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CONDEMNATION CHANGED (PERMANENTLY?) IN VIRGINIA

BY TIMOTHY R. HUGHES, ESQUIRE



On November 6, Virginia voted by a nearly 3-1 margin to amend the state constitution and drastically change eminent domain law. The constitutional amendment may ultimately be the source of quite a few unintended consequences in the future.

The Existing Law

The Constitution of Virginia, like the United States Constitution, already barred governmental entities from taking private property for public use without just compensation. The Virginia Constitution previously stated that the General Assembly would define "public uses." Existing statutes passed by the General Assembly made clear:

- No more private property could be taken than was necessary to achieve the stated public use; and
- Takings were not permitted for matters where the primary purpose was private financial gain, private benefit, an increase in tax base or tax revenues, an increase in employment, or economic development.

The Constitutional Changes

The Constitutional Amendment enshrined some existing statutory elements with constitutional level fiat. The Amendment also added some new elements as well.

- Public use is no longer to be defined by the General Assembly, and the private use language above was added to the Virginia Constitution;
- No more private property could be taken than was necessary to achieve the

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stated public use, adding this language to the Virginia Constitution;

- The Virginia Constitution now places the burden firmly on the condemnor to prove public use with no presumption;
- The language now bars not just the “taking” of property without compensation, but also the “damaging” of property; and
- “Just compensation” must include not just the value of property taken, but also lost profits, lost access, and damages to the residue.

What are the Impacts?

First, it likely just got a lot harder and more expensive to solve the transportation problems in Northern Virginia. Acquisition of right of way access is a major cost component in our road construction expenses. Forced to pay for lost profits and residual damages, VDOT’s current funding woes are likely only made worse by this change.

The change to allow fights over “damages” to property triggering a taking is likely to spawn substantial and unpredictable litigation. As with the residual damages, this will add uncertainty to land acquisition costs for right of way and make VDOT projects even harder to advance. The types of claimants asserting that their property is “damaged” by governmental action are probably only limited by the creativity of their lawyers.

Finally, changing this amendment in the future will be very hard. Passing a constitutional amendment requires passage through the General Assembly

twice with identical language and an intervening election between the two votes. That effort must be followed by adoption by the voters. This amendment was mostly ignored by the business community who advocated en masse against the passage on the second go round, only to be rebuffed by legislators who did not want to explain their positive votes the first time.

We will have to see in the future whether the amendment imposes even further funding burdens on our transportation infrastructure. One thing is certain – if there are problems with this change, they will be virtually impossible to fix after passage of this amendment.

Timothy R. Hughes is a Shareholder in the law firm of Bean, Kinney & Korman in Arlington, Virginia and lead editor of the firm’s blog at <http://www.valanduseconstructionlaw.com>. He represents clients in construction and commercial litigation, and corporate, contracts, and general business matters. He can be reached by e-mail at thughes@beankinney.com and by phone at 703-525-4000.

IT’S A FAMILY AFFAIR: FAMILY SUBDIVISION ORDINANCES

BY LAUREN K. KEENAN, ESQUIRE



The process of subdividing a lot is taking one existing lot and dividing it into two or more lots. Subdividing a large lot into several smaller lots can add value to the existing property (the “Parent Lot”) and is a common practice of land developers looking to maximize returns on a piece of land.

The subdivision process is typically governed by the subdivision ordinance of the county or city where the land is located. All subdivision ordinances have specific

requirements that must be met (such as minimum lot size of subdivided lots, frontage requirements, etc.). Generally speaking, such ordinances are in place to add uniformity to the subdivision process and ensure the subdivided lots conform with one another.

There may be times when a property cannot qualify for subdivision under the general subdivision ordinance because it cannot meet all of the requirements within the subdivision ordinance. For example, consider a lot that is very narrow and long. If subdivided, both subdivided lots could not meet the necessary zoning requirements within the general subdivision ordinance. In such cases, a family subdivision ordinance may provide an alternative avenue to families interested in subdividing an existing lot for use by a family member or as a strategy to create additional value for future generations.

The family subdivision first came about as part of the agrarian tradition of family farmers providing lots on their own lands for their children and their children's family. This was necessary because most of the family was dependent on the land for their livelihood, and they worked the land together so it was beneficial to live in close proximity to one another. Today, this practical reason for a family subdivision ordinance no longer exists in most places, but the ordinances remain and continue to benefit families.

Virginia Code Section 15.2-2244 authorizes family subdivisions and provides that "in any county a subdivision ordinance shall provide for reasonable provisions permitting a single division of a lot or parcel for the purpose of sale or gift to a member of the immediate family of the property owner, including family member's spouse, subject only to any express

requirement contained in the Code of Virginia and to any requirement imposed by the local governing body that all lots of less than five acres have reasonable right-of-way of not less than 10 feet or more than 20 feet providing ingress and egress to a dedicated recorded public street or thoroughfare." Most localities in Virginia have a family subdivision ordinance in place, though they vary from one locality to the next. These ordinances are generally less restrictive than conventional subdivision laws.

There are several limitations that generally apply to family subdivision ordinances and it's important to be aware of what they are in your locality. Virginia Code provides that under a family subdivision ordinance a lot can only be subdivided for the limited purpose of sale or gift to a member of the owner's immediate family. The definition of immediate family might also vary depending on where you live, but Virginia Code defines it as any person who is a natural or legally defined offspring, stepchild, spouse, sibling, grandchild, grandparent or parent of the owner. A locality may choose to expand their definition of "immediate family" by including aunts, uncles, nieces and nephews.

Family subdivision ordinances only permit one such division per family member. Additionally, a locality may choose to include in its subdivision ordinance a requirement that any land to be subdivided has been owned for at least 15 consecutive years by the current owner, and that the new property owner agrees to place a restrictive covenant on the subdivided property to prohibit its transfer to a non-family member for a period of 15 years following the subdivision. Other limitations include affidavit requirements and warning label requirements for deeds. Such restrictions are generally intended to limit abuse of the family subdivision ordinance by those

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who might be only interested in circumventing the subdivision system.

It is important to look at the family subdivision ordinance in your specific locality to learn of any other specific limitations that might apply before deciding if this option may be right for you and your family. Family subdivision ordinances can be a useful tool to subdivide a lot and keep property within the family without having to meet all of the requirements of a general subdivision ordinance.

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