

CONSTRUCTION & LAND USE NEWSLETTER

Volume 6, Issue 3

September 2014

In This Issue

Water, Water,
Everywhere.....Page 1

D.C. Office of Planning
Takes a Stand Against Pop-
Ups with New Zoning Text
Amendment.....Page 2



2300 Wilson Blvd., 7th Floor
Arlington, VA 22201
703.525.4000
www.beankinney.com

Business & Finance

Business Organizations & Transactions
Commercial Lending
Credit Enforcement & Collection
Employment
Government Contracting
Intellectual Property
Mergers & Acquisitions
Taxation

Litigation & Dispute Resolution

Alternative Dispute Resolution
Appellate Practice
Commercial & Civil Litigation

Personal Services

Domestic Relations
Estate Planning & Administration
Negligence/Personal Injury

Real Estate

Commercial Leasing
Construction
Real Estate
Zoning & Land Use

Water, Water, Everywhere

By Matthew Roberts



Despite the lingering effects of the Great Recession on real estate, residential infill development is a popular model in Northern Virginia for the residential developer. With infill development, a developer will typically purchase an existing home that sits on multiple legal lots, and then seek subdivision approval from the local government to create several buildable lots for new homes. But with that comes specific challenges to developed neighborhoods. Among others, neighborhoods in areas like Arlington and Fairfax are faced with increased water flow over adjoining properties, which can cause flooding of basements and backyard ponding, among other woes. So, what is everyone to do?

Surface Water and the Law

In Virginia, water is considered a “common enemy” of all property owners. Each property owner, then, has the right to defend themselves from its effects on the use of their property, subject to certain limitations. This means that a property owner may use their property, such as grading it or constructing buildings and structures on it, without incurring liability to a neighbor for increased surface water discharges over a neighbor’s property that results from these activities.

There are some basic limitations, though. A property owner cannot negligently use their property to the injury of the neighbor. So, grading and construction should be performed according to accepted industry standards or it could be actionable. Further, a property owner may not create artificial channels, like pipes or culverts, which aim surface water runoff onto a neighboring property. Similarly, property owners cannot interfere with the flow of natural channels where it causes injury to a neighbor.

A Practical Solution

Surface water cases are, at best, a difficult matter to win and take lots of time and resources on all sides. Further, a lawsuit is really not the best way to welcome a

(Continued to next page)

new neighbor. As one alternative, neighbors could negotiate (a practice in economics known as “Coasian Bargaining”) the manner in which surface water is diverted from a property. Solutions like installing underground piping or French drains could help alleviate or solve the issue. More than that, negotiations can balance individual rights without creating acrimonious relationships between neighbors.

Floating On

Increased surface water runoff can disrupt the ties that make a neighborhood. Yet individual property rights allow us to use our property, within reason, as we see fit. Striking a balance is difficult, but tools are available. A lawsuit is a blunt instrument, but may be necessary in some cases. A better solution in other cases may be to negotiate and allow neighbors to strike that balance themselves. In the end, the tools used should best fit a case’s unique circumstances.

Matthew Roberts is an associate attorney practicing in the areas of land use law and real estate. He can be reached at 703.525.4000 or mroberts@beankinney.com.

D.C. Office of Planning Takes a Stand Against Pop-Ups with New Zoning Text Amendment


By Zachary Williams



Sustained population growth in the District of Columbia in recent years has spurred a rapid wave of construction throughout the city as upscale condominium projects appear to spring up almost overnight to meet growing demand for housing. But while residential development has been a welcome sign of revitalization in areas from U Street to NoMa, a particular type of residential project, the “pop-up,” has been the subject of intense debate in some of Washington, D.C.’s established row house neighborhoods. In mid-July, D.C.’s Office of Planning seemed to take the side of the anti-pop-up camp when it proposed a zoning text amendment that would limit the development of pop-ups in the city. However, alternative ideas discussed at the Zoning Commission’s initial hearing on the proposal may lead to a middle-ground approach that would slow down, but not ban the rise of pop-ups in D.C.

What is a Pop-Up?

Many might think of a trendy restaurant or temporary boutique retail use when they hear the term “pop-up,” but in the context of real estate development, a pop-up is a very permanent and sometimes dramatic change to an existing building. In D.C., pop-ups often take the form of a century-old row house that is purchased by a developer and then gutted and converted into multiple units. In order to capitalize on the ever-increasing value of real estate in D.C., developers will create a pop-up by extending the height of the building to create additional units. The result is a conspicuously tall and narrow building that sticks out alongside the adjacent and surrounding shorter row houses on the same street. These pop-ups inevitably stoke debate among nearby residents as to the merits of the aesthetic



changes to the neighborhood and the changes in property values that such development may cause. Neighborhood wars over pop-ups in Lanier Heights have the feel of a political campaign, with residents placing signs in their yards and handing out flyers on weekends advocating their position for or against pop-ups.

The Office of Planning's Pop-Up Text Amendment



The Office of Planning presented a proposed text amendment (Case 14-11) to address the pop-up controversy on July 17, 2014 to the Zoning Commission. The zoning text amendment proposes the following changes: (1) change the by-right height for a row house or flat building in the R-4 district from 40 feet to 35 feet, but allow up to 40 feet by special exception; (2) change the definition of mezzanine so that it is included in the number of stories; (3) limit roof structures in the R-1 through R-4 zone to ten feet for single family and flat residential buildings; (4) eliminate the conversion of row houses to multi-family dwellings in the R-4 zone, but allow conversion of larger non-residential buildings by special exception.

The restriction on conversions in the R-4 zone is specifically designed to prohibit pop-ups, where row houses are bought by developers and turned into tall condominium or apartment-type structures with multiple units. The Office of Planning has expressed a desire to maintain the existing character of row house neighborhoods, particularly in the R-4 zone. An alternative proposal discussed at the Zoning Commission hearing is to continue to allow conversions of row houses to multi-unit apartment-type structures, but to apply D.C.'s inclusionary zoning rules to the new units to ensure that affordable housing remains available in row house neighborhoods. This alternative, which would allow pop-ups with restrictions, had some support at the initial Zoning Commission hearing and will likely continue to be considered going forward.

What's Next?

The Zoning Commission voted 5-0 in favor of setting down the Office of Planning's proposed text amendment as a rulemaking case. The public hearing on the proposed rulemaking for Case 14-11 is expected to occur in the late fall. At this time, pop-up development is free to continue in D.C., at least through early 2015, which is when the text amendment, if approved, may go into effect. In the meantime, both sides of the debate are sure to inundate the Office of Planning and Zoning Commission with pleas and information as the future of pop-ups in D.C. is considered.

Zachary Williams is an associate attorney practicing in the areas of land use law and litigation. He can be reached at 703.525.4000 or zwilliams@beankinney.com.



Contact Us

2300 Wilson Boulevard, 7th Floor
Arlington, Virginia 22201
703-525-4000 fax 703-525-2207
www.beankinney.com

This newsletter was prepared by Bean, Kinney & Korman, P.C. as a service to clients and friends of the firm. It is not intended as a source of specific legal advice. This newsletter may be considered attorney advertising under the rules of some states. Prior results described in this newsletter cannot and do not guarantee or predict a similar outcome with respect to any future matter that we or any lawyer may be retained to handle. Case results depend on a variety of factors unique to each case. © Bean, Kinney & Korman, P.C. 2014.