Virginia’s “Property Rights” Constitutional Amendment: A Fundamental Right to Uncertainty

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I. The Amendment

Effective January 1, 2013, Article I, § 11 of the Constitution of Virginia was amended as follows (the “Amendment” [additions in bold italics and deletions in strikethrough]):

ARTICLE I
BILL OF RIGHTS

Section 11. Due process of law; obligation of contracts; taking or damaging of private property; prohibited discrimination; jury trial in civil cases.

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 contracts, 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; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

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 terms "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.
II. Is the Amendment merely an enshrinement of existing Virginia law?

A. Some early versions of the Amendment were portrayed by advocates as merely enshrining existing Virginia law in Virginia’s Constitution. Since, then, however, advocates have generally maintained that at least certain portions of the Amendment will change existing law.

- See, e.g., Senate Joint Resolution 307, offered January 12, 2011. Patron Senator Mark Obenshain (R-Harrisonburg) explained that his version of the resolution “basically codifies the statutory language that we adopted two years ago.”

- Senator Obenshain, however, also contemporaneously noted of other versions of the amendment introduced in the House of Delegates:

  “I love some of the things that [Delegates] Rob Bell and Johnny Joannou are trying to do. I’m not sure that those are within the realm of the possible in the Senate. I believe also that those are areas that can and may be addressed by statute as well, so who knows? Maybe I’ll be surprised” and the Bell-Joannou proposal “will roll out of the House and will be something that the Senate can embrace. I certainly embrace those principles.”

- Delegate Joannou’s House Joint Resolution 693, to which Senator Obenshain refers, was refined to eventually reflect the text of the Amendment as passed.

B. Attorney General Kenneth T. Cuccinelli, II, noted in his opinion of January 26, 2012, that “[e]xcept to the extent of conflicts with the Amendment, the vast majority of our existing eminent domain statutes and related body of case law should remain applicable.”

- Attorney General Cuccinelli further set out four specific ways in which the Amendment represents a “substantial change in policy”, stating that the Amendment will have the following effects (as quoted directly from the Opinion):

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1 “State Senator Mark Obenshain Discusses Property Rights and Eminent Domain Reform,” Richard Sincere, Charlottesville Libertarian Examiner, January 17, 2011. This may have been a reference to § 1-219.1 VA Code Ann., which was actually passed in 2007. Further, despite Senator Obenshain’s comment, this version of the proposed amendment likely would have affected existing Virginia law, as well.

2 Id.

1. operate to impose certain express limitations on the ability of the General Assembly to define what constitutes a public use,

2. expand the scope of just compensation to include “lost access” and “lost profits,” as defined by the General Assembly, which will allow a property owner who suffers condemnation of his property to put on appropriate evidence and receive compensation that more fully covers his losses,

3. prohibit excessive takings beyond what is necessary to achieve the stated public use, and

4. impose upon the condemnor the burden of proving that the use is public and eliminate any presumption that it is.4

- The Attorney General lists these “substantive changes in policy” as part of an analysis of the General Assembly’s authority to act going forward. While certain of these policy changes may require an actual change in the application of previously existing Virginia law, others may simply operate as limits on the General Assembly’s authority to enact new legislation in the future.5

III. What are some potential effects of the Amendment?

A. Uncertainty

1. The Amendment creates substantial uncertainty as to the continued application of previously existing Virginia eminent domain law. The interpretation of the Amendment and its effects will likely be the subject of litigation for many years to come. Some examples of key uncertain issues created by the Amendment include:

   a. Public Use

      1) The Amendment arguably removes the authority of General Assembly to define “public use” but does not provide a definition.6 Section 1-219.1 VA

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4 Id.
5 Id. (analyzing the effect of the Amendment in light of VA. CONST. Art. IV, §14).
6 Interestingly, Senator Obenshain’s aforementioned SJ 307 retained an express provision providing authority to the General Assembly to define “public use.” Neither Delegate Joannou’s original HJ 693, nor the final Amendment, contained such a provision.
Code Ann., passed in 2007 in response to the *Kelo*\(^7\) decision originating from the State of Connecticut (which had nothing to do with Virginia law), previously codified definition of “public use.”

2) The meaning and impact of § 1-219.1 was already unclear in light of existing case law. The status of § 1-219.1 is now entirely uncertain after the passage of the Amendment.

3) Under the Amendment:

   o Clearly a “public use”: “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.”

   o Clearly *not* a “public use”: Any other “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.”

   o The General Assembly’s authority to further define “public use” is uncertain.

b. Lost Profits and Lost Access

Under Amendment, “lost profits” and “lost access” are set out separately from the value of property and damage to the residue. Oddly, in contrast to “public use,” these terms are to be defined by General Assembly pursuant to the Amendment.

   o Statutory definitions of “lost profits” and “lost access” adopted in 2012, in § 25.1-230.1 VA Code Ann. The definitions are not included in amendment, therefore, may be altered in the future.

   o The effect of Amendment and new definitions on prior law relating to “lost access” is unclear. Damages for “lost profits” have previously been rejected by Virginia Courts as overly speculative.\(^8\)

B. Additional Concerns

1. Effect of designating the right to private property as a “fundamental right”

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\(^8\) *See*, e.g., *Ryan v. Davis*, 201 Va. 79, 82-83, 109 S.E.2d 409, 412-13 (1959).
a. The right to private property is undoubtedly important, and condemning authorities should take care in asserting the power of eminent domain. The number of extant Code sections relating to condemnation has made this clear.

b. However, why provide a special designation to the right to private property not otherwise applied to any other vital rights under the Virginia Bill of Rights and in earlier parts of Article I, §11?

c. If, in a given case or circumstance, the “fundamental” right to private property is at odds with another constitutional right not so designated, does the right to private property prevail? If not, what is the effect of the inclusion of the term “fundamental?”

2. Unjustified Costs to Taxpayers

a. Depending on how the Amendment is ultimately construed, it may well result in additional costs to taxpayers which exceed those amounts necessary to fully compensate landowners. Or taxpayers’ quality of life will be reduced because necessary public improvements and facilities are not constructed due to the anticipated costs or time.

b. Lost Profits and Lost Access

1) Will these categories of damages result in speculative, duplicative or windfall awards at the expense of the taxpayer, i.e., you and me?

   o The Virginia Department of Planning and Budget conducted a fiscal impact analysis of the adoption of HB 1035 (adopting § 25.1-230.1 VA Code Ann.) in 2012. Among its findings:

       ▪ “The inclusion of lost access and lost profits will increase the amounts to be paid to landowners.”
• “The amounts paid in a given year will vary depending on the impacts of construction projects.”

• “[T]he Federal Highway Administration does not normally compensate for lost access and lost profits. If the Federal Highway Administration will not authorize the use of federal transportation funds for the compensation, the costs will need to be provided out of the Transportation Trust Fund. In the end, this would reduce funding available to support the construction of new roads and bridges.”

2) Will definitions eventually be expanded to include additional compensation for profits and access?

3. Increased Trial Costs Due to Shifted Burden of Proof

   a. The Amendment states that the “condemnor bears the burden of proving that the use is public, without a presumption that it is.”

   b. This requirement, viewed in light of the restriction that “[n]o more property may be taken than is necessary to achieve the stated public use,” may dramatically increase the complexity and length of condemnation trials.

   c. Are condemning authorities now required to prove that every minute portion of every proposed taking is absolutely necessary? Alternatively, is a resolution stating that the taking is for a public purpose sufficient?

4. Inability to Use Eminent Domain Power for Certain Non-Private Purposes

   a. Due to the uncertainty relating to the definition of “public use” discussed above, the exact types of projects for which eminent domain may be used are not clear. Are the types of projects already specifically designated as “public uses” in the Code affected?

   b. If Amendment is broadly construed to prevent the use of eminent domain in some cases that are clearly for public use, how much this will this over-inclusiveness cost taxpayers, and how difficult will it be to fix?
IV. What’s Next?

A. The General Assembly did little in its most recent session to add any clarity to these issues. The only bills passed relating to eminent domain did not concern issues raised by the Amendment:

1. SB 820, Billboards. Establishes conditions under which certain billboard signs may be relocated if land on which the billboard sign is located is acquired by eminent domain in connection with a highway project.

2. HB 2072, Local application process; condemnation. Provides that no locality shall condition or delay the timely consideration of any application for or grant of any permit or other approval for any real property over which it enjoys jurisdiction for the purpose, expressed or implied, of allowing the locality to condemn or otherwise acquire the property or to commence any process to consider whether to undertake condemnation or acquisition of the property.

3. HB 2306, Eminent domain; just compensation; tax assessments. Provides that just compensation paid for real property taken pursuant to eminent domain shall not be less than the appraisal of the fair market value of such property, if such an appraisal is required, or the current assessed value of such property for real estate tax purposes when the entire parcel for which the assessment has been made is to be acquired, whichever is greater. Nothing in the bill makes evidence of tax assessments admissible as proof of value in an eminent domain proceeding. Under current law, just compensation shall not be less than the appraisal of fair market value if such an appraisal is required.
Bibliography

Discussions of the Eminent Domain Subcommittee of the Real Property Section of the Virginia State Bar, chaired by Charles M. Lollar, Esq.


A series of outlines created for the program “Eminent Domain and The New Constitutional Amendment,” held Friday, April 26, 2013, at the LGA Spring 2013 Conference:


“Lost Access Damages and Inverse Condemnation Under Article I, Section 11 of the Virginia Constitution,” Joseph M. Durant, Deputy City Attorney, City of Newport News.

We are sure that this discussion will continue...