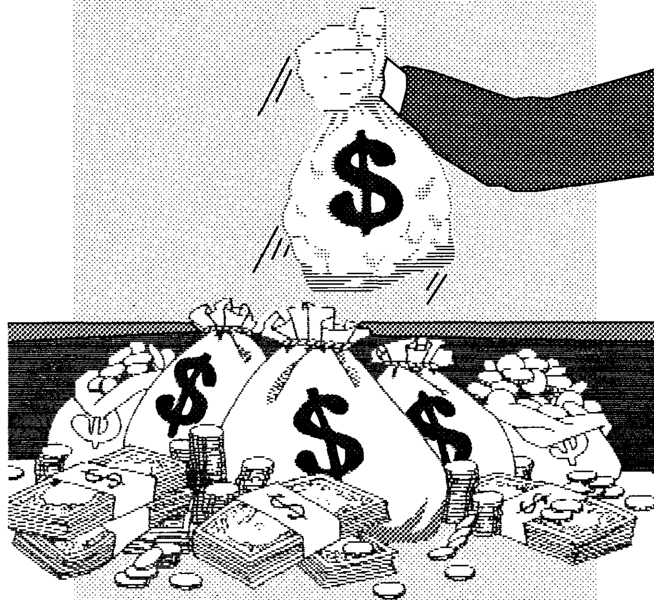
FINAL REPORT

CORRIDOR RESERVATION

Implications for Recouping a Portion of the "Unearned Increment" Arising From Construction of Transportation Facilities



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Abstract

This report examines the phenomenon of the unearned increment, which is the often substantial increase in private land values resulting from transportation facility construction, and possible attempts to recoup it to finance transportation projects.

The report has four parts. Part I examines when, where, and why the unearned increment is likely to be created. It also gives a review of the history of the increment. Parts II and III break down the types of statutes that can be used to recoup the increment. Part II examines corridor reservation laws that restrict any development within a proposed transportation corridor for a period of time without compensation by the government until acquisition of the land occurs. In return, the affected property owners receive transferable development rights. The report concludes that such a regime might survive legal challenges based on the Takings Clause of the Fifth Amendment.

Part III focuses on direct recoupment of the unearned increment from land near a transportation facility that appreciates in value as a result of the construction of the facility. The uses of special assessments, impact fees, proffers, transferable development right receiving areas, and excess condemnation are examined, and analyses of legal ramifications and defects are included.

Part IV is intended to present a plethora of policy choices to recoup the unearned increment, not to give specific recommendations for legislative or administrative action. Instead, the legal and policy issues involved for the various reservation and revenue-enhancement techniques are included as a list of alternatives for action.

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Robert J. Borhart
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(The opinions, findings, and conclusions expressed in this report are those of the author and not necessarily those of the sponsoring agencies.)

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EXECUTIVE SUMMARY

Transportation needs in Virginia are quickly outstripping the state's ability to pay, and projections indicate that the financing gulf will continue to grow. A recent Virginia Department of Transportation (VDOT) study indicated that the state's 1989 modal needs over the subsequent 20 years would total almost $49 billion, of which more than $24 billion would not be available under current funding programs. This study explores methods to increase revenues for transportation projects and focuses on recouping portions of the "unearned increment," the substantial increases in the value of private land located near a transportation facility that is newly created or improved by a governmental entity. Land values near such facilities increase in value due to the land's proximity to the facility and the likelihood that such land will be rezoned to allow commercial development or dense residential development. At this time, the increased land values accrue to the benefit of the property owner and, at a lower monetary level, to the local government through property taxation. The state government, as the main transportation financier and builder in Virginia, receives little if any of the unearned increment.

This study identifies several mechanisms that can be used to recapture a portion of the unearned increment. The main focus is the transportation corridor, forms of which are now employed in several states. A transportation corridor as used in this report is a legislatively defined geographic area focusing on a transportation facility and includes two parts: (1) the primary area, which consists of the necessary rights-of-way for the facility, including cleared widths, medians, buffer zones, etc.; and (2) the secondary area, which consists of the adjoining area impacted by the transportation facility at its full capacity, including surrounding land areas likely to undergo private commercial development or redevelopment as a result of the construction or enhancement of the transportation facility. (See Appendix A for an illustration of the primary and secondary areas and their relationship to the transportation facility.)

The Primary Area and Corridor Reservation

Within the primary area, the corridor can contain a designation of the rights-of-way required for the construction or improvement of the facility itself. *Within* those rights-of-way and *before* government acquisition of the land begins, a rigid development ban can apply: land cannot be developed for up to 3 years after designation unless the property owner can show undue hardship or lack of profitability with the land in its current condition. The governmental entity undertaking the facility's construction would have to be notified of any requests for variances to the building moratoria. Because the legislature designates the corridor and declares it a valid public use, the governmental entity should then be able to acquire land parcels through its eminent domain power

in situations where the owner would otherwise be allowed to develop the land due to the undue hardship exceptions. In effect, the designation of a transportation corridor slows significant appreciation in land values and reduces subsequent acquisition costs. An important communication function is also served: local land planners are given clear warning of major transportation projects, and the state transportation authorities are notified of requests for building permits within a corridor. The latter can then take informed, affirmative action to prevent the development or acquire the land in question.

In addition, land designated within the corridor's primary area can receive transferable development rights, or TDRs. TDRs are alienable rights to develop that can be sold to others or used by the original owner to develop at density levels above the zoned rate in areas designated by the government as TDR receiving areas. The number of TDRs granted to the property owner should be based upon the amount of acreage reserved and its developmental potential. The use of TDRs would serve two purposes: (1) the government may be able to avoid "takings" challenges from owners affected by the corridor reservation statutes because the TDRs compensate for diminution in land value caused by the government's action; and (2) a TDR program can be viewed as an equitable solution that compensates owners overly burdened by government action.

The legality of corridor reservation as a planning technique is unknown at this time. Part I of this report examines takings analysis in both the U.S. and Virginia Supreme Courts in order to attempt to predict the legality of a reservation statute. Both courts recognize a government's right to place restrictions on land development in furtherance of the government's police powers (i.e., to protect the public safety, welfare, economy, etc.); however, both courts also require the government to compensate a property owner when a restriction becomes unduly burdensome or amounts to a "total taking." The legal analysis concludes that a reservation statute may survive a takings attack if (1) the primary area corridor is designated by the legislature after opportunity for public participation, (2) the primary area corridor includes only the rights-of-way reasonably expected to be necessary for the facility, (3) property owners whose land is affected by the primary area reservation are provided a variance procedure to obtain the exceptional building permit or a "buy out" by the state if undue hardship would otherwise result from the development restrictions, and (4) property owners are issued TDRs to compensate for the delay between the time their land is designated as reserved and the land is actually purchased by the state.

The Secondary Area Adjoining the Reserved Corridor

The second part of the corridor concept as conceived in this report can provide a framework in which to implement various other land use and financing techniques. When designating a corridor, the legislature should act upon transportation research and analyses performed by VDOT or a local government

to predict transportation needs and identify areas benefitted by proposed and existing facilities. Such studies are routinely performed by VDOT in order to assess and predict present and future transportation needs. The land that is deemed benefitted by the transportation facility will compose the secondary area adjoining the reserved corridor. (Please see Appendix A for a depiction of the secondary area.) The secondary area serves as a ready-made "district" within which many novel financing techniques can be used in order to recoup portions of the unearned increment created when the transportation facility is completed within the primary area.

It should be noted that the secondary area *does not* include land within the reserved corridor (a.k.a. the primary area). It seems unduly burdensome to restrict development of a piece of land and at the same time impose additional taxes or fees upon the landowners. Next, it is important to note that the financing mechanisms analyzed for use in the secondary area provide a plethora of choices for state and local governments, with the support of VDOT, to implement. In other words, many devices exist that could permit the government to raise revenue from land deemed specially benefitted by transportation facility development. In addition, the various methods do not need to be, and probably should not be, applied to the same piece of land; hence, a plot of land may be deemed worthy for a special assessment tax but should not also be subject to rigid impact fees and exactions. Last, while the financing mechanisms addressed in Part III of the report are geared toward their implementation alongside a reserved corridor, the mechanisms can be adopted without the concomitant adoption of a reservation statute.

Some of the methods described have already been implemented in portions of Virginia and across the country in the absence of reservation statutes for the land required by the transportation facility. This report views a reservation corridor statute working in conjunction with financing mechanisms in a secondary area in order to fully integrate a legal and financial mechanism that recoups as large a portion of the unearned increment as possible, although any one portion of this report can be adopted to stand alone. The emphasis should be on the flexibility of the state legislature and VDOT to explore various financing mechanisms depending upon local conditions.

The financing mechanisms for the secondary area are as follows:

1. special assessment districts

2. impact fee districts

3. zones for proffers

4. receiving areas for TDRs.

Special Assessment Districts

A special assessment or tax can be charged on commercial land or residential complexes built after the tax district is created. Virginia law currently authorizes a form of this district, but only if the designation process is begun by a majority of the commercial property owners in a proposed area; even then, the special assessment district is limited to a very few cities and counties within the Commonwealth. To make the assessment district more feasible for local governments and to aid in the recoupment of the unearned increment, the law could be changed to allow the local government to designate a district as long as it lies within a designated secondary area, or the legislature itself could designate areas within the secondary area that are preapproved or self-instituting. In sum, there are numerous methods to structure the decision-making process at the state, local, or administrative level, or a combination of the three, in order to institute a special assessment tax on commercial real estate and new residential development that accrues special advantages from a transportation facility otherwise financed in large part by general user taxes.

Impact Fee Districts

The area within the secondary area corridor can provide the basis for assessing impact fees against new development. At present, Virginia law allows a small number of cities and counties to assess impact fees only after an extensive, laborious, and expensive study is performed to determine the precise needs created by the development. To make impact fees more reasonable in order to recoup portions of the unearned increment, the statutes could be changed to require a less formal study before implementation, as is the practice in most other states that allow the imposition of impact fees. At best, boundaries within the secondary area could be designated through legislative action as areas appropriate for impact fees according to predetermined formulas. This would alleviate the huge burden now placed upon localities that attempt to charge developers for the externalities created by their *new* commercial and residential development.

Zones for Proffers

The secondary area serves as a well-defined district within which the government can exact proffers for new development for any increased burden placed upon the local infrastructure by a developer. Virginia currently authorizes the use of proffers throughout the state; a transportation corridor with a designated secondary area may help to make the institution of proffers more efficient and predictable than is currently possible.

Receiving Areas for TDRs

Areas within the legislatively determined secondary area could be designated as "receiving areas" for TDRs. TDR legislation would permit governments not only to reserve transportation corridors in the primary area but also to zone sensitive environmental areas, agricultural land, and other areas at low development levels in return for TDRs. The TDRs could then be used only in pre-approved areas, namely those areas where transportation facilities and government services are capable of efficiently handling the new development. Segments of land within the secondary area adjoining a reserved transportation corridor can serve as precisely such receiving areas, especially where transportation systems intersect within a corridor (providing an ideal location for multistory office towers, shopping centers, and multi-modal transportation facilities).

Summary

Transportation corridor reservation legislation, in tandem with other innovative financing mechanisms, could provide numerous mechanisms to recoup large portions of the unearned increment and aid the Commonwealth in bridging the huge funding gap projected to occur in Virginia in the 21st century. This report examines the legal foundations of the various mechanisms, the benefits and burdens involved, and possible alternatives for Virginia and other state governments to implement in areas specially benefitted by transportation improvements.

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INTRODUCTION

Transportation needs in Virginia and throughout the country are quickly rising to levels that governments are unable (or unwilling) to meet through traditional revenue collection methods. As a result, attention has been given to new methods to raise revenues, and in particular to methods that place more of the financial burden on those parties that reap special benefits from transportation facilities. This report analyzes taxation of the "unearned increment," a catch-all term referring to the often substantial increase in private land values that result when a transportation facility is constructed or renovated. The increase occurs for many reasons, including the fact that land adjoining the facility becomes more accessible and desirable, especially for commercial development or office complexes. In one study alone, land prices near a newly completed subway system rose as much as 32%.[1] Since the price increase results from government activity using taxpayer money, it is plausible to believe that the government should be able to recoup a portion of the increased value in order to finance the very project that created the price increase in the first instance.

The fact that owners of land adjoining transportation facilities earn a windfall from the facilities is no secret. A recent example from Northern Virginia provides candid insights into the thoughts of developers and property owners alike in the context of facility development. A private company is presently constructing the "Dulles Greenway" in Loudoun County to connect Dulles International Airport with Leesburg, Virginia. The present route for the Greenway is bucolic and rural; in fact, only one standing residential structure needs to be

1. David J. Hayes, Note, *Rapid Transit Financing: Use of the Special Assessment*, 29 Stan. L. Rev. 795, 803 n.54 (1977). The creation of the San Francisco subway caused the increases in land value.

leveled[2] to build the four-lane tollway at interstate standards with enough clearance to be expanded to six lanes at a future date (a total width of 250 feet and a length of 14 miles).[3] Under such conditions, one might expect that the owners of quiet rural property would vehemently oppose a highway that would destroy the isolated nature of the property. Exactly the opposite occurred, due in large part to expectations of huge financial rewards by virtue of the unearned increment effect. One landowner sold a portion of his land at a "fair value" because he expects the land he owns along the tollway to be rezoned for commercial purposes.[4] Another landowner was more specific: "Without this toll road we were like a back-door piece of property. With the toll road we become a front-door piece of property."[5] A third landowner gave perhaps the biggest understatement, saying that "Having three major interchanges on the toll road on our property is going to enhance the value."[6] Already, developers near interchanges are going ahead with plans to build hundreds of millions of dollars worth of commercial and residential complexes,[7] all thanks to the creation of a roadway by an entity other than themselves.[8]

A second area of concern addressed in this report relates to the lengthy amount of time involved between the planning of a transportation facility and its actual completion. Property owners often are unsure of the precise location of a given facility (as is the transportation department engaged in the planning process) and may engage in expensive development of their land. When the government finally reaches the point where land acquisition begins, acquisition costs include the new development. Similarly, speculators will often drive up land prices near proposed transportation facilities, and once again acquisition costs will include the price increases.[9] Hence, not only does government action create an unearned increment for private property holders, but the government must pay for the added price increase when it acquires land for facility development.

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2. William F. Powers, *Loudoun's Road to Opportunity*, Wash. Post, Oct. 23, 1993, E1, at E6.
3. *Id.* at E1.
4. *Id.*
5. *Id.* at E6. This landowner held out and made a "tough bargain," enabling him to reap a buyout for his land at a price higher than the current land value. *Id.* This phenomenon also contributes to the unearned increment and is addressed in the next paragraph.
6. *Id.*
7. See *id.* for specific examples.
8. It is fair to note that the Dulles Greenway was financed privately, but the same phenomenon occurs time and again near facilities built by VDOT or local governments. The property owners near the Greenway, who are not part of the private consortium paying for the tollway, are exceptional in that their expectations for future profit are so candidly expressed.
9. The Dulles Greenway provides just such an example: a private developer purchased 41 acres of land in anticipation of the tollway's development. He then stonewalled in the negotiations for the acquisition price with the Greenway builder; as a result, the developer received \$4.6 million for the land, a price that was "higher than current land values" and much higher that the \$2.18 million paid for 51 acres from a much less recalcitrant property owner. Powers, *supra* note 2, at E6.

Although the concept of the unearned increment is readily accepted in the literature, it is less clear what steps if any should be taken by the government to recoup it. Fluctuations in land values occur whenever the government acts, including for the worse. If actions are taken to recoup increases in land value, some believe that the government should also compensate owners whose land values decrease (especially residential owners who are burdened with roadway expansion that substantially diminishes the value of their homes and land). Next, unearned increments are taxed at some point, such as when the gain from the sale of land is included as taxable income. Critics may argue that the increase in value should be treated as an increase for most other investments: taxes should be paid only when the good is sold so that reliable numbers exist upon which taxes can be imposed.

This report begins with the premise that the unearned increment accruing to property owners near a transportation facility can be treated differently. First, recoupment would not be attempted in each and every instance of transportation improvement. There is no question that extremely large increases in land values are the exception and not the rule. Care must be taken to identify those facilities that tend to produce the increment, which include urban highways, subway or light rail stations, and airport facilities. Second, measures analyzed in this report to recoup the increment do not suggest that government should even attempt to recoup the entire increase in value. Most options included herein aim to recoup only a small, reasonable portion of the expected increases in land value. Third, recoupment is rational even while the land is held because (1) the government has legitimate short-term needs to finance the projects (e.g., when bond payments need to be made), and (2) the taxes imposed at the time of sale continue to be only a partial recoupment of an increase that the government action created. Last, as will be outlined in detail in Part II of this report, the view that government needs to compensate landowners for every decrease in value caused by government action is readily rejected by both the Virginia and U.S. Supreme Courts; hence, a legal argument that the state will need to compensate for diminutions in land value if it taxes the unearned increment does not necessarily follow.

PURPOSE AND SCOPE

This study has its roots in a previous VTRC study, *Coordination of Transportation Planning and Land Use Control: A Challenge for Virginia in the 21st Century*, by Robert D. Vander Lugt and Salil Virkar. The authors of that study briefly encountered the concepts of corridor reservation and the unearned increment; however, the scope of their research precluded an in-depth treatment. This study expanded on those two areas and had several objectives:

1. to identify the history of and the current thoughts concerning the unearned increment and where, when, and why it is likely to occur

2. to explain the planning technique known as corridor reservation and how it can be accomplished

3. to identify the legal and constitutional concerns associated with reservation statutes and state legislation currently in use that may minimize these concerns, or to find new devices that may help reservation statutes survive legal attack

4. to investigate other financing devices that may be used in conjunction with a reserved corridor to directly finance the facility to be constructed

5. to identify the legal issues associated with those financing mechanisms and locate the legislation used in other states that minimize legal infirmities, and to provide the pros and cons for each mechanism.

Part I provides the theoretical underpinnings of the increment, the situations in which it is created, and its historical roots and treatment. The study did not attempt, however, to engage in a philosophical discussion concerning the normative desirability of recouping the increment; instead, it took as its baseline the proposition that the government finds the increment worthy of recoupment, and the focus became one of identifying methods to achieve that recoupment.

Part II explains the mechanics of corridor reservation and provides an extensive legal analysis under the U.S. and Virginia constitutions to determine whether reservation statutes require immediate compensation under "takings" clauses. The analysis continues with recommended laws and regulations that can minimize the risk that immediate compensation will be required, including a defined variance procedure and the inception of a TDR program for property owners with reserved land. Corridor legislation in North Carolina and Florida is then examined in light of the legal analysis to assess possible legal infirmities. Part II concludes with an assessment of the two states' legislation along with ideas for improved corridor reservation legislation.

Part III analyzes the methods that can be used to directly recoup portions of the unearned increment in land areas adjoining transportation facilities. These methods are the direct means by which revenue may be raised (as opposed to reducing acquisition costs by the state) to finance transportation facility construction. They include:

1. special assessment districts

2. impact fee districts

3. zones for proffers

4. receiving areas for transferable development rights (TDRs).

Part III also includes an analysis of excess condemnation and concludes that excess condemnation as a device to raise revenue for transportation projects is fraught with legal difficulties and is most likely unconstitutional.

Part IV illustrates the alternatives available to governments that wish to recoup portions of the unearned increment or prevent its creation on lands needed for transportation facility construction. The section does not contain specific recommendations for the state but instead is meant to provide a concise "road map" of steps that can be taken together or piecemeal to recoup the unearned increment.

METHODS

This study is almost exclusively the product of literature review and case law analysis. First, literature concerning the unearned increment was examined. Next, the methods by which the increment could be recouped were examined. The examination began with an extensive literature review of corridor reservation concepts, followed by a review of federal and state case law to determine their legal implications. In addition, state statutory law was researched to identify those states using some form of reservation legislation.

Similar steps were undertaken with respect to each of the methods analyzed in Part III: special assessment districts, impact fees, proffers, and TDRs. Then, the legal implications of each device were identified and researched in scholarly publications, and federal and state case law was reviewed to identify legal concerns and outcomes. In addition, several state laws were examined for each method to analyze the legal regimes necessary to withstand attack, as well as to provide practical examples of any required legislation and the effects of its implementation.

Next, an extensive computerized search of newspaper and journal articles was conducted to identify transportation trends in Virginia, with close attention being paid to special tax assessment and proffer use in Northern Virginia. The search aided in the report's discussion of political and practical problems associated with those methods capable of recouping the unearned increment.

Last, transportation officials in VDOT were contacted to obtain information concerning the planning requirements associated with roadway development in Virginia. Many state officials also reviewed the draft of this study to offer suggestions or improvements within the context of the state's planning and budgetary requirements.

PART I: A BRIEF HISTORY OF THE UNEARNED INCREMENT

Federal History

The concept of the unearned increment was catapulted briefly onto the national stage by Franklin Roosevelt and his cabinet in 1939. The now defunct Bureau of Public Roads prepared a report for Congress entitled *Toll Roads and Free Roads*,[10] one part of which dealt with possible means of finance for an extremely expensive proposal concerning superhighways.[11] In the letter of transmittal, Roosevelt suggested that Congress "pay special attention" to the use of excess taking of land for highway rights-of-way in order to reduce greatly the ultimate cost to the government. The President took aim at the chance associated with highway placement:

> We all know that it is largely a matter of chance if a new highway is located through one man's land and misses another man's land a few miles away. Yet the man who, by good fortune, sells a narrow right-of-way for a new highway makes . . . a handsome profit through the increase in value of all of the rest of his land. That represents an unearned increment of profit—a profit which comes to a mere handful of lucky citizens and which is denied to the vast majority.[12]

The report recommended that the government utilize the concept of excess taking to buy a wide strip of excess land on each side of the highway to rent to concessions or to rent and sell to home builders and others who would directly benefit from living near a major travel artery. The President predicted the government could recoup the unearned increment and reimburse itself "in large part" for the road building.[13]

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10. Bureau of Public Roads, Toll Roads and Free Roads, H.R. Doc. No. 272, 76th Cong., 1st Sess. (1939).

11. For a concise, cogent history of the interstate system and its attendant political and financial problems, see Gary T. Schwartz, *Urban Freeways and the Interstate System*, 8 Transp. L. J. 167, 182-208 (1976).

12. Bureau of Public Roads, *supra* note 10, at vii.

13. *Id.* The constitutionality of excess taking or "excess condemnation" is highly questionable. For a thorough discussion, see pages 48–55.

Unfortunately, World War II largely diverted congressional attention away from the roads issue until 1944, and the concept of the unearned increment had seemingly disappeared. By 1956, Congress with regard to the interstate system had set the stage for alternate financing schemes and oversight guidelines that provide an excellent case study of how and why the unearned increment was lost at the national level.

As with most federal programs, the question of financing held center stage as both President Eisenhower and the Congress attempted to create a badly needed interstate highway system. Eisenhower appointed a blue-ribbon committee headed by General Lucius Clay to study the cost question. The Clay Committee's report estimated the total cost for the system at $27 billion, and the President wrote Congress in the report's letter of transmittal that the highway program "can and should stand on its own feet, with *highway users* providing the total dollars necessary for improvement and new construction."[14] The President believed user financing should be based on new gasoline, diesel, oil, and rubber taxes; very limited toll roads; and special bond issues financed exclusively with the expected stream of income from the increased excise taxes.[15]

Neither the report nor Eisenhower's recommendations mentioned any attempt to capture the unearned increment created by state governments, nor was attention focused on the land or business owners directly and specially benefitted by the road building (i.e., an attenuated concept of the "user"). Indeed, the Commissioner of Public Roads in the Commerce Department fully supported the Clay Committee's findings and its complete emphasis on the automobile and truck users.[16]

Determining recoupment of the unearned increment became more unlikely due to the organizational framework of the Interstate Act. The Eisenhower administration insisted that almost all control over the program remain with the individual states. Commerce Secretary Weeks advised Congress that states should have the responsibility for planning, construction, and maintenance, as well as control over speed, highway marking, and other aspects of highway use.[17] Congress for the most part agreed, requiring the

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14. President's Advisory Committee on a National Highway Program, A 10-Year National Highway Program, H.R. Doc. No. 94, 84th Cong., 1st Sess. vi (1955) [hereinafter Clay Committee Report] (emphasis added).

15. *Id.*

16. Commissioner of Public Roads, Department of Commerce, Needs of the Highway Systems, 1955-84, H.R. Doc. No. 120, 84th Cong., 1st Sess. (1955). *See also* A. D. LeBaron, *The "Theory" of Highway Finance: Roots, Aims and Accomplishments*, 16 Nat'l Tax J. 307 (1963) (describing the inefficiencies inherent in a user-based tax for the interstate system, e.g., the lack of a nexus between a gasoline purchase and the likelihood that such gasoline will be used on an interstate).

17. *National Highway Program; Federal Highway Act of 1956: Hearings Before the Subcomm. on Roads of the House Comm. on Public Works*, 84th Cong., 2d Sess. 10 (1956).

states to acquire the necessary rights-of-way; to control access to the highways; and to integrate the workings of the state, city, and county agencies concerned with street and highway research, planning, and construction.

The federal government did very little to help states acquire land after monies had been appropriated. The federal power of eminent domain was to be used only in cases where the state was unable to acquire the land or to do so with sufficient promptness. As a result, many states became overwhelmed and progress was anything but orderly or well planned for the long term.

The experience of California provides a good example. In the 1959–60 fiscal year, only 3 years after the interstate program was approved, the California Division of Highway Right of Way had the responsibility for appraising, acquiring, and managing approximately 10,000 parcels of land *per year*. The budget amounted to $151 million (including the compensation for the land itself), allowing a staff of only 450 people to determine the fate of 70,000 property owners per year. As one high-level highway official wrote, the department had excellent engineers and right-of-way personnel, but there was almost no concern for working with the general public, studying the long-term effects of the massive building effort, or developing land use programs to handle new development near the interstates.[18] The state's main concern was keeping its head above water and spending available federal monies on schedule, even when no reliable data or studies existed on the economic impact of the new controlled-access highways or the "before and after" effects.[19]

Indeed, in 1959, attorney and land use specialist David R. Levin predicted problems that exist today in relation to interstates and state roadways alike:

> [The] approaches to expressways and expressway interchange areas may render these facilities obsolete in a few years unless proper balance is achieved between the design standards of the access facilities and the pattern of land development in these key areas.[20]

Levin also recognized that a gaping hole existed in the areas of cooperation between federal, state, and local governments in areas of "planning, research, financing, land acquisition, construction, maintenance, operation, traffic control, policing and others."[21] Many states were altogether incapable of

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18. Dexter D. McBride, *The Highway Program—Problems of Right-of-Way Acquisition*, 34 Title News 109, 112 (1960). McBride was a supervising right-of-way agent in the California Division of Highways and the National Secretary of the American Right-of-Way Association.

19. *Id.* at 113.

20. David R. Levin, *Problems in Highway Condemnation*, 1959 Wis. L. Rev. 561, 563 (1959). At the time of the article's publication, Levin held the positions of Chief, Highway and Land Administration Division, Bureau on Public Roads, Department of Commerce, and Chairman, Committee on Land Acquisition, Highway Research Board.

21. *Id.* at 562-63.

handling such areas, according to Senator Moynihan.[22] Last, the legality of acquiring land in advance of construction (even if only 5 years beforehand) was not definitively known at the federal level or in the vast majority of states, further hampering comprehensive planning and cost-efficiency.[23] It is important to note that the advance acquisition of land continues to be clouded in mystery to this day. It is not difficult to understand why the concept of acquiring even more land along rights-of-way, then renting or reselling it at higher values along with extensive land-use regulation, was not used. (This is also evident in view of the fact that the federal government provided 90% of the highway costs,[24] leaving little incentive for the states to develop more efficient long-term financing schemes.)[25]

Virginia History[26]

The funding of transportation projects in Virginia has remained largely the same throughout this century. Due to the economic burdens that were placed on the Commonwealth as a result of the Civil War, bond issues for public works were feared by a majority of the state's citizens. In order to create an alternative funding method for transportation financing, the General Assembly in 1923 created a pay-as-you-go financing scheme by imposing a gasoline tax for the first time in the Commonwealth's history. Transportation projects were to be financed only from the revenues that had been gained through taxes. Thus, the state could build roads only to the extent that tax revenues existed.

By 1932, the depression had hit Virginia, causing a fiscal crunch. State Senator Harry F. Byrd sponsored the Secondary Roads Act of 1932 (also known as the Byrd Road Law). The Byrd Road Law left in place Virginia's pay-as-you-

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22. Daniel P. Moynihan, *New Roads and Urban Chaos*, Reporter, April 14, 1960, at 16.

23. Levin, *supra* note 20, at 566. Interestingly, Levin recognized the need to control highway access, to use set-back zoning requirements to facilitate future road widening, to restrict development immediately upon roadway corridors, and to utilize advance acquisition in order to keep costs to a minimum and remove roadblocks in the way of future transportation planners. *See* Levin, *Highway Zoning and Roadside Protection in Wisconsin*, 1951 Wis. L. Rev. 197 (1951). Such ideas came before massive spending on highways in the late 1950s, and Levin now seems to have been a lone voice crying out in the wilderness.

24. Act of June 29, 1956, ch. 462, § 108(b), 70 Stat. 378 (codified at 23 U.S.C. § 120(c) (1988)).

25. Indeed many states agreed to build and finance their share of the interstate system because they did not want to turn down the 90% federal share; sound investment took a back seat to the certainty of federal monies and the concomitant boost for local economies. Schwartz, *supra* note 11, at 217 (quoting R. Goodman, After the Planners (1971)). Taxation problems at the state level are becoming critical, however, because states are required to provide for the "maintenance" of the system. 23 U.S.C. § 116 (1988). Such maintenance may exceed the state's original 10% contribution. *See* Schwartz, *supra* note 11, at 188 n.164.

26. This section contains excerpts from Robert D. Vander Lugt and Salil Virkar, Virginia Transportation Research Council, *Coordination of Transportation Planning and Land Use Control: A Challenge for Virginia in the 21st Century* 5-6 (June 1991).

go financing system, but it also placed under state control all "public roads, causeways, landings, and wharves" that had been under local control.[27] The county feeder road system was included in the roads that were taken over by the state. And the Byrd Road Law created a highway trust fund that would serve as a fund raising and allocation mechanism for the state.

Shortfalls in revenue once again returned to the Commonwealth in the 1950s to the extent that the pay-as-you-go financing scheme was becoming insufficient to meet the state's transportation needs. The influx of funds from the federal interstate highway program alleviated the problem somewhat, but by 1965 it was clear that the amount of money required to meet the state's transportation needs did not exist. In addition, the pay-as-you-go system came under fire from those who claimed that it did not provide an alternative to debt financing. Critics focused on the heavy debt incurred by cities to pay for services not funded by the state as proof of the failure of the system. In effect, critics argued, the pay-as-you-go scheme transferred debt burdens to cities instead of avoiding their accumulation entirely.

Although the legislature has allowed local governments to experiment with new methods to raise revenue for roadways on a very limited scale, the state continues to work within the funding framework adopted in the 1930s for the vast majority of transportation projects. Meanwhile, Virginia's transportation needs are outpacing the state's ability to pay at an incredible rate. A recent VDOT study indicated that Virginia's 1989 modal needs would be almost $49 billion over the subsequent 20-year period, of which more than $24 billion in funds would be unavailable under current funding formulae.[28]

The need to distinguish between local and state taxation powers is essential as well. The Constitution of Virginia vests the power to tax real property and other personal property exclusively with local government (i.e., cities and counties).[29] The Commonwealth government, on the other hand, bears responsibility and power for the creation and maintenance of the primary and secondary road systems throughout the Commonwealth.[30] A true dilemma results: the Commonwealth pays for the highways and creates the unearned increment for adjacent landowners, but the local government reaps the increases in property taxes due to increased land values.

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27. The law did not apply to independent cities, and the counties of Arlington and Henrico chose to exercise an escape clause in the law to retain control over its roadways.

28. Virginia Dept. of Transp., A Study of Transp. Trust Fund Allocation Formulae (SJR 188); 1993 Final Report, at 2 (March 1993). The funding numbers include federal, state, local, and other funds. *Id.*

29. Va. Const. Art. X, § 4. The section is an explicit restraint on the imposition of state taxes on real estate and personal property. *See* C & P Telephone Co. v. City of Newport News, 196 Va. 627, 85 S.E.2d 345 (1955); Fallon Florist, Inc. v. City of Roanoke, 190 Va. 564, 58 S.E.2d 316 (1950).

30. Exceptions to this general rule include cities and the counties of Arlington and Henrico, which bear the cost of maintaining roadways within their borders.

PART II: CORRIDOR RESERVATION LAWS

Corridor reservation laws are aimed at preserving rights-of-way for future transportation facility development at minimal cost. Often, government is constrained from purchasing land for highway development until late in the planning process—after the precise rights-of-way have been determined, the state legislature has appropriated money for actual land acquisition, and public hearings have taken place. By that time, the proposed corridor may have been in the planning process for a dozen years or more, and commercial or residential development occurs that necessitates large increases in the acquisition costs. And, closely related to the issue of the unearned increment, development often occurs near a proposed corridor in anticipation of future roadway development. When changes have to be made in the proposed route for environmental or engineering reasons, the new land routes include the new development and land that has appreciated significantly in value.[31]

"Reservation laws" seek to prevent development in a proposed corridor or along existing roadways requiring expansion, thereby controlling land prices and greatly reducing costs when acquisition is required for facility construction. In addition, the reservation laws seek to prevent the development without requiring massive compensation by the government, in other words, without the need for easements or takings from the affected landowners.

As used in this report, a reservation law would allow a governmental entity to designate precise land areas in which new development is denied or severely restricted. The types of laws often included (but by no means exclusive) are official map acts, set-back restrictions, and building moratoria or zoning laws. In each, the aim is not to recoup increased land values created by transportation facility development but to reduce the development costs themselves by preventing the increment from accruing on needed lands.

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31. The United States Congress recognized the need to preserve corridors for future transportation facility rights-of-way by ordering the Secretary of Transportation to prepare a national list of rights-of-way identified by the states. The list is to include the total mileage involved, an estimate of the total costs, and "a strategy for preventing further loss of rights-of-way including the desirability of creating a transportation right-of-way land bank to preserve vital corridors." Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, § 1017 (c), 105 Stat. 1914, 1948 (1991) (to be codified as a note under 42 U.S.C. § 108). Under ISTEA, states are obligated to undertake a planning process that considers the "[p]reservation of rights-of-way for construction of future transportation projects, including identification of unused rights-of way which may be needed for future transportation corridors . . . ." *Id.* § 1025, 105 Stat. at 1963-64 (amending 23 U.S.C. § 135).

The first tool holds the most promise and will serve as the focus in this report: a legislatively enacted official map[32] or reserved corridor. The map or reserved corridor is a comprehensive plan detailing all current and predicted land uses, along with the infrastructure required to support those uses. Included in such maps are anticipated transportation needs, usually composed of proposed new roadways and the expansions needed to meet future demand. The most potent reservation law would either bar property owners from building in designated transportation corridors or allow development but deny governmental compensation for that new increase in development value when actual land acquisition is undertaken. This highly restricted area is referred to in this report as the "primary land area" within a designated transportation corridor.

Constitutional Issues

The near absolute denial of development envisioned in the primary land area of a highway reservation law will face challenges to its constitutionality. Such challenges can be raised under the Takings Clause of the U.S. Constitution.[33] The Fifth Amendment states:

> No person . . . shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[34]

The theory would be that a landowner's "property" is effectively taken when otherwise valid uses are restricted, usually because the land value decreases substantially or the land's developmental profitability is diminished.

The *Pennsylvania Coal* Opinion

Current Supreme Court doctrine on takings law in situations where the government has not physically invaded the property but has regulated its use has its roots in the landmark case *Pennsylvania Coal v. Mahon.*[35] The Pennsylvania legislature felt it necessary to prevent subsidence caused by unregulated and careless subsurface mining and passed a statute under its police power

32. The designation of corridors could also occur through local government designation if such power is granted to the locality by the state government. The most practical method would envision cooperation between the local government and state transportation department to carry out the planning study and proposed corridor boundaries. That plan would then be presented to the General Assembly for approval, with or without amendment. Virginia statutes currently require localities to develop official maps, but the inclusion of proposed roadways on the maps does not create a legal bar on development within the corridor. *See* Va. Code Ann. §§ 15.1-458 to 15.1-463 (Michie 1989 & Supp. 1992).

33. A taking challenge may also be brought under the Constitution of Virginia. The state law discussion begins on page 25.

34. U.S. Const. amend. V.

35. *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922).

requiring landowners to leave a certain amount of the coal underground. The law made it "commercially impracticable to mine certain coal [and had] very nearly the same effect for Constitutional purposes as appropriating or destroying it."[36] The holders of the mining rights sued, claiming the government had to compensate them for the "taking" of their rights to exploit private property for economic gain.

The Court adopted a two-pronged analysis to decide the case, weighing the magnitude of the public interest at stake against the cost to private landowners. As Justice Holmes noted in the Court opinion, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[37] However, when that diminution "reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act."[38] The Court did not set a strict definition of that "certain magnitude," rather it decided that the determination had to be based on the particular facts of each case.[39]

The law at issue in *Pennsylvania Coal* was very poorly drafted, preventing the removal of great quantities of coal that were completely safe and allowing mining in areas prone to subsidence; hence, the public interest at stake was minimal. The Court weighed that against the extreme diminution in value of the challenger's property and declared the law to be an unconstitutional taking.[40]

This balancing-test approach to takings questions still holds sway. The Court stated in *Agins v. Tiburon*[41] that a regulation is a taking if it "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."[42] The Court has made it clear that the owner's "investment-backed expectations" must be taken into account when courts determine the economic viability of the land in question.[43]

A reservation law would have to pass the *Agins* test: Can a government almost completely prohibit the development of a portion of a person's land in order to serve the very important public interest of providing an adequate trans-

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36. *Id.* at 414.
37. *Id.* at 413.
38. *Id.*
39. *Id.* The Court has consistently upheld this *ad hoc* approach. *See, e.g.,* Lucas v. South Carolina Coastal Commission, 112 S. Ct. 2886, 2893 (1992).
40. *Pennsylvania Coal,* 260 U.S. at 413-14.
41. Agins v. Tiburon, 447 U.S. 255 (1980).
42. *Id.* at 260 (1980) (internal citations omitted). *See also* Lucas v. South Carolina Coastal Commission, 112 S. Ct. 2886 (1992); Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987).
43. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978).

portation network? Unfortunately the Court has never addressed the transportation corridor reservation concept; however, a recent taking case involves a comparable fact situation.

The *Lucas* Opinion

The plaintiff in *Lucas v. South Carolina Coastal Commission*[44] purchased two oceanfront lots in 1986, intending to build single-family homes similar to the developments on adjoining parcels. Laws in effect at the time of purchase permitted the development Lucas had in mind. Eighteen months later, South Carolina enacted the "Beachfront Management Act," which barred the plaintiff and all similarly situated landowners from building any new permanent habitable structures on the beachfront. Lucas immediately brought suit (before applying for a permit to build), alleging that the law deprived him of all economically viable use of the property and hence effectuated a "taking" that had to be compensated.[45]

The Supreme Court agreed, ruling that regulations that deny an owner all "economically viable use of his land" are a discrete category of deprivations that require compensation *without case-specific inquiry* to determine the public interest necessitating the regulation. The government can resist compensation only by demonstrating that the "proscribed use interests" were not a part of the owner's title even before the regulation took effect. This means that the state must point to an existing common law rule or a pre-existing easement or condition upon the owner's fee simple (i.e., "title") in order to justify any new regulation that prevents all economically beneficial use of the land. The law

> must . . . do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners . . . under the State's law of private nuisance, or by the State under its power to abate nuisances . . . .[46]

Questions Concerning *Lucas* and Its Applicability

The *Lucas* opinion leaves many questions unanswered. First, the Court explicitly refrained from determining when land becomes economically nonviable. The majority opinion, in a footnote, "[r]egrettably" recognized the lack of a clear-cut rule, writing that the answer may lie

> in how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the

44. 112 S. Ct. 2886 (1992).
45. *Id.* at 2889-90.
46. *Id.* at 2900.

> particular interest in land with respect to which the [plaintiff] alleges a diminution in . . . value.[47]

As the Blackmun dissent indicates, the determination of a total taking is the threshold inquiry under this category of taking cases, yet there is no objective way to define what the "denominator" should be.[48] For example, a highway reservation law may deny development on 10% of a landowner's estate. A court could rule that, based upon the regulated portion alone, the owner's land is no longer economically viable and compensation is required. Or a court could use the owner's entire tract of land as the baseline and find only a 10% diminution in the total value, hence not the "total taking" as recognized in *Lucas*.[49]

Previous case law cited in *Lucas* only clouds the picture. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[50] a statute almost identical with the one in *Pennsylvania Coal* was challenged, and the public interest claimed remained the same as well. The unexploitable coal amounted to approximately 2% of *all* deposits. The Court, using the value of all coal deposits in the state as the baseline, ruled the diminution minimal and did not require compensation.[51]

In *Nollan v. California Coastal Commission*,[52] cited by the *Lucas* court as a total taking case, a beachfront landowner applied for a building permit to remodel his home. The Coastal Commission premised the issuance of the permit on the dedication of an easement over the plaintiff's land so that citizens could access the beach. The easement caused a small reduction in the overall value of Nollan's estate, but of course a total diminution in value of the immediate land burdened by the easement because all development on it was prohibited. The regulation was ruled a taking and could not be treated as a *quid pro quo* for the issuance of a building permit.[53]

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47. *Id.* at 2894 n.7.

48. *Id.* at 2908 (Blackmun, J., dissenting).

49. For an interesting and prescient discussion of the valuation problem written almost 30 years ago, see Sax, *Takings and the Police Power*, 74 Yale L. J. 36, 60 (1964).

50. 480 U.S. 470 (1987).

51. The *Keystone* Court addressed the new subsidence statute in a different procedural posture, however. The owner in *Keystone* mounted a facial attack, alleging the statute could *never* be applied in a constitutionally sound manner. The Court did not agree with the claim. For a complete discussion of facial versus as-applied challenges in the takings context, see discussion on pages 23-24.

52. Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

53. In fact, the stated premise of the *Nollan* decision was that the required dedication had no relation to the work the plaintiff wished to perform on his home. The Court required a nexus between the permit condition (i.e., the forced dedication) and the original purpose of the building restriction (i.e., the need to allow access to the sea). *Nollan*, 483 U.S. at 831-37. "Unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* at 839 (internal citation omitted).

A second area of concern after *Lucas* involves the meaning of "value" itself. The *Lucas* Court accepted the lower state court's judgment (due to federal/state judicial relations) that the plaintiff's land was rendered valueless, though the accuracy of that assessment remains in doubt. It is clear Lucas could not develop the land in a manner to maximize its profitability, but the South Carolina courts did not look to other inherent land values previously recognized by courts: the right to exclude others from the land; the ability to picnic, swim, camp in a tent, or live on the property in a mobile home; or the right to alienate the land to neighbors or others desiring proximity to the ocean.[54] State and federal courts may cite these "non-developmental" values in order to expand the definition of "property" and avoid the *Lucas* rule, thereby rarely finding total takings.[55]

Third, the decision may have the effect of freezing a state's common law and impairing the ability of a legislature to respond to new crises in the transportation arena. The South Carolina legislature had an abundance of evidence demonstrating the dangers posed by continued development upon the state's sand dunes, evidence that mimicked findings reported by the U.S. Congress 20 years before. The Court responded: "Any limitation so severe cannot be newly legislated or decreed (without compensation) . . . ."[56] Deference was not given to a legislative determination that a new type of hazard existed that threatened public safety and hence required state intervention under its police powers—emphasis was placed on the previously existing common law alone.

Last, it is unclear how the balancing test so fundamental to taking cases will be affected. In dicta near the end of the *Lucas* opinion, the majority wrote that the total taking inquiry will ordinarily entail the same analysis as state nuisance law, meaning an examination of

> the degree of harm to public lands and resources, or adjacent private property, posed by the [landowner's] proposed activities . . ., the social value of the . . . activities and their suitability to the locality in question . . ., and the relative ease with which the alleged harm can be avoided through measures taken by the [landowner] and the government (or adjacent private landowners) alike . . . .[57]

In addition, courts could determine whether the proposed activity had been engaged in for a long period of time before the regulation, or if nearby landowners are permitted the use denied to the claimant, in making their ultimate

54. *Lucas*, 112 S. Ct. at 2908 (Blackmun, J., dissenting).

55. *Id.* at 2919. (Stevens, J., dissenting).

56. *Id.* at 2900. "We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found." *Id.* at 2902 n.18.

57. *Id.* at 2901.

taking determinations.[58] Hence, a balancing may still occur within the common law nuisance/property rights framework.

Lucas and Corridor Reservation

The potential applicability of *Lucas* to the corridor reservation concept is great. First, the denial of *all* development rights within a corridor in the absence of any variance procedure is most analogous to the fact situations in both *Nollan* and *Lucas* and would require immediate compensation or physical appropriation by the government. Second, a court could reasonably find that a reservation law removes all economic "value" from the land; while other non-economic uses remain, courts will probably frown upon government lawyers that contend the right to "enjoy nature" on own's land leaves enough value to ignore severe and/or complete diminutions in economic values. Third, the government would be hard pressed indeed to attempt to argue that any background nuisance law exists to prevent what is otherwise legal and ordinary development within a designated corridor simply to reduce transportation costs. Hence, even though ambiguities remain after *Lucas*, a rigid, complete ban within a corridor is not a realistic option.

Better results can be obtained, however, when the reservation laws or statutes do not completely remove all economic value or when the government provides variance procedures or benefits to property owners (other than through cash payments) in an attempt to compensate for diminutions in land value caused by regulation. Further examination of several key areas in takings law should further illuminate the legal underpinnings of corridor concepts.

"Economic Viability": The Variance Procedure

One prong of the *Agins* test[59] results in a taking if an owner is denied economically viable use of his or her land.[60] In *Agins*, the city adopted a low-density open space ordinance and began eminent domain proceedings to acquire the plaintiff's land. One year later, the city ended the proceedings and the landowner sued alleging, *inter alia*, that the city must compensate a landowner for the reduction in land value incurred during the acquisition process under the Takings Clause. The Court rejected the argument, ruling that "[m]ere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are 'incidents of ownership.' They cannot be considered as a 'taking' in the constitutional sense.' "[61]

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58. *Id.*

59. Agins v. Tiburon, 447 U.S. 225 (1980); *see supra* notes 41-43 and accompanying text. Discussion of the second prong, the legitimate state interest, begins on page 22.

60. *Lucas* dealt with the complete removal of economic viability under this prong.

61. *Agins*, 447 U.S. at 263 n.9 (1980), quoting Danforth v. United States, 309 U.S. 271, 285 (1939).

Several years later, however, the Court opened the door to a new class of takings cases involving "temporary takings." The plaintiff in *First English Evangelical Lutheran Church v. County of Los Angeles*[62] alleged that the government had squandered opportunities to exercise its eminent domain power and created several years of uncertainty concerning the value of his land. The Court did not agree with the plaintiff on the facts of the case, but it did rule that temporary takings that deny a landowner all use of his or her land "are not different in kind from permanent takings, for which the Constitution requires compensation."[63] The Court limited *Agins* to the proposition that property must be valued at the time of the taking and need not take into account any depreciation that occurs during preliminary activities of the government.[64] The *Lucas* decision reaffirmed the validity of a temporary taking challenge, holding that Lucas had standing to sue because the state prevented any development of his land for a 2-year period without compensation and without a variance procedure.[65]

The *Agins/First English* line of rulings applies directly to a highway reservation law. If the government attempts to restrict all development within a corridor, it must either pay the market value for that "easement," acquire the land, or include a well-defined variance procedure.

Under a variance procedure, a landowner that is denied a certain use of his or her land by a zoning law or a reservation statute can petition the government agency responsible for restricting the use. The agency must then review the particular fact situation of the owner and make an individual determination of whether the use can be allowed or whether it would be against the public health, safety, or welfare (i.e., whether it is capable of being restricted under the police power). If the proffered use is allowed, a court under *Agins/First English* should rule that the delay inflicted upon the property holder was a normal and acceptable part of the government decision-making process. If the use is denied, the government must buy an easement to prevent the use, buy the land itself, or be able to defend the restriction under the police power in a court action.

A good example of a variance procedure presently in use involves a set of Florida statutes that temporarily prevent localities from granting building permits to landowners within a restricted transportation corridor.[66] The locality, upon a petition by a landowner to make any changes to his or her property,

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62. 482 U.S. 304 (1987).

63. *Id.* at 318.

64. *Id.* at 320.

65. *Lucas,* 112 S. Ct. at 2891. The *First English* decision, written by Chief Justice Rhenquist, attempted to limit the holding to the "facts presented" and noted that the owner had been denied *all use* of his land. Specifically, variances were held to be outside the holding. *First English,* 482 U.S. at 321.

66. Fla. Stat. ch. 337.243 (1991). The Florida statute is designed first and foremost to foster communication between the local zoning and planning boards and the state transportation department in order to prevent the approval of development permits by the local entities in corridors designated for future highway development by the state. See discussion on pages 28-29 for a more detailed treatment.

must first alert the state transportation department. The department in turn has the option to acquire the land within 120 days or allow the proposed development to occur. In the event the department does not exercise its option to buy, the local government has the authority to act upon the landowner's petition as it would any other zoning or development decision. The inclusion of the variance procedure changes a taking case from the line of reasoning in *Lucas* to that in *Agins*: development is not completely restricted without an administrative appeal mechanism, and the delay in the variance procedure can be attributed to normal delays in the decision-making process.

"Economic Viability": Divisible Property Rights

A very important aspect of the economic viability test and of takings jurisprudence in general is the concept that interests in land are divisible. Government regulation may affect one aspect of land value while having no impact on other aspects of value. As such, courts often will not declare a taking when a valid commercial use or some other identifiable economic use remains. Legal commentators note that the government regulation at issue in the total taking case of *Lucas* was uncharacteristic in that "[e]xtremely few jurisdictions have the unmitigated gall" to regulate property by limiting any alternative uses for it.[67]

One way to approach the divisibility concept is to view property ownership as the legal possession of a "bundle of sticks."[68] Owners of property are able to sell certain sticks to others while maintaining ownership of the surface land, and government can take away other sticks through regulation via valid use of the state police power. One example familiar to most is the possible split in ownership involving mineral deposit rights: one person may hold title to a plot of land above ground, while another owns the rights to any mineral deposits below ground. A third person can hold the separate right to actually extract ore deposits from the ground,[69] and a fourth may have legal ownership of the air rights.

The Supreme Court explicitly recognizes the divisibility of land ownership and has refused to find takings in situations in which government regulations effectively eliminate one "stick." In *Keystone*,[70] an anti-subsidence law prevented the owner from mining portions of his coal deposits, but the Court found no taking because the owner's property contained extractable deposits. Similarly, in *Penn Central Transp. Co. v. City of New York*,[71] the owner of the Grand Central Station railroad terminal alleged that a taking occurred when the city

67. *See* H. Jane Lehman, *Property Rights Drive Picks Up More Ground*, Los Angeles Times, Oct. 11, 1992, at K6 (quoting Los Angeles land-use attorney Gideon Kanner).

68. *Lucas*, 112 S. Ct. 2899.

69. Pennsylvania is one state in which the right to extract mineral deposits is severable from actual ownership of the ore itself.

70. *See supra* notes 50-51 and accompanying text.

71. 438 U.S. 104 (1978).

refused to issue building permits up to the level normally allowed within the building's zoning grid because the terminal had been designated a historic landmark. The Court found no constitutional taking because the property owner could still realize an appreciable profit from his commercial enterprises even though he could not develop as intensively as he had expected.[72]

As such, the government may be able to restrict development rights within the primary area without compensating the owner if other facets of the owner's property rights remain intact and allow identifiable value.[73] This interpretation depends upon the magnitude of the restriction in relation to the economic possibilities remaining in the fee simple and upon the baseline used in the valuation determination.

Divisible Interests and Transferable Development Rights (TDRs)

The view of divisible property rights outlined poses a large problem for transportation financing: a subjective balancing test is required that will be different for every property owner and will be costly to implement in the context of a corridor reservation program. The ultimate key to success for corridor legislation may lie in the following ingenious concept borne out of land divisibility: transferable development rights, or TDRs.[74] The legal idea is that the right to develop one's land is as alienable as the rights to air, water, or underground minerals above, within, and below the same plot of land. If the government imposes a regulation on the land that substantially restricts its developmental capacity, the government should also be able to create severable rights or credits to develop that can be used by the property owner at another location. The development rights are also transferable, or salable on the open market, so that many small, divided property owners can sell their rights to developers that are more likely to be able to afford and use them more efficiently. The owner of the TDRs, in turn, can use them only in predesignated areas, ideally sites that contain the infrastructure needed to support dense development and near multimodal connection points.

The true attractiveness of the concept lies in the fact that the "hit-and-miss" aspects of zoning and government regulation can be reduced to some degree. For example, the corridor reservation proposals and the concomitant financing ideas in this study are aimed at recouping a portion of the *increase* in land value that accrues to the lucky property owner due to government activity. In the TDR context, the aim is to offset the *decrease* in land value that often strikes a property owner due to government regulations and restrictions under

72. *See infra* notes 75-76 and accompanying text.

73. For example, the government could disallow all commercial building if the property owner still earned a profit from renting his or her farmhouse.

74. Known variously as "transfer of density rights," "transfer of density credits," and the like. The terms are limited only by the creativity of legislators and land-use attorneys.

the police power. Indeed, the property owner whose land is immediately needed for the transportation facility in most cases sees a diminution in his or her property values because regulations prevent the landowner from pursuing the most profitable land use possible and yet do not require compensation. TDRs would alleviate that burden by creating a market for the landowner's otherwise unusable development capacity.

The U.S. Supreme Court specifically recognized the legality of the TDR concept in *Penn Central.* The Court cited the existence of the TDRs granted to the plaintiff as demonstrable proof that substantial value remained "in the land," and hence the defendant city's preservation laws did not effect a taking.[75] At the federal constitutional level, commentators describe the creation of TDR programs as "a safety valve for situations in which portions of properties are subject to restrictive treatment."[76]

TDRs in Action

Successful use of TDR programs can be found in Maryland. The purpose of the Maryland programs has been to preserve agricultural farmland from the sprawl of urban development. Since 1981, a state program has paid farmers $97 million to obtain permanent preservation easements on more than 98,000 acres of land.[77] More interesting, the Montgomery County government allows farmers in areas zoned for one house to every 25 acres to sell TDRs to developers. The developer is then allowed to use the rights to build in predesignated areas closer to metropolitan Washington. The effect is to permanently exclude certain land areas from development while at the same time allowing building to occur in greater densities in urban areas that are more prepared to handle the development (i.e., where infrastructure can handle the added growth). And the property owners (i.e., the farmers) are indirectly compensated by the government for the loss of development rights on land they personally own.

New York City has also adopted a TDR framework in order to preserve historic buildings within the city limits. The most visible and expansive example involves the Grand Central Station Terminal. The city denied to the developer the right to demolish the historic terminal or to substantially change its character (which included a denial to construct high-rise office towers). In return, the city calculated the number of stories that would normally be permitted within the terminal's zone and computed the total square footage of office space that

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75. 438 U.S. 104 (1978).

76. Anne E. Mudge, *The Law of the Land,* The Recorder, July 29, 1992, at 9; *see also* H. Jane Lehman, *Property Ruling Prompts Shift in Legal Attacks,* Wash. Post, July 4, 1992, at E1 (citing land-use attorney Katherine E. Stone for the proposition that "[l]ocalities should always allow some reasonable use of regulated property . . . by providing for *variances* or *transfers of development rights* . . . ." (emphasis added)).

77. Paul W. Valentine, *A Vanishing Act Slows; State Preservation Program Stems Loss of Farmland to Development,* Wash. Post, Sept. 10, 1992, at M1.

was "denied." The city then credited the developer with TDRs equal to approximately 1.7 million square feet. The TDRs, in the form of "air rights," may be used in a designated subdistrict surrounding the terminal.[78]

The TDR concept is used in various other states and localities for numerous purposes, including environmental preservation, historic preservation, and the maintenance of low-income housing in urban areas.

"Economic Viability": A Summation

In the context of the corridor reservation proposal, the issue of residual value is critical. Hoping that most property owners will still retain some residential use or other economic benefit from the land, and then that courts will continually recognize the legality of the process, is tenuous. The adoption of new legislation that can compensate the property owner without the need for huge monetary consideration is essential, and a TDR program may be an option to achieve that end equitably for most parties concerned.

"Legitimate State Interest": The Second Prong

It will be recalled that the Court in *Agins* balanced the property owner's interest of economic viability with the "legitimate state interest." As Justice Stevens wrote in *Keystone*, "the nature of the state's interest in the regulation is a critical factor in determining whether a taking has occurred."[79] In *Keystone*, the court explicitly recognized the legitimate governmental interest of preserving the public welfare and maintaining the fiscal integrity of large areas of the state. Compared to the rather minuscule 2% reduction in value to the state's coal deposits, the state interest outweighed the loss to the landowners and no taking was found.[80]

The court in *Nollan* has explicitly made the purpose test more stringent. The court stated that a regulation had to *substantially* advance a legitimate governmental interest and disallowed a rational basis test. Hence, the defendant's requirement that the owner of beachfront property dedicate an easement over his land to allow public access to the ocean when the improvements the owner wished to make to his home had no impact on public access to the beach was more akin to a "plan of extortion" than a valid regulation of land use. The grant of the easement was a taking that had to be compensated.[81]

The state interest in creating a transportation corridor can be considered both substantial and legitimate. The *Keystone* decision explicitly recognized

78. Michael H. Cottman, *Manhattan Neighbors*, Newsday, July 7, 1992, at 25.
79. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 (1987).
80. *Id.* at 493.
81. Nollan v. California Coastal Commission, 483 U.S. 825, 837 (1987).

that preserving the fiscal health of a community is an important public interest, and the immense costs associated with transportation development (both the construction costs themselves and the effects upon a community without sufficient facilities) should be recognized by a court. On the other hand, courts do not place much emphasis on a government's need to be economical when a citizen's property rights are at stake; hence, the need to create alternate forms of compensation such as TDRs becomes critical. And the use of highway reservation laws within a designated corridor may fall into the same category as the required dedication of an easement in *Nollan*: a complete prohibition on the development of reserved land without compensation is an unconstitutional taking.[82]

The Court has also added a gloss in cases where the government is acting in an "entrepreneurial" manner. The plaintiffs in *Penn Central* claimed the city had appropriated parts of the railroad terminal to engage in an "enterprise capacity" for a "strictly governmental purpose," thereby effecting an unconstitutional taking. The Court did not reject the argument out of hand but instead ruled that the preservation law allowed the defendants to continue to use the terminal and did not facilitate any entrepreneurial operations of the city—the regulations preserved historical aspects of the station. It is important to note that the Court recognized the enterprise capacity argument, and laws that further the creation of transportation facilities may be viewed as government acting solely in its entrepreneurial capacity.

"Facial" v. "As-Applied" Challenges

An overriding concern in takings cases involves the procedural stance of the plaintiff. A challenge to a government regulation under the federal or Commonwealth takings clauses can be brought either facially or as-applied. In a facial challenge, the landowner must prove that the regulation or law in question can never be implemented in a constitutionally approved manner. Neither the U.S. nor the Virginia Supreme Court views facial challenges kindly, the former having written that a plaintiff "face[s] an uphill battle in making a facial attack on [a regulation] as a taking."[83] Courts prefer to review laws that have been applied to a specific fact situation and adjudicated in all available administrative proceedings, resulting in an allegedly insufficient remedy for the plaintiff. There is no reason to believe a transportation corridor statute would be an exception, and any such statute that includes a well-defined variance procedure should survive a facial challenge.

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82. *See* Annette B. Kolis & Daniel R. Mandelker, *Legal Techniques for Reserving the Right-of-Way for Future Projects Including Corridor Protection, in* 2 Selected Studies in Highway Law 936-N249, 936-N261 (Ross D. Netherton, ed., 5th ed. 1991). The use of a variance procedure could avoid this problem. *See* discussion *supra* pp. 17-19.

83. *Keystone*, 480 U.S. at 495. The Supreme Court of Virginia will allow a facial challenge only when there is no administrative remedy equal to the relief sought. *See* Board of Supervisors of James City Cty. v. Rowe, 216 Va. 128, 133, 216 S.E.2d 199, 205 (1975).

An as-applied challenge involves a plaintiff that challenges a statute's constitutionality as it was applied to his or her permit application. As-applied challenges must meet the same exhaustion requirement of facial challenges, meaning the landowner must obtain a final (negative) decision from the governmental body that enforces the regulation, such as a zoning or planning board. Only then can he or she seek judicial review.[84]

Lawsuits challenging a corridor statute that includes a variance procedure should be allowed by a court only after the property owner has applied for a permit to develop, exhausted all administrative proceedings, and been denied the right to develop. Some commentators, in view of the high hurdle in place for facial challenges and the requirement of exhaustion for as-applied challenges to statutes with variance procedures, believe successful challenges to reservation laws in a federal court are limited.[85]

A Note on Corridor Reservation and Federal Requirements

State transportation authorities must comply with numerous federal requirements when building facilities that use federal funds. Of central concern are the requirements under the National Environmental Policy Act of 1969 (NEPA),[86] in which corridor reservation in advance of environmental studies may violate laws requiring a "neutral" study of various alternatives for a transportation facility. State agencies examine various alternatives for a transportation facility during the planning process, yet the Federal Highway Administration (FHWA) does not allow federal funds to be used on new facilities until a study of various alternatives for the project is also performed at the preliminary engineering phase. If the state begins to acquire or reserve land before the environmental analyses are performed during the engineering phase in order to obtain "Corridor Approval," the FHWA may view the action as a "pre-selection" of a corridor in violation of NEPA.

These concerns in fact may not pose a critical problem to the corridor reservation technique addressed in this report. Authorities in North Carolina examined the possibility of reserving land and/or dedication of rights-of-way in advance of programming and construction in 1986.[87] The FHWA prepared a document for NCDOT, cleared by the FHWA's state, regional, and Washington

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84. *See, e.g.*, HMK Corp. v. County of Chesterfield, 616 F. Supp. 667 (D.Va. 1985).

85. *See, e.g.*, Kolis & Mandelker, *supra* note 82, at 936-N265. This assertion is all the more powerful because federal courts often require a landowner to apply for several "levels" of zoning requests with varying developmental intensities, and not simply the most "grandiose" and economically profitable. The plaintiff must then be turned down for all such reasonable uses. *Id.* at 936-N264-65.

86. 83 Stat. 852, 42 U.S.C. §§ 4321 *et seq.* (1988).

87. *See* Marion R. Poole, *Consideration of Environmental Factors in Transportation Systems Planning: The North Carolina Experience, in Transportation Research Record No. 1283; Transportation Systems Planning and Applications 1990* 15. Dr. Poole is the Head of the State Planning Unit in NCDOT.

offices, that sought to answer many of NCDOT's concerns. The FHWA document stated that

> [a]n Environmental Impact Statement ("EIS") need not be completed before right-of-way can be protected. However, . . . a protected corridor may carry little weight in the selection of an alignment for federal funding once appropriate environmental studies [are] completed. If the protected corridor has serious environmental problems when compared to other alternatives, federal funds may not be available for construction in the protected corridor.[88]

The FHWA recommended that the state perform a preliminary environmental screening prior to designation of an alignment for protection in order to minimize potential problems.[89] Officials in NCDOT concluded that "if all 'problem' uses are avoided, there should be no problem with right-of-way protection through dedication, reservation, or advance acquisition prior to EIS studies."[90]

Virginia Courts and a Corridor Law

Property owners can bring takings challenges against state or local government entities under the Commonwealth's taking clause. The Constitution of Virginia, Article I, Section 11, states:

> That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law . . . whereby private property shall be taken or *damaged* for public uses, without just compensation, the term "public uses" to be defined by the General Assembly . . . (emphasis added).

Takings challenges under this section may be brought in two related ways. First, a plaintiff may allege an outright government taking, a challenge very similar to that brought under the U.S. Constitution. The Virginia case law in this situation does not add much new gloss to that of the U.S. Supreme Court decisions. The most important doctrine for our purposes is very similar to the *Lucas* ruling. The Virginia Supreme Court ruled that "a zoning ordinance which [has] the effect of completely depriving the owner of the beneficial use of his property by precluding all practical uses [is] unreasonable and confiscatory and, therefore, illegal."[91]

88. *Id.* at 20.
89. *Id.*
90. *Id.*
91. Fairfax County v. DeGroff, 214 Va. 235, 198 S.E.2d 600, 602 (1973) (summarizing *Boggs v. Board of Supervisors*, 211 Va. 488, 178 S.E.2d 508 (1971)).

A second challenge may be brought under the state constitution alleging that the government "damaged" the plaintiff's property and must provide compensation. The Virginia Supreme Court, in its first decision defining the term "damaged,"[92] limited severely the scope of the provision in two ways. First, the court ruled that the clause was intended only to create a new right of action for landowners whose property was physically damaged by some governmental activity.[93] Before 1902, the constitution and the common law of the Commonwealth allowed the legislature to grant municipalities the right to engage in activity that damaged private property (e.g., the felling of trees, runoff damage from roadways) without requiring compensation.[94] The new provision, the Court wrote, changed that practice and required payment to the landowner.

Second, the Court ruled that the definition of damage had not been enlarged by the constitutional provision, but that it retained its common law definition and applied to cases in which

> the corpus of the owner's property itself, or some appurtenant right or easement connected therewith . . . is directly (that is . . . physically) affected, and is also specially affected (that is, in a manner not common to the property owner and the public at large); and such direct and special inquiry must be such as to depreciate the value of the owner's property.[95]

Not included were damages to the feelings, tastes, or sentiments or to a reduction in market value attributable to such emotional considerations.[96] "The mere fact that private property is rendered less desirable for some purposes . . . or may affect the sentiments of prospective purchasers and thereby render the property less desirable and even less salable, does not constitute damage within the meaning of the [constitutional provision]."[97]

Virginia courts continue to uphold the *Lambert* reasoning. In 1971, the Virginia Supreme Court further defined "damage" to emphasize that it must not be given its ordinary rather than its legal meaning. The right must be identifiable as a common law right; if not, any market-based reduction in value is a risk to be borne by the property owner.[98]

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92. The current takings clause was first incorporated into the state constitution in 1902. Va. Const. of 1902, § 58.

93. Lambert v. City of Norfolk, 108 Va. 259, 264, 61 S.E. 776, 778 (1908).

94. *See generally* Myers v. City of Richmond, 172 U.S. 82 (1898); Home Building Co. v. Roanoke, 91 Va. 52, 20 S.E. 895 (1895).

95. *Lambert,* 108 Va. at 268, 61 S.E. at 779.

96. *Id.* at 263, 61 S.E. at 777.

97. *Id.* at 259, 61 S.E. at 776.

98. Potomac Electric Power Co. v. Fugate, 211 Va. 745, 749-50, 180 S.E.2d 657, 660 (1971).

A recent Virginia Supreme Court damage clause decision, handed down in 1989, denied compensation in cases where there is no direct interference with an owner's right to use and dispose of his or her land and where there are only allegations of a potential diminution in property value resulting from the state action. The court wrote the "impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking."[99] It must be noted that in *Bartz* the government had not physically possessed the owner's land or regulated it—it had only begun eminent domain proceedings.

Hence, the state takings case law requires compensation under the "damage" clause whenever a government agency physically interferes with or eliminates a property right recognized by law. This is very similar to the reasoning in the recent U.S. Supreme Court decision of *Lucas v. South Carolina Coastal Council*,[100] in which the government could avoid giving compensation only when an owner's land had already been subject to the restriction at common law, to which the regulation merely sought to enforce (e.g., a law that prevents a public nuisance). The Virginia courts' interpretation of damage requires the owner to demonstrate a right he or she possesses, naturally inhering in the fee simple, that has been taken or otherwise negatively affected by the state. A complete denial of development rights under a reservation law would almost certainly qualify as damage to a property owner's common law rights—the right to develop one's land to build a home is the quintessential right of the fee simple,[101] and zoning restrictions on commercial development must be made in order to preserve the public health, safety, or welfare. Strict reservation laws tend to violate both principles. On the other hand, the use of a variance procedure should qualify as a normal part of the decision-making process and deny a damaged property claim by a property owner. Second, a TDR program as outlined in the federal constitution section should act to leave a residual value in the land and should also be recognized as a form of compensation by the government to the property owner.

Legal Concerns: A Summary

The survival of a reservation statute appears to depend upon an express time limit placed upon the government before which land acquisition or compensation must occur. Both the state and federal supreme courts recognize a planning period when land is designated as likely for acquisition, during which time the land's value may drop substantially. Compensation is not necessarily

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99. Bartz v. Board of Supervisors of Fairfax County, 237 Va. 669, 673, 379 S.E.2d 356, 358 (1989) (citing Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 15 (1984)).

100. 112 S. Ct. 2886 (1992). *See* discussion *supra* notes 44-58.

101. *See Lucas*, 112 S. Ct. at 2901. Common law principles "rarely support prohibition of the 'essential use' of land." *Id.* at 2901 (citing Curtin v. Benson, 222 U.S. 78, 86 (1911)) (referring to the right to erect a habitable structure on the land).

required if the time elapsed is reasonable. In addition, a variance procedure in which property owners can dispute a development ban can strengthen the planning nature of a limited corridor statute. Next, the implementation of a TDR program is a form of compensation that can alleviate the harsh effects of a development ban and can avoid the finding of a taking by the courts. Last, by designating the corridor through legislative action using transportation and planning studies performed by VDOT and/or the localities involved, a valid public use can be declared and the government should be able to acquire land through advance acquisition procedures in order to prevent expensive development from occurring within a corridor.

Statutes in Florida and North Carolina provide excellent examples of limited reservation statutes that appear likely to pass constitutional muster in those states.

Case Study: Florida and Advance Notification

Florida has experienced tremendous population growth and suburban development in the last 30 years, creating a dynamic in which state and local governments chase growth to provide basic services, including transportation. Of late, however, the state has implemented a far-reaching growth management program that places it in the forefront of the national effort to control and regulate development. Included in the program is a state statute allowing the transportation department or any expressway authority to create and preserve transportation corridors.

Florida's first attempt, a very strict version of a highway reservation bill, included an official map statute that forbade any governmental entity from issuing building permits within a mapped, duly designated transportation corridor.[102] The map was binding for 5 years and could be extended for 5 more years after a public hearing was held. The Florida Supreme Court struck down the statute mainly on the grounds that it included only a very narrow variance procedure for disaffected landowners. The court believed the law simply froze property values at a low level in anticipation of eminent domain proceedings,[103] rather than regulating use as a valid police power, and hence was an uncompensated taking. The court clearly recognized an acquisitory intent on the part of government: the land would be needed, but the government wanted to do all in its power to reduce the acquisition costs with little regard for the rights of the property owners.[104]

The Florida legislature continued to recognize the virtues of a reservation law. Heartened by the court's recognition that the economizing of expenditures

102. Fla. Stat. ch. 337.241 (1991).

103. Joint Ventures, Inc. v. Department of Transp., 563 So.2d 622, 626 (1990).

104. *Id.*

of public funds can be a valid government objective under the police power,[105] the legislature amended the corridor statute.[106] A landowner can apply for a building permit or for subdivision plat approval, and if the permit involves land within the right-of-way limits on an official map, the local government must notify the transportation department at least 60 days before granting the permit. The department then has 45 days after notification to inform the property owner of its intent to acquire the land in question. The department has up to 120 days after notifying the owner to initiate efforts to purchase the property or begin eminent domain proceedings. If the department allows any time limit to expire without acting or notifies the local government that it does not want to purchase the land, the local governmental entity is free to proceed with its permit process.[107]

Case Study: North Carolina

In 1987, North Carolina passed a series of statutes intended to lower the state's costs for highway development and at the same time to protect landowners affected by future transportation facility development. The Roadway Corridor Official Map Act allows local governments or the North Carolina Board of Transportation to designate a highway corridor in a recorded official map. Within the first full year following designation of the corridor, work must begin on an environmental impact statement or preliminary engineering; if not, any protection that could be afforded the corridor under the Map Act is withdrawn.

After designation, restrictions are imposed upon private property within the designated corridor, including the denial of building permits or subdivision plats, for up to 3 years. Key exceptions are allowed: (1) permits may be issued for buildings and structures that existed prior to the passage of the act provided that the size of the building is not increased and the occupancy code does not change; and (2) for proposed changes not included under (1), property owners can petition the Department of Transportation (NCDOT) or the city that initiated the corridor official map for a variance. The Code states that "A variance may be granted upon a showing that: (1) Even with the tax benefits authorized by this [Act], no reasonable return may be earned from the land; and (2) The requirements . . . result in practical difficulties or unnecessary hardships."[108] Hence the statute may avoid a temporary takings attack in that a property owner is not completely and definitively denied use of his or her land, and the statute does not arbitrarily apply to every landowner within the corridor regardless of impact.

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105. *Id.*

106. Fla. Stat. ch. 337.243 (1991).

107. In addition, Florida is moving to capture the unearned increment through a variety of techniques. The state is not restricting its focus to the corridor statute itself. See discussion on page 32 for an extended treatment.

108. N.C. Gen. Stat. § 136-44.52 (1992).

Next, North Carolina authorizes advance acquisition of the rights-of-way within official corridors. The initiating authority may purchase specific parcels of property "to protect the roadway corridor from development" or to relieve "undue hardship" imposed upon a property owner due to the restrictions on development within an official corridor.[109]

The interests of property owners desiring subdivision plat approval are advanced by a statute allowing a city or county (1) to require an owner to dedicate land that lies within a roadway corridor in exchange for a transfer of the density credit attributable to the dedicated right-of-way to contiguous land owned by the selfsame landowner; or (2) the right to allow a landowner to willingly dedicate land in exchange for transferring the density credits attributable to the dedicated land to a location previously approved to receive density credits (i.e., a designated "high-density" or "high-growth" area).[110]

Critique

The two states' statutes have many advantages. First, both enable local governments to create official maps and allow them to use eminent domain and other tools to preserve rights-of-way. In Florida, the legislature has encouraged all localities to participate so that the entire state can be mapped and transportation needs can be assessed on a statewide scale.

Next, the statutes require notification of the public regarding approximate locations of the roadway very early in the planning process, but transportation planners retain the flexibility to respond to unforeseen problems involving rights-of-way. A landowner retains his or her right to exploit the economic opportunities of the land unless the state purchases the property in rather quick fashion, thereby eliminating some uncertainty on the part of property owners. This process also demonstrates the government's intensity of preference for the land in question and reduces the likelihood of excessive corridor designations on official maps.

Third, acquisition costs are reduced since the state does not continually find itself purchasing property that has recently been developed, as is often the case in urban settings. The embargo on local government action pending a state assessment of need opens lines of communications, and the respective departments of transportation should not be caught off guard by expensive new development in a planned corridor. The North Carolina law, which bars new development for 3 years, is a much stronger ban than that currently in force in Florida, and it may survive a court challenge similar to the lawsuit that nullified the old Florida ban on building because the time limit is shorter (3 years versus 5 to 10 years) and a variance procedure is mandatory. The effectiveness of

109. *Id.* § 136-44.53.

110. See pages 20-22 for extended discussion of transferable development rights.

advanced acquisition will be limited by the amount of funds the state sets aside for such purposes.[111]

Last, both states' corridor protection statutes do not stand alone: other measures are allowed that should help to funnel growth and make long-term planning easier. The transfer of density (a.k.a. development) rights will encourage commercial builders to site new development in locations that are better able to handle congestion, including multi-modal connection points. The Florida statutes also encourage localities to use the designated corridors as a basis for assessing impact fees or requiring exactions. These multiple uses of the corridor concept are excellent ways in which to coordinate various local tools to recoup portions of the unearned increment and increase communication between local and state governments and agencies; an assessment of each method is discussed in depth later in this report.

For alternatives and options for the creation of corridor reservation statutes, see Part IV of this report.

PART III: FINANCING MECHANISMS TO RECOUP THE UNEARNED INCREMENT

Introduction

The reservation aspect in the primary area of a corridor statute is intended to preserve land that will be physically necessary for a transportation facility. The legislative declaration of a public use, combined with the restricted time period during which land is reserved, should allow the government to acquire land through eminent domain much earlier than heretofore possible. Yet reservation is only one step toward reducing costs; more intensive financing schemes exist that can be coupled with the primary reservation area to directly recoup portions of the unearned increment.

The legislative or local government action necessary to designate a reserved zone of land can also include a secondary area. The secondary area includes land that is specially benefitted by a facility, land that traditionally increases in value due to its proximity to the facility. VDOT, in conjunction with local government, can be required to perform studies and establish projections for transportation needs near the facility. Armed with such a study, the legislature itself can establish zones along or near an existing or planned facility or the

111. The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) will help in that federal funding authorizations to each state are established through 1997, allowing states to plan around the future revenues and possibly begin land acquisition sooner.

legislature can allow the locality to establish or "activate" special zones within the secondary area if the latter so chooses in order to fund improvements more rapidly. The map in Appendix A illustrates the differences between the primary and secondary areas.

As an introductory illustration, Florida is a leading state in the move to reduce land acquisition costs through the use of corridor legislation. The state is also moving to capture portions of the unearned increment near corridors and to channel growth into predetermined areas. The Florida legislature allows the transportation department to lease the use of department property, including rights-of-way, for joint public-private transportation services "to further economic development . . . and generate revenue for transportation."[112] The department is allowed to lease the airspace and subsurface rights of transportation facilities for commercial purposes,[113] and all generated revenue is deposited in the state's Transportation Trust Fund. Last, state statutes encourage localities to allow the transfer of development rights, incentive and inclusionary zoning, impact fees, and performance zoning in conjunction with or separate from designated corridors.[114]

Among the types of areas that are considered in this study are zones for special tax districts, proffers, and impact fees. The three revenue-raising mechanisms are meant to be three *alternative* methods to raise revenue for one parcel of land. The special assessment applies to property zoned for commercial use and may also be applied to residential units that are built after the creation of a special district. Proffers are payments made by developers to local governments in order to receive zoning changes and building permits before the actual development occurs. A property owner on an existing structure would not make payments under a proffer system unless he or she desired a change in zoning to develop the land more intensely. Last, impact fees would be assessed against new development for the estimated impact the new development will have on the transportation infrastructure. As such, it is highly unlikely that one parcel of property would be subject to all three revenue mechanisms, *and the author strongly discourages the imposition of proffers and impact fees for identical parcels of property.*

The last section in this part of the report discusses excess condemnation, or the taking of more property than is physically needed for the creation or improvement of a transportation facility. The excess land would then be leased by the government to private entities or would be resold at prices that reflect the creation of the unearned increment. All funds collected would be used to offset the construction costs for the targeted transportation facility. The constitution-

112. Fla. Stat. ch. 337.251 (1991).

113. This idea is very similar to joint public-private development undertaken by the Washington Metropolitan Area Transit Authority, whereby office towers are built in the airspace over subway corridors and leased to private entities.

114. Fla. Stat. ch. 163.3202(3) (1991).

ality of excess condemnation in Virginia is very unlikely, but the author outlines the concepts involved and recommends further study of its possible use.

Special Assessment Districts

The creation of a special assessment district (or a special tax district) provides an excellent opportunity to recoup a portion of the unearned increment. The special assessment has a long pedigree in municipal government history, beginning with the funding of roads and canals in the 19th century. It is used most often today to partially finance the improvements of local roadways, sidewalks, and water and sewer lines.

The assessment is a statutorily authorized levy on land (or land and improvements thereupon) that a local government imposes to offset the cost of a public improvement. It is based upon the theory that the property receives a disproportionate benefit from the improvement, above and beyond the benefit accruing to the general public. It is believed that the owners of that land should contribute an additional sum of money to fund the project.[115] The assessments are similar to property taxes in that they are usually a predetermined percentage of the property value of each lot affected (for example, $.10 per $100 of assessed value).[116] The difference between a special assessment and a general tax is critical, however. Under the former, the property owner must be specially benefitted by the improvement. General taxes are not based upon a promise of a specific return to the taxpayer, but upon the idea that a citizen may be required to make contributions at rates equal to those of similarly situated citizens in return for the general benefits of government.[117]

Legal Issues

Federal Law

A special assessment must meet two interrelated requirements before it can be levied.[118] First, the improvement must be for a public use, and second, it must confer a special benefit upon the assessed property. The U.S. Supreme Court has ruled that a highway meets the first requirement: "Undoubtedly,

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115. In a perfect world, the property owner would pay the government the exact amount of the benefit accrued. Due to the impracticality of assessing intangible benefits, this is rarely the ultimate goal of the assessment determination. *See* David J. Hayes, Note, *Rapid Transit Financing: Use of the Special Assessment*, 29 Stan. L. Rev. 795, 798 (1977).

116. Governments may also assess benefitted land by the frontal footage, disregarding property value. Tonawanda v. Lyon, 181 U.S. 389 (1907).

117. *See generally* Norwood v. Baker, 172 U.S. 269, 279 (1898); City of Richmond v. Richmond-Petersburg Turnpike Authority, 204 Va. 596, 132 S.E.2d 733 (1963).

118. For an excellent article on the special assessment and its theoretical and practical underpinnings, see Hayes, *supra* note 115, at 798.

abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property."[119] The legislature's power to determine and define a public use in the special assessment context is very broad as well and includes such transportation-related projects as subways, railroads, and airports.[120]

The second requirement of a valid special assessment is that the assessed properties must be specially benefitted by the improvement, and the levy cannot be substantially greater than the estimated benefit. The Supreme Court has given great deference to legislative determinations of the precise property benefitted by given projects, concluding that such decisions should be left to the legislature "unless palpably unjust."[121] The Court has gone so far as to state that the boundary drawn by the legislature "is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefitted or not, but only upon the validity of the [individual] assessment[s]."[122] As one commentator wrote, "in determining the boundaries of the special assessment district, local officials use common sense judgment as to the extent of the special benefit. No rule of thumb guides these efforts, nor have the courts provided meaningful standards: Boundary drawing is left to official discretion."[123]

Likewise, the determination of the individual assessment is left largely to local governments. The crucial factor is the level of benefit that each land parcel receives. The Court in *Norwood* disallowed special assessments levied under a law that made it possible for an assessment to exceed the expected benefit to the property, ruling that the principle underlying the assessment is that an owner is paying only for the additional benefit and should come out even after the fact (i.e., benefit minus assessment equal to zero).[124] Yet precise cost-benefit analysis is not required, owing to the impossibility of definitively assessing an improvement's benefit to a piece of property and to the fact that assessments are usually levied before the improvement is made (and before its effects on land value can be gauged).[125] The *Norwood* Court ruled that only a "substantial excess" of assessment greater than the benefit received would create an unconstitutional taking.[126]

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119. *Norwood*, 172 U.S. at 278.

120. *See, e.g.*, E. McQuillen, 11 Municipal Corporations § 32.39 (3d ed. 1964 & Supp. 1991); Southern California Rapid Transit District v. Bolen, 822 P.2d 875 (Cal. 1992) (recognizing the use of special assessments to partially finance an urban subway system in the Los Angeles metropolitan area).

121. Parsons v. District of Columbia, 170 U.S. 45 (1886).

122. Spencer v. Merchant, 125 U.S. 345, 356 (1888).

123. Hayes, *supra* note 115, at 800.

124. *Norwood*, 172 U.S. at 278-79.

125. *See generally* Hayes, *supra* note 115, at 800-01 (discussing the impracticality of determining benefit by using market-based land values before and after the completion of the improvement).

126. *Norwood*, 172 U.S. at 279.

Virginia Constitutional Law

The Virginia Constitution allows the General Assembly to "authorize any county, city, town, or regional government to impose taxes or assessments upon abutting property owners for such local public improvements as may be designated by the General Assembly; however, such taxes or assessments shall not be in excess of the peculiar benefits resulting from the improvements to such abutting property owners."[127] The Assembly, acting directly under that grant of power, allows cities, counties, and towns to assess levies on property in order to fund walkway, alley, sewer, and curb construction. The cities of Newport News, Norfolk, Richmond, and Virginia Beach are also authorized to impose assessments for the "initial improving and paving of an existing street" provided that 50% or more of the abutting property owners request the improvement.[128] And the General Assembly has granted to localities the power to use special assessments in order to finance, *inter alia*, fire protection services, sanitary districts, drainage projects, and the addition of private roads into the state highway network.[129]

Virginia Statutory Law

Virginia Transportation Service District Act. More promising in the transportation context, however, are statutes that allow certain counties to create "transportation service districts" or "transportation improvement districts." The Virginia Transportation Service District Act, passed in 1987, allows certain counties[130] to form special tax districts in order to raise revenue for transportation projects, including highways, mass transit systems, and related buildings, structures, and equipment.[131]

To create a district, the owners of at least 51% of either the assessed value of land or the land area of real property within the proposed district must petition the county board of supervisors within which the district is to be located. The petition must include (1) proposals for the definitive district boundaries; (2) the transportation facilities needed; (3) changes in zoning and density allowances required by the proposed transportation-related changes;

127. Va. Const. Art. X, § 3. It should be noted that state constitutions, including the Commonwealth's, are limits upon state power and are not grants of power. The power to tax is deemed a sovereign power, and the constitutional section cited should not prevent assessments on non-abutting lands as long as the General Assembly passes the enabling statute for local governments.

128. Va. Code Ann. § 15.1-239 (Michie 1989 & Supp. 1992). The statute authorizes cities with populations of 170,000 or more to use the assessment for street improvement. As of 1990, only the cities listed in the text qualified.

129. *Id.* §§ 15.1-360, 21-127.1, 21-305, 33.1-72.1, respectively.

130. The statute's definition of "county" authorizes the Service District Act for Arlington, Fairfax, Fauquier, James City, Loudoun, Prince William, Pulaski, Smyth, and Stafford counties. *See* Va. Code Ann. § 15.1-791.2 (Michie 1989 & Supp. 1992).

131. *Id.* § 15.1-791.16.

and (4) the expected benefits from the proposed facilities. After public hearings and review, the board of supervisors can approve the plan *in toto* or make amendments to ensure that the plan benefits the public welfare. The board must also list a description of all zoning classifications that will be in effect while the district operates, including the term of years in which each classification will remain in effect without elimination, reduction, or restriction. Thereafter, zoning can be changed only upon a request by the landowner or in order to comply with the Chesapeake Bay Preservation Act or other state laws. Board approval is the only governmental requirement before an assessment district is created.

The district is controlled by a six-member board composed of five members from the county board of supervisors and the Chairman of the Commonwealth Transportation Board. The commission is given a broad range of powers to regulate transportation facilities. Its most important powers include the right to construct, repair, and/or operate transportation facilities within the district as long as such activity is in the public interest. The commission can acquire transportation facilities and incidental equipment or property through gifts, purchase, lease, in-kind contributions, or "otherwise."[132]

A district advisory board is also created; it is composed of three people, chosen by the board of supervisors, who reside within the district and three landowners who are nominated by the original landowning petitioners. Elections for the three landowning representatives are to be held, and persons who own land within the district vote on a weighted basis by either acreage or the assessed value of real property owned within the district. The role of the advisory board is to prepare annual reports to the commission concerning the district's transportation needs and any other matters relating to the district's activities (including contractual problems, financing, etc.).

The commission's source of financing, and hence the root of its power, lies in its ability to levy and collect an annual special improvement tax on taxable real property that is zoned for commercial or industrial use or was unimproved at the time the district was created, regardless of zoning. Even here, however, the commission must request the rate from the board of supervisors, the latter of which makes the final determination of the assessment. In addition, the tax is collected through the county tax system and is then kept in a separate account for the district. The tax is levied upon the assessed fair market value of the property and must not exceed $0.20 per $100 of the assessed fair market value. Counties are also given the option to provide matching funds for the district's projects, and state monies can be diverted to district projects from revenue the county receives under the state highway allocation formula.[133]

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132. Its power has been constrained rather severely by a 1990 General Assembly amendment that removed the commission's ability to use the power of condemnation.

133. *Id.* § 15.1-791.8.

Last, the district must still conform to state transportation standards and long-range planning. A district cannot construct or improve a public highway or mass transit system without the approval of the Commonwealth Transportation Board and the county. The district may then request that the board use its power of condemnation to acquire any needed land for the approved facilities.

Other Statutes. Similar in structure to the Service Districts Act are two other acts: the Multicounty Transportation Improvement Districts Act and the Transportation Improvement District in Individual Localities Act.[134] The former allows two counties to jointly create an improvement district. The delegation is strictly limited to Fairfax County and any adjoining county, and the transportation facilities that can be financed by the districts are mass transit systems or improvements to Route 28 in Fairfax and Loudoun counties. The third piece of legislation is written to apply to Loudoun County and very specific areas within Chesterfield County and the City of Richmond. The act is almost identical with the Transportation Service District Act.

The enabling statutes are very similar in kind to that of the transportation service districts, with two very important additions. First, the district is allowed to contract with the Commonwealth Transportation Board to perform any purposes of the district. The board is then authorized to issue Commonwealth bonds to finance the project[135] under the Commonwealth's State Revenue Bond Act.[136] The board of supervisors of both affected counties must promise that the annual tax assessments will be paid to the board; if the tax is not paid within 60 days of the due date specified in the contract, the board is authorized to withhold funds from other planned projects within the non-paying county in order to meet the special tax district's obligations.

Second, any rezoning performed by a county must be revenue neutral. Hence, if a parcel of land within a district is downzoned and is no longer subject to the special assessment, the board must raise the general tax rate on taxable property within the district or take other measures to make up the revenue shortfall.

Experiences of the Assessment Districts

The impetus for the creation of the special tax district legislation came from Virginia State Senator and Chairman of the Senate's Transportation Committee Charles Waddell (D-Loudoun), who knew firsthand the horrifying traffic conditions in Northern Virginia. It is no surprise that two Northern Virginia counties were the first to take advantage of the improvement district legislation in 1987. The Route 28 Primary Highway Transportation Improvement District

134. *Id.* §§ 15.1-1372.1 to 1372.20, 15.1-1372-21 to 1372.37, respectively.
135. *Id.* § 33.1-268(2)(a).
136. *Id.* §§ 33.1-267 to 295.

involves the widening of approximately 14.3 miles of Route 28 in western Fairfax and eastern Loudoun counties. The highway, once a sleepy two-lane rural roadway, carried up to 22,000 cars per day in 1989 and is projected to carry 95,000 cars per day in 2010. Neither the state nor the counties involved had the financial resources to improve the highway before the turn of the century, so area business owners quickly requested the formation of the district. Private landowners agreed to the maximum tax of $.20 per $100 of assessed value in order to fund 80% of the payments of a $138.5-million revenue bond issue.

Yet the district became enmeshed in an intense political struggle in late 1989 and early 1990. The Fairfax County Board of Supervisors, in response to what it felt were severe overbuilding in the county and a critical lack of infrastructure to support new development, downzoned almost 14,000 acres of land on December 11, 1989.[137] The portion of the tax district within Fairfax County was included in the downzoning. Land values in the affected area dropped substantially, threatening the inflow of assessment monies needed to finance the bond issue and leading Senator Waddell to state that the county board's act sent a signal to bond financiers that the Fairfax County government was unstable.[138] He convinced the General Assembly to retroactively freeze all zoning or building regulations in any special tax district as of the date the district was created. The new "vesting" statute marked the first time in the country's history that a state legislature overturned a local government's zoning decision.[139] As summarized by Commonwealth Transportation Board Commissioner Ray Pethtel, "The legislation is more to the point of making sure a clear message is sent to the bond rating agency and the bond market that the rules of the game will remain consistent."[140]

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137. Downzoning restricts the use of land that had been zoned for commercial and industrial development and in this case prohibits office construction except by the granting of a special permit.

138. Alan Fogg and Mark Grossman, *Assembly Starts to Look at Land Use Curb*, Fairfax J., January 11, 1990, at A1, A15.

139. Brett J. Blackledge, *Downzoning Bill Awaits Signature*, Fairfax J., March 3, 1990; *State Overturns County Building Limitation*, Engineering News-Record, April 12, 1990, at 19. "Vesting" means that the government cannot diminish the rights of a landowner by further restricting the use of his or her property; the landowner's right to use the property under the zoning laws becomes a legally cognizable "property right" in and of itself.

140. Mary K. Blewitt, *Rte. 28 Bill May Block Downzoning*, Jan. 19, 1990, at 1. The retroactive legislation passed by the General Assembly was deemed unconstitutional by the Virginia Supreme Court due to procedural defects in the bill, *County of Fairfax v. Fleet Industrial Park, Ltd.*, 242 Va. 426, 410 S.E.2d 669 (1991), but the Court result is moot for the Route 28 corridor at present: upon the election of a pro-growth majority, the Fairfax Board rescinded the downzoning ordinance in June 1992 and returned most of the county to its 1987 status. *See generally* Whitney Redding, *Building Rules Are Loosened*, Wash. Post, June 25, 1992, at VA3. State legislation that corrects the previous statute's unconstitutional provisions took effect on July 1, 1992. It will vest property owners within an improvement district for 15 years. Va. Code Ann. § 15.1-1372.3(C) (Michie 1989 & Supp. 1992).

Controversy aside, the district completed the improvements to Route 28 on July 3, 1991, $18 million under budget and years before the state would have been able to finance the project. Special assessment tax revenues in the first 2 years were higher than forecast when the bonds were issued in 1988, even in the midst of a severe economic downturn.[141] However, the continuing downturn has decreased the amount of revenues so that projected targets are not being met. And, in the face of an office glut in the Washington metropolitan area, developers now want to rezone much of their land to residential status. Current proposals would allow such rezonings if developers either paid the expected tax over the life of the district up front or passed along the tax to the new home buyers, the latter of whom would be responsible for the tax assessment. Any such changes would require the approval of the General Assembly.

The Prince William Parkway in Prince William County became the second improvement district on December 20, 1990. Landowners formally petitioned the board of supervisors for the creation of the district in October 1990, although informal negotiations had been taking place since 1987.[142] The Parkway will be a 7-mile commuter road, from Davis Ford Road to U.S. Route 1, and will include an interchange with Interstate 95. The 1,460-acre assessment area will finance 85% of the project's estimated $40 million price tag.

Many features of the district deserve mention. First, 80% to 85% of the land required for rights-of-way was acquired through proffers by developers, decreasing costs substantially.[143] Next, the county explicitly agreed to freeze zoning within the district for 15 years. Third, the preliminary engineering and design time took only 9 months, as much as 2 years less than many outsiders expected.[144] And last, in view of the fact that the property owners agreed to finance most of the project, VDOT advanced $9 million to the district to construct the I-95 interchange until private funding could be obtained.[145]

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141. *See* Robert Clarke Brown and Robert M. Brown III, *Financing Virginia Route 28: A Model for Public-Private Partnerships* (January 13, 1992) (unpublished manuscript, on file with author).

142. *See* Brooke A. Masters, *Prince William Sets Up Special Tax District*, Wash. Post, Dec. 21, 1990, at C4.

143. One developer alone accounted for most of the "donated" land. *See* Marc Leepson, *Prince William County: Development Slows Down, But Transportation Improvements Move Ahead*, Regardies The Business of Washington, Feb. 1991, at 193. Nearby residents point to such concessions in return for rezoning approval to charge that the Parkway is merely an "access road" for commercial developers partially subsidized by county taxpayers. *See* Steve Daniels, *Property Owners Facing Parkway Problems, Profit*, Potomac News, Sept. 1, 1989, at D1.

144. Leepson, *supra* note 143, at 193.

145. Masters, *supra* note 142, at C4. The immediate need for the loan is due to the extremely large amount of time that will be needed to engineer and construct any interchange with I-95. Even with the advance financing, the interchange will be the last portion of the Parkway to be completed.

The first 1.1-mile portion was completed on October 29,1991.[146] A second phase brought completion of half of the Parkway in August 1992, and the third phase was scheduled for completion in September 1993.[147] When finished, 40,000 vehicles are expected to use the roadway every day.[148]

The third improvement district created in Virginia is also located in Prince William County. The "Route 234 Bypass District" has as its main goal the creation of a limited-access roadway to link Route 234 south of Manassas with Interstate 66, just west of the Manassas National Battlefield Park near Gainesville. Eventually it would be connected with the Prince William Parkway, and the entire facility would be designated with that moniker. The bypass has been on and off the VDOT 6-year plans since the late 1970s,[149] and it was not expected to be built until the next century.[150]

Developers refused to wait, however, and 15 large landowners spearheaded negotiations to create an improvement district early in the summer of 1990.[151] The county approved the district on December 27, 1991, which includes only the southern 9-1/2 miles of the proposed bypass. The land deemed to be benefitted by the project contains 4,400 acres, subjecting 177 landowners to the assessment.[152]

The Route 234 Bypass District's future is uncertain, however. A group of 30 small landowners, known collectively as Landowners Opposed to Unfair District (LOUD), have threatened to challenge the district and its enabling legislation in court. LOUD members believe the large landowners possess too much power under the statute and are angry because "the tax would place an unfair burden on [small businesses] for a road that will benefit the entire county."[153] The board of supervisors, responding to LOUD's concerns, reduced the requested initial tax assessment from $.03 to $.02 per $100 of assessed value

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146. Kathleen Kennedy Manzo, *Parkway Mile Gives Relief*, Wash. Post, Nov. 14, 1991, at V1.

147. Greg Swope, *Parkway Open Soon From Minnieville to Telegraph*, Potomac News, July 18, 1992.

148. Manzo, *supra* note 146, at V1. The final completion date for the Parkway has not been set.

149. Brooke A. Masters, *Pr. William Businesses, Landowners Seek Broader Funding of Route 234 Bypass*, Wash. Post, Dec. 26, 1991, at B3.

150. Brooke A. Masters, *Bypass Making Strides*, Wash. Post, July 26, 1990, at V1.

151. The major landowners, including International Business Machines (IBM), hold title to 62% of the land taxable under the improvement district statute. Masters, *supra* note 149, at B3.

152. *Id.* at B3.

153. Marylou Tousignant, *Prince William Board Approves Tax District to Pay For Bypass*, Wash. Post, Dec. 28, 1991, at B3. This argument appears to question one of the essential elements of a special assessment district: the improvement to the area must bestow a benefit to the assessed property owners above and beyond that benefit to the public as a whole. *See supra* pp. 33-35.

and required the advisory board to be composed of three members from LOUD's membership.[154]

As of April 1993, no lawsuit had been filed challenging the district's legality. At present, VDOT and Prince William County "are . . . deeply into design and engineering work,"[155] but construction is not expected to begin for some time.[156] In addition, the General Assembly approved the issuance of $105 million in bonds to finance transportation projects in Northern Virginia, a portion of which will build a segment of the bypass. Local leaders continue to believe that the special tax district will be needed to finish the bypass.

The fourth tax district in Virginia is the only one outside of Northern Virginia. In December 1992, James City County established a district in order to build a new 4-mile, two-lane bypass (which will eventually be widened to four lanes) to service traffic to new developments in the county. In the process, historic Route 5 that flanks antebellum plantations along the James River will be preserved in its present path and width. Developers will pay for the $7.6 million over a 10-year period based upon an assessment of $.10 per $100 of assessed land value.

Assessment of the Virginia Improvement District Acts

From a purely legal standpoint, the improvement districts are on strong ground. Limited-access highways and mass transit systems are recognized by the courts as valid public uses. Next, the large amount of deference given to legislative determinations of the lands benefitted by an improvement strongly suggests that Virginia's procedures will be upheld. In addition, the county board must review the proposed boundaries to ensure that the district serves a "public use" and properly includes only those properties benefitted by the improvement.

Next, the assessment itself should not reasonably be considered excessive in relation to the special benefit conferred. While the assessment is levied against the entire land value and is not restricted to the increase in value caused by the improvement, the legislation does limit any tax to $0.20 per $100 of assessed value (i.e., a 0.2% tax).[157]

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154. *Id.*

155. Leepson, *supra* note 143, at 193.

156. The U.S. House of Representatives passed legislation in July 1992 to fund nearly $2 million in highway safety demonstration funding for the proposed interchange of the Route 234 Bypass and Interstate 66. *Route 234, HOV Lanes Receive Aid,* Fauquier Times-Democrat, July 16, 1992.

157. One California study reported that land values near newly created subway stations in the San Francisco area increased by 2% on average, and many areas experienced increases of 23.5% to 35%. Transportation Finance Task Force, Revenue Sources for Transit Support 7-3 (1975), *cited in* Hayes, *supra* note 115, at 802 n.54.

The three special assessment district acts contain both good and bad aspects from the viewpoints of both local governments and property owners. On the plus side, the districts are an important first step toward requiring landowners that reap inordinately large financial advantages from transportation systems to pay extra for the state-created bounty. Developers often "sell" a major transportation facility as part of their development package and increase their prices (and profits) accordingly. From a less cynical viewpoint, those selfsame property owners are given a meaningful opportunity to press for transportation improvements that would otherwise not be available for long periods of time, thereby increasing the economic potential of their properties.

Further, the districts decrease the huge time lag between the points at which a facility improvement is proposed and its ultimate completion because the district need not wait for state financing, especially in tough economic times, because the new source of taxation can be used immediately to make bond payments.[158] State highway funds that are allocated to the improvement in the far-distant future could still become available to aid in the retirement of the district's debt, and county governments are allowed to allocate highway funds to the districts.

In addition, the multi-county bill encourages investors to purchase district bonds and helps to lower interest rates by enabling the counties to allow the Commonwealth Transportation Board to issue state revenue bonds for the district. The triple-A bond rating currently enjoyed by state revenue bonds are extremely attractive to bond markets and carry much lower interest rates than would otherwise be available for a "stand alone" improvement district.

Next, improvements made within any district must be approved by the Commonwealth Transportation Board. This tends to enhance cooperation between local governments and its citizens and the state, a requirement of cooperation that is sorely lacking in most of the Commonwealth's transportation decisions.

Last, the special district statutes contain a limited growth control measure. Any land that is unimproved at the time of the district's creation is to be specially assessed, and the statutes do not limit this requirement to land that is zoned commercially or will be developed commercially in the future (meaning new residential property could be taxed as well). In some sense, the externalities created by new development are internalized, and developers and newcom-

158. This point cannot be emphasized enough. Landowners, by having the responsibility to begin the process and follow it up until the county board votes, dramatically demonstrate their intensity of interest for the proposed facility. Local and state government, impressed by the private financing potential, have little to lose by cooperating in every step of the design and engineering process. The result? Route 28 improvements took only 4 years from the original proposal to phase 1 completion, and the Prince William Parkway is more than half completed only 3 years after the district was seriously contemplated.

ers alike are required to compensate the community for the added burdens placed upon the local infrastructure.

One element of the special district legislation that causes both positive and negative repercussions involves the implications of vesting. The local government must specify all zoning regulations that will be in effect for every land parcel, and each regulation is frozen in place for a 15-year period. Changes may be made only in response to a request by a landowner, and even then, any change must be at least revenue neutral (i.e., approval of a request to change a parcel's zoning from commercial to residential must coincide with a separate change in another parcel's classification from residential to commercial such that the assessment income remains steady or increases).

The state-level concern for the vesting provision is obvious: bond investors must be given as much assurance as possible that revenues generated from the assessments will remain at a level adequate to meet interest and principal payments. Otherwise, investors will refrain from purchasing the debt or will demand excessively high interest rates (from the view of the affected locality and landowners). Yet local governments are loath to forgo the ability to change zoning classifications for long periods of time, especially in areas such as Northern Virginia that historically have seen tremendous building booms and the concomitant traffic explosion is very short time spans.

For possible alternatives to the current state laws relating to special tax districts, see Part IV of this report.

Zones for Proffers: Increased Potential for Use[159]

Proffers are "payments" made by property owners to a locality in return for changes to zoning ordinances that allow more intense development of a land parcel. The proffer system seeks to charge the developer for the expected strains the new development will place on existing infrastructure. Proffers can take the form of off-site improvements, such as enlargements of existing roadways, or proffers can be made through cash payments to the locality.

159. Proffers can also be known as "exactions" or "dedications." In numerous court cases involving a variety of state statutes, the local government is attempting to collect monetary compensation or other consideration from a property owner in return for enhanced building rights, and *in this context* there is room for negotiation between the parties. Hence, for the purposes of this report, the author follows the practice of legal writers on this subject and views the various terms as describing essentially identical processes; the differences in vocabulary are attempts to describe the process in either politically acceptable or unacceptable shades, depending on one's personal view of the proffer system.

The proffer system is used within the context of "wait-and-see" zoning and "conditional" zoning.[160] Under both, a locality designates most of the undeveloped land within its jurisdiction into a relatively restricted land use category. A landowner who wants to develop the land beyond the limits imposed by the zoning restriction must apply for a change to the restriction. The locality, in return for a potential amendment, "conditions" the change upon the receipt of proffers from the developer that will lessen the impact of the development on area roadways, schools, parks, etc. (hence the root of the term "conditional zoning").

Virginia statutes currently authorize conditional zoning in varying degrees throughout the state. Counties in Northern Virginia and counties east of the Chesapeake Bay have very broad conditional zoning powers,[161] and the rest of the state can use conditional zoning as long as cash payments or improvements to off-site projects are not required.[162] Last, certain localities that have had growth rates of over 10% are covered by different conditional zoning requirements.[163]

A 1988 Joint Subcommittee of the Virginia General Assembly identified three advantages of the proffer system. First, flexibility is provided in that the locality can work with the developer in individual cases to estimate the burdens created by new development and the appropriate responses to the burdens. Next, facilities are created quickly by the developer and are not delayed by government planning or funding problems. Third, litigation is reduced through direct give-and-take by the developer and the local zoning board.

There are also two oft-cited weaknesses in the proffer system. First, the system is *ad hoc* and involves a great amount of "deal making" without an overall set of guidelines or formulas. In effect, the greatest asset of the proffer system—flexibility—causes the weaknesses of unpredictability and confusion.[164] Second, developers refer to the system as bribery in that requests for zoning changes are often met with demands for proffers in return.

For possible alternatives to the current state statutes relating to proffers, see Part IV of this report.

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160. *See generally* Fred P. Bosselman & Nancy E. Stroud, *Mandatory Tithes: The Legality of Land Development Linkage*, 9 Nova L. Rev. 381, 385 (1985).

161. Va. Code Ann. § 15.1-491 (Michie 1989).

162. *Id.* § 15.1-491.2 (Michie 1989 & Supp. 1992).

163. *See id.* § 491.2:1 (Michie 1991 & Supp. 1992).

164. *See, e.g.*, Steve Bates, *For Developers, a Proffer Is Not Without Honor*, Wash. Post, May 31, 1990, at V1 (describing the proffer process as a "high-stakes poker game" and an "inexact science").

Impact Fee Districts

Impact fees are charges levied by local governments against new development in order to generate revenue for capital funding necessitated by the new development.[165] The belief is that the cost of providing capital improvements, and transportation projects in particular, should be borne by those who create the need for them. Otherwise, a developer can be viewed as reaping windfall profits in that he or she is "selling" to the buyers the roads, subways, etc., that are primarily paid for by the established residents of the community.[166]

Intuitively, the imposition of an impact fee against a developer is not a logical response to the unearned increment phenomenon; after all, the unearned increment is usually thought of as the increase in land values caused by a public improvement created and financed by the government. The impact fee, however, is usually assessed before a capital project is completed or even begun. The distinction is largely illusory when placed within the larger context. Part of the transportation/development dynamic at which a tax on the unearned increment is targeted is development that occurs near a transportation facility in order to exploit that selfsame facility. It should make no practical difference whether the increment is partially reaped by the government before or after the facility is created. In either event, a private entity is benefitting financially from a facility otherwise created through general tax funds.

Statutes in Virginia

In general, legal challenges to impact fees based upon a facial attack should be unsuccessful as long as the government body imposing the fee has proper legislative authority. The General Assembly of Virginia passed a series of statutes, effective July 1990,[167] permitting certain Northern Virginia localities "to assess and impose impact fees on new development to pay all or a part of the cost of reasonable road improvements attributable in substantial part to [the new] development."[168] An impact fee is limited by definition to mean only a charge or assessment needed in order to raise revenues to meet the costs of reasonable road improvements "necessitated by and attributable to" the new development.[169] The fees cannot be used to repair or expand roads to meet demand that existed prior to the new development.[170]

Before such fees can be imposed, the locality must create an advisory committee of five to ten members, 40% of whom must be representatives of the

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165. *See generally* Julian Conrad Juergensmeyer and Robert Mason Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma,* 9 Fla. State U. L. Rev. 415 (1981).

166. *Id.* at 416 n.5.

167. Va. Code Ann. §§ 15.1-498.1 to 498.10 (Michie 1987 & Supp. 1992).

168. *Id.* § 15.1-498.2.

169. *Id.*

170. *Id.*

development, building, or real estate community. The committee serves in an advisory capacity "to assist and advise" the locality's governing body with regard to impact fees within a designated impact fee area. The "impact fee service area" comprises the area within which new development may be assessed and also designates the area within which the collected revenue must be expended. The locality then has the arduous and time-consuming task of developing a comprehensive study of the fee area, including an analysis of existing capacity, current usage, and existing commitments to future usage of the area's roadways based upon current zoning; costs for improving existing roadways to meet planned future commitments; the projected need for and costs of roadway construction attributable in whole or in part to projected new developments, including a listing of assumptions regarding land uses, densities, intensities, and population upon which projections are based; and the projected traffic use of generation that will occur when the impact fee area is fully developed.[171]

Assessment of Impact Fees in Virginia[172]

There are benefits to the imposition of impact fees to garner a portion of the unearned increment. First, a direct link is created between new development and the impact upon highway systems, and the owners of the new development are required to compensate the government (and indirectly the taxpayer) for increased burdens placed upon roadways. Second, studies must be performed that directly correlate the fee imposed upon a development with the expected strain placed upon the traffic system, thereby increasing the equity of the fee system. Third, impact fees are imposed even in the absence of a request for a zoning change and hence can be used when a proffer is not likely.

Yet the negative aspects of impact fee imposition most likely outweigh their usefulness in Virginia, especially under the current legal format. First, impact fees must be used for the impacts created by the new development within the district itself and do not address problems of congestion or increased use on nearby areas. Second, in order to ensure legality, localities underestimate the costs of impacts to meet the legal requirement that fees not exceed the actual costs created by the new development. Third, and most detrimental, the immense amount of planning and analysis required by the statutes before the fees can be assessed are extremely prohibitive. In the words of one author, "[i]n order to implement an impact fee system, a locality would need to collect and analyze a volume of data which exceeds that required by any planning model currently in use. The requirements . . . may in fact be utopian."[173]

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171. *Id.* § 15.1-498.2.

172. Many of the assessments listed in this section can be found in a previous VTRC report. See Robert D. Vander Lugt and Salil Virkar, Virginia Transportation Research Council, *Coordination of Transportation and Land Use Control: A Challenge for Virginia in the 21st Century* (June 1991).

173. *Id.* at 31.

Case Study: Impact Fees in New Jersey

New Jersey statutes authorize a more workable framework for the imposition of impact fees than does Virginia. In passing its Transportation Development District Act of 1989, New Jersey sought to identify those "growth corridors and districts that are heavily dependent upon the state's transportation system for their current and future development."[174] The state legislature believed it appropriate that special provisions be made for financing needed transportation improvements caused by new growth, mainly through the use of special assessments within the designated districts. In addition, New Jersey wanted a mechanism in which the state, counties, and municipalities could work together on a regional basis, as determined by growth conditions, rather than upon pre-existing municipal and county boundaries. The state lawmakers hastened to point out that the special development fees "supplement, but do not replace, the public investment needed in the transportation system."[175]

The Transportation Development District Act places primary responsibility for establishing a district with the county government, although a municipality or commissioner of NJDOT may begin the process. The county transmits the request for district creation to NJDOT, containing (1) boundaries for the proposed district; (2) evidence of growth conditions; (3) a description of the transportation needs created by development; (4) a certification of a master plan on record; (5) notice to all municipalities involved, along with (6) the comments of the municipalities; and (7) anything else the NJDOT commissioner may require. The commissioner can then grant the request, deny it, or approve it by failing to act within 60 days.[176]

The act also delineates the criteria that can be used for assisting in the determination of whether growth conditions exist. The initiator must demonstrate one of the following: (1) an accelerating growth rate for estimated population or employment in excess of 10% in 3 of the past 5 years in at least three contiguous municipalities; (2) projected local traffic growth in excess of 50% in a 5-year period generated from new development; (3) commercial/retail development projected at a rate of 1 million square feet per square mile in a 5-year period; or (4) projected growth in population or unemployment in excess of 20% over a 10-year period. The act states that the commission may also include additional criteria that recognize existing traffic congestion or that might serve to effectuate the purposes of the act.[177]

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174. N.J. Rev. Stat. § 27:1C-2(b) (1991).

175. *Id.* § 27:1C-2(d).

176. An initiating municipality files a request for district creation with the county government. The county has 120 days to petition the commissioner as described in the text, deny the petition, or fail to act. Upon denial or failure to act by the county government, the municipality can apply directly to the commissioner. If the commissioner approves a request, he or she must also immediately appoint an appropriate governmental organization to administer the district.

177. *Id.* § 27:1C-4(d).

Upon approval of district creation by the commissioner, the requesting county (or the county that is home to a requesting municipality) must initiate a joint planning process that includes all affected counties, municipalities, and private representatives. The process must produce a draft district transportation improvement plan and draft financial plan, the transportation program for transportation projects, and an assessment of development fees, all of which must be in accordance with the state transportation master plan, the county master plan, the State Planning Act, and if possible the local zoning laws. The financial plan must project available financial resources, recommendations for the types and rates of development fees likely, and projected annual revenue.[178] The county governing body then approves the plans by ordinance or resolution, and the NJDOT commissioner must give his or her imprimatur as well.[179] Once approved, the county can begin collection of fees from development based upon formulas relating to vehicle trips generated, the occupied square footage of a developed structure, the number of employees regularly employed at the development, and/or the number of parking spaces located at the development.[180] In addition, developers can avoid the payment of impact fees by providing a plan to reduce peak-traffic congestion caused by their tenants or by developing programs to advertise mass transit or to institute ride-sharing programs.

There are several advantages to the New Jersey system. The biggest advantage is that four clearly defined criteria are outlined that enable a locality to know precisely how to comply with the statutes without first having to perform extensive, expensive, and/or utopian studies. The initiator need only cite population statistics that should be readily available through tax records or permit requests for commercial development. And, after an impact fee district is created, the assessments can be levied using much more practical formulas, including estimated vehicle trips generated. Last, the New Jersey statutes provide exceptions that encourage economic efficiency or promote social goals by permitting developers to avoid an impact fee by taking other steps, including contributions to public transit promotion or ride-sharing and a reduced rate for those developers that submit a peak-hour automobile trip reduction plan approved by the NJDOT commissioner.

For possible alternatives to the current state laws relating to impact fees, see Part IV of this report.

Excess Condemnation

The theory of excess condemnation has been trumpeted for years by presidents and academics alike as a means of self-finance for highways and other infrastructure projects. The idea is quite simple and on its face very appealing: a governmental entity can condemn more land than is physically necessary to

178. *Id.* § 27:1C-5.
179. *Id.* § 27:1C-6.
180. *Id.* § 27:1C-8.

build a transportation project and then sell the excess at an appreciated value. The proceeds are used to offset the costs of the project, including land acquisition and actual construction.

As documented earlier in the report,[181] the concept caught the attention of the Roosevelt administration as it attempted to identify possible revenue sources for the proposed federal interstate highway program in the 1930s. The bureau report indicated that the concept of excess condemnation to recoup monies spent on a transportation facility had been tried successfully elsewhere. The City of London, over a period of almost 30 years, financed 43.5% of its construction costs by acquiring land adjacent to roadways through the eminent domain power and either renting or reselling the property at the inflated, post-construction values.[182] Paris, France, recouped almost one-fourth of its land acquisition costs through similar methods.[183] Last, in the early twentieth century, Philadelphia, Pennsylvania, purchased land adjacent to its Fairmount Parkway project, without using its condemnation powers, to protect the improvement. In 1933, Pennsylvania amended its construction to permit the use of the eminent domain power in such cases.[184] Unfortunately, neither the Congress nor the administration pursued the feasibility of adopting the process in the United States. The use of excess condemnation continues in European countries at the present time.

Academicians and the courts generally recognize three types of excess condemnation: remnant, protective, and supplemental. Remnant condemnation occurs when land has been rendered worthless by an original condemnation needed to satisfy rights-of-way requirements. The excess land may be landlocked, oddly shaped, or unduly small, making it of little practical value to the landowner.[185] The government can purchase the remnants and, if possible, replat the area and sell new parcels on the open market. In the presence of a valid state constitutional provision or statute, courts recognize excess condemnation under the remnant theory.

The second type of excess condemnation falls under the protective theory. Land adjacent to a public project is taken by the government in order to control its use, by either holding the property or reselling it with use restrictions attached. The justification is that unless the condemnation is permitted, the project's value to the public will be lost or diminished.[186] Again, courts allow governmental agencies to use condemnation in these instances as long as the

181. *See* discussion *supra* p. 6.

182. Bureau of Public Roads, Toll Roads and Free Roads, H.R. Doc. No. 272, 76th Cong., 1st Sess. 130 (1939).

183. *Id.* at 131.

184. *Id.* at 132.

185. Gary P. Johnson, Comment, *The Effect of the Public Use Requirement on Excess Condemnation*, 48 Tenn. L. Rev. 370, 383 (1981).

186. *Id.*

authority to do so exists in the state's constitution or statutes, and the condemnation is necessarily limited by the fact that any new development or use of the land allowed after resale must be reasonably related to achieving the purposes of the original condemnation, e.g., prevention of intense development that causes extensive congestion on the facility. This means that if land is acquired by the government in order to restrict or control the use of a highway, all resold land must carry use restrictions that forbid any development capable of burdening the highway.[187]

The third theory of excess condemnation, known as supplemental or recoupment condemnation, provides a near foolproof method of recouping the unearned increment if its use is permitted by the courts. It is this theory that is developed at further length in this section and will, for simplicity, be referred to as "supplemental condemnation."

The supplemental theory of condemnation permits the condemning authority to decrease the overall cost of a public improvement through the condemnation of abutting or adjacent property not actually needed for the improvement itself, with the ability ultimately to sell the excess property at an increased value. It is first and foremost a tool to help government finance the improvement, as opposed to other secondary considerations such as the need to dispose of unusable land or to protect the improvement. The rationale for supplemental condemnation is that the government, through the use of taxpayer monies, created a public facility that in turn caused adjacent land values to increase, often at a substantial rate. Since the government created the increase in land value, it should be able to recoup the increase in order to pay for the improvement itself.[188]

Supplemental condemnation would allow VDOT (or local bodies given the power by the General Assembly) to purchase, and subsequently resell or lease, excess property and use the proceeds either to offset the specific improvement's cost or to replenish the state's general highway fund.

The Public Use Requirement

Of central concern to courts reviewing the constitutionality of supplemental condemnation is the concept of "public use." The U.S. Constitution states

187. At present, condemnation exercised under the protective theory is probably an outdated practice because most jurisdictions can control the use of land adjacent to a transportation facility through the use of zoning. Courts will likely prefer that governments use the latter, less intrusive tool, even though zoning is variable and may not provide long-term protection. *Id.* at 391.

188. A government entity should see an increase in tax revenues due to the increase in land value. In Virginia, however, that tax increase in relation to the overall increase in value accrued to the property owner is paid to the *locality*, and not to the state government or the state highway department. *See supra* notes 29-30 and accompanying text.

"nor shall private property be taken for public use, without just compensation . . . ," and the Virginia Constitution states that the General Assembly cannot pass "any law whereby private property shall be taken or damaged for public uses, without just compensation, the term 'public uses' to be defined by the General Assembly."[189] A property owner could raise the claim that supplemental condemnation takes private land in order to rent or resell it for private uses, such as office space, retail centers, etc. Hence, private land is taken from one owner so that another private party can reap larger profits from the same tract of land.

The U.S. Supreme Court has come close to deciding its constitutionality on only two occasions,[190] and even then, the decisions leave open much room for doubt as to the Court's position. State courts and legislatures have wrestled directly with the problem, however, and an analysis of their reasoning, combined with the Supreme Court decisions, may provide a better appreciation for the public use dynamic in relation to supplemental condemnation.

Public Use: A Historical Perspective

In 1910, the legislature of Massachusetts proposed condemning excess land adjacent to a proposed thoroughfare in Boston. The Commonwealth believed the city to be in dire need of warehouses and manufacturing sites, and it believed the only effective way to amass the needed contiguous land was through condemnation, replatting, and resale to private entities. The elected representatives felt the creation of such industrial sites would benefit the entire city through the creation of jobs and increased tax revenues, and hence it would effectuate a "public use." The proposed legislation was submitted to the state supreme court for a ruling on its constitutional underpinnings.

The Massachusetts Supreme Judicial Court ruled the proposed legislation unconstitutional. The court ruled that "a use of the [excess] property to obtain the possible income or profit that might inure to the city from the ownership and control of it would not be a public use. The city cannot be authorized to take the property of a private owner for such a purpose, nor can the city tax its inhabitants to obtain money for such a use."[191] The court felt the benefit to the public from the modern warehouses and concomitant creation of industry would not be direct but only incidental to the promotion of the interests of private individuals.[192]

Interestingly, however, the Massachusetts statute did not seek to use the supplemental condemnation to finance the thoroughfare but to create new pri-

189. Va. Const. Art. I, § 11.

190. Cincinnati v. Vester, 281 U.S. 439 (1930) (*see infra* notes 193-197 and accompanying text); Berman v. Parker, 348 U.S. 26 (1954).

191. *In re* Opinion of the Justices, 91 N.E. 405, 407 (1910).

192. *Id.*

vate industry along it. A reading of the case opinion indicates that the court was especially wary of the government program when very few limits were placed upon the subsequent use of the land and its impact on the "public use."

The U.S. Supreme Court in 1930 reviewed a case involving a state constitutional clause that allowed supplemental condemnation.[193] The Ohio Constitution allowed excess takings as long as the condemning authority definitively specified the purpose for the taking and its relation to the public use. The Court decided the case as one of statutory construction, ruling that the issue of what constitutes a public use is a judicial determination.[194] The Court ruled that the city failed to adequately define the reason why land adjacent to a proposed thoroughfare needed to be acquired or what would be done with the land after acquisition.[195] Both requirements were listed as requirements in the state statute allowing supplemental condemnation. The Court never reached the question of whether excess condemnation could be legally applied by a governmental entity, since "[i]t is an established principle governing the exercise of the jurisdiction of [the Supreme] Court that it will not decide important constitutional questions unnecessarily or hypothetically."[196] Sixteen years later, the Court reaffirmed the holding in *Vester* and limited it to the proposition that the state statute itself had not authorized the condemnation.[197]

The Modern Era

The watershed case for proponents of excess condemnation is *Berman v. Parker*,[198] decided in 1954. At issue was the District of Columbia Redevelopment Act of 1945, which allowed a redevelopment agency to condemn huge tracts of land in slum areas; clear it; and sell replatted lots to redevelopment companies, individuals, or partnerships.[199] The plaintiff, an owner of a department store, argued the taking of his property would be unconstitutional because it was commercial, not residential, property; it was not slum housing or even in a dilapidated condition; and the land was to be placed into a project under the management of a private agency and redeveloped for private, not public, use.[200]

The Court's response was dramatic and far-reaching. First, the Court stated that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive . . . . The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."[201] Hence, on the issue of defining a public use, the

193. City of Cincinnati v. Vester, 281 U.S. 439 (1930).
194. *Id.* at 446.
195. *Id.* at 448.
196. *Id.* at 448-49.
197. United States ex. rel. Tennessee Valley Authority v. Welch, 327 U.S. 546, 552 (1946).
198. 348 U.S. 26 (1954).
199. *Id.* at 30.
200. *Id.*
201. *Id.* at 32.

Court effectively reversed its position in *Vester.* In addition, the Court ruled that once the object sought to be achieved by Congress was for a public purpose, the means by which the object could be achieved were also for Congress' determination. The power of eminent domain could be used to take private property that would eventually be resold to private parties.

It would be 30 more years before the Court again addressed the concept of "public use" under the Fifth Amendment. In *Hawaii Housing Authority v. Midkiff,*[202] the Court examined a Hawaiian land reform statute that allowed a condemnation authority to condemn the land of a private lessor and resell numerous smaller parcels to the lessees. The aim of the statute was to reduce the concentration of land ownership on the islands, which was the result of the feudal land system instituted by Polynesian settlers in the early 1800s.[203]

The plaintiffs alleged that the statute violated the public use requirement of the Fifth and Fourteenth Amendments because private property was condemned in order to resell it to other private parties. The Court, citing *Berman,* reiterated its position that a legislature's determination of what constitutes a public use is well-nigh conclusive upon the judiciary. The Court went so far as to recite a previous holding that "deficiencies to the legislature's 'public use' determination is required 'until it is shown to involve an impossibility.' "[204] Last, the Court wrote that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, [we have] never held a compensated taking to be proscribed by the Public Use Clause."[205]

It is critical to understand how lenient the *Midkiff* standard is. The public purpose given by the legislature for its action need only be *conceivable,* and the need to use the eminent domain power to achieve that purpose need only be *rational.* That standard in the excess condemnation arena seems very pro-government: the need to build an adequate transportation system is much more than a conceivable public purpose, and the use of the eminent domain power in order to acquire excess land for resale at increased value is rational.

Public Use and the States

However lenient the federal public use requirement may be, any use of supplemental condemnation would also have to pass state constitutional constraints. Not coincidentally, the definition of "public use" at the state level has changed dramatically since the 1930s. Public use has now generally come to mean a benefit or advantage accruing to the public, roughly equating public use with "public benefit."[206]

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202. 467 U.S. 229 (1984).

203. *Id.* at 232. As of the mid-1960s, the state and federal governments owned 49% of the state's land, and 72 private landowners owned another 47%. *Id.*

204. *Id.* at 240 (citing Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925)).

205. *Id.* at 241.

206. *See* Thomas W. Merrill, *The Economics of Public Use,* 72 Cornell L. Rev. 61, 68 (1986).

Examples of the trend toward a very lenient definition of "public use" in the area of highway construction are well established. The Massachusetts Supreme Judicial Court provides the most striking example. In 1910, the court unambiguously rejected supplemental condemnation because the excess property would be used to "obtain the possible income or profit that might inure to the city" and that, as such, would not be a "public use."[207] By 1953, the court "discovered" that a public use could include the acquisition of private property that would eventually be leased to other private entities for the operation of gasoline stations, restaurants, and other services along a turnpike.[208] The court reasoned that the turnpike was "to be no ordinary highway of the kind with which our history has made us familiar,"[209] and that such roadways had to be "serviced" continuously. The operation of restaurants was thought to qualify as such a service required for the public use.

Of course, the same restaurant and gas stations could be operated on private land by the original private owners. Now, the private operation of the commercial enterprises on public property is done for private profit by a second party. Neither consideration was mentioned by the court in its expansion of the public use. Numerous other state courts have approved of state laws that permit the purchase of private land through the eminent domain power, along with the subsequent leasing of land to private entities engaged in commercial activities for private profit.[210]

Public Use in Virginia

The Virginia Supreme Court has not directly addressed the concept of supplemental condemnation in more than 60 years. However, as court observers realize, a Virginia court precedent from 1892 is just as binding today as one from 1992, and the case law is not promising for proponents of supplemental condemnation.

The court squarely rebuked supplemental condemnation in *City of Richmond v. Carneal*, decided in 1921.[211] The General Assembly had passed legislation that permitted a municipality to condemn more land than was necessary for the opening or widening of a street. The municipality could then replat and dispose of the unused portion and create land use restrictions as it saw fit. The court ruled the legislation to be unconstitutional, stating that such for-profit

207. *In re* Opinion of the Justices, 91 N.E. 405 (Mass. 1910).

208. *See In re* Opinion of the Justices, 113 N.E.2d 452 (Mass. 1953).

209. *Id.* at 467.

210. *See, e.g.*, City of Dearborn v. Michigan Turnpike Authority, 73 N.W.2d 544 (Mich. 1955); State v. Giessel, 60 N.W.2d 873 (Wis. 1953); Illinois State Toll Highway Comm'n v. Eden Cemetery Ass'n, 158 N.E.2d 766 (Ill. 1959); Salfi v. Department of Transp., 312 So.2d. 781 (Fla. 1962); State of Washington v. Superior Ct. of the State of Washington for Cowlitz County, 287 P.2d 494 (Wash. 1955).

211. City of Richmond v. Carneal, 129 Va. 388, 106 S.E. 403 (1921).

transactions "may be good financing on the part of the city, and greatly to its benefit, but such use of private property is not a public use. *'Public use' and 'public benefit' are not synonymous terms.*"[212]

It can be noted that the *Carneal* decision came down in the early 1920s, during the era of the very restrictive definition of "public use." Yet it is not at all clear that Virginia jurisprudence has followed the national trend to allow uses that fall under a "public benefit." The Commonwealth's constitution explicitly states that the General Assembly is to define the term "public uses" when in furtherance of its taking power.[213] The General Assembly codified the term "to embrace all uses which are necessary for public purposes."[214] The Virginia Supreme Court, however, has retained the ultimate right to decide the adequacy of the "public use" in this context, maintaining that it is a judicial question. In *Rudee Inlet Authority v. Bastian,*[215] state statutes created an Authority to develop a port in the state. The Authority had the power of eminent domain, and it could lease or sell facilities and their approaches and appurtenances thereto, with little restriction.[216] The court, upon reading the statutes, found that the Authority had the power to condemn property for the purpose of selling or leasing it to private individuals for private uses and as such violated both the state and federal constitutions. The court reiterated its opinion in *Carneal* that public use and public benefit are not synonymous terms, that the use must be fixed and definite, and that it must be one in which the public interest dominates the private gain.[217]

Assessment

In conclusion, it appears that federal case law on the issue of excess condemnation is to some extent favorable to the government if it can be shown that the undertaking is for the public benefit. However, it is extremely unlikely that state courts in Virginia will allow governments to purchase or condemn excess land in order to resell or lease the property to reap public funds. In view of the potential revenues to be raised through excess condemnation, however, it is strongly recommended that further study of this area be conducted.

PART IV: ALTERNATIVES FOR VIRGINIA

The threshold question to be answered in the context of the unearned increment is whether the government should make any attempt to recoup it. It

212. 129 Va. at 390, 393, 106 S.E. at 404, 405 (emphasis added).
213. Va. Const. Art. I, § 11.
214. Va. Code Ann. § 15.1-276.(Michie 1989 & Supp. 1982).
215. 206 Va. 906, 147 S.E.2d 131 (1966).
216. *Id.* at 910, 147 S.E.2d at 134.
217. *Id.* at 911, 147 S.E.2d at 135 (quoting Fallsburg Power & Mfg. Co. v. Alexander, 101 Va. 98, 43 S.E. 194 (1902)).

was the premise of this report that the starting point is an answer in the affirmative. With that in mind, many options are outlined herein that can be made available to policy makers attempting to bridge the funding gaps. The various mechanisms are not intended to be all or nothing; each locality, along with the state government and VDOT, needs to assess the characteristics peculiar to each community before adopting any of the options. **In addition, it is stressed once again that not each alternative discussed can be or should be applied to the same tract of land. The alternatives can be independently applied and should never be thought of as appropriate tools to be pressed onto an identical piece of land all at once.**

The alternatives themselves are broken down into two parts. First, details are outlined for the creation of transportation corridor reservation laws. The second part contains direct financing mechanisms, each of which is broken down into two subparts: first, the mechanism is outlined as a "stand-alone" feature, and second, the mechanism is viewed in conjunction with a reserved corridor.

The Corridor Reservation Alternative

The adoption of a "Corridor Act" would help preserve proposed roadway corridors for development during the preplanning to construction phases; partially eliminate the need for the government to pay private property owners for the unearned increment the government itself created; promote communication between local and state governments; and facilitate the creation of revenue enhancement mechanisms within adjoining secondary areas. The Corridor Act must be carefully crafted to abide by constitutional restrictions and ensure fairness to individual property owners. The alternatives constitute a hybrid of the North Carolina and Florida statutes:

- Cities, counties, and VDOT should be given the authority to specially designate a roadway corridor subject to the act's enhanced protection after a public hearing is undertaken. The designated reserved corridor should be limited as much as possible to the estimated physical rights-of-way necessary for the facility itself, although a somewhat wider swath of land can be designated. For example, a four-lane highway would require room for the lanes themselves, a median strip, shoulder areas, and any necessary cleared widths along the sides of the shoulders.

- Within 1 year of corridor designation, work by the governmental entity that designated the corridor must begin on an environmental impact statement or preliminary engineering.

- After designation of a corridor, building permits may not be granted for a period of up to 3 years. An exception to the ban would allow the issuance of building permits for a building or structure that existed prior to the designation of the corridor provided that the size of the building is not increased and the occupancy code does not change. The latter exception would allow only routine maintenance or aesthetic changes to the existing structure.

- A landowner can apply for an otherwise restricted permit through a variance procedure. The owner may petition VDOT or the locality responsible for designation of the corridor, and a variance may be granted if (1) no reasonable return may be earned from the land under the existing conditions, or (2) the disallowance of a permit results in practical difficulties or unnecessary hardships for the owner.

- VDOT or the responsible locality can choose to purchase the land in question in lieu of granting a building permit. The public use requirement for eminent domain should be met because public participation will occur during the corridor designation process, and EIS and engineering work strengthens the government's position that the land is needed for the public use.

- The state should then adopt a TDR program that credits property owners burdened by a reserved corridor. The credits should be based upon the amount of development that otherwise might have been allowed on the land if the development ban were not in place. The credits should then be alienable from the original reserved land and salable on the open market.

- Designation processes for TDR receiving areas must also be implemented. Areas so designated should be close to urban areas or other areas in which public infrastructure is capable of handling dense development, including sites capable of serving as multi-modal connection points.

Revenue Enhancement Mechanisms

Special Assessment Districts

In Stand-Alone Districts

It is undeniable that the special tax legislation has been enmeshed in controversy over its brief lifespan in Virginia. Yet much of the controversy is due to the very novelty of the statutes in question in the Commonwealth. Kinks in the system can and are being ironed out in order to make the special tax district

framework more attractive to local and state governments, commercial property owners, and ultimately private citizens. The Route 28 District, possibly viewed by some as the most problematic, is a prime example of how various interests are working together to reform the statutes to take into account new funding difficulties and unforeseen changes in potential land development. In view of the idea that special tax districts help to recoup portions of the unearned increment, the following alternatives and possibilities are outlined for Virginia and other states that may wish to use the tax district as a financing mechanism:

- Expand the current enabling legislation for special tax districts to allow localities throughout the state to consider and implement the districts.

- Enact an amendment to allow localities to downzone land within the district if, and only if, the property owner pays all assessments on the affected property in an up-front lump-sum payment for the remaining period of the bond issue.

- The state may wish to allow certain localities to begin the process to create a special tax district without a request from local commercial property owners. Provisions could then be included to require a vote of approval by the affected commercial property owners after initiation of the process.

- State law should explicitly allow tax districts to assess residential property that was built using building permits approved after the creation of a district, possibly with lower tax rates than those applied to commercial development. This would serve to internalize the burdens new residential development imposes on the infrastructure and part of the "sale" that developers make to prospective buyers (i.e., homes are sold by explicitly "selling" the proximity of a major transportation facility). And potential buyers would have knowledge up front that the tax would apply, unlike dwellers in residential units begun or completed before tax district designation who may be hurt by an additional tax imposed on their property after they have purchased their unit.

In the Context of Corridor Act Legislation

The designation of the reserved corridor, the primary area in the corridor designation legislation,[218] should not occur before extensive transportation studies have been conducted by VDOT or the local government. Using that information, VDOT or the locality should be able to predict future traffic needs and the land lots that will receive special benefits from the targeted facility. In

218. See map in Appendix A.

effect, an adequate study exists that indicates land appropriate for the special assessment tax. In addition, it is beyond dispute that the public does and will become involved in proposed corridor designations, alleviating potential fear that property owners will be unfairly or undemocratically treated. New legislation could take the following form:

- The legislature can designate a special assessment area in combination with a reserved corridor or the area can be designated as a "pre-approved" area in which the local government, in cooperation with VDOT and the local citizenry, can institute a set fee if it so chooses. Again, it is emphasized that the special assessment district would be *adjacent to*, and not inclusive of, the reserved corridor. (Please see the map in Appendix A.) The revenues raised would apply strictly to the transportation facility targeted by the corridor legislation and should not decrease the level of funding provided to the locality through the state's revenue allocation formula. In effect, the district would help to build or renovate the facility within a much shorter time-frame than traditional revenue sources would allow.

Impact Fees

Virginia has passed impact fee statutes for a very few localities. But if policy makers seriously believe that impact fees are appropriate mechanisms for recouping the unearned increment and internalizing the costs new development imposes upon existing infrastructure, major changes must be made in the current statutes before those same localities will even begin to consider the use of impact fees. The following alternatives are listed with the assumption that state and local governments wish to implement impact fee enabling legislation, and under the belief that impact fees are a direct response to the monetary advantages that private developers (and then homeowners and others) accrue from government creation of transportation facilities.

In Stand-Alone Districts

Alternative 1

- The existing statutes should be amended to allow localities and VDOT to determine a formula that can be applied to new development. The formula could be based upon the units in a new development, the square footage of office space, or expected vehicle trip generation per unit of development. Many states, including New Jersey, use pre-determined formulas.

Alternative 2

- The specific requirements in the existing statute could be changed so that the local government can use pre-existing data to determine

whether it qualifies to use an impact fee district. Such requirements could include the use of certain percentage increases in population growth, commercial development, etc. The criteria could take the form of the New Jersey statutes and, for example, include growth rates over the previous 5-year period.

Both Alternatives 1 and 2 for the stand-alone impact fee districts aim to reduce the substantial and near-impossible requirements now in place for those few localities in Virginia eligible to consider impact fee imposition.

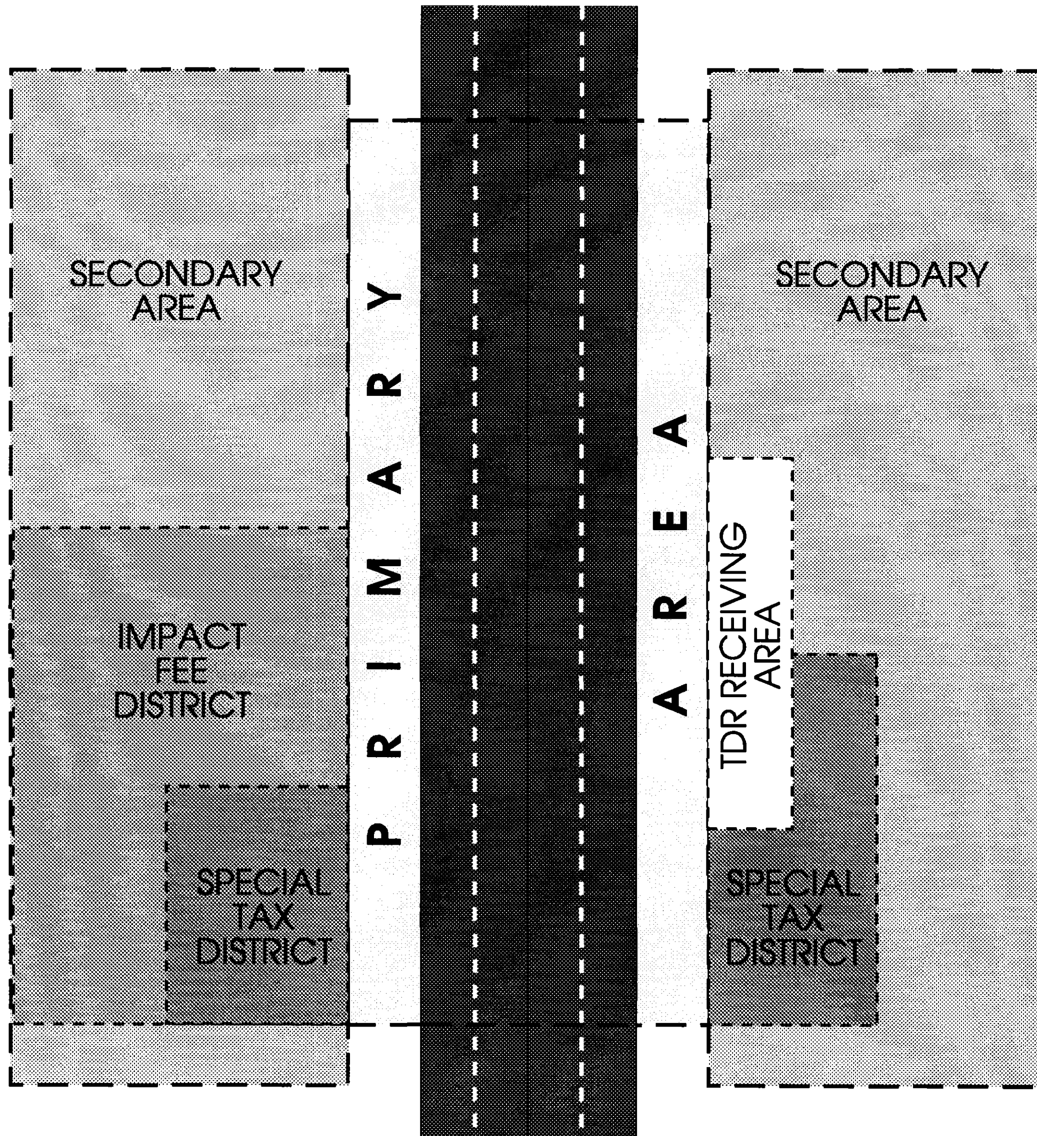
In the Context of Corridor Act Legislation

- Corridor legislation could include a provision in which the legislature determines an area suitable for impact fees or designates areas or zones in which the locality or the state government can establish impact fee assessment areas. The goal would be to levy fees against developers whose new development specially benefits from the proximity of the targeted facility (and by which they reap special windfalls by promoting the facility as part of the development).

Appendix A

THE CORRIDOR RESERVATION CONCEPT

The diagram illustrates the concepts described in this report. The primary area, the reserved corridor, would be subject to building restrictions in return for TDRs. (See Part II of the report.) The areas *adjacent* to the reserved corridor, referred to as the secondary area, are specially benefitted by the transportation facility and can be ideal areas for revenue raising districts to recoup portions of the unearned increment. (See Part III of the report.) The districts denoted are shown strictly as examples to demonstrate the relationship between the primary and secondary areas.



Appendix B

SPECIAL TAX DISTRICTS IN VIRGINIA

Listed is a short chronology of Virginia's special tax districts as of April 1993. It is intended to illustrate the huge potential and the practical difficulties of the current legislation as it has been put into practice in the Commonwealth. The information in the chronology was gleaned almost entirely from newspapers in Northern Virginia. It should also be noted that the information is intended as a chronology to show progress, breaking developments, projected goals, and the special tax district dynamic in Northern Virginia; hence, some estimates of roadway completion are outdated or have or have not been met.

Route 28: Virginia's First Special Tax District

- District created in 1987. Officially known as the Route 28 Primary Highway Transportation Improvement District.
- Roadway carried up to 22,000 cars per day in 1989. Projected to carry 95,000 cars per day in the year 2010.
- Improvements made from Route 7 to Interstate 66, approximately 14.3 miles. District is 3,000 acres.
- Primary objective is the widening of Route 28 from two to six lanes.
- $138.5 million in bonds issued.
- Private landowners will fund about 80% of the project.
- Rate will be the maximum $.20 per $100 of assessed value.

The Downzoning Controversy:

- Fairfax County Board of Supervisors downzoned almost 14,000 acres of land in the western portions of the county on December 11, 1989. The entire portion of the Fairfax County district was included in the downzoning.
- Huge decreases in land value resulted, thereby threatening the amount of funds collected through the special assessment.
- An indirect statement by State Senator Charles L. Waddell (D-Loudoun), State Senate Transportation Commission Chairman: "It

signals to bond financiers that Fairfax government is unstable." *Fairfax Journal*, January 11, 1990, A1 at A15.

- In response to the county board action, Waddell introduced legislation into the state senate that would freeze the zoning within a special tax district at the time of its creation. The bill would retroactively apply to the Route 28 district.

- Said Commissioner Ray Pethtel: "The legislation is more to the point of making sure a clear message is sent to the bond rating agency and the bond market that the rules of the game will remain consistent." *Herndon Times*, January 17, 1990.

- The retroactive legislation was the first time anywhere in the United States that a state legislature overturned a local government's zoning decision. *Fairfax Journal*, March 3, 1990, A1 at A4; *Engineering News-Record*, Vol. 224, No. 15 (April 12, 1990) at 19.

- The Virginia Supreme Court upheld the downzoning move by Fairfax County on November 8, 1991. The retroactive bill passed by the state was declared unconstitutional on procedural grounds on the same day.

Washington Times, October 10, 1990, at B3:

- First section of the widened road opened on October 9, 1990.

- "This is a project that would not have been built in this century if it were not for the transportation district." Secretary of Transportation John G. Milliken.

- Second phase envisions eight lanes between the Dulles Toll Road and Route 50, with the addition of nine interchanges. No date has been set for that expansion.

- First phase of project completed on July 30, 1991.

- October 1992: A recession and an office glut in the Washington, D.C., market cause large decreases in revenues collected for the district. In response, Fairfax County Executive William Leidinger proposed an amendment to the special tax district statutes that would allow commercial developers to rezone their land to build residential units. The Leidinger proposal would pass along the tax to the new homeowners.

- October 23, 1992: The Loudoun County Board of Supervisors, which had been allowing rezonings of commercial land to residential status

within the tax district, agreed to a rezoning moratorium for its portion of the district. The board also had under consideration a requirement that developers could rezone their land if they made a lump-sum payment based upon the estimated taxes to be paid over the 30-year life of the district.

- VDOT projections estimate that the special tax will raise revenues of only $5.6 million in 1992, far short of the anticipated revenues of $7.8 million and of the $8.8-million debt payment.

- November 23, 1993: The Fairfax County Board agreed in theory that developers may be granted the right to rezone if the estimated tax is paid up front in a lump-sum payment. The Board will apparently wait for new legislation as the state level before instituting the new policy.

- December 11, 1992: The Route 28 Highway Transportation Improvement District Commission endorsed a plan to collect lump-sum payments from developers in return for rezonings to residential use. The Commission recognized the fact that changes would be required in the state statutes before the plan could be instituted.

- January 29, 1993: Planners issued a map for the district that discourages the development of office buildings in favor of residential development near offices to ease commuter congestion. When and if adopted by the Fairfax Board, the final result will become part of the county's comprehensive plan that guides land use decisions when landowners seek rezonings and special exceptions.

Prince William Parkway: Virginia's Second Tax District

Steve Daniels, Potomac News, September 1, 1989, at D1:

- Parkway to be a 7-mile-long commuter road, from Davis Ford Road to Route 1 in Prince William County.

- Criticized as an access road for commercial developers.

- 80% to 85% of land to be acquired through *proffers.*

- While it is still in the developmental stages, developers are attempting to buy all adjacent real estate to exploit the expected parkway. [This is the ultimate example of the private windfall gained due to the creation of the unearned increment.]

Brooke A. Masters, Washington Post, November 8, 1990, at V1:

- Ground broken in early November 1990.
- Would not otherwise be built until the next century.
- Landowners petitioned board in October 1990. Proposed rate is the maximum $.20. That will cover 85% of the cost, according to Curtis Coward, the landowner's attorney.
- Entire project, plus interest on bonds: $40 million.
- Expected finish date: December 1992.

Brooke A. Masters, Washington Post, December 21, 1990, at C4:

- District created on December 20, 1990.
- Took 3 years of negotiations.
- 1,460 acres. Will pay off in the allowed 35 years or until 85% of debt is retired.
- Board agree to freeze zoning for 15 years.
- VDOT will advance $9 million to construct the I-95 interchange until financing obtained by district.

Marc Leepson, 11 Regardies 6, at 193 (February 1991):

- Project made feasible by proffer: developer Lee Sammis gave huge tract of land to get rezoning approved.
- Preliminary engineering and design time was only *9 months*.

Kathleen Kennedy Manzo, Washington Post, November 14, 1991, at V1:

- When completed, 40,000 vehicles expected to use Parkway per day.
- October 29: first mile opened. Not expected to be completed until early 1993.

Greg Swope, Potomac News, July 8, 1992:

- Second phase to be completed in mid-August 1992. Half of the "$66 million" parkway will then be completed.

- The third phase is scheduled for completion in September 1993. A segment that will connect the Parkway to I-95, and beyond to Route 1, is not expected to be finished for some time. (No explanation given for the long delay.)

Charles Ashby, Potomac News, December 17, 1992:

- The Parkway completed from Minnieville Road to Horner Road. In January 1994, construction is expected to be complete between Minnieville and David Ford Roads.

- Future plans call for extending the Parkway from the intersection of Hoadley and Davis Ford Roads to Manassas.

- Late in 1993, VDOT planned to begin construction on a new I-95 cloverleaf interchange at Horner Road.

Route 234: Virginia's Third Tax District

Brooke A. Masters, Washington Post, December 26, 1991, at B3:

- Creation of a new Route 234 Bypass has been on and off the VDOT 6-year plans since the late 1970s.

Brooke A. Masters, Washington Post, November 8, 1990, at V1:

- The bypass would link Route 234 south of Manassas with I-66 just west of the Manassas National Battlefield Park near Gainesville.

Brooke A. Masters, Washington Post, July 26, 1990, at V1:

- Bypass not expected to be built until the next century without new source of funding.

- Developers to pay for 9-1/2–mile southern half of road, from I-66 to Route 234.

- Negotiations to create the district began in early summer of 1990.

- 15 large landowners are spearheading the drive.

- Assessment proposed at maximum $.20 per $100 of assessed value.

- Tax will be used to finance $95 million in bonds issued by the Commonwealth Transportation Board. That is expected to cover 75% of

the debt; the rest will come from Prince William County's state highway allocation.

- *Regardie*'s magazine puts the price tag at $290 million. This may be the total cost for the entire bypass. As of February 1991, VDOT and Prince William were deeply into the design and engineering work.

Brooke A. Masters, Washington Post, December 26, 1991, at B3:

- 177 landowners will be taxed under district. It is opposed by about 30, known collectively as Landowners Opposed to Unfair District (LOUD).

- Cost will be $120 million. Estimated that tax will cover 75% of the roadway's cost.

- Construction has not yet begun and is not expected soon. Initial tax rate proposed at $.03.

- District approved on December 27, 1991, is known as the "Route 234 Bypass District."

- 9.4 miles of roadway involved. 4,400 acres of land deemed to be benefitted. Initial tax rate set at $.02 per $100 of assessed value.

- Three of the seven members of the district advisory committee will be from LOUD.

- "Major landowners," including IBM, hold title to 62% of taxable land.

Fauquier Times-Democrat, July 16, 1992:

- The United States House of Representatives allotted $2 million to the Commonwealth for a "safety demonstration" of the proposed Route 234 Bypass/I-66 interchange.

Carlos Sanchez, Washington Post, December 3, 1992, at V1:

- The Prince William County Board has prepared a proposal for a $70 million project that would link Route 28 with I-66. The new plan is only one section of the original bypass; the total cost of a completed bypass will be $289 million.

- Ultimately, the board envisions a link between the Route 234 Bypass and the Prince William County Parkway.

Jaan Vanvalkenburgh, Journal Messenger, December 30, 1992:

- Prince William County officials petitioned the General Assembly to approve funding for the Route 234 Bypass.

- The proposal would be funded with 9(d) bonds, payable with land title recordation fees returned from the state to local governments.

- The portion of the bypass that would be built under this proposal is the $70-million middle section, from I-66 to Route 28.

- The proposal received the approval of the Northern Virginia Transportation Coordination Council.

Peter Baker, Washington Post, February 18, 1993, at V1:

- The General Assembly approved $105 million in bond financing for transportation projects in Northern Virginia. A portion of the money will fund a 6-mile section from I-66 to Route 28.

- The county must raise an additional $51 million in funds to build a 3.5-mile segment to Brentsville Road and $16 million to build an interchange with I-66.

- According to Pierce R. Homer, a lobbyist for the county in Richmond, the interchange can be funded from traditional local, state, and federal monies, and the eastern segment of the bypass may be financed *with taxes raised from the special tax district.*

Route 5: Virginia's Fourth Tax District

An amendment to the Transportation Service District Act, ___ 15.1-791.2, effective July 1, 1992, changed the applicability of the act to allow James City County to establish special assessment districts.

Engineering News-Record, December 21, 1992 (Vol. 229, No. 25, p. 12):

- Developers, the state, and the James City County government established a special assessment district in December.

- The plan will allow the creation of a new 4-mile-long, two-lane bypass (eventually to be widened to four lanes) to service increased traffic caused by two new developments in the county.

- The plan will preserve the original Route 5, a scenic and historic two-lane road that flanks antebellum James River plantations. Local residents had opposed the straightening and "four-laning" of the highway.

- The county and the state will each lend $1 million toward the development of the $7.6-million bypass.

- Developers will repay both governments over a 10-year period, based upon an assessment of $.10 per $100 of assessed land value.