



Major Changes in Virginia Eminent Domain Law on the Horizon

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On November 6, 2012, the voters of Virginia will have the opportunity to add an eminent domain amendment to the Constitution of Virginia. Virginia Attorney General Ken Cuccinelli has said that the amendment will have four specific results. First, it will include the right to private property as a fundamental right and specifically state types of takings that do not satisfy the Public Use Clause of Article I, Section 11 of the Virginia Constitution. Second, the amendment will provide that no more private property may be taken than is necessary to achieve the stated public use. Third, the amendment will place on the condemnor the burden of proving that the use is public, without a presumption that it is. Fourth, the bill will define "lost access" and "lost profits," and provide that takings for these purposes will be compensable as part of just compensation.

Background

Property rights have always enjoyed constitutional protection. The Constitution of Virginia states:

That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contract, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term 'public uses' to be defined by the General Assembly; . . .

Va. Const. Art. I, ? 11. The Fifth Amendment to the United States Constitution has a similar provision.

Though always fundamental, property rights protections have varied as the United States Supreme Court, in a series of three cases, dramatically expanded the types of takings that would satisfy the Public Use Clause. See *Berman v. Parker*, 348 U.S. 26, 34, 75 S. Ct. 98, 103 (1954) (providing the legislature almost complete autonomy in finding and determining public use and explaining that public use could be found in a transfer to a private owner); *Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 104 S. Ct. 2321, 2329 (1984) (stating that great deference will be given to the legislature in determining public use); and *Kelo v. City of New London*, 454 U.S. 469, 125 S. Ct. 2655 (2005). In *Kelo*, the Court allowed the City of New London to condemn the property of Susette Kelo and fourteen other landowners, where public use was found in a comprehensive development plan that did not specify the future uses of the properties being acquired. *Kelo*, 545 U.S. at 472, 125 S. Ct. at 2658. The Supreme Court's decision in that case sparked a period of nationwide enthusiasm regarding

property rights guaranties. Since *Kelo*, forty-two states have passed legislation to provide varying levels of increased protection for property owners.

Just seven months after the *Kelo* decision, Virginia first contemplated reform measures which would better define public use and just compensation. In 2007, the General Assembly passed a bill that narrowly defined public use to include only uses that fell into one of six described categories. Va. Code Ann. ? 1-219.1. The 2007 legislation also provided that no more private property could be taken than was needed for a particular project. *Id.*

After the 2007 reform measures, many in Virginia believed that any problems created by *Kelo* had been corrected. So, of what value is the 2012 amendment, and which, if any, of the four purported results of the amendment will change current Virginia law?

The Amendment's Four Results

1. *True Public Uses*

The amendment states, "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," Act of Apr. 9, 2012, ch. 684, 2012 Va. Acts ____, and adds, "[A] taking or damaging of private property is not for public use if the primary purpose 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." *Id.* In truth, adding this language to the Constitution will be inconsequential for the present time; the Virginia Code already lists private property as a fundamental right. Moreover, the Code also lists the types of takings that are sufficient to meet the criteria for public use. See Va. Code Ann. ? 1-219.1. The amendment, on the other hand, will list uses that do not meet the criteria for public use. Therefore, the primary purpose of the amendment is seemingly to protect the 2007 Code revision from change by future General Assemblies.

2. *No More Than is Needed for Public Use*

Similarly, the goal of ensuring that no more property is taken than is needed for the stated public use, while perpetually ensured with the passage of the constitutional amendment, is already present in Virginia law. The passage of the 2007 legislation provided that the condemnor would be limited in taking only that property necessary for the public use. See Va. Code Ann. ? 1-219.1(C).

3. *The Condemnor Bears the Burden of Proving the Use is Public*

As compared to the first two results of the amendment, shifting the burden of proving public use from the condemnee to the condemnor will be a major change in Virginia law. Currently, after the condemnor alleges in its petition in condemnation that a taking is for a public use, it is presumed to be so unless a challenge is raised by the condemnee. See *Hoffman Family, L.L.C. v. City of Alexandria*, 634 S.E.2d 722, 729 (Va. 2006). Should he do so, the condemnee bears a heavy burden of proof to overcome the presumption. If the amendment passes, the burden of proof will shift. The condemnor will bear "the burden of proving that the use is public, without a presumption that it is." Act of Apr. 9, 2012, ch. 684, 2012 Va. Acts ____. The change will likely result in more challenges by condemnees to the public use to be made with their property, probably extending the time and cost of eminent domain proceedings.

4. Profit and Access Losses are to be Included in Just Compensation

a. Lost Profits

The amendment states that "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." Act of Apr. 9, 2012, ch. 684, 2012 Va. Acts _____. In 2012, the General Assembly defined lost profits as:

[A] loss of business profits, subject to adjustment using generally accepted accounting principles consistently applied, from a business or farm operation for a period not to exceed three years from the date of valuation that is suffered as a result of a taking of the property on which the business or farm operation is located, provided (i) the business is owned by the owner of the property taken, or by a tenant whose leasehold interest grants the tenant exclusive possession of substantially all the property taken, or (ii) the farm operation is operated by the owner of the property taken, or by a tenant using for a farm operation the property taken, to the extent that the loss is determined and proven pursuant to subsection C of ? [25.1-230.1](#). This definition of the term 'lost profits' shall not create any new right or remedy or diminish any existing right or remedy other than to allow the body determining just compensation to consider lost profits in awarding just compensation if a person asserts a right to lost profits as an element of damage in a claim for compensation.

Act of Apr. 9, 2012, ch. 699, Va. Acts _____ (codified as amended at Va. Code Ann. ? 25.1-100).

Allowing for compensation for lost profits is a major change in Virginia law. Virginia courts have not allowed property owners to recover for business losses as just compensation for a taking. See *Ryan v. Davis*, 201 Va. 79, 82-83, 109 S.E.2d 409, 412-13 (1959) (stating business losses are non-compensable); see also *May v. Dewey*, 201 Va. 621, 632, 112 S.E.2d 838, 847 (1960); *Brown v. May*, 202 Va. 300, 308, 117 S.E.2d 101, 107 (1960); *Fonticello Mineral Springs Co. v. City of Richmond*, 147 Va. 355, 368, 137 S.E. 458, 462 (1927). Like the courts in many other states, Virginia courts have reasoned that lost profits are too speculative. Cf. *Kayo Oil Co. v. State*, 340 So. 2d 756, 759 (Ala. 1976) ("One is not entitled to compensation for loss of business due to the taking of land. Business profits are so remote from the market value of the land on which the business is located, that they are not proper indicia of the value of the land.") (citation omitted).

Though the amendment will add compensation for lost profits as an item to be included in a just compensation award, it leaves open the question of whether a track record of business success will be a necessary prerequisite of proof for such recovery. Therefore, Virginia courts may turn to other accepted law to answer that question. For example, Virginia tort law allows for lost profit recovery in certain cases where there is no history of earning or even where the business does not exist. Whether that law will be grafted into Virginia eminent domain law is yet to be decided if the amendment is enacted.

b. Lost Access

Companion legislation, already passed, defines lost access as:

[A] material impairment of direct access to property, a portion of which has been taken or damaged as

set out in subsection B of ? 25.1-230.1. This definition of the term 'lost access' shall not diminish any existing right or remedy, and shall not create any new right or remedy other than to allow the body determining just compensation to consider a change in access in awarding just compensation.

Act of Apr. 9, 2012, ch. 699, 2012 Va. Acts ____ (codified as amended at Va. Code Ann. ? 25.1-100).

Under current Virginia law, a landowner whose access to a public highway is changed by an eminent domain taking, but who is left with a reasonable alternative, may not recover as part of his just compensation award damages caused by such change of access. See, *VMJI No. 46-45*. If the pending amendment is passed, condemnation commissioners will apparently be allowed to consider any change in access to the property in awarding just compensation. The result will be greater just compensation awards and settlements.

Virginia's 2007 legislation ensured a *Kelo* style taking would not be possible in Virginia; Virginia's proposed 2012 constitutional amendment, if passed, will likely result in lengthier, more costly trials and larger just compensation awards.

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