

## Virginia's Response to *Kelo*: Constitutional Amendment or Legislation?

By Jeremy P. Hopkins, Esq.

### Summary

Until Virginians amend their Constitution, Virginia property owners have no legitimate and lasting security, and their private property remains subject to the whim and caprice of unelected bureaucrats, corporate officials, and each new General Assembly.

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***The General Assembly has carelessly handed out powers of eminent domain to countless governmental and non-governmental entities. The Assembly has even given mosquito control commissions power to take property.***

The Fifth Amendment of the United States Constitution states that the government may take private property only for a "public use." Despite the Constitution's plain language, the United States Supreme Court recently declared in *Kelo v. New London* that the Constitution allows local governments to use the power of eminent domain to take property from one person to give it to another. Local governments can now take a person's property solely for economic development. In other words, government is free to take property and give it to someone who will use it in a manner local officials deem more lucrative or desirable. Under the Supreme Court's interpretation of the Constitution, no person's home, business, or farm is safe from government officials or well-connected developers who may covet the property.

After effectively rewriting the Fifth Amendment by substituting the words "public purpose" for "public use," the Supreme Court announced that states may provide more protection for property owners than the limited protection the United States Constitution now provides. Many state representatives responded by proposing state legislation and state constitutional amendments. However, only a constitutional amendment seems a plausible solution for Virginia.

Legislation falls short of providing permanent protection for property owners for three reasons. First, what the General Assembly ("Assembly") gives today, it can easily take away tomorrow. Second, the Assembly's prior record proves it cannot be trusted to protect property owners. Third, with regard to eminent domain, Virginia's Constitution presently allows the Assembly to define the limits of its own power.

A constitutional amendment provides enduring protection because, unlike legislation, which the Assembly can easily change, the Assembly cannot change a constitutional amendment without the people's consent. Only a majority of the voters can change protections placed in Virginia's Constitution. Moreover, the Assembly's previous actions prove the Assembly has not protected property owners. The General Assembly has carelessly handed out powers of eminent domain to countless governmental and non-governmental entities. The Assembly has even given mosquito control commissions power to take property.

Equally disturbing is the breadth of power the Assembly gives these entities. For example, the Assembly gave cities the power to take property for the purposes listed in each city's charter. The Assembly specifically approved

a charter that allows the City of Norfolk to take property “for any purposes of the city.” Norfolk’s Charter even allows the City to sell or transfer, without restriction, property it has taken.

By extensively delegating the power of eminent domain, the General Assembly successfully rid itself of all accountability. Even cities have caught on to this novel concept, as city council members encourage the creation of new layers of government, such as redevelopment authorities, that do the unpopular work of taking people’s property to protect those in public office who must face elections. The Assembly’s careless delegations of power and its broad definition of public use, as discussed below, subject property owners to the whim of unelected, unaccountable bureaucrats wielding immense powers of eminent domain.

The Assembly’s actions are not surprising considering that Virginia’s Constitution presently allows the Assembly to fix the limits of its power of eminent domain. Article I, § 11 of Virginia’s Constitution purports to place a restriction on the Assembly by prohibiting it from taking property for reasons other than “public uses.” The Constitution then immediately removes this restriction by authorizing the Assembly to define “public uses.” Virginia’s Constitution thus places no real limits on the scope of the Assembly’s power of eminent domain. Instead, the Constitution relies on the Assembly to limit itself.

The Assembly’s present definition of “public uses” provides another example why a constitutional amendment is necessary. The Assembly defines “public uses” as “all uses which are necessary for public purposes.” This expansive definition is similar to the definition the Supreme Court used to support its decision in *Kelo*. “Public uses” and “public purposes” are not synonymous. “Public use” means the government owns or the public has a right to use the property taken. “Public purpose” means creating a public benefit, such as increasing jobs or generating more tax revenue. Under this standard, government can take property for public or private uses, such as takings for corporations or developers, so long as it creates a perceived public benefit.

A constitutional amendment provides the only lasting protection for property owners. Mere legislation will not sufficiently restrict the Assembly’s powers. The silver lining in the cloud of the *Kelo* decision is that it has raised public awareness of eminent domain and the threat it poses to all property owners. Virginians must act now to restore and ensure any meaningful protection of their property rights. In the words of Virginia’s own Thomas Jefferson, Virginians must bind the Assembly down “by the chains of the Constitution.” Until the people demand a constitutional amendment, the Assembly will be bound by nothing more than its own conscience and ambition, two things no Virginian should trust.

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