October 2009
Volume 1
Issue 1

BEAN KINNEY & KORMAN PC
ATTORNEYS

Construction and Land Use Newsletter

Inside This Issue:

East Falls Church Planning Study Page 1
Back in Business Page 2
Mechanic's Liens and Construction Bonds 101 Page 3
Crossing your t's and Dotting your i's: Perfecting Appeals Under the Virginia Public Procurement Act Page 4
New Firm Blog: Virginia Real Estate, Land Use and Construction Law Blog Page 5

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East Falls Church Planning Study

by Jonathan C. Kinney, Esquire

For the past two years, a joint Arlington/Falls Church Task Force has been considering which land use and community amenities are appropriate for the East Falls Church area. Of particular interest are the East Falls Church Metro station and portions of Lee Highway at the Arlington County/Falls Church border. The Task Force is considering making various recommendations on land use, transportation and parks, among other things.

The goal of the Task Force is: "To restore the finest elements of the old, embrace existing community assets and overcome the area's shortcomings by turning our transportation links into assets using modern planning and design techniques to create a warm, inviting, accessible and friendly community and integrating together our neighborhood with the rest of Arlington, Falls Church and the region beyond."

A large part of the Task Force's time has been spent on reviewing options for the Metro land at the East Falls Church Metro station, including the possibility of constructing a western entrance to the station in order to connect the station with the Lee Highway area. Discussion on the East Falls Church Metro station itself has focused primarily on the existing surface parking lot and the issue of how to create a mixed use development on the site that does not overwhelm the immediate neighborhood but which takes advantage of the huge investment made by the community in Metro. Proposed design schemes range from three to six story developments to nine story developments, with one plan showing up to a 12 story development immediately next to the Metro station.

Option 1 - Up to 12 stories

The Task Force has also looked at existing development patterns and potential future development along Lee Highway, particularly in the area immediately around the Arlington County/Falls Church boundaries. The Task Force has

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East Falls Church Planning Study
Continued from Page 1

Option 2 - Up to 9 Stories

Option 3 - Up to 6 Stories

considered the implementation of zoning and land use tools that would permit densities consistent with projects already approved in the East Falls Church area. Generally, this would include heights between four and six stories along Lee Highway with a mix of uses, primarily residential and retail.

While the Task Force has not made any final decisions, density and use issues have been discussed. Most likely the Metro station density recommendation will be somewhere above a 2.0 FAR, probably closer to the 2.5 FAR mark. Uses are a mix of residential and office at this location with a potential bus transit point/garage on site. The Task Force anticipates making its recommendations in early Spring 2010. Recommendations will then be reviewed by staff with potential additional recommendations or modifications being made to the Task Force report. The final recommendations will be considered by the Planning Commission and Arlington County Board in Spring/ early Summer 2010.

Further information regarding the East Falls Church Planning Study can be found on Arlington County's East Falls Church Planning Study page.

Back in Business

by Fred Taylor, Esquire

For the longest time, the Board of Zoning Appeals ("BZA") served a valuable function. The BZA was a relatively inexpensive and expeditious venue in which an aggrieved landowner could address what seemed to be major land use impediments created by miniscule deviations from a strict read of the zoning ordinance. The BZA also served the more limited function of hearing appeals of zoning violations and deciding smaller cases involving churches and daycares. Eighty percent of the cases on its agenda, however, were variances.

A property owner looking to reconstruct a house on a lot that no longer conforms with the current zoning ordinance, the property owner whose land's topographic challenges dictate that improvements be located someplace other than within the usual setbacks set forth in the zoning ordinance, the property owner whose lot is a fraction smaller than another (the difference not being discernable to the naked eye, but different enough to keep him from building something that his neighbor could do as matter of right), and a commercial developer whose ALTA survey reveals that the building violates set back lines are examples of the typical cases seeking relief from the BZA, via a variance.

In 2004, the decision in Cochran v. Fairfax County Bd. Of Zoning Appeal came along. In no uncertain terms, this ruling eviscerated the discretionary authority that the BZA had historically exercised in addressing hardships created by the broad brush of the zoning ordinance, by taking a closer look at how the zoning ordinance affected an individual property. It held that the only time that the BZA could find a hardship would be when that hardship deprived the property owner of all reasonable use of the property, a finding approaching total confiscation of the property.

Cochran put the brakes on the variance process. More than 75 cases were denied before the BZA approved its first post Cochran variance. Jurisdictions found themselves unable to dispense simple fairness. Residents

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Back in Business
Continued from Page 2

of New Alexandria, victims of Hurricane Isabelle, found themselves unable to rebuild because the lots in New Alexandria did not conform to the current Zoning Ordinance. Eventually, new local legislation addressed that particular point and Special Permit processes were created to provide limited relief for special circumstances. But that was all that was available: limited relief.

Virginia is a Dillon Rule state, so the only powers that the local jurisdictions can exercise are those powers granted by the legislature. Finally, the legislature did act and amended 15.2-2309 of the Code of Virginia to trump Cochran, codifying what had been the practice of the BZA in earlier times, granting relief for hardships of a much broader nature that the Supreme Court mandated. A standard of a "clearly demonstrable hardship" replaced one "approaching confiscation".

The change in law hasn't created an avalanche of new variance applications but a steady flow. Some of what would have been a pent up demand has been tempered by some limited approvals obtained through a special permit process, probably a fair amount of self help in smaller cases, such as building without permits, and a dramatic increase in filing fees for the BZA. But mostly, the change in law would seem to have reinstated an important and necessary safety net for the innocent landowner seeking nothing more than protection against an overreaching or overly literal and zealous enforcement of the Zoning Ordinance.

Mechanic's Liens and Construction Bonds 101
by Juanita Ferguson, Esquire

The laws regarding mechanic's liens vary throughout the 50 states and the District of Columbia. If you supply materials or services for the improvement of real property in any jurisdiction, it is beneficial that you have a general understanding of the laws of the jurisdiction in the event that payment for materials and services is not forthcoming from the customer.

Who can file a mechanic's lien?

Virginia – All persons performing labor or providing materials for a construction project.

Maryland – All persons performing labor or materials for a construction project.

District of Columbia – Any person having a contract with the owner or the general contractor.

What do I file?

Virginia - A Memorandum of Mechanic's Lien is the initial filing. In order to enforce the lien, a suit to enforce the Mechanic's Lien must also be filed. Subcontractors, sub-subcontractors, and materialmen must also file a Notice to the owner of the property.

Maryland – Subcontractors must file a Notice of Intent to Lien. The first notice required for a general contractor is the Petition to Establish Mechanic's Lien. Subcontractors are also required to file a Petition in order to enforce the lien.

District of Columbia – A Notice of Mechanic's Lien. In addition to filing, subcontractors must serve the Notice on the owner of the property. In order for any contractor to enforce the lien, a Complaint must be filed.

Where do I file?

Virginia - The Memorandum of Mechanic's Lien is filed in the land records of the Circuit Court in the city or the county where the property is located.

Maryland - The Notice of Intent to Lien is filed in the Clerk's office of the Circuit Court where the property is located.

District of Columbia – The Notice of Mechanic's Lien is filed at the office of the Recorder of Deeds in Washington, DC.

When do I file?

Virginia – Any time after work commences or materials are provided, but no later than 90 days after the last day of the month that work was last performed or materials were provided, and in no event no later than 90 days after the project terminates.

Maryland – A general contractor must file a Petition within 180 days of completion of the work or delivery of materials. A subcontractor must file a Notice

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Mechanic's Lien's and Construction Bonds 101
Continued from Page 3

within 120 days after performing work or providing materials.

District of Columbia - The Notice must be filed
Mechanics Liens and Construction Bonds 101
Continued from Page 3

within 90 days after the project is completed or terminated, whichever is earlier.

While contractors can file mechanic's liens against privately owned property, the same is not true for public projects. Alternative, and perhaps, superior, security exists in the form of payment bonds. The federal Miller Act requires that all construction projects for federal contracts be bonded by the general contractor to protect the right of payment for those performing work or providing materials to the project. Similarly, most states have laws for state and municipal projects known as "Little Miller Act" statutes. Miller Act payment bonds protect all persons supplying labor and material for public construction projects.

How much is the bond?

Virginia – For all public projects in excess of $100,000.00, the amount of the main contract.

Maryland – 50% of the total amount due under the main contract.

District of Columbia – One half of the total amount due under the terms of the main contract.

What kind of notice is required?

Virginia - Any person who has a contract with the general contractor does not need to file notice. Any person who has a contract with a subcontractor must give notice to the general contractor within 180 days of the last date that work was performed or materials were provided for which payment is claimed.

Maryland – Any person who has a contract with the general contractor does not need to provide notice. Any person having a contract with the subcontractor or a sub-subcontractor must provide written notice to the general contractor within 90 days of the last date of providing labor or materials and state the amount of the claim and the party for whom the work was performed or materials provided.

District of Columbia – Any person who has a contract with the general contractor does not need to provide notice. Any person having a contract with the subcontractor must provide written notice to the general contractor within 90 days of the last date of providing labor or materials and state the amount of the claim and the party for whom the work was performed or materials provided.

Is my project covered?

Virginia - If the project is $100,000.00 or less, the project is not covered unless required by the Commonwealth, county, or city responsible for the project.

Maryland – With the exception of highway projects, contracts for less than $100,000.00 are excluded.

District of Columbia – If the project is less than $100,000.00 the bond may be waived.

When do I file a lawsuit?

Virginia – Suit must be filed more than 90 days after the last day that labor is performed or materials are provided but within one year after the date on which the claimant last performed labor or provided materials.

Maryland – Suit must be filed more than 90 days after the last day that labor is performed or materials are provided but within one year after the state or municipality accepts the work performed under the primary contract.

District of Columbia - Suit must be filed more than 90 days after the last day that labor is performed or materials are provided but within one year from the last date that labor is performed or materials are provided.

This article is not intended to provide specific legal advice but, instead, a general commentary regarding legal matters. You should consult with an attorney regarding your legal issues, as the advice will depend on your facts and the laws of your jurisdiction.

Crossing Your t's and Dotting Your i's: Perfecting Appeals Under the Virginia Public Procurement Act
by Heidi Meinzer, Esquire

Be aware that the procedural requirements of Virginia Code Section 15.2-1246 apply to appeals disallowing claims arising under contracts covered by the Virginia Public Procurement Act, according to the recent case, Viking Enterprise, Inc. v. County of Chesterfield, Record No. 080215 (Jan. 16, 2009).

In Viking Enterprise, Viking entered into a written contract with Chesterfield County to construct a fire station. The County insisted that Viking had to remove and replace part of a concrete floor. Although Viking believed the floor could be repaired without removing and re-pouring the concrete, it complied with the County's request and submitted a claim for $86,531 for additional work. The County's board of supervisors denied the claim on July 25, 2005, and the clerk of the County's board of supervisors gave Viking written notice of that denial in a letter dated August 2, 2005.

Relying on Virginia Code Section 2.2-4363(E) and 2.2-4364(E), Viking believed that it merely needed to file suit in Circuit Court within six months of the board of supervisor's final decision to perfect its appeal. It filed a complaint in Chesterfield County Circuit Court on January 27, 2006. It later non-suited its action and re-filed its complaint on February 13, 2007.

The County argued that Viking failed to comply with Section 15.2-1246, which would require that Viking appeal within thirty days from the date of the board of supervisors' decision (if Viking had been present at the July 25, 2005 meeting) or within thirty days of being served with the clerk's letter notifying Viking of the board's decision (had Viking not been present at the meeting), and that Viking failed to serve written notice on the clerk and to execute a bond.

The Circuit Court and the Virginia Supreme Court agreed with the County. Because Viking conceded it had not appealed within thirty days of the decision or service of the clerk's letter, had not served notice of the appeal on the clerk and had not executed a bond, Viking's appeal was dismissed because it did not comply with Section 15.2-1246.

The Viking Enterprise opinion concludes with the following recap of requirements to perfect an appeal from a county's disallowance of a claim arising out of a contract covered by the Virginia Public Procurement Act:

[T]he claimant must serve written notice of its appeal on the clerk of the county's governing body and execute a bond to the county, both within 30 days from the date of either the decision or service of the written notice of the denial, in accordance with Code § 15.2-1246. The claimant must then institute legal action in the appropriate circuit court within six months of the date of the decision denying the claim, in accordance with Code Code §§ 2.2-4363(E) and -4364(E).

Notably, the Court recognized that Section 2.2-4363(E) also allows for an administrative appeal if available, and declined to rule on whether that subsection conflicts with section 15.2-1246. The Court also assumed without deciding that the Virginia Public Procurement Act applied, although Chesterfield County argued that it had enacted an ordinance opting out of the Act.

New Firm Blog: Virginia Real Estate, Land Use and Construction Law Blog
by Timothy R. Hughes, Esquire

We are pleased to announce an exciting new venture, our firm's first step into the blogosphere. We launched the Virginia Real Estate, Land Use and Construction Law Blog in September. Here is where you can find us:

http://www.valanduseconstructionlaw.com

We are have a lot of content up already and are adding new materials and topics every couple of days. We see this blog as a way to cover a lot of ground across the entire spectrum of real estate, land use, and construction law and litigation issues in a far more rapid fashion than pushing out quarterly newsletters or writing articles for publications. We also invite comments on the blog, so please feel free to join the conversation.

Here is a quick rundown of just some of the topics we have discussed:

- A three part series on LEED construction, energy efficiency, and potential resulting liability implications (this series was commented on in another nationally established green building legal blog and is being reprinted on another blog right now)

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New Firm Blog: Virginia Real Estate, Land Use and Construction Law Blog
Continued from Page 5

- Real time discussion of changes in stormwater and VDOT regulations
- Multiple legal case treatments, including a decision refusing to enforce arbitration, a controversial Virginia non-suit decision, and a building heights fight
- Arlington's recent lawsuit filed against the "Hot Lanes" project
- Imposition of the E-Verify program requirements on federal contractors
- Analysis of cases addressing the process for appealing state decisions relating to public contracting
- Analysis of the collapse of the Dallas Cowboys' Practice Facility
- Discussion of the basics of mechanics liens
- A case discussion on the failed Granby Tower Project in Norfolk
- A description of the changes from LEED 2.2 to LEED 3.0, relating, in particular, to energy credits

We are pleased with the reception of the blog. In addition to gaining a number of immediate followers, comments and subscribers, we have been asked to guest blog on a number of forums. We also have been honored that the last four blog posts in the list all made the "Top Ten" list of best daily legal blog posts in the LexBlog Law Network Roundup.

If anyone has a topic of interest or information you think would make a good blog post, please feel free to pass that along. In the meantime, come visit, comment and subscribe.

This newsletter was prepared by Bean, Kinney & Korman, P.C. as a service to clients and friends of the firm. The purpose of this newsletter is to provide a general review of current issues. It is not intended as a source of specific legal advice. © Bean, Kinney & Korman, P.C. 2009.

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