

Proposed Amendment to Virginia's Constitution Could Limit Government's Use of Eminent Domain

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The Virginia General Assembly recently voted in support of two identical bills - HJ-3 in the House of Delegates and SJ-3 in the Senate - that propose to amend the Commonwealth's Constitution to further restrict the Government's use of eminent domain.

SJ-3 passed in the state Senate, and HJ-3 passed in the House of Delegates. Each house is now considering the other's identical bill (which are expected to pass). If both houses pass the bills, the amendment will be placed on the ballot in November as a referendum to Virginia voters who will ultimately decide the issue.

Article I, Section 11 of Virginia's Constitution currently mirrors the Fifth Amendment to the U.S. Constitution, providing that "just compensation must be paid whenever property is taken or damaged for public use." In 2005, the U.S. Supreme Court decided the highly controversial case, *Kelo v. City of New London*, where the town of New London, Connecticut, was permitted to take private property for an economic development project. Lawmakers in many states, including Virginia, felt that the Supreme Court decision stretched the power of eminent domain too far and that economic development was not the same as "public use." Since that decision, opponents of the *Kelo* decision have been working to counter its effects within Virginia.

The proposed amendment seeks to contract the power of eminent domain in Virginia and limit the use of the power to strict public uses only. The suggested language of the amendment makes it clear that economic development would no longer qualify as a public use. In addition, property owners would receive reimbursement for the fair market value of their property, as well as any "lost profits" and "lost access." The amendment would also shift the burden of proof to the government taker, who would be required to prove that their taking is in fact for public use. There would be no presumption in favor of public uses.

Those in favor of the amendment feel it is a positive step toward safeguarding against the abuse of the power of eminent domain found in *Kelo*. Supporters believe the amendment will serve to protect the individual property owner's constitutional rights.

In contrast, those opposed to the amendment fear it will make economic development projects too costly and tie the hands of local governments who rely on the power of eminent domain. Local governments feel pressured to complete projects that improve job growth within their communities and increase tax revenues. The proposed amendment will make these efforts more challenging. Projects that were clearly

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(Cont.)

designated "public uses" before will now be open to scrutiny and court review under the new amendment.

Ultimately, the voters are likely to have the final say on this already controversial topic. Supporters and opponents of the legislation alike are gearing up for a passionate debate. One thing is certain, whatever decision Virginia does make is likely to impact eminent domain law throughout the U.S., as other states are watching to see how this all unfolds leading up to the election in November.