Is Eminent Domain

". . . [N]or shall private property be taken for public use, without just compensation." (U.S. Const., Amdt. 5)

". . . [T]he General Assembly shall not pass . . . 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 term 'public uses' mentioned in Article I, Section 11 of the Constitution of Virginia is hereby defined to embrace all uses which are necessary for public purposes." [VA Code §15.2-1900]

And as of the adjournment of the 2006 Virginia General Assembly Session, "public uses" remains as it has been defined in Virginia law for years—and remains open to broad interpretation. The importance of this lies in our Virginia and United States Constitutions: A governmental unit has the right to acquire, by eminent domain (also termed condemnation), private property for **public uses**. Not until the U. S. Supreme Court, just a year ago in the now infamous Kelo case, allowed the condemnation of private property by a city for **private** economic development were Virginians even concerned. (See Kelo v. City of New London, 125 S. Ct. 2655) (Decided June 23, 2005)

In Kelo, the Court allowed 15 residential parcels to be condemned for economic development. None of the properties even were considered blighted; however, New London had been found some years earlier to be a "distressed municipality," and a redevelopment plan to revitalize the City had been created by a private, non-profit entity and approved by the City Council. Ultimately the U.S. Supreme Court determined this to be a proper purpose and allowed the condemnation, citing a state statute providing that the taking of land as part of an economic development plan is a "public use" and is in the "public interest."

During the 2006 Virginia legislative session, no less than 14 separate bills were introduced in an attempt to redefine, more narrowly, what is a "public use." None passed. But the fight appears to be on, as most of these bills sought to exclude taking private property for economic or private development or to increase the tax base, tax revenues or jobs, or even generally to promote economic health and welfare. Basically unless the land condemned is to be owned, possessed and enjoyed by the public or public agencies, it should not be considered a "public use," these bills said. But for now, "public use" in Virginia is not so narrow.

The weightiness of it all goes back to the New London, Connecticut case—the area condemned by the City of New London and sold for development was not even considered blighted. How far from this are we in Virginia? Justice Sandra Day O'Connor, who wrote a stinging dissent in Kelo, perhaps has said it best:

"For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."

One weighty bill did survive, however. **House Bill 699**, the subject of significant controversy in both chambers, significantly amends the Housing Authorities Law (regarding redevelopment and conservation plans), and several other related Code provisions, by adding definitions such as "blighted area," "blighted property," "redevelopment area," "conservation area" and "spot blight abatement plan." The bill makes it clear that eliminating and preventing blight in localities, as well as designating individual properties as blighted pursuant to a spot blight abatement plan, are **public uses and purposes**.

Just what is "blight"? Under these new Virginia laws "any individual commercial, industrial or residential structure" that "endangers the public's health, safety or welfare" due to its condition or that otherwise violates health and safety standards can be considered "blighted property." And "spot blight" is a single structure fitting this definition. [Note that a "farm structure" was exempted from this definition, however.] (See VA Code §36-3, as amended.)

And when a locality determines such property exists, its Redevelopment and Housing Authority has the right to seek to acquire the property, either with consent or by its power of eminent domain, and redevelop it pursuant to a redevelopment plan. The interesting and concerning aspect is that such Authority does have the right to sell the acquired property to "nongovernmental persons or entities;" it is not required to keep it under its ownership.

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With that said, certain checks and balances appear to be built into these major new provisions, such as the required approval of the redevelopment or conservation plan by the locality, notice to the affected landowners and the right to be heard, and the provision that the development upon resale must be in accordance with "the purposes specified in" the redevelopment or conservation plan. (See VA Code §35-53, as amended.)

A somewhat protective amendment to Virginia's condemnation law has been provided by **House Bill 241**. Prior to this amendment, when a condemning authority decided it no longer needed the property it obtained through eminent domain, it was required to offer it back to the former owner. However, the owner could waive this right of repurchase. Now no waiver can be made, so the condemnor must offer it back for sale to the original owner. (See VA Code §25.1-108.) One caveat: This does not apply to land taken for highways by the VA Department of Transportation. Wouldn't you know it?

One further particular eminent domain-related bill, **House Bill 132**, remains curious as to intent and unknown as to outcome. No longer will the affected landowner be able to pre-select his jury commissioners. Instead only a judge or persons chosen from the regular jury rolls may serve as jurors in a condemnation proceeding. The only difference in this "drawn from a hat" selection of jurors for a condemnation trial from those selected for a criminal trial is that each potential juror hearing a condemnation matter must be a landowner. (See § 25.1-100 et seq., as amended.)

And in connection with trials of condemnation matters, **House Bill 631**, which creates the new VA Code § 25.1-205.1, provides for one **mandatory** dispute resolution meeting of the parties. In a Fiscal Impact Statement prepared prior to passage of this new law, notes indicated that the Virginia Department of Transportation favored this provision, believing it would lower legal costs in condemnation actions.

Summaries of other condemnation-related bills of interest are as follows:

(1) Localities and any political subdivision now will be required to hold a **public hearing** before adopting any ordinance or resolution that calls for a condemnation action.
(**House Bill 771** & VA Code § 15.2-903, as amended)

(2) Unincorporated churches, along with incorporated religious organizations, cannot have their property taken through condemnation; they must consent to any sale or transfer.
(**House Bill 955** & VA Code §§ 15.2-5214 & 5343, 16.1-319, & 23-50.16:12)

(3) The discretionary payment for relocation expenses made to persons displaced from their farm or other business operation has been increased from $50,000 to **$75,000**. Interestingly, initially the bill sought to provide the displaced farmer or other business owner 100% of his relocation expenses; that did not survive to final passage, however.
(**House Bill 1099** & VA Code § 25.1-408)

(4) A final curious provision provides that any "sport shooting range" that is condemned through eminent domain cannot be subjected to more stringent noise standards than those then applicable, provided it relocates within two (2) years to another site in the same locality.
(**House Bill 1537** & VA Code § 15.2-917)

What an interesting set of amendments concerning commercial and other real estate in Virginia we now have. More information about these and other statutory changes too numerous to mention but just as deserving of space (such as exemptions from certain permits for Virginia wineries, exemption from liability for farming operations open for tourism purposes, and non-judicial foreclosures of time-share liens) can be found at http://leg1.va.us. All became effective July 1, 2006.

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