

# CONSTRUCTION & LAND USE NEWSLETTER

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## VIRGINIA AMENDS HISTORIC PRESERVATION STATUTES

BY TAD LUNGER, ESQUIRE



As many readers of this newsletter know, being owners of real estate in Virginia, and in particular those with interests in aging multifamily sites in certain progressive localities, the Code of Virginia delegates the authority to localities to be able to enact ordinances designating and mandating the preservation of private property where the locality finds a site has important historic, architectural, archeological or cultural interest. Once such a designation is made, localities can more or less prevent any modifications to the site without the locality first approving it.

In a nutshell, the process for a locality to designate a site as a historic landmark or district is relatively straightforward. All the locality has to do is enact an ordinance creating the historic landmark or district. Thereafter, this would leave a property owner with two options. First, the property owner could appeal the designation as arbitrary and an abuse of discretion at the circuit court for such locality. Second, the historic preservation statute provides that an owner may, as a matter of right, demolish and raze a historic site if the owner has applied for the right to do so with the locality, and for a specified amount of time has made a bona fide offer to sell the property at a fair market value to any entity willing to preserve the historic site, and that within this specified time period, no bona fide contract had been executed. The problem with this second procedural option is that it fails to provide who determines fair market value, how fair market value will be determined once a property has been restricted by its historic designation and what happens if an owner and a locality do not agree about whether the process has been correctly followed.

Effectively, these processes give localities the ability to tie-up private properties potentially for years, and this bureaucratic and litigation-prone quagmire is used as leverage by localities to their advantage. As a result, the Commonwealth of Virginia has taken another step to make it more difficult to use this authority arbitrarily and passed House Bill No. 1137 at this year's session. HB 1137 now provides that before any locality, by ordinance, can designate a site to be a historic landmark or included in a historic district, actual written notice must be given to the owners,

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and if a “majority” of the owners of the landmark or proposed new district object, then the locality cannot include their property in the proposed district.

So what is the next shoe to drop? Besides the likely-to-be strangely shaped historic districts enacted in the future, it would probably behoove property owners in a locality’s historic crosshairs to pay attention to what the locality is discussing with their neighboring property owners. How these districts will be drawn and how a locality will try and achieve a “majority” acceptance by property owners of a restrictive historic designation will be something to keep on top of and will be very political. Also, and maybe this goes without saying, it would be a rare situation where a locality seeking to preserve a site would be willing to allow its redevelopment vis-à-vis some special exception process where they would have the discretion to deny a request for redevelopment. Therefore, I think you could say that redevelopment of these sites poses a threat to localities only if the underlying by-right development potential economically warrants redevelopment. This also affects how much a locality will have to pay a property owner during the above described processes. This leads to the unavoidable conclusion that it may be in a locality’s best interest to remove economically viable by-right redevelopment options from underlying applicable zoning districts, so property owners should pay closer attention to any legislative proposals modifying by-right development options for their properties.

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## KNOWING WHEN TO PULL THE PLUG ON A CONSTRUCTION PROJECT

BY JUANITA F. FERGUSON, ESQUIRE



It is sometimes a painful reality to accept that a construction project does not materialize in the manner that one or more of the parties involved in the project expects. The reasons a project ends unfavorably often include the inability or unwillingness to pay attention to the warning signs. Recognizing and responding to warning signs early in the life of a construction project can save contractors and clients valuable time and expense.

### The Warning Signs:

- o Client Pays Late or Not at All
- o Contractor Misses Deadlines Routinely
- o Quality of Work is Questionable in Early Stages of Project
- o Too Little or Too Much Communication

### Client Fails to Make Timely Payments

Late payments are a strong indicator that the project may result in early termination. It is not uncommon that at the start of the project, payment is received in a timely manner. However, the closer the project gets to substantial completion, only partial payments are made, or worse, no payments are made at all. Because the client has a past reputation of paying on time, work continues on the project with the expectation that the warning sign is not a real consideration.

### ***Don't overlook the obvious.***

Late payment is the client’s way of letting you know that funds are lacking or there is dissatisfaction with the work. Review the construction contract to determine your rights, inquire with the client both verbally and in writing, and don’t be uncomfortable to state that work will cease if any outstanding

amounts are not paid in full. Prolonging issues related to payment increases the cost of doing business. Exercise your right to control the situation.

### **Contractor Misses Deadlines Routinely**

There are legitimate reasons why a contractor may not complete all or a phase of the project in accordance with the construction contract. Change orders may delay the completion date for a project. Inclement weather or other circumstances beyond the control of the contractor may also cause a delay. The contractor should have documentation to support any activity that causes a legitimate delay. If an architect or a construction manager is a part of the team for your project, it is likely that they will have access to and review periodically the contractor's records. If you work directly with the contractor, review the contract to determine if the contractor is in default.

Provide the contractor with the opportunity to avoid termination of the project by giving written notice if in fact the contractor is in default. If the contractor cures the default, the expense of having to terminate the contract and engage another contractor to complete the project is avoided. If the contractor does not cure the default, evaluate the status of the project. An engineer or other construction expert can advise on the expected cost to complete the project as well as document the existing condition of the project in the event that you need evidence for possible litigation. It may be that it is less expensive to accept a later completion date and to continue working with the current contractor rather than instituting litigation or entering into a new contract with a different contractor. Know all of the costs associated with terminating a contractor prior to taking any action against the contractor. Then, if action is needed, you have laid a proper foundation to establish your claim.

### **Quality of Work Is Questionable**

Quality of workmanship issues are often a real source of tension between an owner and a contractor. When a project is at or near the stage of substantial completion, a punch list is prepared and the contractor completes the list of uncompleted contract items in order to receive final payment from the owner. Examples of punch list items include damaged building components, such as a broken window or cracks in paving, or problems with the final installation of building materials or equipment, such as peeling carpet or missing roof shingles.

Owners often seize the opportunity before final payment is made to voice their concerns about the overall quality of the work. The punch list addresses minor items. To alleviate concerns about inferior workmanship of major components of the project, work with the contractor early in the project to establish criteria for judging workmanship. The more that an owner and a contractor come to agreement about established standards for workmanship, the more likely that the project will result in good quality without unreasonable expectations on the contractor.

### **Little or Excessive Communication**

Parties to a contract may have different expectations about the level of communication that should exist, and therefore, it is critical for each party to communicate those expectations. Some clients are satisfied with periodic updates on the progress of a project, while others want to engage in daily communications either in-person, by phone or e-mail. If your style and frequency of communication is at odds with the other party, it may lead to miscommunication or a breakdown in the client-contractor relationship.

Timely updates are critical during a project, though the frequency of the updates preferred by each client varies. Some clients want hour-by-hour updates, while others want their contractor to supply updates every few days or weekly. Whatever the case, both parties should be clear

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about the reporting requirements at the beginning of the project.

If the contract needs to be terminated, consider the practical consequences and work actively to reach a compromise and limit your exposure to damages. Successful projects are ones where the parties to the contract have a clear understanding about each other's concerns, limitations and ability to readjust if the situation requires.

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