



By Paul Terpak, ESQ. and By Laurie Dolson, ESQ.

Paul is an attorney with Blankingship & Keith, P.C. in Fairfax, Virginia. He is the editor of *Eminent Domain Law in Virginia*, the standard treatise in Virginia on eminent domain law. He served on the Virginia Code Commission Advisory Committee on the recodification of eminent domain laws in Virginia.

Laurie is an attorney with the Law Offices of Laurie L. Dolson, P.C., in Fairfax, Virginia, and practices exclusively in the area of community association law. For more than 30 years, she has been an active member of CAI and has represented community associations in a wide range of matters.

Obtaining Just Compensation for Condemnation of Common Area Owned by Homeowners Associations

As the number of planned developments with common area owned by homeowners associations has increased since the 1970s, governments more frequently have needed to obtain common area for public use. HOA common area parcels are often located at the perimeters of developments, making them ripe targets for road expansion, power lines, and other public uses. All condemners wish to minimize the cost of their projects and tend to perceive common area as being

companies prefer to install new power lines over vacant ground.

Even if the HOAs do not wish to sell common area to a governmental entity, the government has the right to take the property for a public use through a process known as “eminent domain” or “condemnation.” Both federal and state laws, including those of Maryland and Virginia¹, require that the owner of property taken by eminent domain be given “just compensation.”

“comparable sales,” which are problematic with association property. Typically, there are no comparable sales to determine the fair market value of common area, because common area is rarely sold on the open market.

Zoning ordinances and development proffers generally require that common area not be sold or further developed for home sites, but rather be used only for neighborhood recreational purposes. In addition, HOA governing documents



less valuable than developable property, especially if condemning common area will avoid the destruction of any homes or other structures. For example, common area shielding a neighborhood from a road may be taken if the road is expanded; common area along a stream may be taken if a sewer line that follows the course of the stream bed is installed to provide for gravity flow of sewage; and common area for new power lines may be condemned because power

Before condemners – which include local governments, state transportation departments, and public utilities – may exercise the power of eminent domain or condemnation and take property, it is necessary for a condemner to obtain an appraisal of the property. For property taken by eminent domain, the laws of Maryland and Virginia have defined just compensation as “fair market value.” To determine fair market value, appraisers generally use

usually make it extremely difficult for the HOA to voluntarily convey common area to a third party, even if such a conveyance is not prohibited by zoning ordinances. As a result, condemners’ appraisers usually select sales of undevelopable and odd-shaped pieces of unusable property to assess the market value of HOA common area.

Consequently, valuations tend to be unreasonably low.



However, common area is not the same as a parcel of land which is unusable or undevelopable for other reasons. Common area is valuable to HOAs and their members because it may be used for recreational facilities and may establish critical buffers between the homes in the neighborhood and busy streets. Further, most HOA governing documents in Virginia and Maryland provide that all lot owners are granted an “easement of use and enjoyment” to the common area owned by the association, generally giving every homeowner a legal right to use the common area.

When a new subdivision is created, it must go through an approval process with the local government. Developers usually strive to maximize the density on parcels being developed, while local governments have an interest in providing for common recreation, setbacks, and preservation of natural areas. This results in a compromise where developers leave portions of land in a natural state or improve them for common recreation, rather than include those land portions in the individual lots sold to the homeowners. Sometimes such land is given or “dedicated” outright to local governments for recreational use, but typically, the undeveloped land is conveyed to the HOA as “common area.” Every yard in a community may have been made slightly smaller through a technique called “clustering,” because the developer dedicated part of the land being subdivided to common area. Part of what may have been an individual lot is added to a collective “commons” which all lot owners enjoy together.

Recent cases indicate that courts and juries understand the importance and value of common area to homeowners associations. In a Northern Virginia case, counsel successfully introduced into evidence the value of HOA common area based on its contribution to the community as a whole. Factors such as buffering from noisy roads, current recreational value, and potential for further development for recreational uses were allowed into evidence. The cost to obtain replacement developable land was also considered. Based on this evidence, a jury awarded the association damages many times greater than the initial offer by the condemnor.

Knowing that they may not be obligated to accept unreasonably low offers of compensation gives associations better leverage in settlement negotiations with condemnors. Associations should be aware that if eminent domain litigation is resolved prior to a verdict by a judge or jury, the board’s authority to approve a settlement offer may be subject to relevant provisions of the association’s governing documents and state laws.

The lesson for HOAs is simple: if an offer for the taking of common area appears too low, it may well be. Fortunately, condemnors do not have the final say on property value. Under both Maryland and Virginia law, a jury of other landowners in the local jurisdiction has the power to set the amount of just compensation in a condemnation. If associations are willing to defend their property rights, it is likely that a jury will understand and appreciate the special value that common area provides to the association. 📌

¹ Because there are relatively few HOAs in the District of Columbia, and no reported cases on HOA common area valuation, this article focuses on Virginia and Maryland. The authors wish to thank Joe P. Suntum of Miller, Miller & Canby in Rockville, Maryland, for his insight on Maryland law.