷ As discussed in *supra* Parts III.B.1. and 2.a.(i), (ii), open-space easements held by state agencies and entities that effectively function as state agencies, such as the VOF, should be treated as “property owned by . . . a State” and, thus, as exempt from a public utility’s exercise of the federal power of eminent domain under a FERC permit. Accordingly, such easements should be extinguishable only upon satisfaction of: (i) the conversion or diversion requirements of the Open-Space Land Act and (ii) in appropriate circumstances, the requirements applicable to fiduciaries under charitable trust principles. With regard to open-space easements held by public bodies other than state agencies or the VOF, see *supra* Part III.B.2.a(iii).

¹⁰⁸ See *supra* Part III.B.2.b. (noting a possible basis on which to defend against condemnation).

same time, land encumbered by conservation easements is likely to be a natural target for condemnation because it is largely undeveloped, and condemning authorities generally prefer undeveloped land due to the political difficulties associated with locating public works projects (particularly unpopular projects such as high-voltage electric transmission towers) in populated areas. If we do not require condemning authorities to accord any weight to the protected status of easement-encumbered land when considering condemnation alternatives, we risk subverting the strong public policy in favor of the use of conservation easements as a land protection tool through the condemnation process. Alternatively, a blanket prohibition on the condemnation of easement-encumbered land would be unwise given that there will be cases where the public interest clearly warrants the taking of such land.

Whether the law currently accords too much or too little protection to open-space easements or VCEA easements is impossible to fully evaluate in a short article. Indeed, the appropriate level of statutory or judicial protection from condemnation that should be accorded to conservation easements is likely to be the subject of much debate as undeveloped land becomes mores scarce and the percentage of that land that is encumbered by conservation easements grows. At this point, however, at least one message should be clear: it makes little sense to expend enormous public resources on the acquisition of conservation easements as conservation and historic preservation tools if, at the end of the day, these easements and the land they encumber become the path of least resistance for condemning authorities.

