# LIMITS ON CONSIDERATION OF MANDATORY DEDICATIONS IN EMINENT DOMAIN

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## SUMMARY

In a recent eminent domain action, expert witnesses for the Virginia Department of Transportation (VDOT) asserted that VDOT's taking of land for certain road improvements enhanced the value of the residue of the property because it saved the landowner from having to dedicate its land and pay for the very improvements VDOT planned to make. In response to Requests for Admissions, VDOT conceded that the need for its project was substantially generated by public traffic demands rather than by the landowner's development of its property. Ultimately, VDOT conceded that a forced dedication of the road was improper and instructed its experts to produce revised opinions that did not offset the landowner's damages by reason of "enhancement."

## FACTS

In *Commissioner of Highways v. Nova Hospitality Group*, No. 79170-00 (Loudon Cnty. Cir. Ct.), VDOT took 14,854 square feet of land and several permanent easements from property owned by Nova Hospitality (the "Property"), in order to add a lane in each direction on Route 50 and to build a ten-foot-wide trail along the frontage of the Property (the "Project"). Both parties' appraisers agreed that the Project damaged the value of the residue of the Property. VDOT's expert witnesses nonetheless expected to testify that the Project so enhanced the value of the residue of the Property that it offset all of Nova Hospitality's damages. Specifically, VDOT's expert engineer would testify that, if Nova Hospitality were to develop its land, Loudoun County would require Nova Hospitality to build the additional lane, which VDOT was constructing at a cost of $277,996.00, as well as the ten-foot-wide trail, which VDOT was developing at a cost of $77,958.00. Accordingly, VDOT's appraiser would testify that the Project would "enhance" the value of the Property by "eliminate[ing] the need for the property owner to pay for the same costs upon future development." VDOT's appraiser estimated that the value of this enhancement would exceed the decrease in value of the residue of the Property—which he calculated to be $217,500—and thus concluded that Nova Hospitality was entitled to *no* damages.

VDOT, however, conceded in response to Requests for Admission that the need for its Project was substantially generated by public traffic demands. Nova Hospitality argued that because the need for the Project was substantially generated by public traffic demands, it would be unconstitutional for Loudoun County to require Nova Hospitality, by ordinance or otherwise, to dedicate its land or construct the slated improvements; thus, it argued, VDOT's experts could not offset Nova Hospitality's damages by reason of these "enhancements."

## I. Local Governments Cannot Require a Landowner to Dedicate Land and Build Roads to Satisfy Public Traffic Demands.

It is well-settled that local governing bodies cannot require individual landowners "to dedicate a portion of their fee for the purpose of providing a road, the need for which is substantially generated by public traffic demands rather than by the proposed development [of their own property]." Board of Supervisors v. Rowe, 216 Va. 128, 138-39 (1975).

In *Rowe*, the Virginia Supreme Court considered whether a county zoning ordinance could, as a condition of development, require landowners to dedicate the frontage of their parcels to accommodate a

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public road and sidewalks and to construct those improvements. Finding that Virginia delegated no such power to local governing bodies when the need for improvements was generated by public traffic demands, the Court held that the dedication of land would amount to an unconstitutional taking of private property without just compensation. *Id.* at 138-39. The Court also rejected the requirement that the landowners pay to construct the road and sidewalk, holding that "nothing in the constitution, enabling statutes, or case law of Virginia empowers a sovereign to require private landowners, as a condition precedent to development, to construct or maintain public facilities on land owned by the sovereign when the need for the such facilities is not substantially generated by the proposed development." *Id.* at 140.

Following *Rowe*, the Virginia Supreme Court considered whether Fairfax County could condition the grant of a special exception on the landowners' dedication of land to and construction of a deceleration lane to expand Route 7. Cupp v. Board of Supervisors, 227 Va. 580 (1984). Again, the Court rejected the dedication and construction requirements upon finding that they were "unrelated to any problem generated by the use of the subject property." *Id.* at 594, 596.

Last year, the U.S. Supreme Court affirmed the position that dedication and construction requirements unrelated to the impact of a proposed development are unconstitutional. In *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), the government sought to condition a landowner's development on either the dedication of a conservation easement or on payment for improvements to government land. *Id.* at 2593. Rejecting these conditions, the Court held that "the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." *Id.* at 2595 (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994)). The Court also found the government's alternative option, paying for improvements on nearby government land, to be unconstitutional, holding that "so-called monetary exactions" also must bear an "essential nexus" to the impact of the development, and these did not. *Id.* at 2599.

The newly enacted VA. CODE § 15.2-2208.1 confirms this view, as it provides for damages due to a locality's grant or denial of approval of any land use based on "unconstitutional conditions." To preserve such a claim, a landowner need only show "that the applicant objected to the condition in writing prior to such a grant or denial." This new statute should significantly shift the bargaining power regarding so-called "voluntary" proffers.

## II. Because the Local Government Cannot Exact these Improvements as a Condition of Development, VDOT's Proposed Testimony was Inadmissible in a Condemnation Proceeding.

Notwithstanding the well-settled law in *Rowe*, *Cupp*, and *Koontz*, VDOT designated two expert witnesses to testify that Nova Hospitality should not recover damages as a result of the taking because VDOT's construction of the road and trail *enhanced* the value of the residue of the Property by saving Nova Hospitality from having to dedicate its land and construct the improvements when it developed its Property in the future. Following the Virginia Supreme Court's decisions in *Rowe* and *Cupp*, this type of evidence has been found to be inadmissible in eminent domain cases. *See* Board of Supervisors v. Smith, 17 Va. Cir. 147 (Fairfax Cnty. 1989). In *Smith*, the county condemned part of a parcel to construct a road and designated an expert to testify that the landowner would have been required to dedicate that same land in order to rezone its property. *Id.* at 147. The circuit court excluded the expert's opinions, holding that the evidence was speculative and that *Rowe* controlled the issue by clearly prohibiting local governments from requiring dedications of land as a condition of rezoning when the need for the dedication was substantially generated by public traffic demands rather than by the landowner's proposed development. *Id.* at 148 (citing *Rowe*, 216 Va. at 138).

In *Nova Hospitality*, as in *Smith*, VDOT conceded that the need for the Project was substantially generated by public traffic demands and not by any proposed development of Nova Hospitality's property.