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DIVISION IN KIND

ABSTRACT

Whether real property in Virginia may be sold as a single parcel or divided "in kind" is typically determined by the circuit courts by authority of Virginia Code § 8.01-83, pursuant to a Bill of Complaint filed by one or more co-owners (who may be unable to agree on disposition of the property). Forensic engineers must help the courts decide whether large, complex land parcels may be divided *in kind*—partitioned conveniently and equitably between or among the owners—or whether, alternatively, it must be sold in its entirety and the proceeds divided among the owners. Answering this question for two sisters who inherited a family farm in Virginia seemed to call for the wisdom of Solomon. But a thorough analysis of development potential based on the relevant attributes of the parcel recently enabled a Virginia Circuit Court to reach a clear decision.

I. INTRODUCTION

The two sisters waved goodbye to the last of the friends who had stopped by to extend condolences on the death of their father.¹ As they sat in the kitchen talking about their lives, Frances said, “Just think of all the time and effort Mom and Dad put into this farm. Now that it’s ours, what do you think we should do with it?” Linda poured her sister another cup of coffee and looked thoughtfully out the kitchen window before replying: “You know, Daddy always said that the land would take care of us. He said that we should never sell this property.” They agreed not to sell.

¹ While the article is based on a recent, true case in Virginia, names of the parties and street names have been changed, and the property description/location changed.

Twenty years later, in 1999, Frances and Linda still owned the property, but it had become a burden on which they owed ten years of back taxes totaling in excess of \$150,000. While Linda remained independent and active, Frances had been institutionalized and was represented by a conservator. Frances's family was seeking to resolve the tax issue by selling the property before it went on the auction block. Thus far, Linda had resisted the sale of the property. Frances's conservator retained an attorney to pursue an equitable resolution, and he in turn retained the author as forensic engineer. The attorney's objective was to show, by expert testimony and evidence, that the 18.7 acre parcel ("Joint Property", or "Smith/Jones Property") could not be "conveniently" partitioned (as required by Va. Code § 8.01-83) and therefore must be sold in its entirety. The forensic engineer's task: to determine whether the character and unique attributes of the Joint Property itself required the sale of the entire parcel in lieu of a division in kind.

II. APPLICABLE LAW

Under Virginia law (Virginia Code § 8.01-83), the Court's authority to sell the land must be predicated on a judicial determination from the evidence that "partition cannot be conveniently made." *Nickels v. Nickels*, 197 Va. 498 (1955). The Commissioner in Chancery, and ultimately the Court, must be convinced that division in kind cannot be made based upon the attributes of the land itself, not merely value. The Virginia Supreme Court has stated that such determinations are based upon the "distinctive facts of each case". *Bridge v. Snead*, 145 S.E. 338, 342, 151 Va. 383, 393 (1928). "Partition by sale cannot be ordered unless two statutory prerequisites are met: (1) that partition in kind **cannot be conveniently made** and (2) that a **sale**

will promote the interest of those entitled to the property". *Shannon v. Hall*, 368 S.E.2d 695, 698, 235 Va. 360, 364 (1988); *see* Va. Code § 8.01-83. In essence, the case law requires the Commissioner in Chancery, and ultimately the trial court, to be satisfied there is sufficient proof that a division in kind *cannot* be conveniently made based on the attributes of the land itself, not merely value (*i.e.*, reduction in value by reason of division in kind). In fact, it should be noted that while it may be considered, VALUE is not the dispositive or even primary factor in a partition analysis.

FACTORS TO BE CONSIDERED BY THE ENGINEER IN DETERMINING WHETHER PARTITION CAN BE CONVENIENTLY MADE

A. Feasibility Study

To make this determination, the engineer conducted a feasibility study to analyze and assess the land in terms of development potential. The study focused on the physical conditions of the parcel; regulatory limitations; sketches of lot yields if developed as a whole parcel and under two different partitioning designs; and the probable results of those design scenarios.

1. Physical Conditions

a) Topography - As illustrated on the county topography maps with 5' contours, the property has three drainageways, with natural runoff flowing north, south and west directly into Difficult Run. Steep slopes (greater than 15%) are located along the stream valley.

b) Floodplain / RPA / EQC / Wetlands – Prior to development of the property, a floodplain study would be required to determine the limits of the 100-year floodway for Difficult Run, where disturbance would be prohibited. The Environmental Quality Corridor (EQC) and Resource Protection Area (RPA) limits are one and the same on the property. However, since the maximum development potential for this property already exists through the

"by-right", R-2 zoning regulations,² only the RPA limits would be delineated and could be located within a privately owned individual lot, although disturbance would still be prohibited. The National Wetlands maps indicated no areas of wetlands. EQC would not apply in the absence of a rezoning request.

c) **Soils** – Only the western two-thirds of the Joint Property had soils designated on the County's soils map. Those identified included problems soils (1A – mixed alluvial land, and 61 – loamy and gravelly soil) within the RPA area, which would require a geotechnical report prior to development.

d) **Vegetation** – The property consisted primarily of hardwood forest with few areas of heavy underbrush.

e) **Utilities** – Public water and sewer were available to the property. A 12" water main could provide sufficient pressure to service the entire site. For sanitary sewer service, it was anticipated that new development would connect primarily with the existing trunk line located within the Difficult Run stream valley. An additional sanitary sewer line was also located within the Washington Avenue right-of-way, where new lots fronting the roadway could connect.

f) **Frontage** – To subdivide and develop the property, access to a publicly maintained street would be required. Over 900 feet of frontage existed along Washington Avenue a major thoroughfare. Also, prior to development the county would require a street dedication of 45 feet from centerline along the frontage to match the adjacent properties. The

² "By-right" development rights are those which can be implemented by the owner without request for any further land use permissions or modifications (excluding typical administrative requirements such as applicable building permits, site plan approvals, and subdivision approvals).

total existing right-of-way width along the frontage was 30 feet, or 15 feet from centerline.

Although substantial, this dedication would eliminate any potential sight distance concerns for ingress and egress.

g) Historical / Archeological Significance – According to the County’s Comprehensive Plan, investigations in Difficult Run had indicated the presence of significant historical archeological resources, including not limited to Native American artifacts. However, no mention of this was made during a 1998 county analysis for a special exception application for a school or a 1991 special permit analysis for a church located just north of the property. If developed by-right, this ‘potential significance’ should have no impact on development of the property.

2. Regulatory Limitations

The County’s Comprehensive Plan map and text, used as a guide for potential development, designated the property as R-2 residential, with an allowed density of 1-2 single family detached homes per acre. The property was already zoned at that level of use. The Comprehensive Plan also delineated the westernmost portion of the site, along the stream valley, for public parkland. Development at a higher density would require an amendment to the Comprehensive Plan and approval of a rezoning request by the Board of Supervisors. Since the rezoning process is frequently a 12- 15 month process, costly in terms of requested improvements (generally in the form of proffers), and unpredictable in results, it was anticipated that development of this property would not entail a rezoning but would develop under the R-2 Zoning District.³ Cluster development would be permitted with approval of a special exception by the Board of Supervisors.

³ The major development criteria for the R-2 District includes:

Theoretically, development at the maximum potential density would yield 37 residential lots on the site. However, the maximum density allowed did *not* take into account the need to provide on-site detention and retention facilities, such as ponds to comply with the Chesapeake Bay Preservation Act, or the requirement for frontage along a public street.

B. The Impact of Division

In evaluating a parcel to determine whether partition can be conveniently made, it should be recognized that every parcel of ground is unique. When division occurs, experience has shown that each of the resulting parcels becomes unique in its own way, creating further significant circumstances. These considerations and others relating to comparable size, shape, character and cost to develop indicate the problems associated with achieving a division in kind.

To help determine these problems and other practical aspects of potential development of the property after a division, the engineer first prepared a sketch of maximum lot yield of the property as a whole under the existing R-2 zoning regulations. This proposed development would provide a yield of 30 lots for single-family detached houses. Subsequently the property was analyzed in two hypothetical scenarios of partitioning to determine whether a convenient division in kind could be made. While any number of divisions *could* be made, the two selected for analysis, illustrated by Sketches A and B, were chosen as the two giving the most promise for an equitable and convenient division and yielded 15 lots each.

1. Topography- A difference of 50 vertical feet occurred on the site. Divided parcels would exhibit a different range of elevations, and construction would yield different

Minimum Lot Area: 15,000 sq. ft.; Average Lot Area: 18,000 sq. ft.; Minimum Lot Width:

Corner - 125', Interior - 100'; Minimum Yards: Front - 35', Side - 15', Rear - 25'

values of cut and fill operations; that is, one could exhibit more cut than fill, while the other, more fill than cut. A balance of earthwork would be difficult to achieve. Not only would topographic relief vary between parcels, but the location of ravines would vary and exhibit different watersheds and tributary areas. *These and other differences would yield dissimilar, irregular shaped parcels, and construction within each parcel would result in significantly different costs.*

2. Shape of Parcels after Division - Division of an L-shaped parcel to achieve two equal areas, while mathematically possible, resulting in sections that would be entirely different in other important respects. For example, frontage along Washington Avenue would vary between parcels, while frontage along Difficult Run would result in unequal lengths along the stream. *These and other differences in shape would yield dissimilar, irregular shaped parcels that would generate entirely different construction costs.*

3. Width and Depth - The depth varies from approximately 250 to 1330 feet toward the southern side as the property adjoins Difficult Run. The mid-site width, north to south, measures from approximately 565 to over 600 feet. To maximize access, the designs of hypothetical partition scenarios provided only one extended cul-de-sac and two short streets. Along Washington Avenue, only long, large lots with driveways were proposed to connect directly to Washington Avenue *In both division scenarios, the varying width and depth of [specifically which?] lots precluded efficient and effective access.*

4. Sketches

a) **Sketch A**, not shown, illustrates the 18.7 acre property developed as a whole parcel, with a yield of 30 lots at the existing R-2 zoning.

[TO BE ADDED]

b) **Sketch B** - In this side-by-side division, Lots 1-15 would be in the northern half of the property and Lots 16-30 in the southern half.

[TO BE ADDED]

The southern portion would be responsible for constructing most of the roadways, while the northern section would benefit with only the stub street (leading to Parcel 45A) to be constructed, plus a little more than one-half of the improvements along Washington Avenue. The southern section would then have to bear most of the roadway construction while the northern half would benefit by reduced road costs.

If the southern section developed first, sanitary sewer and storm sewer easements from the northern portion would be required. Even if not planned for immediate development, the northern half would have to be designed in order to efficiently locate the easements to avoid relocating the utilities later. Because waterlines must be extended from Washington Avenue at the time of road construction in the southern section, most of the waterline, sanitary sewer facilities and storm sewer facilities would be provided with the southern section, resulting in unavoidably higher costs for the owner/developer of that section. A turning lane would also be required for southbound traffic on Washington Avenue, necessitating acquisition of land from

the northern section for a minimum 150-200 feet of roadway improvement. An additional 150-200 feet might be required for an acceleration lane. The access road would need to be entirely built for both sections in order for it to be dedicated into and accepted for maintenance by VDOT.

The southern parcel depicts one stormwater management pond. In order to meet the state and county water quality requirements, a portion of Parcel A, shown within the northern section, would be required to serve as a conservation easement. The RPA, floodplain and all the steep slopes are located within the northern section, either in or adjacent to Lots 9, 10, 11, 12 and 13. These would be the most difficult lots on which to construct, due to the significant changes in elevation. However, they may benefit aesthetically from the conservation area in Parcel A as well as from public maintenance of the existing mature trees and related vegetation. Because of the grading for roadways, utilities and houses, most of the existing trees in the southern section would be eliminated.

While theoretically there are an infinite number of divisions which could have been pursued, these two examples show conclusively that the problems encountered by an otherwise "equal" division of fifteen (15) lots each render an equitable division of the property impractical to impossible to achieve. The need for off-site easements would vary, and construction costs incurred by one or the other section could also be substantially different.

Result: Division in kind in a side-by-side partition could not be realized.

- **Sketch C** - In this front-to-rear division, the front (eastern) and rear (western) sections would consist of 15 lots each.

The development sequence presents complications. The front portion could develop immediately but at significant initial costs, since all the frontage improvements along Washington Avenue would have to be constructed. Sewer and water hookups would also have to be initiated along this frontage. Lots 1, 2 and 3 would be less than satisfactory, inasmuch as they would access the busy four-lane Washington Avenue by driveways rather than by a secured internal roadway. The geometry of this area of the front section does not lend itself to any reconfiguration that could better utilize the space or create more lots. Development of the rear portion of the site could not commence until the front portion is developed or a right-of-way secured, possibly through purchase, from the front portion to gain access to Washington Avenue. Of course, without public access, division and development could not occur at all. Accordingly, off-site construction of a public road estimated at approximately 650 feet and costing in excess of \$200,000 to construct, plus the value of the land to be purchased or secured, would render development of the rear section impractical as a first phase.

VDOT would require dedication of 45 feet from the center line of Washington Avenue, and the burden of that dedication and construction would fall disproportionately on the front portion, which would need to satisfy state and county requirements before approval of a subdivision could be granted. Additionally, acceleration and deceleration lanes along Washington Avenue would be required with the development of the front portion, further driving up the cost of development of the eastern (front) section *vis-a-vis* the western (rear) section.

If the front portion developed first, a sanitary sewer easement would be required from the rear section to connect to the trunk line along Difficult Run. In order to optimize lot yield and assure efficiency of design, the utilities, including stormwater management requirements, would force a detailed design of both sections, even if only one section developed.

Environmental issues would place a disproportionate burden on the rear section, which contains the steep slopes, floodplain and Parcel A, the proposed conservation area. The conservation area would be required to supplement the stormwater management ponds, all of which would be needed to satisfy the requirements of the Chesapeake Bay Act. In effect, a part of Parcel A would be needed to satisfy the stormwater management requirements for the front section, in addition to the proposed stormwater management pond #1. Alternatively, pond #1 could be enlarged, but revisions to lots or loss of a lot would occur. Lots 8, 9, 10, 11, 12 and 13 exhibit slopes ranging from 15% to 23%. While walkout basement units could be constructed, these lots remain the least desirable for housing construction. Additional siltation and erosion controls would be required to stabilize these steep slopes, resulting in a higher than normal construction cost.

As in a side-by-side division, earthwork and grading would be disproportionate in a front-and-rear division. The front portion exhibits gentle slopes. While design would need to be pursued for future development of the rear section, grading and earthwork there would not seem to be extraordinary. The rear section, however, would require significant grading of its steep slopes and most likely would generate fill requiring removal to a remote location. Only development of the parcel in its entirety would allow an earthwork balance to be achieved.

Result: Division in kind in a front-and-rear partition could not be realized.

Conclusion

□ The sketches illustrate that different shapes occur, various topography is encountered, off-site easements are required, and one section may be dependent upon the other for easements, access, and/or land to accommodate state, county, or other regulations.

Additionally, the timing for development for the "divided" sections may vary from owner to owner. And yet, coordination in planning of both sections is required to optimize lot yield. And such coordination *cannot* be assured if the Joint Property is divided into two 15-lot parcels. Accordingly, significant planning of both parts is required to optimize the lot yield. Certainly it is clear that one parcel will be more expensive to develop than the other, may generate a lower lot yield than the other, and almost certainly will be dependent upon its neighbor for complete utilization. The inevitable conclusion is that the most optimum approach to developing the best plan and promoting "the interest of those who are entitled to the subject property or its proceeds" as required by Va. Code § 8.01-83 is to develop the entire tract of land.

Sketches B and C show two possibilities for dividing the parcel. In both examples, each division created 15 lots, albeit the lot sizes somewhat differed. Off-site easements would be required, with one section possibly dependent on the other for easements, access and/or land to accommodate state, county and other regulations. And while the timing for development of each resulting section could differ, one section would be more expensive to develop than the other, could generate a lower lot yield than the other, and could well be dependent on its neighbor for complete utilization. Clearly, developing the parcel in its entirety represents the optimum approach and best opportunity for the property owners.

Therefore, a *division in kind* "could not be conveniently" achieved as required by Va. Code § 8.01-83. The property was found to be impractical to divide into two portions, the result would be inequities not only in area, development costs and all the other attributes discussed, but in value as well.

The forensic engineer presented these findings to a Commissioner in Chancery as detailed, indicating that in his opinion the property should be developed as a whole to optimize

development potential and value. Frances, the incapacitated sister, was represented by her conservator. Linda, the Defendant, was also present and represented herself.

The Commissioner's Report was promptly prepared and presented to the Circuit Court, which agreed that the property could not be divided in kind and issued a Decree ordering the sale of the parcel in its entirety.⁴

The court's decision, which benefitted both parties, ordinarily would have resulted in satisfaction all around. This is not always the case, however, when family property is involved. As the hearing concluded, Linda only commented, sadly, "But Daddy said we should never sell the farm."⁵

⁴ In Virginia, the Commissioner in Chancery's Report is delivered to the Circuit Court. The parties are given opportunities to file objections to the report, and if they desire, an opportunity for a hearing to orally argue those objections. Once the objections have been heard and ruled on, the Court makes its ruling by the issuance of a Decree. In this case, the Decree directed the sale of the Joint Property by the appointment of a Commissioner of Sale who was directed to allocate all costs, expenses, professional fees, including attorney's fees, expert fees, etc. necessitated by the litigation to be apportioned between the parties as the Commissioner of Sale thinks appropriate. Once a contract is received, the Commissioner of Sale comes back to the Circuit Court for entry of a Decree of Confirmation of Sale which, when entered by the Court, authorizes the Commissioner of Sale to execute a Deed on behalf of the Joint Owners.

⁵ Beyond the scope of this article are a substantial number of additional legal issues which typically must be addressed in law suits seeking sale in lieu of partition. Such issues include the disproportionate contribution by one co-owner for expenses related to the retention and maintenance of the Joint Property, property taxes, etc. Other factors may also impact on the Court's decision, such as the immediate physical and financial needs of the parties, deteriorating health, the need for funds to pay for companion care, health, room and board, potential nursing home care, etc.