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City of Alexandria, Virginia

MEMORANDUM

DATE: OCTOBER 18, 2011

TO: THE HONORABLE MAYOR AND MEMBERS OF CITY COUNCIL

FROM: BRUCE JOHNSON, ACTING CITY MANAGER

SUBJECT: PROPOSED CITY LEGISLATIVE PACKAGE FOR THE 2012 GENERAL ASSEMBLY SESSION

ISSUE: Consideration of the proposed City Legislative Package for the 2012 General Assembly Session.

RECOMMENDATION: That City Council:

- (1) Receive the proposals for the City's 2012 Legislative Package, as recommended by Council's Legislative Subcommittee and included in Attachment 1;
- (2) Schedule the legislative package proposals for public hearing on Saturday, November 12; and
- (3) Schedule adoption of the Legislative Package for Tuesday, November 22.

DISCUSSION: Council's Legislative Subcommittee met with the City's General Assembly delegation on October 5 to discuss the preliminary legislative package. For the past several months, staff has been working with Council members, City departments, and boards and commissions to develop legislative and funding proposals for the City's 2012 Legislative Package. Twenty-nine such proposals are described in Attachment 1; all of them have been recommended by Council's Legislative Subcommittee for your consideration. Section A contains six major fiscal issues of concern to the City; Section B consists of eleven legislative proposals recommended for introduction by the City; and Section C includes twelve proposals which the Subcommittee recommends that the City support. A Work Session with the City's Legislative Delegation will be held beginning at 5:30 p.m. in the Council Work Room on November 22.

The 2012 General Assembly Session will be a "long" 60-day Session, beginning January 11, and ending March 10. On December 19, 2011, Governor McDonnell will submit his proposed biennial budget for FY 2013-14, as well as any amendments he is recommending to the budget

for FY 2012. Staff will report on the Governor's proposed amendments shortly after they are announced. While no specific issue has emerged for the Session, fiscal issues are likely to predominate.

Legislative Director Bernard Caton will represent the City in Richmond again this year, and we will report to you regularly on the status of legislative and budget issues that arise during the 2012 General Assembly Session.

ATTACHMENTS:

Attachment 1 - City of Alexandria 2012 Potential Legislative Package Proposals

Attachment 2 - Chapter 757, 2011 Acts of Assembly (Proposed Constitutional Amendment on Eminent Domain)

Attachment 3 - VML Policy Statement on Proposed Constitutional Amendment on Eminent Domain (October 3, 2011)

STAFF: Bernard Caton, Legislative Director

Attachment 1

**ITEMS RECOMMENDED BY CITY COUNCIL'S LEGISLATIVE SUBCOMMITTEE
FOR INCLUSION IN THE 2012 CITY PACKAGE**

*Note: Items with a [V] are supported by the Virginia Municipal League,
and those with an [N] are supported by Northern Virginia localities; individuals and
boards/commissions that proposed items are shown in parentheses.*

A. MAJOR FISCAL ISSUES

1. **[V,N] Discontinue the Local Aid to the State Program.** In the 2009 General Assembly, a provision was added to the biennial State budget requiring localities to give back funds to the State to help the State deal with its revenue shortfall. This “give back” was set at \$50 million annually statewide, and was in addition to various programmatic reductions in state funding of state-local programs. The portion of the \$50 million allocated to the City of Alexandria was \$1.1 million; the City had to give back a similar amount in FY 2010. As the State’s FY 2011-12 budget was prepared, this local aid to the state program was increased to \$60 million annually statewide. The City share for the current biennium (FY 2011 and FY 2012) is approximately \$2.5 million. The State should never have balanced its budget on the backs of local governments, and now that State revenues have improved, this program should be discontinued.
2. **[V,N] Funding the State-Local Partnership.** In order to balance the state budget in recent years, the State has adopted a number of unusual and sometimes questionable practices, including the Local Aid to the State program described above. Others include funding for human service, social service, and mental health programs; HB 599 local law enforcement; K-12 education; and funding for constitutional officers and local jails. Again, now that State revenues are improving, the State should redirect more of its revenues to shared state-local programs. In addition, any proposals that would reduce the ability of localities to raise local revenues (such as the BPOL tax) should be opposed.
3. **[V,N] Transportation Funding—General Position (Transportation Commission).** The City of Alexandria and other Northern Virginia jurisdictions (as well as localities statewide) continue to seek additional funding for transportation. Revenues from all major transportation funding sources continue to deteriorate, yet needs continue to rise. New funding must be found to cover major transit needs, as well as road construction and maintenance. Any funding source must continue to include dedicated revenue needed to meet federal match requirements for the Washington Metropolitan Area Transit Authority. Transportation formulas should not be revised in a way that will lessen revenues coming to Alexandria. Finally, any new transportation funding must not be taken from traditional core service funding programs, such as education and public safety.
4. **Transportation Funding—Maintenance Payments.** The Commonwealth Transportation Board has appointed a subcommittee to study maintenance payments for streets and highways. Among the potential recommendations is the possibility of shifting the responsibility for city and town (and possibly county) maintenance costs to localities, so that the State will have more revenue to pay for needed construction projects and other

State costs (e.g., interstate maintenance). Such an initiative may also include an attempt to transfer the responsibility for maintenance of county roads, along with the responsibility for paying for that maintenance, to county governments. State gasoline tax revenues have always been used to pay for maintenance. If the State is unwilling to raise sufficient revenues to pay for transportation needs, it should not transfer the responsibilities for raising these revenues to localities, which would then have to increase local tax rates to pay for this added responsibility.

5. **[V,N] Line of Duty Benefits.** Alexandria supports efforts to return funding responsibility for the Line of Duty program to the State, which created Line of Duty as a State program. Should local government be required to pay these benefits, they should have the authority to establish and administer these benefits.
6. **[V] Eminent Domain.** Legislation (Attachment 2) was passed in 2011 to add an amendment to the Virginia Constitution that will fundamentally change the law regarding eminent domain; this legislation must be reenacted in the 2012 Session for the proposal to go on the ballot in November 2012. The proposed change being contemplated is far-reaching and expensive, and includes unintended consequences.

The amendment has two provisions that are extremely troublesome. The first involves lost profits and lost access. A locality will have to pay property owners for lost access and lost profits caused by government action—whether or not any land is acquired from the owners. For example, suppose a City four-lane street through commercial corridor is overloaded. The city installs medians and traffic lights to improve traffic. Every business along the street has lost access – no left turn in or left turn out. Every business can sue the City for that lost access. The taxpayers foot the bill. Or suppose the City closes a major street for the weekend for an arts festival. Every business that loses customers as a result can sue the City for lost profits. Again, the taxpayers foot the bill. A final example—what if a water main breaks in the middle of winter on a busy commercial street and repairs close the street for several days. The businesses on the closed street have claims for lost access and lost profits – and again the taxpayers foot the bill.

The second troublesome provision prohibits using eminent domain for economic development. The amendment prohibits eminent domain if the purpose is for “increasing jobs, increasing tax revenue, or economic development.” What if a new commercial building is constructed, but a water line easement is needed to provide water to the site. The landowner where the easement is needed can argue that the purpose is economic development and charge whatever he wants for the easement (not fair market value, as eminent domain provides). The taxpayers foot the bill or the City doesn’t run the water line and the project dies.

The City asks its General Assembly delegation to oppose the Constitutional amendment as currently proposed. The Virginia Municipal League discussed the amendment (Attachment 3) and voted to oppose it at its 2011 annual Conference.

B. LEGISLATION TO INTRODUCE

1. Tools for Energy Conservation (Krupicka). Because of their age and construction, there is a great deal of energy wasted in older buildings. The City recommends that local governments be given the authority to use tax incentives to help encourage private property owners to upgrade the energy efficiency of their buildings. By exempting the value of these improvements against property taxes for a period of up to 10 years (at the option of the locality), property owners can be encouraged to upgrade their buildings, save energy, and reduce the need for new power plants.
2. HIV/AIDS Funding (Alexandria Commission on HIV/AIDS). The Virginia AIDS Drug Assistance Program (ADAP) is insufficiently funded in FY2012 and beyond to meet the needs of low-income Alexandrians, as well as other Virginians, for whom medication cannot be purchased through health insurance, Medicare or Medicaid. In FY2011, the State Health Department was forced, for the first time, to establish a waiting list for ADAP assistance. As of July 1, 2011, the waiting list in Virginia numbered 850 individuals, of whom 36 were Alexandria City residents. New applicants for ADAP are now limited to children under 18, pregnant women and people with an active infection related to AIDS, such as TB or certain kinds of pneumonia. The Virginia Department of Health is now using an out-of-state mail-order pharmacy to supply AIDS drugs to those who are on the waiting list, but it is unclear how long this option will be available. The Alexandria Commission on HIV/AIDS recommends full funding of ADAP or another appropriate source of AIDS drugs in the State's FY2013 budget. ADAP program supporters are working with the State Health Department to determine the amount of funding needed, but it is estimated at \$6.4 million or more annually.
3. Funding for High Capacity Transit Corridors (Krupicka). New funding is needed for high capacity transit corridors so that localities can build and operate the mass transit and other transportation improvements need for such corridors. The City recommends that the General Assembly give new funding tools to local governments that encourage them to plan and implement these systems. These sources could include one or more of the following to support the planning, construction and operations of the corridors, through direct payments, bonding or other tax-increment financing:
 - a. **New Gasoline Revenues:** Allow a local government to raise the gasoline tax in its jurisdiction by up to 2 percent, provided that the funds generated by the increase are used for high capacity transit corridor infrastructure, the operation of the locality or region's transit systems, or both.
 - b. **New Retail Sales Tax Revenues:** Allow a jurisdiction to increase the retail sales tax by up to 0.5 percent in order to pay for transit infrastructure.
 - c. **State Grant Funding:** Introduce legislation or a resolution asking the Commonwealth Transportation Board to give high priority to funding for high capacity transit corridor projects whenever possible.
4. Increased Flexibility for Unused Virginia Preschool Initiative (VPI) Funds (Krupicka). Each year millions of dollars of state preschool money goes unused because local jurisdictions are not able to come up with matching funds. Providing a match is particularly difficult now as the struggling economy prevents many local governments

from expanding Pre-K services. The City recommends that its delegation support any proposals to increase the use of VPI funds, and encourage the creation of a competitive grant process that allows local communities to apply for the unused funds for purposes such as improved preschool teacher training, the expansion of preschool space, the implementation of the Virginia Quality Rating System, or the creation of innovative early childhood programs for rural communities where access to services is limited.

5. Local Option for Setting the Opening Day of School (Donley & Krupicka). Current Virginia law prohibits school divisions from beginning the school year before Labor Day (although exceptions are allowed for school systems that experience a significant number of closures due to bad weather). Many school systems believe they would improve student performance, especially on standardized tests, if they could begin the school year sooner. This proposal would allow each school board to set the beginning of the school year on whatever day it deems appropriate.
6. Equality in Adoption (Krupicka and Human Rights Commission). The City recommends the introduction of legislation to allow any adult couple, including same-sex partners and grandparents, who want to share in the adoption and commitment to care for a child, to be eligible to do so. The well-being of the child should be the priority in adoptions.
7. Virginia Human Rights Act - Discrimination in Employment (Human Rights Commission). The City recommends that the Virginia Human Rights Act be amended to address these issues:
 - **Protect individuals from discrimination in all matters of employment.** The Virginia Human Rights Act provisions prohibiting employment discrimination currently apply only to termination of employment. The Commission recommends that it be amended to include discriminatory actions with respect to hiring or the terms and conditions of employment.
 - **Protect employees of all firms with five or more employees from discrimination.** Virginia anti-discrimination statutes currently protect only employees of employers with 5 to 14 employees from being wrongfully terminated (on the basis of race, religion, etc.). Federal law applies to employers with 15 or more employees. Federal law prohibiting age discrimination, however, applies only to employers with 20 or more employees. The Commission recommends fixing this discrepancy by amending the Virginia Human Rights Act so that it prohibits the various types of employment discrimination (hiring, termination, age, and terms and conditions of employment) for any employer with five or more employees.
8. Statutory Protection Against Employment Discrimination for State Employees (Human Rights Commission). The City recommends the introduction of legislation which would prohibit workplace discrimination against State employees. City Council passed a resolution unanimously on June 23, 2009, supporting the right of all public employees to be free from discrimination in the workplace. In March 2010 City Council adopted a resolution proposed by the Alexandria Human Rights Commission on the protection of public employees from workplace discrimination. The Virginia Association for Human Rights, at its annual meeting in June 2008, passed a resolution calling upon the General Assembly to "pass legislation codifying the basic human right of all public employees to

be free from discrimination in the workplace based on race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, status as a special disabled veteran or other veteran covered by the Vietnam Era Veterans Readjustment Act of 1974, as amended, and sexual orientation, including gender identity.” Survey research shows that more than 90 percent of Virginians support the right of gay, lesbian, bisexual and transgender citizens to work for the government without discrimination. In the increasingly competitive and diverse workforce and economy, recruiting and retaining the best public employees requires the Commonwealth of Virginia to be as attractive an opportunity as possible. Private businesses have already recognized the competitive advantage afforded by offering progressive employment practices; 94 percent of Fortune 500 companies have non-discrimination policies protecting employees on the basis of sexual orientation, and many include gender identity.

9. Restore 19 Adult Beds at Northern Virginia Mental Health Institute (NVMHI). The City requests that its delegation introduce or support budget language that will restore State funding for the 19 beds that were eliminated at the Northern Virginia Mental Health Institute in the spring of 2010. Thirteen of the 19 beds have been temporarily restored using one-time State funding, which will run out on July 1, 2012. The need for these beds in Northern Virginia is critical. This area has fewer state-funded beds per capita than any other region in the state and 52 private psychiatric beds have been closed over the past several years. These reductions often cause a shortage of psychiatric beds during mental health emergencies. Lack of beds can result in releasing people from custody even though they meet criteria for detention and are a danger to themselves or others. The cost of keeping the 19 beds open is estimated by NVMHI at \$1.8 million annually. This is the highest funding priority for the Alexandria Community Services Board (CSB), as well as other CSBs in the region.
10. Implement Regional Crisis Intervention & Stabilization for Individuals with Mental Health and Mental Health with Co-occurring Substance Abuse Issues--Children. The City also supports funding for up to 5 regional CSB pilot programs (including one in this region) that will offer a full array of Crisis Stabilization services for children undergoing acute crises (they are a danger to themselves or others). Many of these children are now transported to a State facility in Staunton, tying up City staff for many hours. It would be preferable for many of these children to be treated at a facility nearer to the community. This is the second highest funding priority for the Alexandria CSB, as well as other CSBs in the region.
11. Veterans Support Study (Krupicka). Virginia has one of the largest veteran populations in the country. When veterans return home from overseas duty and re-enter civilian life, they often need assistance in getting jobs, health care, housing and education. The obligations that the nation owes its veterans will likely create strains on local government services, including housing, homeless shelters, employment assistance, and CSB services. Since we cannot assume that the federal government will meet all these needs, there must be a strong network of state, local and not-for-profit organizations to assist veterans. Rather than wait until the lack of a network results in crises, the City recommends that the General Assembly or the executive branch, in partnership with local governments, formally study the needs of veterans and their families in Virginia and the impact of those

needs on state and local government. The outcome of the study should be a plan for the provision of support for veterans.

C. LEGISLATION TO SUPPORT

1. Local Option for Setting the Opening Day of School (Donley & Krupicka). Current Virginia law prohibits school divisions from beginning the school year before Labor Day, although exceptions are allowed for school systems that experience a significant number of closures due to bad weather. Many school systems believe they would improve student performance, especially on State-required standardized tests, if they could begin the school year sooner. This proposal would allow each school board to set the beginning of the school year on whatever day it deems appropriate.
2. Supplier Diversity in Contracting (Councilwoman Hughes). The City will support legislation that will make supplier diversity in State government contracting a priority.
3. Anti-bullying legislation (Human Rights Commission). The City will support legislation, if introduced, which would amend the existing anti-bullying statute to include sexual orientation and gender identity, and the perception thereof, in the definition of bullying. North Carolina's statute has the following language:

"Bullying or harassing behavior includes, but is not limited to, acts reasonably perceived as being motivated by any actual or perceived distinguishing characteristic, such as race, color, religion, ancestry, national origin, gender, socioeconomic status, academic status, gender identity, physical appearance, sexual orientation, or mental, physical, developmental, or sensory disability, or by association with a person who has or is perceived to have one or more of these characteristics."

43 states have anti-bullying laws; 7 states have no anti-bullying laws. One state has a cyber-bullying law but no anti-bullying law.

4. Stop for Pedestrians (Transportation Commission). For a number of years, the City had legislation introduced that would have revised the State's crosswalk laws so that drivers would have been required to stop—not just yield—to pedestrians in crosswalks where the speed limit was 35 mph or less. The legislation never passed, and for strategic reasons (we seemed to be losing ground rather than gaining), the City stopped asking for the legislation, hoping that legislators from other parts of the State would introduce it. This has not yet happened. The Transportation Commission has asked that we continue to support such legislation if it is introduced.
5. NVAN Platform (Commission on Aging). The Commission on Aging asks that the City support the legislative platform of the Northern VA Aging Network, which includes a number of requests for appropriations as State revenues rebound in the future:
 - Protect older and vulnerable adults by criminalizing their financial exploitation.
 - Support visibility and accessibility options for new single family homes.
 - Ensure that nursing home residents receive notice of the right to return to a nursing home following a hospital stay.

Budget Priorities

- Support services that keep older adults in their home and communities.
- Build a quality long-term care workforce.
- Support public guardianship/conservatorship services for vulnerable, at-risk adults.

Continuing Concerns

- Provide a Community-based Continuum of Psychiatric Care.
- Promote Livable Communities.
- Provide access to Respite for Virginia's Caregivers.
- Support Long-Term Care Ombudsman staffing by the State.
- Improve voting access.

The City has supported the NVAN platform for a number of years; this allows Commission members to lobby (as Alexandria Commission members) for its components.

6. The Alexandria Economic Opportunities Commission recommends that the City support legislation at the 2012 General Assembly session that would assist low income Virginians. Such legislation could include proposals such as:
 - A tax incentive for businesses in Virginia that hire low-income Virginia residents as employees (validated through payroll records and/or audit);
 - Tax incentives and State funding for existing Virginia businesses to promote on-the-job training for new hires and apprenticeship programs for low-income and/or unemployed Virginians in professional and skilled industries;
 - Re-establishment, with funding, of the Virginia Housing Trust Fund to provide more affordable housing in Alexandria and throughout Virginia; and
 - The restoration of State funding to Community Action Agencies.
7. Implement Regional Crisis Intervention & Stabilization for Individuals with Mental Health and Mental Health with Co-occurring Substance Abuse Issues--Older Adults (Alexandria CSB). Alexandria supports the creation of a Geriatric Psychiatric System of Care in each region of Virginia at an average cost of \$2 million per region. This funding will be used to provide services for older adults at times of crisis in order to augment the effective use of the acute care resources in the least restrictive treatment environment (e.g., their home, or a local nursing home). These funds are needed to eliminate disparities in health care for older adults, increase the number of staff trained to provide community-based crisis prevention and stabilization for geriatric populations, and augment current CSB services.
8. Support community placement of individuals leaving State training centers and of high-need individuals living in the community who need intensive services (Alexandria CSB). To ensure services for high-need individuals both from State training centers and the community, Alexandria supports changing the Intellectual Disabilities (ID) Medicaid Waiver rate and rate methodology. The number of beds at the Northern Virginia Training Center (NVTC) has decreased from 193 beds in 2005 to 169 in 2010, and further reductions are occurring. Alexandria, like many other localities, has no community beds available to serve individuals discharged from the training centers. Our

nonprofit residential providers are very reluctant to increase the numbers served due to non-competitive Medicaid reimbursement rates. To discharge people successfully from training centers (and serve high-need individuals currently living in the community who would otherwise be referred to the training centers), the State must restructure the ID waiver reimbursement system so that these individuals can be supported in the community. Changes must be made to the Waiver rate and rate methodology in order to place fewer restrictions on the service providers regarding reimbursements, as well as increases in the reimbursement amount. Other changes that would facilitate the expansion of community capacity to serve high-need individuals include: broadening the allowable uses of State Capital Funds (i.e., Community Housing Funds) beyond the construction of community-based intermediate care facilities (ICFs) and Waiver-funded group homes for persons discharged from training centers; allow current community residents to be admitted to these community ICFs and group homes, thereby preventing future admissions to training centers; and shorten the waiting time for processing initial State reimbursements to newly-certified ICFs.

9. Merge the Intellectual Disability (MR/ID) Medicaid Waiver with the Individual and Family Developmental Disabilities Support (DD) Medicaid Waiver and expand services to individuals with autism spectrum disorder (ASD) (Alexandria CSB). This would allow the ACSB and its counterparts to better serve this population. The cost of doing this would be small—about \$600,000 would be needed to train staff in the assessment, treatment planning, and coordination of services for children with ASD.
10. Provide funding statewide for Peer Model Recovery Support Services (RSS) (Alexandria CSB). There are only five state-supported RSS organizations in Virginia, and Alexandria does not have one. Recovery Support Services are grassroots, self-help programs, or peer-provided services that use recovering substance abusers to work with current substance abusers. RSS programs have been shown to improve the outcomes for consumers with substance abuse. This proposal seeks sufficient funding for each CSB to hire at least one Peer Recovery Support Specialist to provide peer addiction recovery support services before, during, and after a substance abuser's participation in a formal treatment system.
11. Provide additional funding for Children's Psychiatry Services (Alexandria CSB). There is a significant lack of child psychiatry services available statewide to children in need of these services. In response, the City supports additional funds to be used by CSBs to provide child psychiatry services to an additional 4,000 children per year statewide.
12. Energy Conservation (Krupicka). Councilman Krupicka recommends that the City support legislation to change the way the State Corporation Commission evaluates potential energy saving and conservation projects. Virginia appears to be one of the few states in the country that uses a formula that evaluates potential energy saving and conservation projects based on how they impact energy users who don't participate in the conservation program. This approach makes it much harder to justify the return on investment for a project. Instead, Virginia should follow other states and evaluate conservation projects based on the total energy savings and return on investment they create for the entire state. Moving to this Total Resource Cost test would enable a number of projects to move forward, saving Virginians energy and money. Experts

from Duke University and Georgia Tech estimate that this change could help Virginia save up to \$1.8 billion (\$325 per household) and create 28,500 new jobs by 2020.

Attachment 2

VIRGINIA ACTS OF ASSEMBLY -- 2011 SESSION

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 I of the Constitution of Virginia as follows:

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.

Attachment 3



October 3, 2011

VML Annual Conference

Henrico County, Va.

**Passage of eminent domain constitutional amendment
will drive-up cost of economic development in Va.**

Virginia is contemplating adding an amendment to our constitution that will fundamentally change the law regarding eminent domain. That's a big deal because that's the power of a government agency – *including cities, towns and counties* – to require property owners to sell them land when the acquisition is for public use. The power is critical for enabling local governments to serve their citizens by carrying out projects for the greater public good. It has been an important tool for the growth of the state since the United States was formed.

Make no mistake about it ... the change to the constitution that is being contemplated is far-reaching and expensive. It would drive up the cost of acquiring land to a point where some projects simply will become too expensive to build – even a routine road widening. And ... it's filled with a host of unintended consequences that could very well prompt local governments to curtail community celebrations, including parades and festivals.

Let me give you a very brief refresher of how we got where we are today. In 2005, the United States Supreme Court decided a case involving the use of eminent domain to transfer land from one private owner to another to further economic development. You probably have heard it referred to as the "Kelo case." It arose from the condemnation of privately-owned real property – make that homes – by the City of New London, Connecticut, so that the land could be used for redevelopment that promised more than 3,000 new jobs and \$1.2 million a year in tax revenues. The plan called for conveying the land to a private company for development.

The court held that the general benefits a community enjoyed from economic growth qualified such redevelopment plans as a permissible "public use" under what lawyers know as the Takings Clause of the Fifth Amendment. Ultimately, however, the project was abandoned when the developer could not obtain financing.

Public reaction to the decision was rightfully indignant. As a result, many states changed their eminent domain laws, including Virginia in 2007. The changes to the Virginia law, supported by VML, have worked well.

However, in the minds of some members of the General Assembly the law doesn't go far enough to protect the rights of private property owners. So last year, the General Assembly passed a bill to amend the constitution's eminent domain provisions. State law mandates that the bill must pass two years in a row before it can appear on a statewide ballot for voters to decide.

House Joint Resolution 693 will be back before the General Assembly again in 2012.

So ... what else do you need to know?

First off, it's worth noting that a case like Kelo could never have happened in Virginia. In fact, the two or three cases that promoters of the amendment use could not happen under the current law, because the law was changed to specifically deal with those old cases.

Secondly, as elected officials, we know that our cities, towns and counties work hard to avoid using eminent domain when buying land from citizens.

Most importantly, know that if the use of eminent domain is severely restricted by this constitutional amendment, the cost of building certain public improvements will increase, perhaps dramatically in some instances. When that occurs, it will be Virginia residents who will be forced to pay higher local and state taxes to cover the increased costs. The increased costs will retard economic growth. Fewer jobs will be created.

Here's why:

The amendment has two provisions that will be very expensive for taxpayers. The first involves lost profits and lost access. The second provision prohibits using eminent domain for economic development.

Let's talk about lost profits and lost access.

Any government agency, including a town, city or county, will have to pay property owners for lost access and lost profits caused by government action whether or not any land is acquired from the owners.

Let's take a look at this part of the amendment:

"No private property shall be damaged or taken for public use without just compensation to the owner thereof – (just compensation has always been the law). 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."

Examples:

- Locality or VDOT builds a by-pass to relieve congestion - every business on the old road will have a lawsuit for lost profits due to fewer people driving by and stopping in. McDonald's on the old road has a 30% decrease in business when the by-pass opens – the taxpayers pay McDonalds the lost profits.
- New Route 460 in Southeast Virginia. Hundreds of businesses on the old 460 will have lost profits.

- Route 29 Charlottesville bypass. Same problem as a new 460. Will the increased costs force VDOT to delay or abandon those projects?
- City four-lane street through commercial corridor is overloaded. The city installs medians and traffic lights to improve traffic. Every business along the street has lost access – no left turn in or left turn out. Every business can sue the city for that lost access. The taxpayers foot the bill.
- Town holds major festival – attracts thousands – closes Main Street for three days. Every business that can't access its shop (plumbers, dry cleaners, attorneys, doctors, accountants, car repair shops, car dealerships, etc.) can sue the town for lost access and lost profits. The taxpayers foot the bill. Winchester Apple Blossom Festival?
Clarksville Lakefest? Virginia Beach's Pungo Strawberry Festival?
- Water main breaks in the middle of winter on a busy commercial street – repairs close the street for 4 days. The businesses on the closed street have claims for lost access and lost profits – and the taxpayers foot the bill.

Now let's talk about what happens if you cannot use eminent domain when a project is for “economic development.”

The amendment prohibits eminent domain if the purpose is for “increasing jobs, increasing tax revenue, or economic development.”

When a locality negotiates with a landowner to buy land, the locality and landowner know that fair market value is the standard – if the locality has to condemn, fair market is what it will pay. But, if a court rules the constitution means that eminent domain cannot be used because the purpose is economic development – the fair market value standard doesn't apply. The price is whatever the landowner wants. Either the locality pays it or doesn't do the project. When one landowner wins that case, most other landowners will take the same position.

Examples:

Rolls Royce Plant in Prince George County. The head of the project said: "This is a \$170 million investment, that will eventually reach \$500 million in Virginia and will create 500 jobs in the coming years." If the county has to buy land for an access road to the plant, the landowner could convince a court that the purpose for the acquisition is for jobs and economic development. If the court agrees, which is likely, then the landowner can charge any amount he wants for his land – fair market value ceases to be a check. The taxpayers foot the bill.

City water lines to a new commercial park requires a water line easement – landowner where the easement will go convinces the court that the purpose is economic development – he charges whatever he wants, no longer limited by fair market value. The taxpayers foot the bill or the city decides it can't run the water and sewer and the project dies.

County buys land for industrial park – clearly for economic development – fair market value doesn’t apply – the price is whatever the owners want – and the taxpayers foot the bill, or the county abandons the project because it’s too expensive. The 100 jobs the park projected – gone.

These examples also make it clear that this amendment will be a jobs-killer, when localities and the state are forced to stop projects due to the costs. Every project that a locality abandons due to the increased costs will be an opportunity for new jobs that is lost.

There is no question that some other parts of the amendment reflect the current law on the books. Those parts could become part of the constitution without harming the citizens. However, the two provisions that we’re talking about today will be very expensive for the citizens of Virginia.

We have copies of this talk for you at the doors. We strongly encourage you to talk with your Senators and Delegates about what this amendment will do to Virginia and especially to the taxpayers who foot the bill for it. You will be hearing much more on this from VML. Please talk with your members of the General Assembly to strike the amendment’s two harmful provisions.