



Virginia Local Government Law

Proposed Constitutional Amendment on Eminent Domain: Cons and Pros

By: Andrew McRoberts. *Thursday, February 2nd, 2012*

The proposed eminent domain constitutional amendment is pending at the 2012 Virginia General Assembly. See 2012's bills on the amendment, **HJ 3** and **SJ 3**.

If these bills pass the proposed amendment in the same form as last year, the amendment will be on the ballot in Fall 2012 for voter approval. This blog, which until now has been silent on the topic, now weighs in as a source for information on the proposed amendment.

First, the con view.

Some have asserted that eminent domain authority can be (and is) set by statute, and a constitutional amendment is unnecessary. They note that the General Assembly has heavily amended the statutes authorizing eminent domain to address (and arguably over-address) the Connecticut-based Kelo case, thus making the amendment arguably unnecessary or at least premature, until the true impacts of the statutory amendments are known. Thus, "Virginia would be wise to allow the 2007 reforms to be fully implemented before pursuing any additional legislation for a problem that may no longer exist." **See Craig Wilson op end, "Eminent Domain Amendment Unnecessary in Virginia," published March 5, 2011.**

A major criticism of the proposed amendment is the cost to taxpayers. Additional moneys will be required to condemn anything, even for scenarios in which the public purpose is unquestioned, like a condemnation for a needed school or an improvement to a crowded intersection. Additional awards to landowners will be mandated for "lost profits" and "lost access", heretofore not recognized as a property right (except for a complete or "unreasonable" loss of access). The Roanoke newspaper said this: "State lawmakers must take a more discerning approach and defeat this amendment. The constitution should be reserved for long-standing principles, not used as a test tube for untried feel-good measures. This is one experiment Virginia taxpayers cannot afford." **See Roanoke Times editorial: "A Costly Over-Reach on Condemnation: A proposed constitutional amendment would force taxpayers to pay more for roads and utilities."**

Although there is likely no real way to know the total fiscal impact, or the impact on individual projects being delayed or canceled because of additional cost, the **official state fiscal impact study** estimates the annual cost to taxpayers would be \$36 million. This is due to requirement that new sources of damage awards never before recognized will be added — lost profits and lost access.

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“Lost profits” are not real property and therefore **not part of the condemned property**. They are incidental costs to a landowner’s business and very difficult to discern given the variety of factors in determining a profit. “Lost access” is typically not real property, either, as a **landowner only has a right to “reasonable” access to a public street**. The government’s police power to provide for safe, effective transportation for the public trumps any particular mode or route of access. The proposed amendment may make these non-realty business interests compensable in a taking of land for the first time.

Others have raised concerns about the wording and the harm that may befall the Commonwealth’s economic development efforts if a necessary access road or utility easement for a major potential user cannot be promised in a timely fashion (or at all). These concerns are not just from governments, they come from businesses as well. For example, the Northern Virginia Chamber Partnership — comprised of the Dulles Regional, Greater Reston and Loudoun County chambers of commerce — announced the formation of a broad coalition of business organizations across Virginia to oppose the proposed constitutional amendment regarding eminent domain. In a press release, Tony Howard, President and CEO of the Loudoun County Chamber of Commerce, stated that “all Virginians agree that private property rights are fundamental; however, the proposed constitutional amendment suffers from serious flaws that have the potential to stop critical infrastructure in its tracks and to jeopardize Virginia’s economic recovery. In the current economic climate, Virginia can ill afford to diminish its competitiveness with other states and reduce its ability to attract the investments that will create much needed jobs for Virginians.” You can **read more on Chamber of Commerce efforts to oppose the proposed amendment here**.

As noted, a large number of business-related organizations oppose the wording of the proposed amendment, and sent a letter to the members of the General Assembly on January 18, 2012, opposing passage. These organizations included American Council of Engineering Companies of Virginia (ASEC-VA), Apartment and Office Building Association of Metropolitan Washington, CenturyLink, Community Planning Partners, Greater Richmond Association for Commercial Real Estate, Hampton Roads Association for Commercial Real Estate, Home Builders Association of Virginia, NAIOP Northern Virginia, Northern Virginia Building Industry Association (NVBIA), Northern Virginia Chamber Partnership, Northern Virginia Transportation Alliance, Old Dominion Highway Contractors Association, Portsmouth Partnership, Prince William Chamber of Commerce, The Virginia Society – American Institute of Architects (VSAIA), Virginia Association for Commercial Real Estate, Virginia Association of Realtors, Virginia Beach Vision, Virginia Society of Professional Engineers (VPSE), Virginia Telephone Industry Association (VTIA) and Virginia Transportation Construction Alliance.

Hanover County Attorney and Legislative Liaison Sterling Rives has noted a number of concerns about the wording of the proposed amendment in an op ed published in the Richmond Times-Dispatch on January 9, 2012, “**Eminent Domain Amendment Needs More Work**.” He points out that there are some unintended pitfalls in the proposed amendment. He states that “the specific language and provisions of the pending proposal are seriously flawed. If approved as currently drafted, this amendment will cost Virginia taxpayers dearly and will severely hamper economic development in the commonwealth. A flawed constitutional amendment, once approved, is time-consuming and extremely difficult to remedy. The General Assembly owes it to the taxpayers to get this right.”

Another concern may be that, as proposed, the language of the actual constitutional amendment will not be on the ballot at all. **See HB 5 here. SB 240 is identical**. The actual constitutional amendment states in significant part:

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“That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use. Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking. The term “lost profits” and “lost access” are to be defined by the General Assembly. A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services. In all other cases, a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property. The condemnor bears the burden of proving that the use is public, without a presumption that it is.”

This language will **not** appear on the ballot. Instead, the ballot will only include the following question:

“Question: Shall Section 11 of Article I (Bill of Rights) of the Constitution of Virginia be amended to eliminate the General Assembly’s authority to define a public use for which private property may be taken or damaged and to provide that no private property shall be taken or damaged for a public use without just compensation to the property owner and that only so much of the property as is necessary to achieve the public use is taken or damaged?”

One can argue that this proposed ballot text is not fairly descriptive of the amendment’s actual language, let alone describe its various parts or legal effects. Several of the more problematic parts of the amendment described by Mr. Rives are not referenced in the ballot question at all. One might ask, do we trust the voters to know exactly what they are voting upon?

Now, the pros.

Virginia Attorney General Cuccinelli responded to some of the criticisms and made his case in favor of the proposed amendment in an official Attorney General’s Opinion, dated January 26, 2012. He opines, among other points, that compensation for lost profits will not be payable to a business owner if his land is not taken, and that, assuming the condemnor’s proposed use meets the new definition of “public use”, a condemnor can use condemnation to replace a sprawling development with a mixed use, compact one. Of course, that definition prohibits any condemnation if the “primary” use is to increase jobs or for economic development. You can find **his opinion here**.

The Attorney General has also **appeared before a House subcommittee to lobby** in favor of the proposed amendment. In response to concerns over the estimated \$36 million annual cost, he argued that this \$36 million annual cost is now absorbed by private business owners. He asserted that the current law was “morally wrong” not to compensate the business owners in these new ways.

In response to critics who complain that the public does not know how the terms “lost access” and “lost profits” will be defined and how these will be determined, “companion bills” have been introduced to do so. These bills would provide the statutory basis for considering lost profits and lost access in a condemnation award, as well as define these terms as authorized in the proposed amendment. **See HB 597 here. See HB 1035 here. See SB 437 here.**

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Proponents of the proposed amendment argue that this is a logical step and necessary as the political pressure to protect individual property rights from eager governments begins to ebb, and criticizes local government as being opposed, essentially saying that local governments were opposed to the current statute and will always be opposed to eminent domain reform. Some even assert that conservatives and liberals alike should favor the proposed amendment. **See Barton Hinkle's column published in the Richmond Times-Dispatch on November 25, 2011.**

Many proponents see the constitutional amendment as simply enshrining existing property rights and call the opponent's concerns and arguments about soaring costs "hollow." See Delegate Mark Obenshain's commentary, **"Property Rights Need Constitutional Protection,"** published on January 22, 2012 in the Richmond Times-Dispatch. Others see this as a logical re-ordering of priorities and the first reconsideration of Virginians' constitutional property rights in a hundred years. See eminent domain lawyer Jeremy Hopkins' op ed, **"Debunking property rights amendment fears: Virginians need measure to temper eminent domain"** published in the Washington Times on January 22, 2012.

In summary, it appears that if this amendment takes effect, private landowners will gain new rights and new protections for existing rights, costs for public projects will rise significantly, private business owners will get more money in awards, condemnation will be made far more difficult in many cases, and condemnation will be unconstitutional even if for needed economic development that affects no one's home or business. No one truly knows the fiscal impacts of this proposal, or the ultimate legal effect of calling property a "fundamental right." Opponents are very concerned and point out that it would take years to amend the Virginia Constitution again if the impacts prove to be unaffordable or undesirable over time. Proponents say the opponents are alarmists on the impacts, and we need to protect private property rights and business owners and to this degree.

Whether this amendment is good or bad depends on who you ask, and if adopted, we will all know soon enough.

Tags: **condemnation, constitutional amendment, Eminent domain, Kelo, taking, Virginia General Assembly**

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