



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Kenneth T. Cuccinelli, II
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

The Honorable Jackson H. Miller
Member, House of Delegates
P. O. Box 10072
Manassas, Virginia 20108

Dear Delegate Miller:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask several questions regarding a proposed amendment to Article I, § 11 of the Constitution of Virginia ("the Amendment") relating to the taking or damaging of private property by the power of eminent domain.¹

1. You ask whether the Amendment, if adopted, would expand the meaning of "damages" to such an extent that it would enable the owners of property located in the vicinity of, or affected by, an unpopular public facility to recover damages, even when none of their land has been taken for the facility;
2. You ask whether the Amendment, if adopted, would require local governments to compensate property owners for "lost access" and "lost profits" in the following examples:² (a) the conversion of a major cross-town highway featuring at-grade intersections and lined with businesses to a limited-access-only highway with grade-separated interchanges that would eliminate the direct access of abutting landowners and require access through a back road or other separate access road; (b) the reconstruction of major arterial streets within a city or town to four-lane divided roads with medians, resulting in vehicular access being limited by the medians to right-in and right-out for abutting commercial property owners, eliminating left-in and left-out turns for vehicles; (c) the closure of a street, which happens to be lined with commercial businesses, during a period that extends for approximately 54 hours, from 4:00 p.m. on Friday through 10:00 p.m. Sunday to host a festival; and (d) other similar temporary road closures for parades; and

¹ See 2011 Va. Acts ch. 757. See also second resolutions H.J. 3, 2012 Reg. Sess. (Va.), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=121&typ=bil&val=hj3>; S.J. 3 2012 Reg. Sess. (Va.), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=121&typ=bil&val=sj3>.

² You also ask whether each of these examples constitutes a "taking" for which just compensation must be paid. The answer to this question, however, would depend on the precise facts of the particular case.

3. You ask whether the Amendment, if adopted, would prevent the use of eminent domain by a locality to acquire land for the upgrading of public infrastructure (*i.e.*, roads and utility facilities) to support a redevelopment plan adopted by the locality to promote and encourage high density, multi-use, urban-style development in the place of aging low-density suburban-style development.

Response

It is my opinion that:

1. The Amendment, if adopted, would not expand the meaning of “damages” to such an extent that it would enable the owners of property located in the vicinity of, or affected by, an unpopular public facility to recover damages when none of their land has been taken for the facility;
2. Bearing in mind that determinations in condemnation cases always depend on the precise facts of a particular case, the following general conclusions may be made with respect to your examples:
 - (a) Damages sustained when a major cross-town highway is converted to a limited access only highway which eliminates all direct access to the major highway by abutting landowners are compensable under our current Constitution and will remain compensable under the Amendment;
 - (b) The design and construction of highways and roads, including the installation of medians and other traffic management and safety features, represent the exercise of the Commonwealth’s police power, the exercise of which generally is not compensable under our current Constitution, provided that a reasonable means of ingress and egress for an abutting property remains; whether limitations on vehicular access will be compensable under the Amendment will depend on how the General Assembly defines by statute “lost access” and “lost profits,” but a property owner likely will have an opportunity to present to the body determining just compensation evidence of the damages alleged to have been sustained;
 - (c) The temporary closure of a street for a weekend festival represents the reasonable exercise of the police power by a locality, is not a taking or damaging of property and, thus, would not be compensable if the Amendment is adopted; and
 - (d) The temporary closure of a road to accommodate a parade represents the reasonable exercise of the police power by a locality, is not a taking or damaging of property and, thus, would not be compensable if the Amendment is adopted; and
3. The Amendment, if adopted, will not prevent the use of eminent domain by a locality to acquire land for the upgrading of public infrastructure, such as roads and utility facilities, to support a locality’s redevelopment plan to promote and encourage high density, multi-use, urban-style development, so long as the condemnor can meet its burden of proving that the use of the property taken is a public use.

Background

The General Assembly has proposed amending specific provisions pertaining to eminent domain in Article I, Section 11, of Virginia’s Constitution and has initiated the amendment process pursuant to Article XII, § 1 (entitled “Amendments”). The initial step in that process was House Joint Resolution 693, agreed to at the 2011 session of the General Assembly. The joint resolution is set forth below in its entirety:

CHAPTER 757

HOUSE JOINT RESOLUTION NO. 693

Proposing an amendment to Section 11 of Article I of the Constitution of Virginia, relating to taking or damaging of private property.

Agreed to by the House of Delegates, February 23, 2011

Agreed to by the Senate, February 22, 2011

RESOLVED by the House of Delegates, the Senate concurring, a majority of the members elected to each house agreeing, That the following amendment to the Constitution of Virginia be, and the same hereby is, proposed and referred to the General Assembly at its first regular session held after the next general election of members of the House of Delegates for its concurrence in conformity with the provisions of Section 1 of Article XII of the Constitution of Virginia, namely:

Amend Section 11 of Article 1 of the Constitution of Virginia as follows:

ARTICLE 1

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.^[3]

³ 2011 Va. Acts ch. 757.

The present efforts to amend Virginia's Constitution have been strongly influenced by the decision of the United States Supreme Court in the case of *Kelo v. New London*.⁴ In *Kelo*, the City of New London, Connecticut condemned non-blighted residential property belonging to Susette Kelo for the primary purpose of promoting economic development. Her land was condemned so it could be used for the benefit of private business. The decision prompted an outpouring of criticism that began with the rather pointed dissent of Justice O'Connor, who was joined by Chief Justice Rehnquist and Justices Scalia and Thomas. As stated in Justice O'Connor's dissent: "Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded...."⁵ The Court's decision, based on the Fifth Amendment to the United States Constitution, was the final blow in Susette Kelo's efforts to save her property, as the Constitution and other laws of Connecticut afforded her no relief. Significantly, the majority in *Kelo* emphasized "that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power" and that "many States already impose 'public use' requirements that are stricter than the federal baseline."⁶

In an effort to address concerns raised by the *Kelo* decision, as well as the concerns of Virginians, the General Assembly enacted § 1-219.1 of the *Code of Virginia*, entitled "Limitations on eminent domain."⁷ The proposed Amendment to the Virginia Constitution incorporates a number of the central concepts contained in § 1-219.1, including the right to private property being a fundamental right.

The proposed Amendment is designed to establish, as an integral part of Virginia's Constitution, that the right to own and possess private property is a fundamental right and to embody that principle in the laws and jurisprudence of the Commonwealth of Virginia. A fundamental right "must be a right 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it were] sacrificed.'"⁸ As Justice Thomas noted in his dissent in *Kelo*, "[t]he Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from 'tak[ing] property from A. and giv[ing] it to B.' *Calder v. Bull*, 3 Dall. 386, 388 (1798); see also *Wilkinson v. Leland*, 2 Pet. 627, 658 (1829); *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304, 311 (CC Pa. 1795)."⁹ The majority result in *Kelo* raised significant concerns regarding whether the right to own property was "'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty.'" A recent opinion of this Office has suggested that, under the current state of the law, property rights are not now recognized as a fundamental right.¹⁰ In light of these circumstances, the authors of the proposed Amendment decided to remove all

⁴ *Kelo v. City of New London*, 545 U.S. 469 (2005).

⁵ *Id.* at 494 (O'Connor, J., dissenting).

⁶ *Id.* at 489.

⁷ 2007 Va. Acts chs. 882, 901, 926.

⁸ *McCabe v. Commonwealth*, 274 Va. 558, 562, 650 S.E.2d 508, 510 (2007) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

⁹ *Kelo*, 545 U.S. at 510-11 (Thomas, J., dissenting).

¹⁰ See 2011 Op. Va. Att'y Gen. 11-065 at 1-2 ("Property rights certainly benefit from constitutional protection and constitute a cornerstone of our prosperity as a Nation. Property rights, however, are not absolute.... Where, as here, a policy or regulation does not infringe upon a suspect class, such as race, or a fundamental right, such as freedom of speech, the standard of review is highly deferential toward the locality.").

doubt, at least in Virginia's jurisprudence, by explicitly stating that the right to own property will be deemed a fundamental right in Virginia.¹¹

In furtherance of that objective, the Amendment will impose specific limitations on the exercise of eminent domain powers and help ensure that "no private property shall be damaged or taken for public use without just compensation to the owner thereof." The Amendment will reinforce the requirement for a "public use" and provide clarification by specifying what is not considered to be a "public use." In the event private property is "damaged" by a public project or use, the proposed Amendment will retain the existing requirement that just compensation is due to the owner thereof, even in the absence of a direct taking of an owner's property. (In our Constitution, as it now exists, the term "damaged" or "damages" is used in a legal sense, as further discussed below.) Regarding compensation, however, the Amendment provides 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." The General Assembly is directed to define the added terms of "lost profits" and "lost access," which may expand the scope of just compensation for damages, depending upon the wording of the definitions in the legislation to be enacted.

Applicable Law and Discussion

If the Amendment ultimately is adopted and incorporated into our Constitution, an important issue will be how and to what extent the Amendment will affect existing statutes and case law pertaining to eminent domain, including statutes such as § 1-219.1. Without attempting a detailed analysis, I will outline certain general principles or rules that will apply. As noted in the case of *Swift & Co. v. Newport News*,¹² a decision that followed soon after the adoption of Virginia's Constitution of 1902: "And all statutes existing when such a Constitution is adopted, or which might thereafter be passed, inconsistent with its provisions, are nullified by such constitutional prohibition, though legislation may nevertheless be desirable and valuable for the purpose of defining the right [*i.e.*, rights and limitations] and aiding in its enforcement."¹³ Of particular interest is the fact that the 1902 Constitution amended the eminent domain provisions from Virginia's prior Constitution by requiring just compensation when property has been "damaged" for public uses.¹⁴ Significantly, the decision in *Swift & Co.* also states that "[i]t is also well settled that the common law remains in force in this State, except when changed by statute or the Constitution, which operate prospectively only[.]"¹⁵

More importantly, however, the Amendment will be interpreted, in part, in conformance with the following provision set forth in Article IV, § 14, of the current Constitution of Virginia:

¹¹ The notion of a "fundamental right," as opposed to other rights, comes from federal jurisprudence. When a fundamental right is impinged upon in federal jurisprudence, strict judicial scrutiny is triggered. *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). Virginia courts speak of strict construction in their eminent domain cases (*e.g.*, *Hoffman Family, L.L.C. v. City of Alexandria*, 272 Va. 274, 283, 634 S.E.2d 722, 727 (2006)), but in practice, great deference is typically provided to condemning authorities (*e.g.*, *Hoffman*); *see also supra* note 10. Use of the phrase "fundamental right" in the Amendment would require a consistently strict construction by courts in eminent domain proceedings. Eliminating the deference granted to condemning authorities under current law is also consistent with the shifting of the burden of proof accomplished by the Amendment.

¹² *Swift & Co. v. City of Newport News*, 105 Va. 108, 52 S.E. 821 (1906).

¹³ *Id.* at 115, 52 S.E. at 824.

¹⁴ VA. CONST. of 1902, art. IV, § 58; *see also Swift & Co.*, 105 Va. at 113, 52 S.E. at 823. Article IV, Section 58 of Virginia's 1902 Constitution added "or damaged" by providing that the General Assembly "shall not enact any law whereby private property shall be taken *or damaged* for public uses, without just compensation."

¹⁵ *Swift & Co.*, 105 Va. at 112, 52 S.E. at 823.

The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted; and a specific grant of authority in this Constitution upon a subject shall not work a restriction of its authority upon the same or any other subject. The omission in this Constitution of specific grants of authority heretofore conferred shall not be construed to deprive the General Assembly of such authority, or to indicate a change of policy in reference thereto, unless such purpose plainly appear.^[16]

As noted in *FFW Enterprises v. Fairfax County*,¹⁷ the first paragraph of Article IV, § 14 is the appropriate starting place when addressing the power of the General Assembly.¹⁸ This case further affirms that “[t]he Constitution does not grant power to the General Assembly; it only restricts powers ‘otherwise practically unlimited.’”¹⁹ Stated differently, “the legislature has the power to legislate on any subject unless the Constitution says otherwise.”²⁰ Except 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.

The current eminent domain provisions in the Constitution of Virginia state, in part, as follows: “[t]hat the General Assembly shall not pass any law...whereby private property shall be taken or damaged for public uses, without just compensation.”²¹ This basic limitation is carried forward in the proposed Amendment. Deletion of the phrase “the term ‘public uses’ to be defined by the General Assembly” from the present Constitution and its omission from the Amendment’s new language shall not be construed to limit or deprive the legislature of such authority (*i.e.*, to define “public uses”),²² but other provisions in the Amendment do represent substantive changes in policy of the type referenced in Article IV, § 14 of our Constitution. Such substantive policy changes will (1) operate to impose certain express limitations on the ability of the General Assembly to define what constitutes a public use,²³ (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,²⁴ (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.

The limitation that private property may not be taken or damaged except for a “public use,” without just compensation to the owner thereof, will continue to be a basic component of our Constitution

¹⁶ VA. CONST. art. IV, § 14.

¹⁷ *FFW Enters. v. Fairfax Cnty.*, 280 Va. 583, 701 S.E.2d 795 (2010).

¹⁸ *Id.* at 592, 701 S.E.2d at 801.

¹⁹ *Id.* at 593, 701 S.E.2d at 801 (internal quotation marks omitted) (quoting *Lewis Trucking Corp. v. Commonwealth*, 207 Va. 23, 29, 147 S.E.2d 747, 751 (1966)).

²⁰ *Id.* at 592, 701 S.E.2d at 801 (citing 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 538 (1974)).

²¹ VA. CONST. art. I, § 11.

²² VA. CONST. art. IV, § 14.

²³ 2011 Va. Acts ch. 757 (In part, the Amendment specifies that “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”).

²⁴ Under current law, compensation for lost access is available only

in limited circumstances, and compensation for lost profits is not available at all in condemnation cases.

under the proposed Amendment.²⁵ The ability of the General Assembly to define public uses will continue, subject to constitutional limitations. As a repository of sovereign powers, including the police power and the power of eminent domain, the Commonwealth of Virginia may delegate such powers to its departments, agencies and institutions, as well as to its political subdivisions and to private entities (such as utilities and railroads). Such delegations and their scope are legislative functions, but will be subject to any constitutional limitations.²⁶ Nonetheless, in any given case, ““what constitutes a ‘public use’ is a judicial question to be decided by the courts.””²⁷ As previously noted, the extensive body of statutory and case law regarding eminent domain that has been enacted and developed over the years will continue to provide valuable direction and precedent, except where inconsistent with the proposed Amendment.

I will now address your specific questions and issues seriatim.

I.

Before responding to your first inquiry, the concept of “damage” to, or “damaging” of, private property must be distinguished from the requirement for “just compensation” to a landowner whose property has been taken or damaged in conjunction with a public use. Under the proposed Amendment, the terms “lost access” and “lost profits” will be components of “just compensation.” If property is “damaged” for public uses under Virginia’s Constitution, just compensation will include, depending on the facts of the particular case, compensation for “lost access” and “lost profits” to the extent authorized by the General Assembly.

Regarding damage, and as explained in *PEPCO v. Highway Commissioner*,²⁸ the contention that a landowner who has suffered damage to his private property is entitled to compensation under the eminent domain provisions of the Virginia Constitution turns on the meaning of “damage” or “damages.”²⁹ Under Article I, §11 of our Constitution, the term is not accorded its ordinary meaning. Instead, the term “means damaged in the legal sense.”³⁰ In *PEPCO*, two electric utilities that maintained pole lines on highway department right-of-way were forced to relocate their lines, but the utilities did not hold any easements or other interest in the subject land. The claim of entitlement to just compensation failed because the pole lines were installed and maintained under mere licenses or permits issued by the State Highway Commissioner that were revocable at will. Thus, the utilities suffered *damnum absque injuria*, as the physical invasion caused by the displacement of their lines “did not result in damage in the constitutional sense,” which involves damage resulting from a legal invasion that amounts to a loss of property rights.³¹

²⁵ 2011 Va. Acts ch. 757.

²⁶ See 1984-85 Op. Va. Att’y Gen. 129, 131 (“the power of eminent domain, as an incident of sovereignty, can be exercised only when properly delegated by the General Assembly and subject to constitutional and statutory limits”).

²⁷ *Hoffman*, 272 Va. at 285, 634 S.E.2d at 728 (quoting *City of Richmond v. Carneal*, 129 Va. 388, 394, 106 S.E. 403, 405 (1921)).

²⁸ *PEPCO v. Highway Comm’r*, 211 Va. 745, 180 S.E.2d 657 (1971).

²⁹ *Id.* at 749-50, 180 S.E.2d at 660.

³⁰ *Id.* at 749, 180 S.E.2d at 660.

³¹ *Id.* at 749-50, 180 S.E.2d at 660.

In 1902, Virginia adopted a new constitution, which amended prior eminent domain provisions in the 1869 version to include for the first time the term “damaged.”³² The then new version stated that the General Assembly “shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation.”³³ As noted in *Tidewater Railway Co. v. Shartzer*,³⁴ prior to such amendment “[i]t was uniformly held...that there could be no recovery for an injury or damage to property, no part of which was actually taken.” This was a construction that resulted in much hardship and denied justice in cases where the use, enjoyment and value of property was greatly impaired under conditions that did not amount to a taking.³⁵ Nonetheless, even this early case recognized that merely rendering a property less desirable, such as the erection of a nearby county jail, does not constitute the damage contemplated by the Constitution, absent some “diminution in substance” caused by the public use.³⁶ The proposed Amendment will not alter this threshold requirement that there be damages in the constitutional sense. Owners of property will be no more entitled under the Amendment to compensation for the inconvenience of having an unpopular public facility located nearby than they are under current law. As demonstrated in Example (a) below, an abutter’s easement of access to a public road is a property right, the loss of which, when caused by a public use, constitutes damage in the constitutional sense.

II.

Next, I will cover the examples that you present and the impact of the proposed Amendment to Virginia’s Constitution. Given that condemnation cases usually turn on a number of very specific facts, and the details of the examples set forth in your opinion request are not fully developed, my responses must be considered as general in nature and subject to modification depending on the precise facts of a particular case.

Example (a) involves the conversion of a major cross-town highway into a limited-access-only highway that eliminates all direct highway access by abutting landowners, leaving access only by local or back roads. The facts presented are nearly identical to those in *State Highway & Transportation Commissioner v. Linsly*,³⁷ except that in *Linsly* the State Highway Commissioner planned to construct a service road providing indirect access. An easement of access to a public road (generally, an easement by implication) is a property interest, and its extinguishment by the Commonwealth or a locality under powers of eminent domain would be a form of “damage” in a legal sense. In your example, as in *Linsly*, the landowner has lost his abutter’s easement of access to a major public highway, a substantive property right, resulting in damage in the legal sense. The damage suffered entitles the landowner to just compensation. The proposed Amendment will not affect this result; however, the determination of just

³² In the debates at the constitutional convention that led to the adoption of the Constitution of 1902, advocates for Virginia municipalities vigorously fought the proposed extension of just compensation to damages to private property. These advocates made dire warnings: “we are entering into a matter that is fraught with great danger to the public interests of this Commonwealth by taking it out of the hands of the Legislature”; “in our new and rapidly growing cities public improvements would be practically stopped”; “every city in this Commonwealth and every railroad company will be assailed with suits in our courts”; and the proposed constitutional language “will have a tendency to prevent capital from coming into our State.” I REPORT OF THE PROCEEDINGS & DEBATES OF THE CONSTITUTIONAL CONVENTION 688, 691, 694 (1906).

³³ VA. CONST. of 1902, art. IV, § 58.

³⁴ *Tidewater Ry. Co. v. Shartzer*, 107 Va. 562, 565, 59 S.E. 407, 408 (1907).

³⁵ *Id.* at 565, 59 S.E. at 408.

³⁶ *Id.* at 571-72, 59 S.E. at 410.

³⁷ *State Highway & Transp. Comm’r v. Linsly*, 223 Va. 437, 290 S.E.2d 834 (1982).

compensation may include a recovery for “lost profits” and “lost access” as defined by future legislation.³⁸ I decline to speculate as to how such future legislation might expand the scope of just compensation.

The facts in Example (b) involve the construction of medians affecting vehicular access. Such construction could limit ingress and egress for certain properties to right-in and right-out only. In cases such as this, where reasonable access remains, even though it is not as extensive, the current rule, stated in *Highway Commissioner v. Easley*, is that “[a]n abutting landowner’s right of access to a public road is subordinate to the police power of the state reasonably to control the use of streets so as to promote the public health, safety, and welfare,”³⁹ and that no compensation is due to the owner of property abutting a public road “when the state, in the exercise of its police powers, reasonably regulates the flow of traffic on the highway.”⁴⁰ (Of course, the key word is “reasonably,” because if access were completely eliminated there would be legal damages.) In *Easley*, the Court stated that this rule applies regardless of whether the diminished access occurs conjointly with a taking of property.

The proposed Amendment will not change the rule in *Easley* for cases where a median or other regulation of traffic leads to diminished access and there is no taking or damaging of property. In such cases, no just compensation, including lost profits or lost access, would be due because the median or other traffic regulation would be an exercise of the police power and not an exercise of the power of eminent domain. In cases, however, where a loss of access occurs conjointly with a taking or damaging of private property, the Amendment provides that just compensation will include damages for the lost access. Under the Amendment, the term “lost access,” and thus the degree of loss that will qualify for compensation, is to be defined by the General Assembly. The property owner will have the opportunity to present evidence of the damages sustained as a result of the lost access to the body determining just compensation, but in any event, the property owner will have to show that the lost access has resulted in a diminution of value in the residue property in order to receive compensation for that damage.

In Example (c), a street is closed for an entire weekend for a festival. Under the given facts, there is no taking of land, and the same principles apply as set forth in *Easley*. Even assuming the street closure resulted in a substantial decrease in the business of abutting merchants during the course of the festival, no damages would be payable. In this situation, the relatively short duration of the closure represents the exercise of the police power and does not involve or cause any substantial “damages” in the legal sense of that term.⁴¹ This answer similarly applies to Example (d), where the road closure is to accommodate a parade and any impact lasts only for a very limited period of time.

III.

In the example presented by your Question 3, you describe a major project by a locality to facilitate a redevelopment plan. In order to accomplish the project’s objective and to induce private

³⁸ As called for by the Amendment, the General Assembly is considering in its 2012 regular session bills that define “lost access” and “lost profits.” H.B. 1035, 2012 Reg. Sess. (Va.) *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?121+sum+HB1035>; S.B. 437, 2012 Reg. Sess. (Va.), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?121+sum+SB437>.

³⁹ *State Highway Comm’r v. Easley*, 215 Va. 197, 203, 207 S.E.2d 870, 875 (1974) (citing *Wood v. Richmond*, 148 Va. 400, 138 S.E. 560 (1927) (closing one service station’s curb cut to a public street is a non-compensable act of the police power)).

⁴⁰ *Id.* at 203, 207 S.E.2d at 875.

⁴¹ *PEPCO*, 211 Va. at 749-50, 180 S.E.2d at 660.

landowners to invest the necessary time and capital required to achieve the stated objective, such a project normally will require the enhancement of infrastructure, including road improvements and utility expansion and upgrades. The construction phase of the infrastructure improvements often will require the acquisition of title to land and easements. For purposes of completing required acquisitions, the General Assembly has granted localities condemnation authority pursuant to Title 15.2, Chapter 19 (entitled, "Condemnation") of the Virginia Code.⁴² Article I, Section 11 of the Constitution of Virginia, however, both now and with the proposed Amendment, limits the exercise of such authority by providing that private property may not be taken (*i.e.*, condemned) except for "public uses" or "public use."

In addition to establishing the general scope of condemnation authority granted to localities, § 15.2-1903 sets forth several mandatory prerequisites that must be satisfied prior to initiating condemnation proceedings. Simply stated, § 15.2-1903 requires a public hearing at which the governing body must adopt a resolution or ordinance approving the proposed public uses and directing the acquisition of such property by condemnation or other means. Further, the resolution or ordinance must state, (1) the use to which the property shall be put, and (2) the necessity therefor. These two components are referenced and examined in the case of *Hoffman Family, L.L.C. v. City of Alexandria*.⁴³ *Hoffman* explains that the stated "necessity" for resorting to condemnation is a legislative function that the courts will not review unless the decision by the locality is arbitrary or capricious or in the event there is evidence of manifest fraud.⁴⁴ Subsection C of § 15.2-1903 concludes with the provision that a duly adopted resolution or ordinance that satisfies the criteria of § 15.2-1903(B) and is filed with the condemnation petition "constitutes sufficient evidence of such public use and necessity." This statutory presumption is inconsistent with the provision in the proposed Amendment that states "[t]he condemnor bears the burden of proving that the use is public, without a presumption that it is." If the Amendment is adopted, the statutory presumption in § 15.2-1903(C) will become void, localities will be required to prove that the use is public, and citizens whose property is subject to condemnation will have the opportunity to fully challenge any such assertion by the locality.

In discussing the "public use" requirement, the Court in *Hoffman* noted that "[t]he judicial question of what constitutes a 'public use' is well established." In describing what constitutes a "public use" the Court stated as follows:

A use to be public must be fixed and definite. It must be one in which the public, as such, has an interest, and the terms and manner of its enjoyment must be within the control of the State, independent of the rights of the private owners of the property appropriated to the use.^[45]

The Virginia Supreme Court's baseline criteria for determining a "public use" should remain intact under the proposed Amendment, except as therein provided and except as may be modified by future legislation. Under the Amendment, there is one particular provision that may impact development projects such as described in your example, depending on the precise facts. The referenced provision states that, except as otherwise provided in the Amendment, "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..." Under the proposed Amendment, the determination whether the "primary use" for a condemned property is for private gain, or private benefit,

⁴² See VA. CODE ANN. §§ 15.2-1901 through 15.2-1907.1 (2008).

⁴³ *Hoffman*, 272 Va. at 274, 634 S.E.2d at 722.

⁴⁴ *Id.* at 285, 634 S.E.2d at 728.

⁴⁵ *Id.* at 286, 634 S.E.2d at 728 (quoting *Carneal*, 129 Va. at 395, 106 S.E. at 406).

etc., will be based upon the evidence presented, without any legal presumption in favor of the condemning authority, with ultimate oversight of such issue to be retained by the courts.

Furthermore, under the Amendment, the enactment in Virginia of laws similar to the laws of Connecticut in effect at the time of the *Kelo* decision, which authorized condemnation for economic development and allowed private property to be condemned and transferred to private owners all under the banner of economic development, would be unconstitutional in Virginia.

The *Hoffman* opinion, along with the dissent, demonstrates how difficult it is to reach a decision in such cases. As the Court further explains, however, “[t]he fact that property acquired to serve the public may also incidentally benefit some private individuals does not destroy the public character of the use.”⁴⁶ According to the Court, “the focus of a public use inquiry must be on the property to be acquired by condemnation, not on its effect on neighboring properties.”⁴⁷ As noted above, the proposed Amendment would establish that “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.”⁴⁸ In the absence of a statutory definition, the plain and ordinary meaning of a term is controlling.⁴⁹ The word “primary” means “first in order of time or development” and the word “use” means “the act or practice of employing something.”⁵⁰ Thus, a court would focus on the use for which the condemning authority employs the property taken. Applying the proposed Amendment to the scenario presented in Question 3, the “primary use” of such infrastructure construction is not economic development but, instead, to provide improved transportation to the public and enhanced utility service that will facilitate and support future economic development, a secondary benefit. Note, however, that any taking or damaging of private property would nevertheless be restricted by, and subject to, Code § 1-219.1, including subsection D, which provides,

Except where property is taken (i) for the creation or functioning of a public service corporation, public service company, or railroad; or (ii) for the provision of any authorized utility service by a government utility corporation, property can only be taken where: (a) the public interest dominates the private gain and (b) the primary purpose is not private financial gain, private benefit, an increase in tax base or tax revenues, or an increase in employment.^[51]

Notwithstanding the provisions in the Amendment, localities will retain ample condemnation authority to improve and upgrade transportation and utility infrastructure in conjunction with development projects, including those planned by the locality or as may be planned by private developers and approved by the locality. The elimination of the statutory presumption in § 15.2-1903(C), however, will afford citizens a fair and open process in the determination of what constitutes a “public use” in their individual cases.

Generally, the proposed Amendment, if adopted, will result in changes to the way just compensation for a taking or damaging might be calculated. This calculation, however, will be based on

⁴⁶ *Id.* at 287, 634 S.E.2d at 729 (citation omitted).

⁴⁷ *Id.*

⁴⁸ See 2011 Va. Acts ch. 757 (emphasis added).

⁴⁹ See, e.g., *Sansom v. Bd. of Supvrs.*, 257 Va. 589, 594-95, 514 S.E.2d 345, 349 (1999); *Commonwealth v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980).

⁵⁰ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 925, 1301 (10th ed. 1994).

⁵¹ VA. CODE ANN. § 1-219.1(D) (2011).

the specific facts of each case and the specifics of any legislative enactment regarding the definitions of "lost profits" and "lost access" as required by the Amendment. Any speculation on the impact of such legislation or the calculation of compensation in any particular set of circumstances is beyond the scope of this opinion.

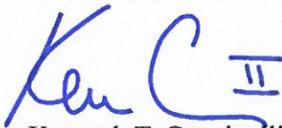
Conclusion

Accordingly, it is my opinion that:

1. The Amendment, if adopted, would not expand the meaning of "damages" to such an extent that it would enable the owners of property located in the vicinity of, or affected by, an unpopular public facility to recover damages when none of their land has been taken for the facility;
2. Bearing in mind that determinations in condemnation cases always depend on the precise facts of a particular case, the following general conclusions may be made with respect to your examples:
 - (a) Damages sustained when a major cross-town highway is converted to a limited access only highway which eliminates all direct access to the major highway by abutting landowners are compensable under our current Constitution and will remain compensable under the Amendment;
 - (b) The design and construction of highways and roads, including the installation of medians and other traffic management and safety features, represent the exercise of the Commonwealth's police power, the exercise of which generally is not compensable under our current Constitution, provided that a reasonable means of ingress and egress for an abutting property remains; whether limitations on vehicular access will be compensable under the Amendment will depend on how the General Assembly defines by statute "lost access" and "lost profits," but a property owner likely will have an opportunity to present to the body determining just compensation evidence of the damages alleged to have been sustained;
 - (c) The temporary closure of a street for a weekend festival represents the reasonable exercise of the police power by a locality, is not a taking or damaging of property and, thus, would not be compensable if the Amendment is adopted; and
 - (d) The temporary closure of a road to accommodate a parade represents the reasonable exercise of the police power by a locality, is not a taking or damaging of property and, thus, would not be compensable if the Amendment is adopted; and
3. The Amendment, if adopted, will not prevent the use of eminent domain by a locality to acquire land for the upgrading of public infrastructure, such as roads and utility facilities, to support a locality's redevelopment plan to promote and encourage high density, multi-use, urban-style development, so long as the condemnor can meet its burden of proving that the use of the property taken is a public use.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General