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LIEN FILING UPDATE: VIRGINIA MECHANIC'S LIENS GET EVEN HARDER

BY TIMOTHY R. HUGHES, ESQUIRE

As many contractors and lawyers know, filing a proper mechanic's lien in Virginia is quite difficult. Virginia law provides that a mechanic's lien must strictly comply with all of the provisions of the code. Because the lien recovery can circumvent typical limitations and allow parties to sue outside the contract chain, any technical failure in the lien filing can result in the entire lien being thrown out in court.

Over the last two sessions of the General Assembly, legislators in Richmond have tried to make an already difficult lien process even tougher. During the 2012 session, the General Assembly considered a bill that would have required contractors on all residential projects to transmit a written notice of intent to claim a lien 30 days before filing the lien memorandum in land records. Supposedly, a legislator upset about a lien filed on his own house project proposed the bill. While the bill initially passed the House by a 90-7 margin, it stalled in the Senate in 2012 and was continued to the 2013 session. Happily, the bill again stalled during the 2013 session, but it does demonstrate legislative aggressiveness against lien claims.

Unlike the first bill, another mechanic's lien bill was actually enacted by the General Assembly. Effective July 1, 2013, a lien claimant must now include the claimant's license number on a recorded memorandum of lien. Further, the bill included language expressly barring lien claims for work that is performed without a legal license where one is required.

The change in the law is clearly an effort to bar unlicensed contractors from not only filing suit, but also from asserting lien claims. Unfortunately, the change in the legal requirements and forms will catch a host of unsuspecting victims.

Contractors drafting their own liens, watch out. You need to update your forms and many will fail to do so. This will translate to a lot of avoidable failed lien claims. In the same vein, lawyers who fail to update their forms run the risk of having their clients' lien claims blown out purely on a technical failure. This area of law is already one that is highly complex, and it just got a little bit harder.

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ARLINGTON COUNTY RECONSIDERS PARKING RATIOS FOR COMMERCIAL SITE PLANS

BY LAUREN K. KEENAN, ESQUIRE

In 2012, the Arlington County Board directed county staff to investigate the effect of approving less parking for site plan office buildings and to determine methodologies to mitigate impacts attributable to approving lower parking ratios within the county.

In January 2013, Arlington County began hosting a working group to analyze the issue of parking. The working group meets monthly and includes representatives from the development and business communities, residents and county staff. The ultimate goal is to settle on a methodology that the board can use going forward when reviewing requests for parking space modifications within site plan projects.

Currently, Arlington County has a minimum parking requirement which developers must provide unless the county board approves a lesser amount of parking for the specific site plan project (which happens often). The county's proposal under consideration by the working group states that developers would pay the county a specific dollar amount for providing less parking than what is required under the "starting parking ratio" for the area in which their project is being built. The dollar amount of the average parking space remains a topic of discussion as does the payment structure (whether it will be a lump sum or annual payment) and whether or not a stepped up or escalated payment might be sought.

Urban areas across the country are requiring less parking to encourage residents to adopt a less car-dependent lifestyle and take advantage of alternative modes of transportation including biking, public transit, carpooling and car share programs like Zipcar. Similarly, the trend in Arlington County has been that developers request to build less parking than the ordinance requires. This is particularly common in areas near metro stations where lower parking ratios have previously been approved. Current standard site plan conditions already include measures to encourage multi-modal travel and incentivize the use of public transportation and other alternative commuting methods. Standard site plan conditions incorporate transportation demand management plans ("TDMs"). TDMs generally require monetary contributions to Arlington County Commuter Services, incorporation of bike parking and storage facilities, and delivery of free SmarTrip cards to employees, among other things. Often times, as part of the site plan process, developers are also asked to improve a bus stop or shelter or a section of sidewalk to improve pedestrian access to Metro. All of these efforts are intended to encourage a superior mode-split between residents driving, walking, biking and taking public transit. Some critics of the new policy are questioning if the newest proposals for further mitigation make sense in light of the other efforts currently in place.

Arlington County has demonstrated through past policies it's committed to encouraging better mode-splits and encouraging residents to drive less. However, is a policy requiring developers to provide a minimum number of parking spaces or pay a fine for offering less parking the best policy to encourage this behavior? Places like the District of Columbia and Fairfax County would surely say "no." In fact, the District and parts of Fairfax County have done the opposite. Rather than setting a minimum parking requirement and asking developers to pay if below it, these jurisdictions have set a maximum parking ratio and if a developer offers more parking, mitigation efforts might be required. By reducing the number of available parking spaces, the market price should adjust accordingly, and in turn, encourage price-sensitive residents to avail themselves of alternative transportation methods.

Under the proposed policy, a developer would have to pay Arlington County if they provided less parking spaces than required by the "starting parking ratio" for the specific area where the project was being built. The working group's discussions have focused on the following areas: Columbia Pike Commercial Nodes, CO-Rosslyn, Crystal City redevelopment area, Pentagon City metro station area and Crystal City outside redevelopment area, Rosslyn to Ballston metro station areas (except for CO-Rosslyn), and all other areas, and they have tried to set a starting ratio for each area. It has been suggested that the proposed starting ratio for CO-Rosslyn, Columbia Pike and Crystal City should be 1:1000, while the starting ratio for Rosslyn to Ballston Metro should be 1:630. If the end goal is to raise funds to offset increased demand on public transit resulting from less parking, then from a policy point of view, should one area of the county be treated differently than others?

The development community appears to be interested in the idea of providing less parking and receiving clearer guidance from the board on what to expect when applying for a modification of parking ratios. However, there are still many questions to be answered. What are the appropriate starting ratios? Should the mitigation efforts include a stepped escalation model? Where should the mitigation funds go? Would the funds be contributed to the area where the project is built or elsewhere? Also, by taking cars off the roads, some funds designated for street improvements should become available for other transit system improvements, such as trail improvements, bus upgrades and maintenance. How will that trade-off be appropriately quantified?

The Arlington County staff, along with the working group, intends to present its recommendations to the county manager this summer and hopes to have a board vote on the policy sometime thereafter. For more information on this process and to stay abreast of any changes on the horizon, visit the Arlington County website, Environmental Services, Commercial Parking Study homepage at http://www.arlingtonva.us/departments/EnvironmentalServices/dot/Parking/page88037.aspx.

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ZONING ORDINANCE REVISIONS AFFECTING ARLINGTON COUNTY'S BY-RIGHT OUTDOOR CAFÉS

BY MATTHEW G. ROBERTS, ESQUIRE

The more things change, the more they stay the same. Or at least that is the case if you plan to eat at any one of Arlington's 200-plus outdoor cafés.

On May 18, 2013, the Arlington County Board unanimously approved revisions to the Arlington County Zoning Ordinance that affect by-right outdoor cafés. These revisions codify many of established norms for by-right outdoor cafés that have developed over time and through the zoning administrator's interpretation of the zoning ordinance. At the same time, the revisions bring welcomed flexibility and clarity for Arlington's restaurant business community.

Arlington has regulated outdoor cafés since 1978, and the regulations have remained largely unchanged until now. Under the 1978 regulations, outdoor cafés were uses accessory to an established restaurant and permitted either by-right or through a special exception. However, the ordinance was largely devoid of specifics. For instance, it did not include a formal definition of "outdoor café." Many of the issues associated with this lack of clarity could be addressed through a special exception from the county board, but only if the outdoor café was located within a public right-of-way or easement for public use. Ultimately, the Arlington County Zoning Administrator issued an advisory memorandum in December 2010 defining "outdoor café" in an attempt to provide some guidance. This proved controversial; however, as the zoning administrator defined outdoor cafés as being "seasonal." The seasonality requirement was also incorporated into outdoor cafés established by special exception. In practice, this meant that outdoor cafés would be required to close for at least one season per year.

The resulting give-and-take between the Arlington County and the Arlington restaurant community culminated in the May 18th revisions to the zoning ordinance. The revisions, however, will only affect by-right outdoor cafés. According to county staff, the practices and procedures that have developed for special exception outdoor cafés (i.e. outdoor cafés within a public right-of-way or easements for public use) remain in place going forward.

The most important changes for by-right outdoor cafés were made to section 1 and section 31 of the Arlington County Zoning Ordinance. Under section 1, a formal definition for outdoor cafés was added, which applies whether the outdoor café is established by-right or through a special exception. An outdoor café is defined as an area located outside the exterior walls of a restaurant and containing portable seating and tables that are intended only for eating and drinking food and beverages the restaurant offers as part of its standard menu. Rooftops are excluded from this definition.

Important changes were also made to section 31 of the zoning ordinance. As before, outdoor cafés will be uses accessory to an established restaurant. They, therefore, must have fewer seats than the indoor section of the

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restaurant and cannot operate beyond the restaurant's normal business hours. They will also remain within a building setback, and they will not need to meet any additional parking requirements under the zoning ordinance.

However, unlike by-right outdoor cafés under the previous ordinance, the new law will only allow sound, audio, or visual entertainment to be visible or audible from outdoor cafés from 9 a.m. to 10 p.m. on Sundays through Thursdays and 9 a.m. to 11 p.m. on Friday and Saturday. This effectively incorporates timing restrictions into the new ordinance that are regularly used in special exception outdoor cafés by the Arlington County Board.

On the upside, and departing from the zoning administrator's interpretation, outdoor cafés will not be seasonal, except as the Arlington County Board may require through a special exception. As county staff explained, this change recognizes the impractical nature of a seasonality requirement. Enforcing the seasonality requirement can be difficult. More fundamentally, weather and seasonal changes naturally dictate when it is too inclement to open an outdoor café for customers to use. The new ordinance wisely gives restaurant owners the flexibility to determine when they should provide customers with access to the outdoor café, preventing popular space from going to waste when the weather is otherwise amenable.

In all, these changes do not deviate much from the norms Arlington's restaurant owners have grown accustomed to over the years. However, as Arlington's outdoor cafés continue to rise in popularity, the changes will provide some needed clarity in the zoning ordinance and flexibility for the restaurant community, while compromising on matters affecting the communities surrounding them.

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