



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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September 20, 2013

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Mark C. Popovich, Esquire
County Attorney, County of Isle of Wight
Post Office Box 80
17090 Monument Circle, Suite 128
Isle of Wight, Virginia 23397

Dear Mr. Popovich:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.¹

Issues Presented

You inquire as to whether the deed by which the Commonwealth of Virginia conveyed Fort Boykin to Isle of Wight County entitles the Commonwealth to reclaim title to the property if the County has failed to maintain and preserve a specific dwelling located thereon in accordance with the requirements of a covenant within the deed. In addition, you inquire whether the deed entitles the Commonwealth to reclaim title to the property as a result of that dwelling having been deemed a total loss as a result of a recent fire.

Response

It is my opinion that the deed obligated Isle of Wight County to maintain and preserve the dwelling in good condition, including to take reasonable measures to protect it from catastrophic loss. It is further my opinion that the county's failure to maintain and preserve the dwelling does not give rise to a right of entry and reverter under the deed, so as to entitle the Commonwealth to reclaim title to the Fort Boykin property.

Background

On August 21, 1974, Sarah Elizabeth Jordan conveyed to the Commonwealth of Virginia, Department of Conservation and Economic Development, Division of Parks, (a predecessor agency to the current Department of Conservation and Recreation or "DCR") some 14.43 acres of real property generally referred to as "Fort Boykin." In accordance with authority granted by the General Assembly, DCR subsequently conveyed the Fort Boykin property by deed to the surrounding locality, Isle of Wight County (the "County").²

¹ You have made two opinion requests on related topics, and my responses to them are consolidated into this opinion.

² See 1998 Va. Acts ch. 41.

In your opinion request and the accompanying materials, you relate that the residential dwelling on the property, formerly the home of Sarah Elizabeth Jordan, had fallen into substantial disrepair. As of April 24, 2012, the dwelling suffered from the effects of termite damage, foundation damage due to improperly sized floor joists, and water leakage around windows. Then, on March 20, 2013, an accidental fire severely damaged the dwelling. According to the Fire Scene Examination Report issued by the Virginia State Police, the dwelling suffered such damage that the cost to repair the structure will equal or exceed its value.³

Applicable Law and Discussion

DCR conveyed Fort Boykin to the County pursuant to a Deed of Conveyance, dated January 21, 1999. The deed sets forth the obligations of the County and enumerates four distinct covenants “which shall run with the land and be binding upon” the County.⁴ One of the four covenants requires that “the existing dwelling or farm house on said property, formerly the home of Sarah Elizabeth Jordan, shall be maintained and preserved in good condition.”⁵

Courts will not look beyond the four corners of a deed when the language is clear, unambiguous, and explicit.⁶ Consistent with the plain definition of the term, the Supreme Court of Virginia has found the word “maintenance” to mean, “to preserve or to keep ‘in a state of repair,’ and ‘repair’ means to fix or ‘restore what is torn or broken.’”⁷ Moreover, the concomitant obligation to “preserve” may extend to taking reasonable measures to protect an object; a former opinion of this office relied on that word’s plain definition to find the imposition of an obligation, “to keep safe from injury, harm, or destruction.”⁸

³ The report’s narrative attachment concluded that

The area of origin for the fire occurred in the kitchen, around the area of the panel box. This is where the heaviest fire damage was found in the in the kitchen. A distinct fire pattern was noted on the wall around the panel box. A hole was seen on the wall where the panel box was originally mounted. The interior of the panel box showed signs of arcing to the wiring. The cause of the fire is found to be accidental. The damage surrounding the panel box and the signs of arcing in the panel box show the most probable cause to be an electrical malfunction.

⁴ Deed of Conveyance between the Commonwealth of Virginia, Department of Conservation and Recreation, and Isle of Wight County, Instrument #99-5244, recorded Sept. 29, 1999, in the Office of the Circuit Court Clerk, Isle of Wight County, at Page 41.

⁵ The covenants require that

(1) Fort Boykin, including its breastworks and other remaining physical features, shall be properly maintained and preserved as an ancient fort in keeping with prudent preservation practices for a historic fort of this type; (2) a bronze memorial plaque . . . shall be maintained on the grounds of Fort Boykin; (3) the existing dwelling or farm house in said property, formerly the home of Sarah Elizabeth Jordan, shall be maintained and preserved in good condition; and (4) the 14.43 acres of real property herein conveyed, including the Fort, shall be used, properly maintained and regularly kept open to the public at reasonable times and subject to such reasonable rules and regulations, as determined by the Grantee, for recreational and park use.

Id.

⁶ Forster v. Hall, 265 Va. 293, 301, 576 S.E.2d 746, 750 (2003).

⁷ *Id.*

⁸ See 1977-79 Op. Va. Att’y Gen. No. 61, 62 (citing *Webster’s Seventh Collegiate Dictionary* (1972)); see also MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 920 (10th ed. 2001), wherein the verb “preserve” is defined as, “to keep safe from injury, harm or destruction: PROTECT . . . to keep . . . free from decay . . . MAINTAIN”.

Based upon the facts that you provide, and for the purposes of this opinion, it appears that the County breached the covenant to maintain and preserve the dwelling in good condition when it failed to prevent or repair the damage related to termite infestation, improperly sized floor joists, and water leakage around windows, all of which disrepair was evident in 2012.⁹ Because the accidental fire appears to have arisen from an electrical malfunction of undetermined cause, upon the facts provided I cannot herein conclude whether or not the County breached its covenant obligation to take reasonable measures to protect the dwelling from catastrophic loss.

With respect to covenants within the deed, it further contains conditions subsequent, the breach of which trigger a right of DCR, on behalf of the Commonwealth, to take steps to reclaim title to the Fort Boykin property through a right of entry and reverter:

In the event that Fort Boykin, including its breastworks and other remaining physical features, are not properly maintained and preserved as an ancient fort, or in the event that all of said property is not used as a public park or for public park purposes or is not maintained and regularly open for public recreational and park use, then all right, title and interest in and to the said property shall revert to [DCR], which reverter interest shall entitle the Commonwealth to immediate right of entry and control in the event of a breach or violation of any of said conditions.^[10]

At common law, as in this deed, a *covenant* may be coupled with a *condition subsequent*, and a breach of that condition may enable the grantor to enforce a forfeiture of the grantee's fee simple title.¹¹ Upon breach, the grantor may choose to enforce the covenant by seeking legal damages or specific performance thereof, or to enforce the condition by seeking forfeiture of the grantee's title.¹² However, when such *possibility of reverter* exists, it is not self-executing upon breach of the condition subsequent; instead, title to the property remains with the grantee unless and until the grantor takes appropriate action to enforce it through exercising a *right of entry* in an action of *ejectment*.¹³ Such forfeitures are not favored at common law, and the terms of conditions subsequent "are strictly construed, because they are calculated to defeat a vested estate and give rise to a situation by which the grantor can again obtain the granted property."¹⁴ The intent of the condition subsequent respecting forfeiture must be clear,¹⁵ and "a

⁹ I note that an obligation to maintain a structure generally does not include an obligation to make improvements upon it. *See, e.g.* *Montgomery v. Columbia Knoll Condo. Council*, 231 Va. 437, 439, 344 S.E.2d 912, 913 (1986). Nevertheless, the breach of a deed covenant may give rise to an election to claim for legal damages or for specific performance. *See Neal v. State-Planters Bank & Trust Co.*, 166 Va. 158, 164-65, 184 S.E. 203, 205-206 (1936); and *see Adams v. Seymour*, 191 Va. 372, 61 S.E.2d 23 (1950).

¹⁰ Deed of Conveyance, *supra* note 4.

¹¹ *Neal*, 191 Va. at 164-65, 184 S.E. at 205-206. *See also* 2 Thompson on Real Property §§ 20.01 through 20.05 (2004)

¹² *Id.*

¹³ *Id.*, and *see Commonwealth Transp. Comm'r v. Windsor Indus., Inc.*, 272 Va. 64, 78-9, 630 S.E.2d 514, 520-21 (2006); and *Pence v. Tidewater Townsite Corp.*, 127 Va. 447, 452-55, 103 S.E. 694, 695-96 (1920). *See also* VA. CODE ANN. § 8.01-131 (2007), *et seq.* (ejectment).

¹⁴ *Roadcap v. Rockingham Cnty. Sch. Bd.*, 194 Va. 201, 205-207, 72 S.E.2d 250, 253 (1952); and *see disc'n Copenhagen v Pendleton*, 155 Va. 463, 477-80, 155 S.E. 802, 806-807 (1930).

¹⁵ *Epperson v. Epperson*, 108 Va. 471, 475, 62 S.E. 344, 346 (1908).

party who insists upon a forfeiture of an estate for breach of a condition must bring himself clearly within the terms of the condition.”¹⁶

A careful reading of the deed reveals that none of its conditions subsequent relate specifically to the covenant to maintain and preserve in good condition the dwelling on the Fort Boykin property. Instead, by their unambiguous language, those conditions pertain only to the covenants requiring satisfactory maintenance and preservation of the ancient fort and its appurtenances, and the public recreational and park use of the Fort Boykin property as a whole. Therefore, I conclude that the County’s apparent breach of the covenant to maintain and preserve the dwelling did not trigger the deed’s right of entry and reverter provisions.¹⁷

Conclusion

Accordingly, it is my opinion that the deed obligated Isle of Wight County to maintain and preserve the dwelling in good condition, including to take reasonable measures to protect it from catastrophic loss. It is further my opinion that the county’s failure to maintain and preserve the dwelling does not give rise to a right of entry and reverter under the deed, so as to entitle the Commonwealth to reclaim title to the Fort Boykin property.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II
Attorney General

¹⁶ Peoples Pleasure Park Co. v. Rohleder, 109 Va. 439, 445, 61 S.E. 794, 796 (1908), *reh'g denied*, 109 Va. 439, 63 S.E. 981 (1909) (citing “Dev. on Deeds, sec. 973 and note”).

¹⁷ As discussed above, a breach of the covenant pertaining to the dwelling’s proper maintenance and preservation entitled DCR to seek damages at law against the County, however, the structure’s total loss by fire of indeterminate cause obviated any putative right to seek specific performance of the covenant’s obligations.