

# **EXHIBIT 1**

## **Transcript of Hearing on House Bill 831**

### **Virginia House of Delegates**

**February 6, 2020**

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**Transcript of 6:44:40-6:52:30**

1 **Joshua Baker:** Madam Chair, Committee Members. My name is Josh Baker. I'm a partner at  
2 the law firm Waldo & Lyle. We do one thing: we represent property owners in eminent domain  
3 takings cases.

4 The bill before you is going to authorize unconstitutional, uncompensated takings from  
5 property owners across Virginia. The bill is no longer restricted to rural areas. That's how it  
6 began. Nobody's against rural broadband; we just need to do it in a constitutional manner.

7 The case that Mr. Rossi described to you is a 1982 U.S. Supreme Court case called the Loretto v.  
8 Teleprompter coming out of New York, and the U.S. Supreme Court found that when you place  
9 what was described there as an inch-and-a-quarter wide cable on someone's property without  
10 their permission, that's an unconstitutional taking for which compensation needs to be made.

11 This bill does not provide protections despite some representations for property owners. There  
12 are a number of things that this bill does that do not protect property owners. I would advise the  
13 Committee that the definitions even just inside the drafting of this bill, setting aside the  
14 constitutional problems, create (kind of) a word soup when you get further down into the bill  
15 where the definitions certainly for prescriptive easement as it's used throughout the bill. I'd have  
16 to draw your attention certainly to Section F. It seems to make no comprehensible sense.

17 I submit there's are a lot of drafting problems with this; I know my time is short, but, Committee,  
18 I would mention to you that there are three different statues of limitations that get mentioned at  
19 the back end of this bill. None of them are in line with what the constitutional standard is for a  
20 statute of limitations for an inverse condemnation action, which is what this is going to give rise  
21 to. We will be challenging this statute in the courts. I think we will win that. I don't think that  
22 this statute can withstand constitutional scrutiny. I understand there's a lot of support for it.

1 Again, we're not against broadband and (it) being extended; it just needs to happen in a  
2 constitutional way.

3 One of the better ways, and I think there have been some measures before this body in the  
4 past, would be to put it in the already owned public Rights of Way—the Rights of Way that the  
5 Commonwealth already owns, where it has free reign to put and allow any users it wants.  
6 Delegate Kilgore, you asked a great question, “Is this adding users to existing easements—can  
7 we do it?” I think you asked. You can't. An easement is a specific agreement, a contract  
8 between a landowner and a company—Dominion, the co-ops, Verizon. When you go in and  
9 rewrite, and that's what this bill does—it rewrites every existing easement in the  
10 Commonwealth—when you add another user to that easement area, that is unconstitutional.  
11 There's no compensation that's provided for, there's a claims—attempts to be some sort of  
12 claims scheme—that is not the way condemnation works. This is an absolutely unconstitutional  
13 bill as written. I would be happy to answer any questions the Committee may have or to work  
14 with the Committee as it considers this. This may be something that should be referred to Courts  
15 where these kinds of bills are traditionally heard—

16 **Chairperson:** Thank you, sir—

17 **Joshua Baker:** I appreciate it.

18 **Chairperson:** Thank you so much. Question, Delegate Webert?

19 **Delegate Webert:** I guess, for the utilities, so in regards to prescriptive easements, etc., because  
20 this bill was before Communication Innovation as well, so in regards to the prescriptive  
21 easements, if you, there's obviously the easement you obviously can't place anything else on,  
22 there's easements where the telephone wire's there already, so it's already got multiple uses. If a

1 landowner wants to contest that, what is the process by which they contest the use of the  
2 easement that's on their property?

3 **Sam Brumberg:** Madam Chair, Delegate Webert, it's Sam Brumberg with Virginia's Electric  
4 Co-Operatives, Chief Cook of the word soup.

5 The landowner would have full protection to go to court and sue over the nature or  
6 existence of a prescriptive easement that spanned less than the twenty-year period. One of the  
7 things we added to the substitute was a specific carve out that specifically said, "Landowner, if  
8 you think there's a problem with the prescriptive easement, just as you can do today, please go to  
9 Court and have that adjudicated."

10 **Delegate Webert:** So where exactly is that in the bill? Is it F?

11 **Sam Brumberg:** Yes, Madam Chair, Delegate Webert, I would refer the Delegate to the  
12 sentence beginning at the end of line 92.

13 **Delegate Webert:** I've got a further question, Madam Chair.

14 **Chairperson:** Yes?

15 **Delegate Webert:** So, are there provisions in the bill at which, like say, you're coming in to put  
16 broadband fiber on top of a power line or something. Are there provisions in the bill at which  
17 you would be compensating the owner for some of that, depending on the easement?

18 **Sam Brumberg:** So, broadly speaking, Madam Chair, Delegate Webert, the bill creates a  
19 framework for apportioning easements in gross. I would refer the Committee to the case of Hise  
20 v. BARC Electric Cooperative, another Supreme Court of Virginia case which adjudicated  
21 prescriptive easement as an easement in gross. That's an easement where the utility has exerted  
22 an exclusive use over the easement, thus making it apportionable. Again, this bill is not going to  
23 address every case and every situation, but to your example, what recourse does the landowner

1 have in those cases? Just as he could today, he could file an action to reform or otherwise  
2 adjudicate the prescriptive easement. Thank you.

3 **Chairperson:** Thank you, Delegate Carroll Foy? Would you like to?

4 **Delegate Wilt:** Madam Chair.

5 **Chairperson:** Yes, Delegate Wilt?

6 **Delegate Webert:** Excuse me. The gentleman standing back there seems to possibly have input  
7 into the previous question.

8 **Delegate Foy:** Did you want to call him? I'm sorry, Madam Chair, is he being called on? I  
9 know Madam Chair asked me to respond.

10 **Delegate Webert:** Yes, Madam Chair. I'm sorry, Delegate, I'd like to ask that gentleman a  
11 question.

12 **Chairperson:** Delegate Carroll Foy, you may continue and then we'll ask him, if there is a  
13 question for him. I'm sorry, I did ask you first.

14 **Delegate Foy:** Thank you, Madam Chair. So, just to address some of the things that were laid,  
15 this is not a condemnation, it's not a taking, and it's not—it has nothing to do with eminent  
16 domain. The reason that is, is that this is not a government action and actually taking the land  
17 for a government use. As far as this should be referred, it's actually passed unanimous in the  
18 Senate Labor and Commerce, so this is the correct place for this bill to be heard because this is  
19 an infrastructure issue. This isn't a changing of the legal code, the civil, criminal—this is  
20 actually establishing infrastructure broadband to rural Virginia. So I just want to make that  
21 unequivocally clear, that this is the best and right now the only way to get broadband to rural  
22 Virginia.