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“Takings” Liability for Vacating Roads in Flood-Prone Areas: Poquoson Case Study

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About the Author

Kelci Block, J.D. graduated from William and Mary Law School in the class of 2013. She is currently a post-graduate fellow in the litigation department of the Humane Society of the United States. During school, she served as the co-president of the Environmental Law Society and president of the Student Animal Legal Defense Fund. Ms. Block has interned at the Humane Society of the United States, the Southern Environmental Law Center, the Chesapeake Bay Foundation, and the Virginia Outdoors Foundation. She has also externed for Virginia Supreme Court Justice Elizabeth McClanahan. Before law school, she graduated from the University of Central Florida with a BA in Political Science. During undergraduate, Ms. Block also interned for the Sierra Club's Environmental Law Program and the National Park Service.

About the Virginia Coastal Policy Clinic

The Virginia Coastal Policy Clinic (VCPC) at William & Mary Law School provides science-based legal and policy analysis of environmental and land use issues affecting the state's coastal resources and educates the Virginia policy making, non-profit, military, legal and business communities about these subjects.

Working in partnership with Virginia scientists, law students in the clinic integrate the latest science with legal and policy analysis to solve coastal resource management issues. Examining issues ranging from property rights to federalism, the clinic's activities are inherently interdisciplinary, drawing on scientific, economic, and policy expertise from across the university. VCPC has a strong partnership with the Virginia Institute of Marine Science (VIMS) and Virginia Sea Grant.

VCPC is especially grateful to Virginia Sea Grant for providing generous funding to support our work as well as to the Virginia Environmental Endowment for providing funding to establish the clinic in fall 2012.

A Note from the VCPC Director

VCPC received funding from the Virginia Environmental Endowment to produce a series of white papers analyzing legal issues Virginia localities may face as they respond and adapt to increased flooding caused by sea level rise. To focus the students' analysis, we selected two Virginia jurisdictions—Norfolk and Poquoson—to analyze. The students utilized facts from published reports and press accounts to inform their work. Although we focused on these two jurisdictions, the issues raised are broadly applicable to similarly situated cities in Virginia. The reader should be aware, however, that the legal issues that county governments may face might be different from those in the city government context.

Future work is likely to involve interviews, additional analysis, and engagement with the broader policy community about some of the issues raised. Adapting to flooding and sea level rise is a complex area. We have not identified all of the possible legal issues that may arise. Nor have we necessarily answered every possible legal question as part of the analysis that was conducted. We hope, however, that our white papers begin to answer some of the threshold questions facing Virginia localities at this time. We also anticipate that they lay the groundwork for in-depth work and identify areas of needed discussion and additional research. We therefore welcome any feedback on our work.

Finally, a special thanks goes to Chris Olcott, a rising third-year law student and Virginia Sea Grant Summer Fellow, for source-checking and editing this white paper. VCPC is also grateful to Virginia Sea Grant for funding the VCPC Summer Fellow program at William & Mary Law School.

Summary

- As a city, Poquoson has the authority to vacate roads under Virginia law as long as it follows statutory procedures.
- Even though it has the authority to close roads, however, Poquoson—and other Virginia localities—may be liable for “taking” private property if the action limits access entirely. Actions that only diminish access are less likely to be a taking.
- If Poquoson abandons a road the title to the land under the road can pass directly to the abutting landowner. This can help mitigate any potential takings liability.

Background

Poquoson’s transportation infrastructure—like that of many Virginia localities—is vulnerable to increases in sea level. Ninety percent of Poquoson is in a 100-year floodplain,¹ including forty-eight miles of Poquoson’s roads.² Roads in low-lying areas will become more frequently inundated as sea level rises, potentially causing road base failure and pavement damage.³ Such regular damage will make it costly to keep roads passable and safe for use.

Raising Roads

Norfolk has expended significant funds to deal with the increased flooding of its roads. A road in its Larchmont neighborhood regularly experienced flooding from tidal cycles as well as storm surge, becoming virtually impassable about nine times a month.⁴ High tides pushed two to three feet of water into the residents yards, preventing them from parking in front of their own homes.⁵ To remedy this, the City spent \$1.25 million to raise the short stretch of road—one that serves only a few modest houses—eighteen inches.⁶

It is unlikely that the houses abutting the renovated street in Larchmont will ever produce enough tax revenue to recoup the costs of construction.⁷ In many areas, raising a street might not be the most cost-effective way to respond to increased flooding of coastal roads and infrastructure.

Poquoson can opt to pay to raise streets affected by floodwaters or Poquoson can stop maintaining such roads altogether, employing a policy of managed retreat.⁸ Virginia law permits a locality to close roads within its jurisdiction⁹ and Poquoson could vacate a road in a low-lying area, eliminating its obligation to pay to keep it clear for public use.¹⁰ While a city such as Poquoson may have the *authority* to vacate a road, that authority does not make it immune from potential “takings” claims: vacating a road could constitute a compensable “taking”—under both the United States and Virginia constitutions—if it unreasonably affects an individual’s right to access his or her property.

Indeed, Virginia’s constitution recently has been amended to require local governments to compensate landowners where government activity impacts access to their property.¹¹ The effects of this amendment are not certain—any takings inquiry depends on a variety of unique factors—but it is likely that an action that eliminates access entirely will be a compensable taking. Actions that merely diminish access are less likely to be a taking.

Local governments can vacate roads within their jurisdiction using formal procedures. However, such actions can be compensable takings if they eliminate or limit access to a person's property. It is likely that vacating a road providing the sole access to a property is a compensable taking, but it is less likely that a compensable taking occurs where a landowner's access is simply made more circuitous as a result of the vacation. Although the paper focuses on Poquoson, other Hampton Roads localities face many of the same issues.

Authority: Poquoson can Vacate Roads as Long as it Follows Statutory Procedures

The governing body of a locality can vacate a public right-of-way in its jurisdiction if it follows the procedures set forth in Virginia Code section 15.2-2006. If it wishes to close a public street, Poquoson must publish its intent to vacate the road, have a hearing to allow the public to weigh in, and then appoint a body to investigate the vacation and make a final decision.¹²

Localities also have the power to abandon state-controlled roads within their jurisdiction if certain conditions are met.¹³ The locality must publish notice of its intention to abandon the section of highway and must make findings that “the section of the secondary system of highways is no longer necessary for the uses of the secondary system.”¹⁴ Once those conditions are met, the state can relinquish control of the roadway at issue and abandon it as a right of way

As long as the decision is for the public welfare, courts are highly deferential to city decisions to vacate streets.¹⁵ If a decision to close a street was not solely for private benefit, it will remain undisturbed by the courts.¹⁶ As such, Poquoson could close any street in its jurisdiction as long as it did so to promote the public welfare. Because Poquoson would seek to vacate roads in order to limit its expenditure of public funds, vacation would likely be found to be in promotion of the public welfare.

Constitutional Analysis: Vacating a Street may Constitute a “Taking”

A property owner is entitled to just compensation where the government takes or damages the owner's property for a public use.¹⁷ Typically, a takings action involves a government entity physically appropriating land for some use and paying the landowner the market price for the parcel.

However, not all takings involve a physical appropriation. A landowner may be owed compensation where a government action negatively affects a landowner's ability to exercise a right connected with a property.¹⁸ The action need only interfere with a recognized property right—such as the right to use and enjoy the land—to warrant compensation.¹⁹ An affected landowner may bring a suit, known as an inverse condemnation claim, seeking compensation from the government for that interference.

The right to access one's property is such a right connected to a property and government interference with that right may warrant compensation.²⁰ In 2012,

Virginia voters approved a constitutional amendment that explicitly requires compensation where government action eliminates access to a property.²¹ The overall effects of this amendment are not entirely clear, as the courts have not yet ruled upon any cases that have invoked it.²² However, the amendment likely does not alter existing compensation practices for disruptions in access to property.

Va. Const. Art. 1, §11

No private property shall be damaged or taken for public use without just compensation to the owner thereof.... 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.

For the purposes of the amendment, “lost access” is defined as a material impairment of direct access to the property, a portion of which has been taken or damaged.²³ A complete elimination of access certainly constitutes a “material impairment,” however whether a limited loss of access is a “material impairment” will depend on the facts of each individual case.

If Poquoson vacates a road that provided the sole access to an abutting property, it will have to compensate the owner when that access becomes cut off. The compensation will equal the diminution in the parcel’s value resulting from the new route of access. However, if Poquoson vacates a road and simply creates a less convenient route of access for a nearby or an abutting landowner, it is less likely to have to pay compensation.

Each landowner that has a property right abutting the vacated street—either owning the adjacent property or having an easement for access to the street—will have standing to bring a takings claim for a loss of access. Possessing standing will allow the landowner to bring the claim, which then permits the court to decide what amount of compensation that landowner deserves.²⁴

If Poquoson chooses to vacate roads within its borders, it may be required to compensate landowners with abutting property interests for their lost access. Courts weigh a number of factors in determining if a government action amounts to an inverse condemnation, making it nearly impossible to predict the result of any given case. However, as discussed more fully below, it is likely that a total loss of access will warrant compensation while a limited impact upon access is less likely to require compensation.

Total Loss of Access Will Likely Warrant Compensation

Landowners have a right to direct access to an abutting roadway.²⁵ If a government action extinguishes that access entirely, it must pay the affected landowner compensation.²⁶ Further, a government may be required to pay compensation if it fails to act in situations where it should have acted and access to property is extinguished.²⁷ The Virginia constitutional amendment does not broaden a government entity’s liability for eliminating access to property. It simply ensures the continuity of existing judicial practices by incorporating them into the constitution.

If Poquoson followed statutory procedures to vacate a street or simply halted maintenance on the road, landowners that needed that road as their sole manner of

access may be able to bring a successful inverse condemnation claim. The government action would be vacating the street—or failing to keep it passable by no longer maintaining it—which would impair a landowner’s right to direct access to his or her property.²⁸ In that situation, Poquoson would owe compensation to the landowner: enough to cover any diminution in the value of the parcel.²⁹ However, Poquoson could mitigate this diminution in value, and its potential liability, by providing substitute access to the parcel.³⁰

A court in Florida came to the same conclusion, finding that government failure to maintain roads providing the sole access to a property can amount to a compensable taking. In that case, a county failed to regularly maintain a short stretch of road on a barrier island that was subject to repeated storm damage.³¹ The road became heavily damaged and a number of property owners with homes along it sued the county government.³² The court determined that the county had a duty to maintain the road and that a breach of that duty could be a taking if it inhibited access to a person’s property: it remanded the case to determine how much compensation the landowners were owed.³³

Limited Loss of Access Is Less Likely to Warrant Compensation

A landowner in Virginia does not have an automatic right to compensation in situations where a government action limits his or her access to a property.³⁴ Historically, a landowner was only entitled to reasonable access to his or her property: a rule that is unchanged by the new Virginia constitutional amendment.³⁵ A government action that simply imposed a more circuitous route of access upon the landowner was not a compensable taking.³⁶

In order to have standing to bring a takings claim for lost access, a property owner must have a property interest abutting the vacated street.³⁷ Thus, only those landowners located directly adjacent to the street or holding an easement leading to the street will have the right to seek compensation. Once standing is established, then the court may hear the claim and decide on the amount of compensation. Individuals abutting unaffected streets who are merely inconvenienced by the vacation will have no right to seek compensation in court.

In a case brought by a landowner with standing, a court would determine if the remaining access was reasonable or not. If the access was deemed reasonable, no compensation will be awarded.³⁸ However, if the court deems the new access unreasonable, it will award compensation based upon the diminution in value of the parcel due to the new, unreasonable access.³⁹

If access is simply reduced, compensation may not be owed at all if the remaining access is adequate or reasonably equivalent to the prior access.⁴⁰ If compensation is owed, it will likely be the diminution in value of the property resulting from the new, less-desirable route.⁴¹ Poquoson could limit its responsibility to pay compensation to affected landowners if it provides substitute access to the property after vacating the road.⁴² Substitute access can reduce the diminution of value of the property caused by the vacation or could be sufficient for a court to find that there was no unreasonable disruption to access and no compensation is warranted.

Landowners Abutting a Vacated Street Retain Title to the Abandoned Property

Upon vacating a public street, the locality will lose its right to utilize the land underlying the road unless it affirmatively retains title to the land. While relinquishing title is probably desirable in situations where the government is attempting to retreat from coastal flooding, Poquoson should consider the property ownership ramifications of abandoning roads.

Title to the land previously occupied by a vacated road is presumed to belong to the abutting landowners.⁴³ If the locality fails to affirmatively retain title to the underlying land, the owners of abutting lots receive fee simple title to the land up to the center line of the former roadway and those who own property with a road running through it receive title to the entire road bed.⁴⁴

It is possible that the reversion of title to the abutting owners following the abandonment of a road will make certain properties more valuable, mitigating any damages for which the locality must pay compensation.⁴⁵ If access to a property is limited but not destroyed, the measure of damages from any taking will be the diminution in value of the property.⁴⁶ As such, the reversion of title to the former roadway could grant enough valuable land to the owner to offset the diminution in value caused by the alteration in access to the property.

Conclusion

Poquoson is able to vacate roads within its jurisdiction that it no longer wishes to maintain. As sea levels rise, many low-lying roads will be inundated with increasing frequency, resulting in regular damage and requiring costly maintenance.

Poquoson may seek to limit this expense by vacating these roads and retreating from the shoreline. However, abandoning a road could expose Poquoson to takings liability where the road was the sole source of access for a landowner. The affected landowner could claim that his or her right to access a property was extinguished by Poquoson's actions and could be entitled to compensation.

It is likely that a landowner will be owed compensation where the government action completely eliminates access to a property. It is less likely that compensation will be owed where the road closure simply reduces access or alters it. However, the takings inquiry is necessarily fact-intensive and it is very difficult to predict the outcome of a given case.

Vacating streets affected by sea level rise may prove to be an effective way to reduce maintenance costs in Poquoson. Still, if those streets are the sole source of access to a property, then Poquoson will need to weigh the expense of providing compensation to a landowner against the expense of continually maintaining roads subject to regular flooding. If Poquoson fails to keep its roads maintained, it could be subject to takings liability in the same manner as if it voluntarily abandoned the street. Therefore, Poquoson must weigh the costs and benefits of each course of action when responding to rising sea levels.

Notes

- 1 CITY OF POQUOSON, MULTI-HAZARD MITIGATION PLAN (2009).
- 2 *Coastal County Snapshots*, NOAA COASTAL SERVICES CENTER, <http://www.csc.noaa.gov/snapshots/> (last visited May 7, 2013).
- 3 Bloetscher et al., *Identification of Physical Transportation Infrastructure Vulnerable to Sea Level Rise*, 5 J. OF SUSTAINABLE DEV. 40, 41 (2012).
- 4 Leslie Kaufman, *Front-Line City in Virginia Tackles Rise in Sea*, N.Y. Times, Nov. 25, 2010 http://www.nytimes.com/2010/11/26/science/earth/26norfolk.html?_r=0.
- 5 *Id.*
- 6 *Id.*
- 7 *Id.*
- 8 Lisa Grow Sun, *Smart Growth in Dumb Places: Sustainability, Disaster, and the Future of the American City*, 2011 B.Y.U. L. REV. 2157, 2160.
- 9 See VA. CODE § 15.2-2006 (2013). A locality may also request that the state abandon portions of the state secondary highway system. See VA. CODE § 33.1-151 (2013).
- 10 See *Votsis v. Ward's Coffee Shop, Inc.*, 217 Va. 652, 654, 231 S.E.2d 236, 237 (1977) (“[A] city has the positive and non-delegable duty to keep and maintain its streets and sidewalks in repair and in safe condition for public travel.”)
- 11 See Va. Const. Art. 1, § 11 (“No private property shall be damaged or taken for public use without just compensation to the owner thereof.... 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.”).
- 12 VA. CODE § 15.2-2006 (2013).
- 13 VA. CODE § 33.1-151 (2013).
- 14 *Id.*
- 15 *City of Lynchburg v. Peters*, 145 Va. 1, 13, 133 S.E. 674, 678 (1926).
- 16 *Id.* (“When the power to vacate or close streets has been delegated to a municipality, in the absence of a showing that the closure was for solely private benefit, or that it was the result of collusion or fraud, it is the exercise of a political or legislative function which the courts will not review.”).
- 17 U.S. Const. Am. V; Va. Const. Art. 1, § 11.
- 18 *Kitchen v. City of Newport News*, 275 Va. 378, 386, 657 S.E.2d 132, 136 (2008).
- 19 *Richmeade, L.P. v. City of Richmond*, 267 Va. 598, 602, 594 S.E.2d 606, 609 (2004).
- 20 See *State Highway & Transp. Comm’r of Va. v. Lanier Farm, Inc.*, 233 Va. 506, 510, 357 S.E.2d 531, 533 (1987).
- 21 See Fredrick Kunkle, *Va. Amendment Limiting Eminent Domain Could Affect Some Public Projects*, *Washington Post*, (Nov. 7, 2012), http://articles.washingtonpost.com/2012-11-07/local/35504489_1_local-governments-eminant-domain-amendment.
- 22 See Va. Const. Art. 1, § 11.
- 23 VA. CODE § 25.1-100 (2013).
- 24 Va. Const. Art. 1, § 11.
- 25 See *State Highway & Transp. Comm’r of Va. v. Lanier Farm, Inc.*, 233 Va. 506, 510, 357 S.E.2d 531, 533 (1987).
- 26 See *id.*
- 27 *Livingston v. Va. Dep’t of Transp.*, 284 Va. 140, 159, 726 S.E.2d 264, 275 (2012).
- 28 *Id.*
- 29 *State Highway & Transp. Comm’r v. Linsly*, 223 Va. 437, 444, 290 S.E.2d 834, 838 (1982).
- 30 *Id.*
- 31 See *Jordan v. St. Johns Cnty.*, 63 So.3d 835 (Fla. Distr. App. 2011).
- 32 *Id.*
- 33 *Id.* at 839.
- 34 See *State Highway Comm’r v. Easley*, 215 Va. 197, 203, 207 S.E.2d 870, 874-75 (1974).
- 35 *State Highway & Transp. Comm’r of Va. v. Dennison*, 231 Va. 239, 246, 343 S.E.2d 324, 329 (1986).
- 36 *State Highway Comm’r v. Howard*, 213 Va. 731, 732, 195 S.E.2d 880, 880 (1973).
- 37 See *Dennison*, 231 Va. at 245, 343 S.E.2d at 328.
- 38 *Id.*
- 39 *State Highway & Transp. Comm’r v. Linsly*, 223 Va. 437, 444-45, 290 S.E.2d 834, 838-39 (1982).
- 40 See, e.g., *City of Lynchburg v. Peters*, 145 Va. 1, 27 (1926); *Erichsen v. City of Norfolk*, 54 Va. Cir. 392 (2001).
- 41 See *Linsly*, 223 Va. at 444, 290 S.E.2d at 838.
- 42 *Id.*
- 43 See *Bd. of Sup’rs of Louisa Cnty. v. Va. Electric & Power Co.*, 213 Va. 407, 412-413, 192 S.E.2d 768, 772 (1972).
- 44 *Tidewater Area Charities, Inc. v. Harbour Gate Owners Ass’n, Inc.*, 240 Va. 221, 224, 396 S.E.2d 661, 663 (1990).
- 45 See *Linsly*, 223 Va. at 444, 290 S.E.2d at 838.
- 46 *Id.*

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