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## CONDEMNATION PROCEDURE UNDER THE VIRGINIA GENERAL CONDEMNATION ACT

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Eminent domain is the power to take private property for public use by governmental entities, public service corporations, and individuals. The power of eminent domain is considered an inherent attribute of sovereignty that exists independent of any constitutional provision. *Town of Purcellville v. Loudoun Cnty. Bd. of Sup'rs*, 74 Va. Cir. 417 (Loudoun Cnty. 2007) (citing 29A C.J.S. Eminent Domain §§ 4, 61).

### 4-1 CONSTITUTIONAL CONSIDERATIONS

#### 4-1.01 United States Constitution

The Fifth Amendment to the Constitution of the United States provides in part: "No person shall be . . . deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment also provides in part: "[N]or shall any state deprive any person of . . . property, without due process of law . . . ."

Some commentators have suggested that "just" compensation should be a much broader notion than "fair market value" and should include such concepts as loss of goodwill and other subjective values related to property. See W. Harold Bigham, "Fair Market Value," "Just Compensation," and the Constitution: A Critical View, 24 Vanderbilt L. Rev. 63 (1970); Glynn S. Lunney, Jr., *Compensation for Takings: How Much is Just?*, 42 Catholic U. L. Rev. 721 (1993).

#### 4-1.02 Virginia Constitution

Article I, § 11 of the Virginia Constitution states, in part: "No person shall be deprived of his . . . property without due process of law." In 2012, the Virginia Constitution was amended<sup>2</sup> by adding language to article I, section 11, that, in part:

1. declares that ownership of private property is a "fundamental" right,
2. requires that "lost profits" and "lost access" are elements of damages in any taking,

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<sup>1</sup> Many thanks to the previous author of this chapter, Steven L. Micas, former County Attorney, Chesterfield County and Prince George County.

<sup>2</sup> For opinions of the Attorney General on the effects of this amendment, see 2014 Op. Va. Att'y Gen. 18; 2012 Op. Va. Att'y Gen. 37. In addition, for a comprehensive summary of the jurisprudence affecting public use and necessity in Virginia and the impact of the 2012 constitutional amendment, see James J. Knicely and Francis A. Cherry, Jr., *Eminent Domain Reform: The "Virginia Way"*, 45 Real Est. L.J. 290 (Winter 2016).

3. places the burden on the condemnor to prove that the taking is for a public use, with no presumption favoring the condemnor, and
4. includes the limitations on the exercise of eminent domain that are found in Va. Code § 1-219.1.

In *Palmer v. Atlantic Coast Pipeline*, 293 Va. 573, 801 S.E.2d 414 (2017), the landowner alleged, based on the “fundamental right” of property ownership, the existence of a right to exclude a natural gas company from entering her property pursuant to Va. Code § 56-49.01 (which authorizes natural gas companies to make surveys and tests on private property without permission upon proper notice). The Supreme Court held that although fundamental, the right to exclude was not absolute as recognized by hundreds of years of common law and statutory authority. The 2012 amendment to article I, § 11 did not enhance property rights so as to create an absolute right to exclude.

“Damage” exists independent of the exercise of eminent domain and can include not only physical damage to property, but also a negative effect on any right connected to the use of the property, such as reduced development opportunities. See, e.g., *Va. Uranium, Inc. v. Commonwealth*, 105 Va. Cir. 421 (Wise Cnty. 2020) (statutory moratorium on uranium mining constituted a damage to property because owners could not exercise rights over mineral estate under Va. Const. art. I, § 11). Moreover, a government’s failure to act (such as properly maintaining a drainage ditch) can cause “damages” under article I. *Livingston v. Va. Dep’t of Transp.*, 284 Va. 140, 726 S.E.2d 264 (2012).

In *Lynnhaven Dunes Condominium Ass’n v. City of Virginia Beach*, 284 Va. 661, 733 S.E.2d 911 (2012), the Supreme Court held that the locality’s damage to the property owner’s riparian (or more accurately, littoral) was compensable because the city’s beach replenishment project was not an exercise of the police power, as it was insufficiently related to the efforts to regulate and improve navigation. However, in *Byler v. Virginia Electric & Power Co.*, 284 Va. 501, 731 S.E.2d 916 (2012), a landowner could not make a diminution in value claim arising from the public use of proximately located property because no property right belonging to the owner was affected. Likewise, a landowner’s loss of ingress and egress caused by the city’s closure of a road was not compensable because the one closing, by itself, did not constitute a “material impairment of direct access to [the] property” under Va. Code § 25.1-230.1. *Hooked Grp., LLC v. City of Chesapeake*, 298 Va. 663, 842 S.E.2d 413 (2020).

However, if the damage to property rights by the government is only incidental, or if the “invasion” is not intended or foreseeable, it does not constitute a taking and, therefore, does not require compensation. *Yawn v. Dorchester Cnty.*, 1 F.4th 191 (4th Cir. 2021) (death of appellants’ bees following aerial pesticide spraying for mosquitoes not compensable because harm was unintentional and not foreseeable) (citing *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 133 S. Ct. 511 (2012)).

## 4-2 STATUTORY CONSIDERATIONS

### 4-2.01 Delegation of Eminent Domain Power and Territorial Limits<sup>3</sup>

Virginia Code §§ 25.1-101, 15.2-1901.1, 15.2-1907, and 33.2-1001 statutorily extend the eminent domain power to state agencies, localities, and the Commissioner of

<sup>3</sup> Generally, grants of condemnation authority to localities are contained in Title 15.2, and procedural requirements for condemnation are contained in Title 25.1. See Va. Code § 25.1-200 et seq. Many of the cases and Attorney General’s opinions cited in this outline were decided under repealed Title 25 and, therefore, may have reduced relevance under Title 25.1, even though most

Highways. Other statutes specifically grant condemnation power to special governmental entities such as public authorities. Under Va. Code § 15.2-1901, cities and towns may acquire property through eminent domain outside their boundaries without any specific grant of authority when condemning for public utilities or transportation purposes. For any other public purpose, cities and towns must have a specific grant of authority to condemn outside their boundaries. For example, a town could not condemn in a county for a town school site. *Town of Purcellville v. Loudoun Cnty.*, 74 Va. Cir. 417 (Loudoun Cnty. 2007). Counties are limited to using their eminent domain power within their boundaries unless a special act or general law specifically extends authority to condemn beyond their boundaries. The Governor, on behalf of the Commonwealth, may acquire by condemnation satellite service facilities for the General Assembly in areas “near” the capitol upon a majority vote of the members of the General Assembly. 1973 Va. Acts ch. 525; 1973 Op. Va. Att’y Gen. 187. For other extraterritorial authority, see Va. Code § 15.2-1907 relating specifically to water systems and Va. Code §§ 15.2-1907.1 and 25.1-109 regarding additional restrictions on condemning land as compensatory mitigation for adverse effects on wetlands.

#### **4-2.02 Delegation of the Eminent Domain Power to Subordinate State Agencies and Units of Local Government**

The General Assembly may delegate the eminent domain power to subordinate agencies (for example, the Virginia Department of Transportation (VDOT)) or subordinate units of government created by the General Assembly (e.g., counties, cities, towns, public authorities, districts, and school boards). Rather than separate references to condemnation restrictions based on status such as a county, city, or town, Title 15.2 of the Va. Code now generally uses the term “locality,” which encompasses counties, cities, and towns “as the context may require.” Va. Code § 15.2-102.

Statutes delegating the eminent domain power are strictly construed against the condemnor, thereby requiring full compliance with all preconditions to the taking of property. *3232 Page Ave. Condo. Unit Owners Ass’n v. City of Virginia Beach*, 284 Va. 639, 735 S.E.2d 672 (2012); *State Highway Comm’r v. Hooker Furniture Corp.*, 214 Va. 137, 198 S.E.2d 649 (1973); *Plummer v. Dir., Dep’t of Conservation & Econ. Dev.*, 209 Va. 616, 166 S.E.2d 281 (1969); *Light v. City of Danville*, 168 Va. 181, 190 S.E. 276 (1937); *Ruddock v. City of Richmond*, 165 Va. 552, 178 S.E. 44 (1935). Every reasonable doubt relating to the authority to condemn should be resolved adversely to the right to condemn. *Sch. Bd. of Harrisonburg v. Alexander*, 126 Va. 407, 101 S.E. 349 (1919). However, federal courts will require precise and specific allegations of procedural irregularities or unconstitutional animus before a landowner will be allowed to turn a condemnation case into a § 1983 civil rights claim in federal court. *Clear Sky Car Wash, LLC v. City of Chesapeake*, 910 F. Supp. 2d 861 (E.D. Va. 2012), *aff’d on other grounds*, 743 F.3d 438 (4th Cir. 2014). Subordinate agencies may not delegate their authority to condemn. *Ruddock, supra*. Accordingly, governmental entities that are delegated the power of eminent domain may not relinquish or surrender the power to condemn land needed for public safety purposes. An airport commission, in acquiring an easement permitting removal or topping of trees, may not give up the right to condemn any of the landowner’s property. *Evans v. Smyth-Wythe Airport Comm’n*, 255 Va. 69, 495 S.E.2d 825 (1998).

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changes to Title 25 were intended to be “non-substantive.” For an explanation of the reasons for changes in the language of the sections in Title 25.1, see Senate Document 16, 2003 General Assembly session. For an additional resource addressing ten topics related to eminent domain practice, see Virginia Law Foundation, *Eminent Domain Law in Virginia* (Paul B. Terpak, ed., 2012) (Virginia CLE Publication).

A local community services board possesses some, but not all, of the attributes essential to being deemed a municipal corporation in Virginia. In *Fines v. Rappahannock Area Community Services Board*, 301 Va. 305, 876 S.E.2d 917 (2022), the plaintiff sued the community services board and one of its employees for various intentional and negligent torts. The trial court dismissed all of the claims, ruling that the community services board was a municipal corporation and, therefore, immune from liability. The Virginia Supreme Court reversed, noting that, among other powers and characteristics, the community services board lacked the power of eminent domain, an essential attribute of a political subdivision.

However, with the court's approval, parties to condemnation actions may agree to waive strict compliance with the statutes and such agreements will be enforced against the condemnor. *State Highway Comm'r v. Hooker Furniture Corp.*, 214 Va. 137, 198 S.E.2d 649 (1973). In contrast, in *HMK Corp. v. Chesterfield County*, No. 84-0170-R (E.D. Va. Aug. 9, 1984), the district court held that as a condition to agreeing to review road plans for the developer's needs, a county could not constitutionally require the property owner to agree to a non-statutory alternative method of valuing his road right of way for any future acquisition by the county. See *HMK Corp. v. Walsey*, 637 F. Supp. 710 (E.D. Va. 1986), *aff'd*, 828 F.2d 1071 (4th Cir. 1987).

Statutes have delegated the power of eminent domain to the following entities for their respective listed purposes.

#### 4-2.02(a) Counties

Under Title 15.2, historically different county and city condemnation powers have largely been equalized, and include the following public purposes:<sup>4</sup>

1. *Roads and bridges.* Under Va. Code § 15.2-2233, localities may “hold,” for up to 120 days, applications for building permits for construction in any future or proposed right of way in order to give the locality time to acquire the property by condemnation. Va. Code § 33.2-700 et seq.
2. *Acquisition of Remnants in Connection with Public Right-of-Way.* Condemnors may condemn portions of any lot or other subdivision of property not needed for public rights of way when the residue after the taking is not suited for development. Va. Code § 15.2-2002.
3. *Airports.* Va. Code §§ 5.1-34, 5.1-35 (applying to localities and to joint exercises of the eminent domain power).
4. *Sanitary Landfills and Other Waste Disposal Facilities.* Va. Code, Title 15.2, ch. 19.
5. *Parks, Recreational Facilities, Sports Facilities, Playgrounds, and Swimming Pools.* Chapter 18 of Title 15.2 generally extends to localities the power to condemn property for parks, recreational facilities, sports facilities, and swimming pools. In addition, any county or city within which a sanitary district has been established may condemn property for parks, recreational facilities, and swimming pools. Va. Code § 15.2-1811. Under Va. Code § 15.2-1801, localities may condemn real property “adjoining” or “in the vicinity” of public property to protect its beauty or usefulness. Property may be

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<sup>4</sup> Va. Code §§ 15.2-1901-1904; but compare the differences between counties, cities, and towns, respectively, for condemnations outside their boundaries contained in §§ 15.2-1901(B) and 15.2-1907.

condemned for a park only if the park is so designated by the Commonwealth or the locality in its comprehensive plan. Va. Code § 1-219.1(B).

6. *Drainage*. Va. Code, Title 15.2, ch. 19; see *Phillips v. Foster*, 215 Va. 543, 211 S.E.2d 93 (1975) (limiting the scope of the eminent domain power to pre-existing area-wide drainage problems). Allegations that a municipality's actions caused an increase in the down-stream flow of water onto a piece of land alone were sufficient to meet the pleading requirements under state law and the Fifth Amendment to state an inverse condemnation cause of action. *Livingston v. Va. Dep't of Transp.*, 284 Va. 140, 726 S.E.2d 264 (2012); *Kitchen v. City of Newport News*, 275 Va. 378, 657 S.E.2d 132 (2008); see also *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 133 S. Ct. 511 (2012) (government-induced flooding temporary in duration may be compensable under the Takings Clause). But see *Collett v. City of Norfolk*, 85 Va. Cir. 258 (City of Norfolk 2012) (holding government must have within its control the instrumentality of the flooding and that the issuance of a permit for fill that allegedly caused the flooding could not be the basis for an inverse condemnation claim). However, under the Fifth Amendment, diminution in value alone will not support an inverse condemnation claim.
7. *Educational Purposes Such as Schools and Related Facilities*. Va. Code § 22.1-126.1.<sup>5</sup>
8. *Waterworks, Gasworks, Mass Transit, Storm Water Management, and Other Public Utilities*. Va. Code §§ 15.2-1906, 15.2-2109, 15.2-2146 (exempts from the jurisdiction of the State Corporation Commission acquisition of entire waterworks or sewage disposal plants owned by public service corporations; in those circumstances, the determination of valuation would then be conducted by the local circuit court). A government utility corporation (e.g., a county or municipality, or entity or agency thereof that provides or operates utility services) is considered to be acting as a public service corporation with regard to the provision of such authorized utility services for the purposes of any taking of private property by eminent domain. Va. Code § 1-219.1(K). A locality may not acquire a public utility operated by another locality or all of a public utility's natural gas or electric power systems or facilities within the locality's limits unless the acquisition is approved by referendum or agreed to by the utility. The requirement of consent or use of a referendum does not apply to certain cities or counties that use methane gas from landfills to create electricity. Cities and towns that provided electric service as of January 1, 1994, are exempt from the referendum requirement with regard to electric power. Va. Code § 15.2-2109. The authority of a city or town under Va. Code § 56-265.4:2 to acquire by eminent domain the distribution facilities of an electric utility serving an annexed area does not extend to a shire, borough, or other subdivision of a city or town or to

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<sup>5</sup> Virginia Code § 22.1-126.1 also applies to cities and towns and combinations of cities, counties, and towns. If the acquisition by condemnation is outside the affected jurisdiction, the acquisition is limited to fifty acres.

additions of territory by consolidation, merger, or other voluntary means.

9. *Waterworks Systems*. Va. Code § 15.2-1908 et seq. (applies to cities and counties).<sup>6</sup>
10. *Sewerage Systems*. Va. Code § 15.2-2122.65.
11. *Cemeteries*. Va. Code § 57-25 (applies to counties, cities, towns, and magisterial districts). The Attorney General opined, relying on statutory and charter authority outside Title 25.1, that the City of Falls Church can condemn land owned by a private cemetery association devoted to cemetery use for the purpose of straightening a curve in the street. 1982-83 Op. Va. Att’y Gen. 59. The Attorney General also opined that the specific authority granted to condemn land to operate an airport prevails over the general statutory prohibition of condemnation of cemetery property. 2009 Op. Va. Att’y Gen. 12.
12. *Courthouse and Parking Areas*. 1964-65 Op. Va. Att’y Gen. 113; see also *Bd. of Norfolk Cnty. Sup’rs v. Cox*, 98 Va. 270, 36 S.E. 380 (1900); *Bd. of Sup’rs of Culpeper Cnty. V. Gorrell*, 61 Va. (20 Gratt.) 484 (1871).
13. *Hospitals*. Va. Code § 15.2-1225 (applies to counties only).
14. *Housing*. A local governing body on behalf of a housing authority may condemn real property for renovation, rehabilitation, and redevelopment for housing. Va. Code § 36-27.
15. *Wharves, Piers, or Docks for Public Harbor Facilities*. See *Rudee Inlet Auth. v. Bastian*, 206 Va. 906, 147 S.E.2d 131 (1966).
16. *Historic Areas, Landmarks, Buildings, Structures, or Land in Order to Preserve Historic Sites*. Virginia Code § 15.2-2306 applies to all localities, but the power may be exercised only if, in the opinion of the governing body, the area must be acquired for the “use, observation, education, pleasure and welfare” of its citizens and the historical value of what is to be condemned is “about to be destroyed.”

#### 4-2.02(b) Cities

Cities generally have the same condemnation authority as counties, although they have some additional authority outside their boundaries regarding public utilities.<sup>7</sup> See Va. Code §§ 15.2-1901(B), 15.2-1907. An Attorney General’s opinion indicates that any General Assembly legislation permitting the City of Richmond to condemn on behalf of a state agency would be unconstitutional. 1965-66 Op. Va. Att’y Gen. 70.

Under Title 15.2 of the Code of Virginia, all localities must use the condemnation procedures of Title 25.1, except that Title 33.2 procedures relating to VDOT quick-take also apply in condemnations by a locality for highway purposes even though the

<sup>6</sup> Virginia Code § 15.2-2109, which sets forth procedural requirements to be followed at the State Corporation Commission, is a statute of general applicability to all public entities.

<sup>7</sup> See generally Va. Code Title 15.2 (extending equal condemnation authority to counties, cities, and towns).



locality uses Title 25 (Va. Code § 25.1-300 et seq.) certificate/quick-take authority. 1965-66 Op. Va. Att’y Gen. 70.

Specific governmental activities such as prisons, markets, and public lighting are defined as public purposes, thereby permitting the exercise of eminent domain. Although a statute may not contain an express grant of condemnation power, the Virginia Supreme Court, prior to the 2007 legislation limiting eminent domain, and the 2012 constitutional change, held that the eminent domain power can be “necessarily implied,” *City of Hopewell v. Norfolk & W. Ry.*, 154 Va. 19, 152 S.E. 537 (1930), even in the absence of an express grant of authority. For example, statutory language was “broadened” to allow the condemning of property for an off-street parking facility. *Stanpark Realty Corp. v. City of Norfolk*, 199 Va. 716, 101 S.E.2d 527 (1958).

The Attorney General opined that a proposed statute allowing Virginia Beach to condemn for slum clearance for economic development is a constitutionally valid public purpose, 1993 Op. Va. Att’y Gen. 84, an opinion likely invalidated by the 2012 constitutional amendment.

#### 4-2.02(c) Towns

Towns have the same authority to exercise eminent domain as cities. Va. Code §§ 15.2-1901 through 15.2-1907.1 (including the same additional authority cities have outside their boundaries regarding public utilities in Va. Code §§ 15.2-1901(B) and 15.2-1907). A county may not exercise the power to condemn in order to benefit a town. 1965-66 Op. Va. Att’y Gen. 299. Towns may not condemn land owned by a county in the absence of express statutory authority in the town charter. *Town of Purcellville v. Loudoun Cnty.*, 74 Va. Cir. 417 (Loudoun Cnty. 2007).

After holding a public hearing, towns may acquire land within their boundaries or within three miles of their boundaries for business or industrial development, but not by condemnation. Va. Code § 15.2-1802. After conducting a public hearing, any property so acquired may then be sold to a business.

#### 4-2.02(d) School Boards

School boards may condemn in their name so long as it is for a public school purpose. Va. Code § 22.1-127; *Sch. Bd. of Harrisonburg v. Alexander*, 126 Va. 407, 101 S.E. 349 (1919).

Virginia Code § 22.1-127 provides for a right of entry to determine the suitability of property for school sites pursuant to the procedures set forth in Chapter 2 of Title 25.1 (25.1-200 et seq.) and to obtain defeasible title as provided in Va. Code § 25.1-300 et seq.<sup>8</sup>

Under Va. Code § 25.1-108, if a condemnor has acquired property by eminent domain and the stated public use is completed or abandoned, the former property owner or his successor in interest is entitled to make a written demand that the excess real property be declared surplus, which triggers an obligation of the condemnor to offer to sell the surplus property back to the property owner or his successor at the price paid by the condemnor plus 6 percent annual interest, plus the value of improvements. If a school board obtains a school site by eminent domain, and years later the site is no longer needed as a school site but is needed by the locality for another public use,

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<sup>8</sup> It is unclear how far in advance school boards can condemn when there are no present plans or financial resources to construct the school. Existing judicial concepts of “necessity” would suggest that the condemnor must show that the consequences of being in a rapidly growing locality or a rapidly “gentrifying” area of a city would effectively preclude delayed acquisition of a school site.

Va. Code § 22.1-129 requires the school board to declare property surplus, which triggers the requirement to offer the property to the prior owner of the condemned property.

#### **4-2.02(e) Sewer and Water Authorities**

Virginia Code § 15.2-5114 extends the condemnation power to authorities created under the Virginia Water and Waste Authorities Act. Va. Code § 15.2-5100 et seq. Property of a locality may only be condemned with its consent. Va. Code § 15.2-5114; 1972-73 Op. Va. Att’y Gen. 186.

A regional water authority may condemn private land outside the member jurisdictions for the purposes for which the authority was created. 1972-73 Op. Va. Att’y Gen. 508. However, according to the Attorney General, a regional water authority may not condemn property of a municipality without its consent. 1972-73 Op. Va. Att’y Gen. 127.

Large authorities have the same powers as localities, so that an authority does not have to institute condemnation proceedings in the State Corporation Commission (SCC) when condemning a water system owned by a privately held public service corporation. *Virginia-American Water Co. v. Prince William Cnty. Serv. Auth.*, 246 Va. 509, 436 S.E.2d 618 (1993).

#### **4-2.02(f) Housing and Redevelopment Authorities**

Housing and redevelopment authorities may condemn to carry out their statutory purposes within their area of operations. Va. Code §§ 36-27, 36-36, 36-50. Redevelopment and housing authorities may not use eminent domain to acquire property in a redevelopment or conservation area unless the parcel to be acquired is itself blighted, i.e., property that endangers public health or safety and constitutes a public nuisance or is “beyond repair or unfit for human occupancy or use.”<sup>9</sup> Housing authorities may not use the “quick-take” provisions in § 25.1-300 et seq. However, a locality may acquire property by eminent domain and then convey the property to the housing authority. Condemnation is generally prohibited unless the public interest predominates the private gain and the primary purpose is not for private financial gain, private benefit, an increase in tax base or tax revenues, or an increase in employment. To the extent the broad powers to condemn in Va. Code § 36-27 are inconsistent with § 1-219.1, the latter provision controls by virtue of § 1-219.1(H).

At least one owner of every parcel to be acquired as part of a redevelopment plan must be notified that he has the right to participate in any condemnation proceeding. A housing authority must provide the property owner with a copy of the appraisal from a certified appraiser identifying the fair market value. Va. Code § 36-27(B).

A circuit court found that Va. Code § 36-49(1) articulates the standard by which blight must be measured, not Va. Code § 36-48 (condition of blight represents a *detriment* to health and safety rather than a *menace* to health and safety). *City of Roanoke Redev. & Hous. Auth. v. B&B Holdings*, 79 Va. Cir. 495 (City of Roanoke 2009).

*Pearsall v. Richmond Redevelopment & Housing Authority*, 218 Va. 892, 242 S.E.2d 228 (1978), indicated that a media announcement of an authority’s interest in

<sup>9</sup> Virginia Code § 1-219.1 requires that the redevelopment plan must have been adopted before January 1, 2007, and the acquisition completed by July 1, 2010, if the acquisition is to include property that is itself not blighted. *PKO Ventures, LLC v. Norfolk Redev. & Hous. Auth.*, 286 Va. 174, 747 S.E.2d 826 (2013).



an area was not a “public announcement” so as to trigger the authority’s obligation to condemn without unreasonable delay.

If a housing authority has unreasonably delayed condemning after the announcement of a project, the condemnation court should instruct the jurors or commissioners to ascertain separate damages arising from the delay in addition to ascertaining fair market value. Va. Code §§ 36-27, 36-36, and 36-50. Such additional “delay” damages may not exceed the change in fair market value of the property during the period of delay. Va. Code § 36-27. A housing authority’s determination that property is “blighted” does not constitute a permanent determination of “blight” if the authority waits many years to condemn. The current status of the property at the time of condemnation must be considered by the court, even though a determination of blight retains a strong presumption of validity. *Norfolk Redev. & Hous. Auth. v. C & C Real Estate, Inc.*, 272 Va. 2, 630 S.E.2d 505 (2006). *Claytor v. Roanoke Redevelopment & Housing Authority* cites *Pearsall* to support its notion that an announcement of a project that does not result in a condemnation can result in an inverse condemnation “takings” claim. 95 Va. Cir. 527 (City of Roanoke 2004). Loss of potential rents arising from “condemnation blight” will not support an inverse condemnation claim. *Springbelt Bus. Ctr. v. Fairfax Cnty.*, 18 Va. Cir. 8 (Fairfax Cnty. 1988); *see also BWT, LLC v. Norfolk Redev. & Hous. Auth.*, 57 Va. Cir. 121 (City of Norfolk 2001) (no inverse condemnation claim for diminished value while housing project being completed). Active participation by the city with the housing authority to designate a “blighted” area necessary to establish a public use for condemnation does not taint the trial court’s review of whether the landowner could present “clear and convincing” proof that the designation by the Housing Authority was arbitrary or capricious. *City of Roanoke Redev. & Hous. Auth. v. B&B Holdings, LLC*, 79 Va. Cir. 495 (City of Roanoke 2009). See also the extended discussion of the effect on valuation of downzoning in conservation or rehabilitation plan areas contained in Chapter 3, “Redevelopment & Housing Authorities,” section 3-6.05.

#### **4-2.02(g) Other Authorities Created by Statute**

Other authorities with the power to condemn include park authorities (Va. Code § 15.2-5704); community development authorities (§ 15.2-5158); health center commissions (§ 15.2-5214); hospital authorities (§ 15.2-5343); electric authorities (§ 15.2-5425); the Virginia Baseball Stadium Authority (§ 15.2-5807); the Virginia Port Authority (§ 62.1-136); the Virginia Passenger Rail Authority (§ 33.2-293), and the Richmond Metropolitan Transportation Authority (§ 33.2-2915). For example, the Virginia Highlands Airport Authority may use eminent domain to condemn trees in a private cemetery in order to provide unobstructed airspace to improve safety at the airport. 2009 Op Va. Att’y Gen. 86.

#### **4-2.02(h) Authorities Created by Special Act**

Condemnation power is given to various authorities providing special services by special act of the General Assembly, such as the Shenandoah Valley Joint Airport Commission, 1958 Va. Acts ch. 396, and the Appomattox River Water Authority. 1962 Va. Acts ch. 346.

A regional parking authority cannot condemn unless the condemnation is consented to by all political subdivisions that are members of the authority. Each locality may withhold consent to condemnation of its own property, even if that condemnation would not interfere with any essential services of the locality. 1972-73 Op. Va. Att’y Gen. 186. Contrast the broader authority to condemn without consent given to regional water authorities. 1972-73 Op. Va. Att’y Gen. 508.

Condemnors seeking to condemn property of any corporation possessing the power of eminent domain (e.g., electrical utilities, railroads, etc.) must obtain

certification from the SCC that a “public necessity” or an “essential public convenience” requires the condemnation. Such requirement also exists when using “quick-take” authority under Va. Code § 25.1-300 et seq. and includes special valuation rules that take into account any “stranded” investment when the SCC values the take. Va. Code § 25.1-102.

#### **4-2.02(i) Sanitary Districts and Mosquito Control Districts**

Sanitary districts and mosquito control districts are addressed in Va. Code §§ 21-118 and 32.1-193.

A county may not exercise its condemnation authority outside a sanitary district even when the purpose is to benefit the sanitary district. 1964-65 Op. Va. Att’y Gen. 127.

#### **4-2.02(j) Public Institutions of Higher Learning and Other State Institutions**

State hospitals, institutions for the deaf and blind, colleges and universities, and other state institutions have the power of eminent domain. Va. Code § 25.1-101.

#### **4-2.02(k) Public Service Corporations**

Public utilities not allotted public utility service territory may exercise the power of eminent domain only after having received a certificate of public convenience and necessity to provide services within the state and so long as this restriction on the power of eminent domain does not unconstitutionally burden interstate commerce. *VYVX of Va., Inc. v. Cassell*, 258 Va. 276, 519 S.E.2d 124 (1999).

1. *Railroads*. Virginia Code § 56-347 gives power to condemn to railroads and includes all property interests necessary for railroad purposes and purposes “incidental thereto.”
2. *Public Service Corporations Other Than Railroads*. Virginia Code § 56-49 allows acquisition of property interests for many purposes subject to similar limitations contained in Va. Code § 56-347.
3. *Telephone and Telegraph Companies*. Virginia Code §§ 56-458, 56-458.1, and 56-464 permit only the acquisition of easements and rights of way (as opposed to fee interests), and such property interests may not be exclusive. *Kricorian v. C&P Tel. Co.*, 217 Va. 284, 227 S.E.2d 725 (1976).
4. *Hydroelectric Projects by Public Service Corporations*. Va. Code § 62.1-98.
5. *Foreign Corporation*. Foreign corporations generally cannot exercise eminent domain in Virginia (unless the foreign corporation is also a Virginia public service corporation). See Va. Const. art. IX, § 5; see generally Va. Code Title 56. However, corporations authorized to use the eminent domain power by Congress, for example, natural gas companies operating pipelines in interstate commerce under the Natural Gas Act, 15 U.S.C. § 171, may condemn in Virginia even if they are foreign corporations. In creating the United States, the individual states consented to the delegation of their eminent domain powers to the federal government. Thus, the federal government may authorize private companies to enforce federally approved condemnations against non-consenting states in order to build interstate pipelines. *PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. \_\_\_, 141 S. Ct. 2244 (2021) (“[W]hen the States entered the

federal system, they renounced their right to the highest dominion in their lands . . . .”) (internal quotation omitted); see also *Torres v. Texas Dept. of Public Safety*, 597 U.S. \_\_\_, 142 S. Ct. 2455 (2022) (citing *PennEast* in decision regarding the yielding of state sovereignty to federal government’s power to raise and support the military).

6. *Toll Bridge Companies. Boulevard Bridge Co. v. City of Richmond*, 203 Va. 212, 123 S.E.2d 636 (1962).

#### 4-2.02(l) Individuals

1. Mills, Dams, and Certain Other Works or Watercourses. Va. Code §§ 62.1-116 to 62.1-127.
2. Drainage Easements. Va. Code § 21-428 et seq. In *Phillips v. Foster*, 215 Va. 543, 211 S.E.2d 93 (1975), the Virginia Supreme Court said that any taking must be for a predominately public use rather than merely “some” public benefit. In *Phillips*, the benefit was essentially for private development even though there was an ancillary public benefit.<sup>10</sup>
3. Cemeteries. Va. Code § 57-25. See also 1991 Va. Acts ch. 180 (giving specific power to the Washington Dulles International Airport (now the Metropolitan Washington Airports Authority) to condemn a cemetery for its western expansion).

#### 4-2.03 Property Interests Subject to Condemnation

##### 4-2.03(a) Real and Personal Interests

With some narrow exceptions, the power to condemn extends to all interests in “property,” and any right, title, interest, claim, or estate in such property.<sup>11</sup> Va. Code §§ 15.2-1901, 25.1-100. Numerous statutes affecting the power of eminent domain refer to the generic concept of “property” (i.e., not limiting condemnation to just real property, but allowing condemnation for all forms of legally held property, including personal property).<sup>12</sup>

<sup>10</sup> For a similar holding, see *Burns v. Bd. of Sup’rs of Fairfax Cnty.*, 218 Va. 625, 238 S.E.2d 823 (1977). The law on public use, particularly in federal condemnation cases interpreting the Fifth Amendment, tends to support any condemnation where there is a demonstrably predominant public benefit even in the face of a significant private benefit accruing to non-governmental entities. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 104 S. Ct. 2321 (1984). Following *Kelo* but prior to the 2007 clear statutory direction on the concept of “public use” in Virginia, the Virginia Supreme Court validated a broad notion of public use in *Hoffman Family, LLC v. City of Alexandria*, 272 Va. 274, 634 S.E.2d 722 (2006).

<sup>11</sup> Other property interests conceivably could include a contract right or a chose in action.

<sup>12</sup> For example: (i) Article I, § 11 of the Virginia Constitution, which prohibits taking of “property” without just compensation; *AGCS Marine Ins. Co. v. Arlington Cnty.*, 293 Va. 469, 800 S.E.2d 159 (2017) (“‘private property’ under Article I, Section 11 of the Constitution of Virginia applies to personal property” as well as real property); (ii) Va. Code § 15.2-1901, which provides that whenever a locality is authorized to acquire “personal property” or “property interests” for a public use, it may do so by the power of eminent domain; (iii) Va. Code § 1-219.1, which uses the unlimited concept of “private property” and in subsection (J), makes the section inapplicable to certain “real property” acquired prior to July 1, 2007; (iv) Va. Code § 25.1-100, which provides that “[p]roperty” means land and personal property, and any right, title, interest, estate or claim in or to such property”; and (v) Va. Code § 25.1-209, which states that the petition must designate “property” to be taken by “kind, quantity and location” (emphasis added).

As an example of one exception to this broad concept of condemnable property, a trial court has ruled that a historic train depot could be separated from the underlying real estate owned by the railroad and was, therefore, personal property. Accordingly, the town was precluded from condemning the train depot for preservation purposes because Va. Code § 15.2-944 precludes using condemnation for a “landmark . . . of historical interest and value” and because Va. Code § 15.2-1901.1 only authorizes condemnation for certain real property. *Town of Rural Retreat v. Huckleberry Farms, L.L.C.*, 81 Va. Cir. 18 (Wythe Cnty. 2010).

In *3232 Page Avenue Condominium Unit Owners Association v. City of Virginia Beach*, 284 Va. 639, 735 S.E.2d 672 (2012), the Virginia Supreme Court held that long public use and the city’s exercise of dominion and control for years over a beach established an implied dedication of a public easement, thereby eliminating a need to condemn.

Certain statutes applicable to public authorities limit the power of eminent domain to real property interests only. See, e.g., Va. Code § 15.2-5214. Virginia follows the minority rule that restrictive covenants are property interests that may be condemned. *Meagher v. Appalachian Elec. Power Co.*, 195 Va. 138, 77 S.E.2d 461 (1953); see also *Minner v. City of Lynchburg*, 204 Va. 180, 129 S.E.2d 673 (1963) (city was required to condemn restrictive covenants to build a road). The right to condemn restrictive covenants includes condemning a right of reversion in a deed of gift if the use changes from the use mandated in the gift (for example, a gift of land limited to use for a public school when converted to county offices triggered reversion sixty years after the gift).

By statute, mental health group homes and homes for the elderly and disabled can be built in subdivisions even though restrictive covenants limit development to “single family homes.” See Va. Code §§ 15.2-2291, 36-96; *Sussex Cmty. Servs. Ass’n v. Va. Soc’y for Mentally Retarded Children, Inc.*, 251 Va. 240, 467 S.E.2d 468 (1996); *Omega Corp. v. Malloy*, 228 Va. 12, 319 S.E.2d 728 (1984).

A condemnor is not barred from acquiring property by eminent domain where it earlier conveyed the property to the new owner with a covenant of “quiet enjoyment.” *City of Alexandria v. 49,422 Square Feet of Land*, 21 Va. Cir. 165 (City of Alexandria 1990).

A condemnor may not condemn a leasehold or other property interest in a private telecommunications tower in order to operate a public radio communications system. Va. Code § 15.2-1800(A).

A condemnor may not condition or delay the timely consideration of applications or grants of any permit or other approval for real property for the purpose of allowing the locality to condemn or consider condemning the property. Va. Code § 15.2-1901(C).

In *State Highway & Transportation Commissioner v. Edwards Co.*, 220 Va. 90, 255 S.E.2d 500 (1979), the Virginia Supreme Court held that tanks, rails, siding, and scales used in the coal and fuel business are property fixtures subject to condemnation as real estate rather than personalty. “If the chattel is essential to the purposes for which the building is used or occupied, it will be considered a fixture, although its connection with the realty is such that it may be severed without injury to either.” *Id.*, (quoting *Danville Holding Corp. v. Clement*, 178 Va. 223, 16 S.E.2d 345 (1941)). Similarly, restaurant equipment at a fast food restaurant such as pans, chairs, freezers, sinks, and workstations, even if easily moved, could still be fixtures to the real property if the equipment as “chattel” was essential to the building as used or occupied. *Taco*

*Bell v. Commonwealth Transp. Comm’r*, 282 Va. 127, 710 S.E.2d 478 (2011) (citing *Danville Holding Corp. v. Clement*, 178 Va. 223, 16 S.E.2d 345 (1941)).

The Virginia Highway Commissioner may not condemn commercial property in order to limit access to the property if it is located within three hundred feet of an interstate interchange, and the commercial property has a fair market value of one million dollars or more. See 2000 Va. Acts ch. 452 and annotation to Va. Code § 33.2-1001.

In *AGCS Marine Insurance Co. v. Arlington County*, 293 Va. 469, 800 S.E.2d 159 (2017), the Supreme Court clarified that the references in these cases to personalty and fixtures did not limit the obligation to pay damages only to such personal property that was appurtenant to real property. It held that article I, § 11 of the Virginia Constitution applies to personal property, and whether the personal property has been transformed into real property under fixture law is irrelevant.

A condemnor may not resolve a title dispute over an alleged year-to-year tenancy by filing a condemnation action against a former owner seeking a decree that fee simple title had already been conveyed to the condemnor by deed of bargain and sale. *Accomack Cnty. Sch. Bd. v. Shields*, 39 Va. Cir. 411 (Accomack Cnty. 1996).

A beach replenishment project that has the effect of impairing access to the Chesapeake Bay gave rise to a compensable taking because dredging during a navigation improvement project did not necessitate the replenishment project that led to the elimination of access to the Chesapeake Bay. *Lynnhaven Dunes Condo. Ass’n v. City of Virginia Beach*, 284 Va. 661, 733 S.E.2d 911 (2012).

#### **4-2.03(b) Special Acts and Charters**

Statutes of special application and local charters in Virginia giving the power of eminent domain to individuals or public bodies vary and must be consulted to determine precisely what property may be taken, how much of the property may be taken, for what purposes it may be taken, and whether any special procedural requirements apply.

For example, neither Va. Code § 15.2-4901 nor § 15.2-4905 contains a specific grant of power to local industrial or economic development authorities to exercise the power of eminent domain. Some peculiar charter provisions in town and city charters may be unconstitutional in light of the 2012 amendment to article I, section 11 of the Virginia Constitution.

Property already devoted to public use cannot be condemned by a locality for another public use unless:

1. The taking is by the state itself;
2. The taking is expressly authorized by the legislature, such as in Va. Code § 15.2-2122; or
3. The taking is approved by the SCC in accordance with Va. Code § 25.1-102. If acquiring property of a public service corporation, another public entity may never take property owned by and “essential” to the public service corporation except when acquiring sewer and water systems. Cities are bound by the requirements of SCC approval when acquiring property of public service corporations for other city purposes. *City of Richmond v. Southern Ry.*, 203 Va. 220, 123 S.E.2d 641 (1962).

- a. Localities are not bound by Va. Code § 25.1-102 when acquiring water or sewage disposal systems, even if the locality intends to convey the property to an authority. *Bd. of Cnty. Sup'rs of Fairfax Cnty. v. Alexandria Water Co.*, 204 Va. 434, 132 S.E.2d 440 (1963).
- b. When granting permission to condemn public service corporation property, the SCC may provide for compensation for any "stranded investment" of the utility. "Stranded investments" represent facilities built to create capacity that may become surplus as customers move to other sources of supply. Va. Code § 25.1-102.

## 4-3 SUBSTANTIVE PREREQUISITES

### 4-3.01 Public Use

Any property acquired by the use of the eminent domain process must be for a "public use." The definition of "public use" is controlled by Va. Code § 1-219.1, which supersedes any broader definitions elsewhere in the Code. See Va. Code §§ 1-202, 1-219.1(H). Section 1-219.1 provides that the term "public uses" mentioned in article I, section 11 of the Virginia Constitution is defined as the acquisition of property where:

1. The property is taken for the possession, ownership, occupation, and enjoyment of property by the public or a public corporation;<sup>13</sup>
2. The property is taken for construction, maintenance, or operation of public facilities by public corporations or by private entities provided that there is a written agreement with a public corporation providing for use of the facility by the public;
3. The property is taken for the creation or functioning of any public service corporation, public service company, or railroad;
4. The property is taken for the provision of any authorized utility service by a government utility corporation;
5. The property is taken for the elimination of blight, provided that the property itself is a blighted property; or
6. The property taken is in a redevelopment or conservation area and is abandoned, or the acquisition is needed to clear title where one of the owners agrees to such acquisition or the acquisition is by agreement of all the owners.

Public facilities are defined as:

1. Airports, landing fields, and air navigation facilities;
2. Educational facilities;
3. Flood control, bank and shore protection, watershed protection, and dams;

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<sup>13</sup> "Public Corporation" is later defined to mean the Commonwealth, any political subdivision thereof, any incorporated municipality, or any agency of any of them.



4. Hospital facilities;
5. Judicial and court facilities;
6. Correctional facilities, including jails and penitentiaries;
7. Library facilities;
8. Military installations;
9. Parks so designated by the Commonwealth or by the locality in its comprehensive plan;
10. Properties of historical significance so designated by the Commonwealth;
11. Law enforcement, fire, emergency medical, and rescue facilities;
12. Sanitary sewer, water or stormwater facilities;
13. Transportation facilities including highways, roads, streets, and bridges, traffic signals, related easements and rights of way, mass transit, ports, and any components of federal, state, or local transportation facilities;
14. Waste management facilities for hazardous, radioactive, or other waste;
15. Office facilities occupied by a public corporation; and
16. Such other facilities that are necessary to the construction, maintenance, or operation of a public facility as listed in clauses (1) through (15) and directly related thereto.

No more private property may be taken than that which is necessary to achieve the stated public use. Va. Code § 1-219.1(C). Except for the facilities and uses of public service utilities (including governmental utilities), railroads, public service corporation water, sewer, and stormwater facilities, and public service corporation transportation facilities, property can only be taken where the public interest dominates over any private gain and the primary purpose is not private financial gain, private benefit, an increase in tax base or tax revenues, an increase in employment, or for economic development. Va. Code § 1-219.1(D).

#### **4-3.02 Judicial Determination of Appropriate Public Use**

The 2012 amendment to article I, section 11 of the Virginia Constitution provides that the “condemnor bears the burden of proving that the use is public, without a presumption that it is.” Thus, any case discussed below in this section, to the extent it turns on the burden of proof, is no longer valid law. And as previously discussed, what constitutes public use has also been limited. The discussion is retained in the chapter as there may be aspects of these decisions that are still good law, and thus they should still be consulted with the caveat that the constitutional amendment’s effect on the prior holding must be considered. These cases may be relevant for those condemning authorities proceeding under Va. Code § 25.1-200 et seq. (also known as the “slow-take” procedure).

Whether a use is public or private is a judicial question determined by the character of each use. *Light v. City of Danville*, 168 Va. 181, 190 S.E. 276 (1937).

Otherwise, the legislature could decide the constitutionality of its own acts. For example, in *Ottofaro v. City of Hampton*, 265 Va. 26, 574 S.E.2d 235 (2003), condemning the right of way shown on a comprehensive plan was for a public use even though the exact location was not specified in the enabling resolution and even though the road was to be built by a private developer who, along with the traveling public, benefited from the construction. The Court held that land was properly taken for public use as a roadway even though the city planned to transfer the residue to an industrial development authority, which would lease the property to a private developer. The road was shown on the comprehensive plan, owned by the city, and used by the public. The Court also held that the enabling resolution or ordinance required by Va. Code § 15.2-1903(B) need not include a fixed and definite description of the road. The city's statement that the acquisition was to improve the city's transportation network, provide access to underutilized property within the city, and reduce traffic flow was sufficient. Finally, the Court held that the council's direction to the city attorney to acquire the entire tracts upon which the road was to be located in accordance with the limitations of Va. Code § 33.2-1007 was not an illegal delegation of its condemnation powers.<sup>14</sup> After construction, the road was owned and maintained by the city.

In *Phillips v. Foster*, 215 Va. 543, 211 S.E.2d 93 (1975), and *Burns v. Board of Supervisors of Fairfax County*, 218 Va. 625, 238 S.E.2d 823 (1977), the Virginia Supreme Court balanced public and private effects of a taking and required a showing of predominant public use for the exercise of eminent domain. In *Town of Rocky Mount v. Wenco, Inc.*, 256 Va. 316, 506 S.E.2d 17 (1998), the Court stated that to be public, a use must be one in which the terms and manner of its enjoyment are within the control of the governing body. See also *Norfolk Redev. & Hous. Auth. v. C & C Real Estate, Inc.*, 272 Va. 2, 630 S.E.2d 505 (2006). In *Hoffman Family, LLC v. City of Alexandria*, 272 Va. 274, 634 S.E.2d 722 (2006), the Virginia Supreme Court held that there was a public purpose in condemning property to relocate an existing functioning stormwater culvert so that a developer could build a structure on the site of the storm sewer because the new culvert location was consistent with a comprehensive plan and also allowed easier repair by the city. The Court stated that in a condemnation proceeding, the appropriate consideration is whether a *public use* predominates, not whether a *public benefit* results.<sup>15</sup>

In *City of Virginia Beach v. Christopoulos*, 54 Va. Cir. 95 (City of Va. Beach 2000), a circuit court held that a city could not condemn land for a public parking garage when the city, through a development agreement, gave all development and operational control of the facility to the adjacent private hotel. Based on the terms of the agreement, the circuit court found that the public's right to use did not "dominate" over the private benefit.

In *Virginia Uranium, Inc. v. Commonwealth*, 105 Va. Cir. 421 (Wise Cnty. 2020), a circuit court considered landowners' claims that the state's moratorium on uranium mining constituted an unconstitutional taking because they could not exercise their ownership rights over the mineral estates in the land. In a somewhat opaque analysis, the court denied the right to compensation for the landowners, ruling that the moratorium constituted an exercise of the state's police power because the moratorium furthered the health, safety, and welfare of its citizens by protecting the water supply from potential radioactive contamination.

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<sup>14</sup> Virginia Code § 33.2-1007 provides that a residue can be acquired when, among other reasons, it can no longer be utilized for the purpose for which the entire tract was utilized or it no longer has public access.

<sup>15</sup> In *Hoffman*, the property was to be a part of the public utility system.

The United States Supreme Court defines a court's role in reviewing a legislative determination of public use as extremely narrow under the Fifth Amendment. *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 104 S. Ct. 2321 (1984). Thus, the Court held that a locality could constitutionally condemn non-blighted private property for the "public purpose" of economic development so long as the property was part of a comprehensive redevelopment plan. The General Assembly acted vigorously in the wake of *Kelo* to more narrowly define a locality's ability to exercise eminent domain than allowed by the U.S. Constitution. Thus, for all property for which a petition of condemnation or certificate of take was filed after June 30, 2007, the case law and statutory authority pertaining to the exercise of eminent domain must be measured against the 2007 legislation limiting the scope of the eminent domain authority of localities.

#### 4-3.03 Necessity

Where an intended use is public, questions of the necessity, propriety, expediency, or the manner of making the public improvements are legislative matters more properly left to elected officials. *Stewart v. Fugate*, 212 Va. 689, 187 S.E.2d 156 (1972); *Light v. City of Danville*, 168 Va. 181, 190 S.E. 276 (1937).

Determination of which property or how much of it is necessary for public purposes is normally not subject to judicial review unless the decision is a clear abuse of power. *Kricorian v. C&P Tel. Co.*, 217 Va. 284, 227 S.E.2d 725 (1976); *Stewart v. Fugate*, 212 Va. 689, 187 S.E.2d 156 (1972) (holding that a public use determination is reviewable only if arbitrary, capricious, or manifestly fraudulent); *Va. Elec. & Power Co. v. Webb*, 196 Va. 555, 84 S.E.2d 735 (1954); see also 1984-85 Op. Va. Att'y Gen. 129 (rejecting the ability of a county to acquire property from a private country club for use as a private driveway by a proposed private office development). A town's extension of a sewer line outside its boundaries to serve a single customer met the necessity requirement because it facilitated sources of revenue for the town. *Town of Rocky Mount v. Wenco, Inc.*, 256 Va. 316, 506 S.E.2d 17 (1998). One circuit court has found that an agreement between the county and the developer in which the developer would pay all the costs of condemnation did not by itself establish the lack of public necessity. *Chesterfield Cnty. v. Orgain*, No. CL88-413 (Chesterfield Cnty. Cir. Ct. 1991) (sufficient necessity existed to condemn for a sewer easement solely for the purpose of allowing new residential development to be served by public utilities rather than using septic tanks).

A condemnor may acquire excess capacity to satisfy future needs. "Necessity" means reasonable, not absolute, necessity. *City of Richmond v. Old Dominion Iron & Steel Corp.*, 212 Va. 611, 186 S.E.2d 30 (1972); *Miller v. Town of Pulaski*, 114 Va. 85, 75 S.E. 767 (1912); John Lewis, *A Treatise on the Law of Eminent Domain in the United States* § 601, at 1062 (3d ed. 1909). The necessity for a project may exist even where funding for the project has not been determined. *City of Alexandria v. 49,422 Square Feet of Land*, 21 Va. Cir. 165 (City of Alexandria 1990) (acquiring property for a parking garage in the absence of a financing plan or special tax district was permitted). Condemnation proceedings may proceed even though certain federal permits and the consent of the locality where a water supply system is to be located have not been obtained. See *Boulevard Bridge Corp. v. City of Richmond*, 203 Va. 212, 123 S.E.2d 636 (1962); *Stanpark Realty Corp. v. City of Norfolk*, 199 Va. 716, 101 S.E.2d 527 (1958). However, at least one circuit court has held that, in the absence of a definitive plan for the use of the property to be acquired, there can be no necessity for acquisition. In *Carl v. City of Richmond*, 11 Va. Cir. 100 (City of Richmond 1987), the city, in attempting to acquire a parcel for a visitor's center, did not define the proposed

facility sufficiently to establish a necessity for the taking.<sup>16</sup> There is no necessity when a locality seeks to acquire an entire tract to avoid an “uneconomic remnant” or to avoid a “detriment” from future development to the public project when the public purpose (reservoir) is completely satisfied by a partial take. *Spotsylvania Cnty. v. Mineral Springs Homeowners Ass’n*, 62 Va. Cir. 319 (Spotsylvania Cnty. 2003). In a partial take, the condemnor must offer to buy any “uneconomic remnant;” however, the landowner has the right to maintain ownership of the excess property. Va. Code §§ 1-219.1 and 25.1-417. Even in the absence of a specific statutory remedy, the common law provides a remedy for a claim of inverse condemnation under article I, § 11 when the landowner asserts that the proposed take leaves the landowner with an uneconomic remnant that the condemnor is obligated to condemn. *Comm’r of Highways v. W. Dulles Props.*, 86 Va. Cir. 284 (Fairfax Cnty. 2013).

The burden of proof and the burden of going forward with evidence are on the landowner to show an abuse in a legislative determination of necessity. See *Va. Elec. & Power Co. v. Webb*, 196 Va. 555, 84 S.E.2d 735 (1954); *Zircle v. Southern Ry.*, 102 Va. 17, 45 S.E. 802 (1903). If the landowner establishes a prima facie case, then the burden shifts to the condemnor to produce sufficient evidence that the issue of necessity is fairly debatable. *Hamer v. Sch. Bd. of Chesapeake*, 240 Va. 66, 393 S.E.2d 623 (1990). The actions of legislative bodies are still presumed proper and clothed with a presumption of regularity. Courts are not to substitute their judgment for that of elected officials who presumably know more about the operational needs of their localities.

## 4-4 PROCEDURAL CONSIDERATIONS

### 4-4.01 General Procedural Principles

#### 4-4.01(a) History of Title 25.1

Title 25 controlled condemnation by government agencies and public service corporations from 1950 to 2003. The changes in Title 25.1, although largely non-substantive, modernized the language and placed the sections in a more rational order.

#### 4-4.01(b) Exceptions to Applicability of Title 25.1

Title 25.1 applies to all condemnation proceedings “[u]nless otherwise specifically provided by law.” Va. Code § 25.1-200. The principal exceptions include:

1. Condemnations by the Commissioner of Highways, Va. Code §§ 33.2-1001 to 33.2-1029.
2. Property in an agricultural or forestal district, which requires compliance with the special provisions of Va. Code § 15.2-4313.
3. Special condemnation procedures relating to the power of housing, road, or utility authorities to condemn exist in special general assembly acts or local charter provisions. See *Chesapeake Bay Ferry Revenue Bond Act*, 1962 Va. Acts ch. 605; *Chesapeake Bay Revenue Bond Act*, 1956 Va. Acts ch. 714; see *generally* Virginia Beach City Charter.
4. Takings of multifamily housing must be accompanied by a relocation plan for the displaced residents approved by either the housing authority or, if none, the political subdivision where the project is

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<sup>16</sup> A petition for appeal was granted by Virginia Supreme Court with the statement that the trial court was not “plainly correct”; however, the case was settled before the appeal was heard.

located. Va. Code § 36-27.01.<sup>17</sup> The requirement of a relocation plan is not applicable if the authority merely “guarantees” financing for a privately owned housing project and no title is acquired by the authority. 1984-85 Op. Va. Att’y Gen. 149.

#### **4-4.02 Statutory Principles for Eminent Domain Proceedings**

##### **4-4.02(a) Action at Law**

All eminent domain proceedings are on the law side of the court and should be treated as any other law action. Va. Code § 25.1-202.

##### **4-4.02(b) Solely Statutory**

Eminent domain proceedings are statutory in nature, and courts may not invoke equitable principles to decide who among competing condemnors shows greater public necessity for particular property. As between competing condemnors, the locality that may condemn is the locality that first complies with the statute. *Bd. of Sup’rs of Prince William Cnty. v. Bd. of Sup’rs of Fairfax Cnty.*, 206 Va. 730, 146 S.E.2d 234 (1966).

A condemnor that files a petition to condemn or a certificate of take does not then acquire a vested right to finish that condemnation when the General Assembly in a later enactment requires that all condemnation must be completed by a date certain. *PKO Ventures, LLC v. Norfolk Redev. & Hous. Auth.*, 286 Va. 174, 747 S.E.2d 826 (2013).

##### **4-4.02(c) Jurisdiction**

Jurisdiction lies in the circuit court for the locality in which the property or a greater portion of it is situated. Va. Code § 25.1-201.

##### **4-4.02(d) Discovery**

All pretrial procedures of the rules of the Virginia Supreme Court apply to “the exercise of the right of eminent domain.” Va. Sup. Ct. R. 4:0. One unique rule is Rule 4:1(b)(4)(D), which provides that if the condemnor initiates discovery, it must pay all reasonable costs of discovery, including the cost and expense of experts. Recoverable costs and expenses are limited to those incurred in responding directly to discovery and do not include costs incurred for preparing for discovery or for developing a work product. *Commonwealth Transp. Comm’r v. Coffey*, 31 Va. Cir. 354 (Fairfax Cnty. 1993). Rules 4:2 and 4:5 (Depositions), Rule 4:8 (Interrogatories), Rule 4:9 (Requests for Production of Documents and Entry on Land for Inspection), and Rule 4:11 (Requests for Admission) are now commonly used in eminent domain cases. Rule 4:9(a)(3) permits entry upon land for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property. The inspection is permitted without leave of court,

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<sup>17</sup> If the housing authority is required to submit an application to the U.S. Department of Housing and Urban Development to demolish, liquidate, or otherwise dispose of the housing project, it must also serve notice of its intent at least twelve months prior to the HUD application date to the Virginia Department of Housing and Community Development and each tenant residing in the housing project. Va. Code § 36-7.2 (describing information such notices must include). Previously, the housing authority was also required to provide notice to any agency that would be responsible for administering tenant-based rental assistance to those who would be displaced from the housing project, but that requirement was eliminated in 2022. The housing authority cannot require any tenant currently residing in the housing project to leave until at least twelve months after notice is served upon the tenant, Va. Code § 36-7.2(D), except for a lease violation, including the failure to pay rent. Va. Code § 36-7.2(E). The statute provides a civil right of action for any violation of the notice requirements. Va. Code § 36-7.2(F).

upon serving notice on the landowner of the time and manner of conducting the inspection.<sup>18</sup>

In an eminent domain action, the basis for an expert witness's opinion is discoverable as is the assessed value for tax purposes even though assessed value is inadmissible at trial. *Va. Dep't of Transp. v. Fairbrook Bus. Park Assocs.*, 22 Va. Cir. 199 (Fairfax Cnty. 1990), *aff'd on other grounds*, 244 Va. 99, 418 S.E.2d 874 (1992); see also Va. Code §§ 25.1-305(E), 25.1417(C) (even though the tax assessment must be the basis for an offer in certain circumstances, such tax assessment does not then become admissible as proof of value in an eminent domain proceeding).

#### **4-4.02(e) Dismissal of Proceedings or Nonsuit**

Dismissal by the condemnor is available as a matter of right. If the trial on just compensation has not commenced, the condemnor must pay the owner "reasonable expenses" actually occurred in preparation for trial. If the trial has commenced, then in addition to incurred reasonable expenses, the condemnor must pay attorney's fees and witness fees. *Trout v. Commonwealth Transp. Comm'r*, 241 Va. 69, 400 S.E.2d 172 (1991); see also Va. Code § 25.1-248 et seq.

### **4-4.03 Other Conditions Precedent to Exercise of Eminent Domain Power**

#### **4-4.03(a) Title Search**

Prior to making an offer to purchase, filing a certificate of take, or filing a certificate of deposit to acquire a fee simple interest, the condemnor must undertake a title search going back at least sixty years to determine the nature and extent of the ownership interest in the property. Va. Code § 25.1-204(D). A copy of the report must be provided to the owner, including a copy of all recorded instruments within the sixty-year title history. *Id.*

#### **4-4.03(b) Bona Fide But Ineffectual Effort to Purchase**

Every condemnation must be preceded by a bona fide but "ineffectual" effort to buy the property if the known owner is competent and can be found in the state by the exercise of reasonable diligence. Va. Code §§ 15.2-1903 and 25.1-204. Before making an offer to acquire or initiating any related negotiations for real property, the condemnor must "establish an amount which it believes to be just compensation."

The manner of compliance with this condition must be stated in the petition. Va. Code § 25.1-206(2)(h). Such bona fide effort must include a written statement to the landowner that explains the public use for which the property is desired and certifying compliance with Va. Code § 1-219.1 (see section 4-3.01), a summary basis for the amount it established as just compensation, and a complete copy of any appraisals done. Va. Code § 25.1-204(B) and (E)(1). The offer must be written on the condemnor's letterhead and signed by an authorized employee of the condemnor. Va. Code § 25.1-204(B). If appropriate, the just compensation for the real property acquired and for damage to the remainder will be separately identified. Va. Code § 25.1-204(E)(1).

An appraisal is required if the property is valued at more than \$25,000. If the value is between \$10,000 and \$25,000, the owner may request that an appraisal be used as the basis for determining just compensation. Va. Code §§ 25.1-204, 25.1-417. An offer based upon a value determined by a professional appraiser is "not frivolous" as a matter of law and does not defeat the jurisdiction of the trial court even if the landowner contests whether the appraisal includes all the interests being acquired.

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<sup>18</sup> Compare Rule 4:9(a)(3) with Va. Code § 25.1-203, which permits entry for any actual or proposed acquisition upon compliance with certain notice requirements.



Such a factual defense—that the appraisal is faulty because of being incomplete—is preserved as a defense for the trial on just compensation. *Norfolk Redev. & Hous. Auth. v. Norva Props.*, 84 Va. Cir. 45 (City of Norfolk 2011), *rev'd on other grounds sub nom, PKO Ventures v. Norfolk Redev. & Hous. Auth.*, 286 Va. 174, 747 S.E.2d 826 (2013); *Norfolk Redev. & Hous. Auth. v. Cent. Radio, Inc.*, 82 Va. Cir. 240 (City of Norfolk 2011).

In no event shall such amount be less than the state agency's approved appraisal of the fair market value of such property, if such an appraisal is required, or the current assessed value of such property for real estate tax purposes, unless the property has physically changed in a material and substantial way since the current assessment date such that the real estate tax assessment no longer represents a fair valuation of the property, when the entire parcel for which the assessment is made is to be acquired, whichever is greater.

Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, shall be disregarded in determining the compensation for the property.

Where the question of an adequate offer is put in issue by the owner, the condemnor has the burden of showing compliance. *Charles v. Big Sandy & Cumberland R.R.*, 142 Va. 512, 129 S.E. 384 (1925). A bona fide offer is deemed made when negotiations indicate the impossibility of an agreement with the landowner and when there are multiple refusals of various offers. Mere arithmetic errors do not make an offer a bad faith offer. Nor does a clerical error in identifying the property. *Commonwealth Transp. Comm'r v. Holly Tree Props., Inc.*, 71 Va. Cir. 353 (Fairfax Cnty. 2006). A bona fide offer need not include any value for lost profits. Va. Code § 25.1-230.1(E). To lack any bona fide basis, the offer must be a product of fraud or oppressive conduct by the condemnor. The amount offered must be at least the greater of the condemnor's approved appraisal of the fair market value of the property, if such an appraisal is required, or the amount of the real estate tax assessment, if the entire parcel for which the assessment was made is sought to be acquired. See Va. Code §§ 25.1-204(E), 25.1-417 (requires compliance "to the greatest extent practicable"), 33.2-1001 (highway commissioner). A reduction in the size of a take that was determined to be more than "necessary," does not render the original offer by the Highway Commissioner no longer "bona fide" because no statute explicitly sets forth such a jurisdictional standard after the amendment to article I, § 11 of the Virginia Constitution. *Comm'r of Highways v. Sadler*, 93 Va. Cir. 74 (City of Petersburg 2016).<sup>19</sup> The filing of a condemnation certificate does not constitute a continuing offer to purchase the land in the amount set forth in the certificate. *Commonwealth Transp. Comm'r v. Klotz, Inc.*, 245 Va. 101, 425 S.E.2d 508 (1993).

A bona fide offer is a procedural requirement that is deemed waived if an objection is not timely raised. Pursuant to Va. Code § 25.1-213, a landowner must object to whether the offer is bona fide as part of the answer and grounds of defense. A general denial regarding the sufficiency of the offer is not a valid basis for finding that an offer was not bona fide so as to deprive the court of jurisdiction. *Va. Elec. & Power Co. v. Hylton*, 292 Va. 92, 787 S.E.2d 106 (2016).

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<sup>19</sup> *Sadler* was decided before *Virginia Electric & Power Co. v. Hylton*, 292 Va. 92, 787 S.E.2d 106 (2016), and the circuit court incorrectly held that it had jurisdiction to consider the landowner's defense even though the challenge to whether the offer was bona fide was not made in the answer and grounds of defense. However, the court's reasoning is instructive.

Relying in large measure on federal jurisprudence and non-Virginia cases, the Virginia Supreme Court in *Ramsey v. Commissioner of Highways*, 289 Va. 490, 770 S.E.2d 487 (2015), held that an appraisal given to the landowner by the condemnor before the “initiation of negotiations” (see Va. Code § 25.1-417(2)) is admissible as a party admission when the appraisal exceeded the condemnor’s offer. The appraisal was not an “offer to settle” and therefore, was not a protected offer within settlement discussions.

#### **4-4.03(c) Adoption of Ordinance or Resolution after Public Hearing**

Virginia Code § 15.2-1903 requires the adoption of a resolution or ordinance authorizing use of eminent domain after a public hearing. Charters may also require adoption of an ordinance or resolution authorizing condemnation in a specific fashion. *City of Richmond v. Dervishian*, 190 Va. 398, 57 S.E.2d 120 (1950). There is no single, generic advertising requirement in the Code of Virginia for the adoption of resolutions, ordinances, or public hearings for either cities, counties, or towns. Some specific preconditions to adoption of resolutions do exist in the Code of Virginia. For example, the sale of real estate may be approved by adoption of a resolution after holding a public hearing.

In the absence of any specific advertising requirements, localities have interpreted Va. Code § 15.2-1800(B) to require only one advertisement prior to the holding of the public hearing. Procedural requirements for the adoption of ordinances also vary widely. For example, all localities must advertise zoning ordinances and plan amendments “once a week for two successive weeks” and hold a public hearing no less than five nor more than twenty-one days after the last advertisement. Va. Code § 15.2-2204. In counties, other ordinances must be advertised “once a week for two successive weeks, with the first notice appearing no more than 14 days prior to the intended passage of the ordinance,” and the second notice not sooner than one calendar week after the first notice, prior to holding a public hearing as set forth in Va. Code § 15.2-1427(F). Municipalities also may have varying public notice and public hearing requirements as a condition of adoption of ordinances such as authorizing condemnation, which may require multiple “readings” of a proposed ordinance in public at successive council meetings before council holds a public hearing to consider adoption of that ordinance. See, e.g., Blacksburg Town Charter § 3.15(c); Richmond City Charter § 4.10. If the locality files a true copy of the resolution or ordinance with the condemnation petition, such filing constitutes sufficient evidence of public use and necessity. See *Champion Int’l Corp. v. City of Virginia Beach*, 16 Va. Cir. 58 (Greensville Cnty. 1989). But compare Va. Const. art. I, § 11 (2012 amendment, placing burden of proof on the condemnor). Local governing bodies have legislative immunity from federal civil rights claims even if their decision to authorize condemnation was motivated by a desire to retaliate against a landowner for having filed a successful lawsuit against the city. *Sable v. Myers*, 563 F.3d 1120 (10th Cir. 2009). An ordinance authorizing condemnation does not preclude an independent action to quiet title for the same property interest. *Lynnhaven Dunes Condo. Ass’n v. City of Virginia Beach*, 284 Va. 661, 733 S.E.2d 911 (2012).

#### **4-4.03(d) Limitation on Condemning State Property by Political Subdivisions**

As a general rule, localities or other political subdivisions may not condemn the property of the state that created them. 26 Am. Jur. 2d *Eminent Domain* § 88 (2012); Julius L. Sackman, *Nichols’ The Law of Eminent Domain* § 2.2 (rev. 3d ed. 1994). It is axiomatic that the state, however, may condemn property of political subdivisions, authorities, or public service corporations. In a dispute over Northampton County’s decision to condemn property owned by the Chesapeake Bay Bridge and Tunnel Commission for a beach, the Attorney General deemed the Commission equivalent to the sovereign state and, therefore, beyond condemnation by a subordinate public agency. 1980-81 Op. Va. Att’y Gen. 75. In *Continental Casualty Co. v. Town of Blacksburg*, 846 F.Supp. 486 (W.D. Va. 1994), the court held that a town, as a subordinate of the state, could not “take”

the property of a state educational institution, and thus could not be liable for damages to state property when it improperly directed water onto the Virginia Polytechnic Institute campus.

#### **4-4.03(e) Approval of General Assembly Required for Certain Condemnations**

Any condemning authority must have General Assembly approval for condemnation of land owned by any state institution or any property used as a cemetery. Property belonging to private nonprofit colleges may not be condemned for roads if the road is within 500 feet of a school building or the property surrounds a school building and is used as a campus, an athletic field, or a park. Va. Code §§ 25.1-103 through 25.1-105; *Marymount Coll. v. Harris*, 205 Va. 712, 139 S.E.2d 43 (1964).

#### **4-4.03(f) Limitation on Inverse Condemnation Cause of Action**

Inverse condemnation actions may be brought against counties only after compliance with Va. Code § 15.2-1248, which requires that any claimant must first present their claim to the governing body of the county prior to instituting a lawsuit. *AGCS Marine Ins. Co. v. Arlington Cnty.*, No. 1:13-cv-01160 (E.D. Va. Dec. 13, 2013) (opinion given in open court; transcript available on PACER). An erroneous VDOT permit was, ab initio, an invalid exercise of eminent domain and, therefore, the presence on property of underground utility lines that were not identified in a certificate of take was a continuing trespass from the time of installation. *TLP, LLC v. Cent. Tel. Co. of Va.*, 93 Va. Cir. 275 (Campbell Cnty. 2016).

#### **4-4.03(g) Approval of State Corporation Commission Required for Certain Condemnations**

The condemning authority must obtain the approval of the State Corporation Commission (SCC) to take property of any other corporation possessing the power of eminent domain. The SCC must certify (1) that a “public necessity” or “essential public convenience” requires the take and (2) that no property “essential” to the public service corporation will be taken. Va. Code § 25.1-102. Approval of the State Corporation Commission is not required when condemning an entire water or sewer system. Va. Code § 15.2-1906.

A town sought to condemn a public utility’s electric facilities in an annexed area pursuant to the provisions of Va. Code § 56-265.4:2, which permit such condemnation “in the manner provided by [then] Title 25.” The town argued that only the procedural requirements of Title 25 were intended to be complied with and that SCC permission was not necessary. The Virginia Supreme Court held that all requirements of Title 25 (now Title 25.1), including the SCC certification contained in Va. Code § 25.1-102, must be met. The Court also rejected the town’s argument that a “less stringent” standard for determining public necessity should be used when a municipality seeks to condemn a public utility’s facilities. *Town of Blackstone v. Southside Elec. Co-op.*, 256 Va. 527, 506 S.E.2d 773 (1998).

#### **4-4.03(h) Uniform Relocation Assistance and Real Property Acquisition Policies**

All localities, state agencies, and individuals must comply with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies article in Title 25.1, regardless of whether local, state, or federal funds are used to acquire the property. Va. Code §§ 15.2-729 (applicable to County Manager form of county government), 25.1-100, 25.1-400 et seq. The federal URA does not create a private federal right of action claiming failure to comply with the Act by a Virginia condemnor. *Clear Sky Car Wash, LLC v. City of Chesapeake*, 743 F.3d 438 (4th Cir. 2014). The relocation assistance portion of the article must be complied with in most circumstances and requires the condemnor in any condemnation necessitating relocation of a family or a business to pay reasonable

relocation expenses within monetary caps set out in the statutes.<sup>20</sup> Those monetary caps are adjusted over time in accordance with state law. Any displaced person must be given ninety days' written notice before he must move. In addition, the condemnor must make relocation payments for replacement housing for homeowners and tenants. Va. Code §§ 25.1-409, 25.1-410. The real property acquisition guidelines set out in Va. Code § 25.1-417 et seq. shall be followed "to the greatest extent practicable" in acquisitions, even if they do not involve relocation. For example, prior to initiating a condemnation action, the locality must give the landowner the opportunity to accompany the condemnor's appraiser, and the condemnor must offer the full amount of "just compensation" to the landowner, which must be at least its appraised value. Va. Code §§ 25.1-406, 25.1-407, 25.1-408. The landowner must be given a written explanation of the basis of the offer and a copy of any appraisal if the acquisition is in excess of \$25,000 in value.<sup>21</sup> The condemnor is required to acquire the entire property if the acquisition of a part of the parcel would leave the owner with an uneconomic remnant. Va. Code §§ 25.1-206(2)(h), 25.1-417(A)(9); see *Spotsylvania Cnty. v. Mineral Springs Homeowners Ass'n*, 62 Va. Cir. 319 (Spotsylvania Cnty. 2003) (a county does not have the power to condemn the "uneconomic remnant" if the landowner rejects its offer). Virginia Code § 25.1-420 provides a duty to pay certain costs including attorney, appraisal, and engineering fees if a government agency loses an inverse condemnation action for taking or damaging property.

#### 4-4.04 Form and Content of the Petition

The form and content of the petition are addressed in Va. Code § 25.1-206.<sup>22</sup>

Since any ambiguities in pleadings are resolved against the condemnor, care should be exercised in drafting the petition. See *Va. Elec. & Power Co. v. Lado*, 220 Va. 997, 266 S.E.2d 431 (1980).

##### 4-4.04(a) Designation of Property as Defendant

Because of the in rem nature of condemnation, the property to be condemned should be designated as a defendant in the caption by kind, quantity, and location. The person or entity vested with the power of eminent domain must be listed as the plaintiff.

##### 4-4.04(b) Description and Plat of Property

The description of the property to be taken must be sufficient for its identification, and a plat or drawing sufficient to allow the landowner to understand the nature of the work and the effect of the construction and improvements must be attached to the petition if only a portion of a parcel is being acquired. Va. Code § 25.1-206. However, the condemnor need not describe and file a plat of the "residue" of the land taken or other property owned by the landowner that may be damaged. See *Va. Elec. & Power Co. v. Coleman*, 212 Va. 171, 183 S.E.2d 130 (1971) (permitting acquisition of the right to remove dangerous trees "which in falling or being felled could come within ten feet of any conductor," even though the size of the easement effectively expands as the height of the adjacent trees increases); *Va. Elec. & Power Co. v. Webb*, 196 Va. 555, 84 S.E.2d 735 (1954) (permitting acquisition of an unlocated easement of ingress and egress incidental to a right of way). A clearly defined plat, even though error exists in the metes and bounds description, constitutes sufficient description under Va. Code § 25.1-206 if

<sup>20</sup> If the landowner initiates negotiations or the property is dedicated, the condemnor need not follow the relocation guidelines, unless required by its use of federal funds. Va. Code § 25.1-401.

<sup>21</sup> A condemnor's pleading must, where applicable, allege compliance with the required elements of § 25.1-417. See Va. Code § 25.1-204; *Campbell Cnty. v. Royal*, 75 Va. Cir. 460 (Campbell Cnty. 2007).

<sup>22</sup> For a compendium of eminent domain forms, consult Barbara Wright Goshorn, 2-VI *Virginia Forms* Nos. 6-401 through 6-425.

the property owners are not misled. *Schmidt v. City of Richmond*, 206 Va. 211, 142 S.E.2d 573 (1965). A description of property need not identify applicable restrictive covenants (in this case a requirement to install underground utilities) that the landowner believed “enhanced” the value of the property. *NBS Loudoun Gateway IV, L.L.C. v. Commonwealth Transp. Comm’r*, 63 Va. Cir. 342 (Loudoun Cnty. 2003).

The condemnor may amend a petition to change the interest from fee simple to an easement and also amend the amount of land to be taken, but only if the amendment reduces the amount of land. *Va. Dep’t of Transp. v. Fairbrook Bus. Park Assocs.*, 23 Va. Cir. 309 (Fairfax Cnty. 1991). A certificate of take may be altered or reformed, if this does not add to the area of the taking. *State Highway & Transp. Comm’r v. Goodrich*, 237 Va. 144, 375 S.E.2d 745 (1989).

The condemnor should consider appending to the petition a copy of the easement agreement when acquiring an easement or other limited interest in property, such as a lease, so that the landowner cannot complain that he did not know the exact “bundle of rights” to be acquired by the condemnor in order to allow an appraisal of the fair market value of the take by the landowner. An easement for electricity is “apportionable” (allowing other companies to install lines) even though the instrument describing the rights acquired in the eminent domain proceeding did not contain broad “apportionability” language. *Hise v. BARC Elec. Coop.*, 254 Va. 341, 492 S.E.2d 154 (1997).

Reference to a plat without height elevations is insufficient to describe an aviation easement. *Chesterfield Cnty. v. Kavanaugh*, No. CL95-1224 (Chesterfield Cnty. Cir. Ct. 1998).

#### **4-4.04(c) Multiple Parcels Permitted**

More than one parcel may be included in the same petition, even though taken from different owners or for different purposes. Va. Code § 25.1-208; *Watts v. State Highway Comm’r*, 202 Va. 166, 115 S.E.2d 899 (1960). On motion of any party, however, severance of the cases and separate trials may be ordered “in furtherance of convenience or to avoid prejudice.” Va. Code § 25.1-208.

#### **4-4.04(d) Identification of Owners**

As to each parcel, all owners, holders “of some interest therein” ascertainable “by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired,” and those whose names “have otherwise been learned” must be named as parties. Va. Code § 25.1-206(g). An “owner” is defined in Va. Code § 25.1-100 as any person owning property of record in the land records of the clerk’s office of the circuit court of the county or city where the property is located. This definition of the term “owner” does not affect in any way the valuation of the property. The definition of “owner” does not include trustees or beneficiaries under a deed of trust, any person with a security interest in the property, or any person with a judgment or lien against the property. Va. Code § 25.1-100; *Williams v. Fairfax Cnty. Redev. & Hous. Auth.*, 227 Va. 309, 315 S.E.2d 202 (1984). Although trustees are not “necessary” parties, they are still likely to be considered “proper parties.” If names are not known, they are designated “Unknown Owners” in the petition. Va. Code § 25.1-206. Noteholders under deeds of trust and other lienholders are not “owners” given notice under the condemnation statutes; however, their secured interest is transferred to the funds on deposit with the court at the moment the certificate of take is filed and the take amount deposited into the court. Va. Code §§ 25.1-237 and 25.1-307.

A tenant under a lease with a term of twelve months or longer may intervene and participate in the proceeding for the sole purpose of offering evidence of the value of the property being taken or damaged. Evidence of the value of the leasehold is not

allowed. Va. Code §§ 25.1-234, 33.2-1001; see also *Lamar Corp. v. Commonwealth Transp. Comm'r*, 262 Va. 375, 552 S.E.2d 61 (2001); *Lamar Corp. v. City of Richmond*, 241 Va. 346, 402 S.E.2d 31 (1991); *May v. Dewey*, 201 Va. 621, 112 S.E.2d 838 (1960); *Va. Elec. & Power Co. v. Haycox*, 17 Va. Cir. 87 (City of Va. Beach 1989).

The Commissioner of Highways must also notify as “owners” persons owning structures or improvements for which an outdoor advertising permit has been issued. Va. Code §§ 25.1-229(H), 33.2-1001(G).

Special terms and conditions in leases and deeds of trust may determine the relative financial rights and opportunities of landowners and lessees to participate in condemnation cases. *Exxon Corp. v. M & Q Holding Corp.*, 221 Va. 274, 269 S.E.2d 371 (1980) (lease has a significant bearing on fair market value of property taken and damage to residue); *Stanpark Realty Corp. v. City of Norfolk*, 199 Va. 716, 101 S.E.2d 527 (1958).

Claimants of an interest in real estate to be condemned may intervene if a dispute exists as to the extent of the interest of any claimant, but disputes over ownership interests shall not delay the proceedings. The award will be held by the court for a commissioner in chancery to determine the amount of the appropriate shares. Va. Code §§ 25.1-218 and 25.1-222.

#### **4-4.04(e) Required Statements**

The following short and plain statements should be made in the petition, Va. Code §§ 25.1-205 through 25.1-208:

1. The authority for the taking, including the status of the condemnor and the statute under which it has the power of eminent domain;
2. The necessity for the work or improvements to be made;
3. The public uses for which the property is being taken;
4. A description of the work or improvements to be made;
5. In partial takings, or where other property is likely to be damaged, there should be attached to the petition a plat, drawing, or plan, in sufficient detail to enable the owner to be reasonably informed of the effect of the taking and the construction and operation of such public improvements. Virginia Code § 33.2-705 requires that any petition to acquire an easement also must indicate any appurtenant rights of way or easements for ingress and egress to the proposed public easement;
6. The estate, interest, or rights to be taken by the condemnor;
7. The manner in which the condemnor complied with the duty to make a bona fide effort to purchase, *Dillon v. Davis*, 201 Va. 514, 112 S.E.2d 137 (1960) (the manner of such compliance); see also Va. Code § 25.1-204;
8. A general prayer for the condemnation of the property in the manner provided by Title 25.1; and
9. A justification for the granting of an award of right of entry where appropriate.



Virginia Code § 15.2-1903 sets forth other statutory obligations of the condemnor, and the petition should also reflect compliance with those obligations.

#### **4-4.04(f) Miscellaneous Matters**

The petition must be verified by the affidavit of an officer, agent, or attorney of the condemnor. Va. Code § 25.1-206. One copy of the petition and all exhibits must be filed with the clerk. Additional copies of the petition as may reasonably be needed by the clerk or any defendant must also be given to the clerk. *Id.*

#### **4-4.05 Service of the Petition Notice**

Notice of the filing of the petition and of the time when the condemnor will apply to the court to set the trial for the ascertainment of just compensation must be given to the property owners as described below.

##### **4-4.05(a) Matters Required to be Included in Notice**

The petitioner shall give notice to the property owner that an answer or grounds of defense setting forth any objection or defense to the taking or damaging of the property or to the jurisdiction of the court to hear the case must be filed and should include the owner's election to proceed with a jury or panel of commissioners to determine just compensation. Va. Code §§ 25.1-209, 25.1-213, 25.1-214. The condemnor should include a statement in the notice that all issues relating to jurisdiction or any other defense or objection will be resolved at the preliminary hearing.

##### **4-4.05(b) Competent Resident Owners**

Competent resident owners are served by written notice and a copy of the petition twenty-one days in advance of asking the court to set the trial date to determine just compensation. Va. Code § 25.1-209.

##### **4-4.05(c) Nonresidents or Unknown Owners**

Owners who are nonresidents, who are unknown, or whose residences are unknown are served by publication. Va. Code § 25.1-210. Publication is only appropriate if the attorney or agent for the condemnor by affidavit asserts that the owner cannot be served or is outside the state. The form of the order of publication is included in Va. Code § 25.1-211, and the form of the publication should be "substantially" as included in the statute. The order is published once a week for not less than two successive weeks and posted on the courthouse door within ten days of the entry of the order. The locality may post the order on the locality's government website or the website of the circuit court clerk in lieu of, or in addition to, the courthouse door. Va. Code § 1-211.1. The clerk of circuit court must also mail a copy to any owner whose residence is known but who cannot be served. Personal service outside the Commonwealth on nonresidents is expressly authorized as an alternative to publication under Va. Code § 25.1-212. The sheriff or other process server must complete a return under oath and show where the notice was served and that the person was served as a nonresident. *See* Va. Code § 25.1-212; *Light v. City of Danville*, 168 Va. 181, 190 S.E. 276 (1937). The procedures for service by publication for eminent domain actions differ from service by publication for other civil actions set out in Va. Code § 8.01-316 because, unlike § 8.01-316, § 25.1-210 does not allow reopening of a case within two years of judgment if necessary to prevent a miscarriage of justice. Such a difference does not violate the due process or equal protection clauses of the U.S. or Virginia Constitutions. *See Norfolk Redev. & Hous. Auth. v. Stevenson*, 63 Va. Cir. 567 (City of Norfolk 2004).

##### **4-4.05(d) Actual Notice**

Actual notice is not a required aspect of constitutional due process if the statute creating the cause of action includes publication as a method of service. *Via v. State Comm'n on Conservation & Dev.*, 9 F. Supp. 556 (W.D. Va.), *aff'd on other grounds*, 296 U.S. 549, 56 S. Ct. 245 (1935).

**4-4.05(e) Right of Entry**

The notice may include notice that the petitioner's application for right of entry pursuant to Va. Code § 25.1-223 was included in the petition and if authorized by Va. Code § 25.1-207. See longer discussion at section 4-7.

**4-4.05(f) Persons Under a Disability**

Infants, incapacitated persons, and convicts with no guardian, conservator, or committee in Virginia need not be given notice, but a guardian ad litem must be appointed as required in Va. Code §§ 8.01-9 and 25.1-215. Once a final order is entered in a condemnation action involving infants, any interests of the infants in the proper or improper use of the property are extinguished. *City of Fredericksburg v. Yarbboro*, 54 Va. Cir. 612 (Spotsylvania Cnty. 2000).

**4-4.05(g) Addition, Substitution, or Removal of Parties**

Notice of filing an amended petition to add parties need not be given to those already named as parties. *Schmidt v. City of Richmond*, 206 Va. 211, 142 S.E.2d 573 (1965). Notice of substitution as a party of any successor in interest because of incapacity is served on remaining parties in whatever manner is deemed appropriate by the court. Va. Code § 25.1-217. The court may drop an unnecessary or improper party at any stage of the proceeding.

**4-4.06 Mandatory Dispute Resolution Orientation**

Following the filing of a petition initiating a condemnation proceeding, the court refers the matter to a dispute resolution orientation as provided in Va. Code § 8.01-576.5. The court sets a date for the parties to return to court in accordance with its regular docket and procedure, irrespective of the referral to an orientation session. The parties notify the court, in writing, if the dispute is resolved prior to the return date. The parties must attend one orientation session. Further participation in a dispute resolution proceeding is by consent of all parties. Attorneys for any party may be present during a dispute resolution proceeding. Va. Code § 25.1-205.1.

**4-5 ANSWER AND GROUNDS OF DEFENSE****4-5.01 Time Requirements for Response**

The answer or grounds of defense must be filed within twenty-one days of service of the notice or within ten days after publication of the order. Va. Code §§ 25.1-213 and 25.1-214; see also Va. Sup. Ct. R. 3:5 (governing defendant's responses).

**4-5.02 Failure to File Answer and Grounds of Defense**

If the owner fails to file a timely answer, he waives all objections to jurisdiction and all other matters, *Va. Elec. & Power Co. v. Hylton*, 292 Va. 92, 787 S.E.2d 106 (2016) (challenge to whether an offer to purchase was bona fide was waived when objection not made in answer), except that the landowner may participate in the empanelment of the jury or panel of commissioners, may submit evidence of valuation of just compensation, and may participate in the distribution of the award. If the owner fails to file an answer or fails to elect either a jury or panel of commissioners, the condemnor may make the election to proceed using a jury, a panel of commissioners, or the court to determine just compensation, as provided in Va. Code § 25.1-220. Va. Code § 25.1-214.

**4-5.03 Amendments to Pleadings**

Amendments to pleadings must be approved by the court and are to be liberally allowed absent capricious action or fraud. Va. Code § 25.1-216; *Commonwealth Transp. Comm'r v. Klotz, Inc.*, 245 Va. 101, 425 S.E.2d 508 (1993). If an owner becomes incapable of defending an action because of death, conviction of a felony, removal from office, or other cause, any party may make a motion to substitute a party. The new party generally will be served and given time to file responses to protect his or her interests.

Va. Code § 25.1-217; see *Commonwealth Transp. Comm'r v. Klotz, Inc.*, 245 Va. 101, 425 S.E.2d 508 (1993) (court approval of amendments is to be liberally granted subject to judicial intervention only if the amendment is arbitrary and capricious or would constitute fraud).

## **4-6 DETERMINATION OF JURISDICTIONAL MATTERS**

### **4-6.01 Title Issues**

A court not only has the authority, but also the obligation to determine title ownership issues in a condemnation proceeding, and that obligation applies to the condemnor as well as the condemnee. Thus, a locality can bring a condemnation petition and alternatively assert ownership of easements by implication. *Lynnhaven Dunes Condo. Ass'n v. City of Virginia Beach*, 284 Va. 661, 733 S.E.2d 911 (2012) (quiet title action in conjunction with condemnation proceeding proper); *3232 Page Ave. Condo. Ass'n v. City of Virginia Beach*, 284 Va. 639, 735 S.E.2d 672 (2012).

### **4-6.02 Burden of Proof**

Jurisdictional matters in controversy are decided by the court but only if properly put in issue by the owner's answer and grounds of defense. The landowner generally has the burden of proof for many defenses such as whether the condemnor made a bona fide offer to purchase. The burden shifts to the condemnor to affirmatively prove that necessity is "fairly debatable" when the issue of lack of necessity has been raised by the landowner. See *Stanpark Realty Corp. v. City of Norfolk*, 199 Va. 716, 101 S.E.2d 527 (1958).

### **4-6.03 Pre-trial Settlement Conference**

The court shall order a non-binding pre-trial settlement conference to be conducted by a neutral third party (if available) if either the owner or condemnor requests one. Such conference may be requested at any time by either party but, if requested, it must be held within thirty days of trial. Va. Code § 25.1-219(A).

### **4-6.04 Order Setting Trial**

At the preliminary hearing, the court enters an order disposing of all preliminary issues, decides whether a jury, commissioners, or the court will determine valuation, and sets a date for trial if just compensation is the only issue remaining to be resolved (other than allocation of the award). Va. Code § 25.1-219(B). Although mere issuance of the order serves as notice to all parties, failure to issue the order is reversible error, because the owner must be given a reasonable opportunity to ascertain when to appear to participate in determining just compensation. *Schmidt v. City of Richmond*, 206 Va. 211, 142 S.E.2d 573 (1965). It is proper for the court to determine the existence or nonexistence of a reversionary interest at a preliminary hearing in order to identify proper parties. *Martin v. Norfolk Redev. & Hous. Auth.*, 205 Va. 942, 140 S.E.2d 673 (1965).

### **4-6.05 Appeal Prior to Trial**

Only court orders ruling against condemnors may be immediately appealed after issuance of the preliminary order or may be deferred until a final order. Va. Code § 25.1-219. Orders against owners cannot be appealed at that time. In *Dove v. May*, 201 Va. 761, 113 S.E.2d 840 (1960), for example, the Supreme Court held that when the State Highway Commissioner proved that for road construction purposes it was necessary to take a cemetery and remove the bodies, there was no final order that the landowner could appeal.

## 4-7 POSSESSION PENDENTE LITE

### 4-7.01 Entry for Survey, Appraisal, and Tests<sup>23</sup>

Virginia Code § 25.1-203 provides general authority for localities and any condemnor authorized to use the quick-take procedures to enter property in or out of the jurisdiction to make tests, surveys, borings, appraisals, or examinations to determine suitability for its intended use and whether the property should be acquired.<sup>24</sup> Prior to 2021, condemnors were required to request permission and, if the owner did not respond within fifteen days, provide notice of intent to enter and allow an additional fifteen-day period for the owner to respond. Virginia Code § 25.1-203 now provides for a somewhat streamlined process. The condemnor must request permission to inspect and may do so after allowing thirty days for the owner to respond.

The request for permission to inspect must be on the condemnor's official letterhead and signed by an authorized employee of the entity. Va. Code § 25.1-203(B)(1). It must be sent by certified mail, return receipt required, guaranteed overnight delivery, or otherwise delivered to the owner in person with proof of delivery. *Id.* The request must be made at least thirty days before the proposed date of entry. *Id.* The request is deemed made on the date of mailing, if mailed, and otherwise on the date of delivery. *Id.* The request for permission must include the date of the proposed inspection, the name of the entity entering the property, the number of persons intending to enter, the purpose of the entry, and any actions to be taken. Va. Code § 25.1-203(B)(2). The request must also notify the owner that if permission is withheld the condemnor will be permitted to enter the property on the proposed inspection date. Citing the section number of the statute by itself will not satisfy the requirement to notify the owner. Va. Code § 25.1-203(B)(1).

If the owner obtains a judgment for actual damages caused by the entry, a court may also award attorney fees, court costs, and fees for up to three testifying experts (or however many the petitioner calls to testify at trial, if more than three). Va. Code § 25.1-203(D).

### 4-7.02 Entry After Filing Petition

After filing a petition for condemnation and upon application to enter a landowner's property, a condemnor may construct improvements on the property if, after a hearing, a court finds the condemnor established a public necessity for the entry, an emergency exists justifying the entry, and the interests of the property owners are adequately protected by the payment of the estimated value of the property into the court. The property owner may withdraw the deposit, and the court may require that the

<sup>23</sup> See, e.g., Va. Code § 56-347 (applying to railroads); see also Va. Code §§ 25.1-203 and 56-49 (applying to public service corporations other than railroads). Virginia Code § 33.2-1011 applies with respect to entry for the purpose of condemnation for a highway purpose. Va. Code § 15.2-1902(4).

<sup>24</sup> The right of a public service corporation with the power to condemn to enter onto private property without the owner's permission to conduct surveys was recognized by common law. Accordingly, Va. Code § 56-49.01, which authorizes a natural gas company to survey land without permission, is constitutional. *Charlottesville Div. v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673 (W.D. Va. 2015). Notice to a landowner that the gas company intended to enter the property "on or after" an identified date is not sufficient notice under the statute. The notice must set forth a range of dates certain that entry will be effected, and if circumstances prevent entry during that range, notice must be reissued. *Chaffins v. Atl. Coast Pipeline*, 293 Va. 564, 801 S.E.2d 189 (2017); see also *Barr v. Atl. Coast Pipeline, LLC*, 295 Va. 522, 815 S.E.2d 783 (2018).

In *Palmer v. Atlantic Coast Pipeline*, 293 Va. 573, 801 S.E.2d 414 (2017), the Court held that Va. Code § 56.49.01 applies by its terms to out-of-state natural gas companies, but that appellant had waived its constitutional argument regarding the ability of foreign corporations to exercise the statute's rights.

condemnor provide additional bond if the value appears higher than the original estimate. Once entry is exercised, the condemnor may not abandon the condemnation action without the consent of the owner. Va. Code §§ 25.1-223, 25.1-224, and 25.1-225.

In *Vaden v. Chesterfield County*, Ch. No. 629-84 (Chesterfield Cnty. Cir. Ct. 1984), the landowner sought to enjoin entry for failure to show an “emergency.” The circuit court held that an emergency exists when a contract to extend a sewer or water line has been made by the condemnor, the contractor cannot proceed without the easement, and building permits have been issued dependent on public sewer and water.

#### **4-7.03 “Quick-Take” or Use of Certificate to Transfer Defeasible Title**

Virginia Code § 15.2-1904 provides for quick-take right of entry and possession prior to the institution or conclusion of condemnation proceedings for localities for certain specified public purposes using the certificate of take or certificate of deposit authority set out in Chapter 3 (Va. Code § 25.1-300 et. seq.) of Title 25.1. Those public purposes are streets and roads, drainage facilities, water and sewer systems, governmentally owned public utilities, oyster beds, and any purpose set out in § 15.2-1901.1. Virginia Code § 15.2-1901.1 references the power to condemn for roads and “any other authorized public undertaking.” That language, coupled with § 15.2-1902 referencing all the procedures in Title 25.1, would seem to suggest that the “certificate” quick-take process could be used for the entire panoply of public uses, not just those specifically mentioned in § 15.2-1904. The more conservative view would limit “certificate” quick-take to only those public projects listed in § 15.2-1904.

Notice of the intent to file a certificate must be given to any known owner or tenant by certified or registered mail between thirty and forty-five days before the certificate is filed. Va. Code § 25.1-306. The statute specifies language that must be included in the notice, including a statement that a certificate of take or deposit, as applicable, will be recorded in the land records of the court between thirty and forty-five days of the notice and that, upon recordation of the certificate, defeasible title will transfer to the condemnor. *Id.* The notice must also state that the owner may petition the court for distribution of the funds represented by the certificate. *Id.* Within four business days after filing, the condemnor must provide the owner or tenant, by certified or registered mail, with a copy of the certificate. *Id.*

A bona fide effort to purchase property as required in Va. Code § 25-1-204 (see section [4-4.03\(b\)](#)) must have been made. Va. Code § 25.1-303.

The recordation of the certificate operates to terminate the property interest of the owner and vest title with the condemnor and give the owner an interest in the deposited funds or certificate of deposit. The title is defeasible until the amount of compensation and damages is determined by agreement or condemnation proceedings. Va. Code § 25.1-308. Unless already instituted, condemnation proceedings must be instituted within 180 days of the recordation of the certificate if there has been no agreement as to compensation and damages. Va. Code § 25-313.

The locality must exercise “diligence” to protect crops and pastures and prevent damage to property not taken. Va. Code § 25.1-302.

##### **4-7.03(a) Inspection Under Rules of Court**

See Rule 4:9(a)(3) permitting entry onto property being condemned as part of discovery to conduct inspections, testing, sampling, etc.

##### **4-7.03(b) Special Provision for Counties**

When a county is authorized to use the quick-take procedures of Va. Code § 25.1-300 et seq., it must follow one of two procedures. The first, set forth in Va. Code § 15.2-

1905(B), requires notification by certified mail to the property owner of the condemnor's intention to take the property and the amount of compensation and damages offered. A landowner has thirty days to file a circuit court action to determine whether "the circumstances are such as to justify an entry upon and taking possession by the county of the property involved prior to an agreement or award upon compensation and damages." If no such necessity exists and the entry would create an undue hardship on the property owner, the county will be required to acquire the property without right of entry. There is no requirement to wait to build improvements until the thirty-day appeal period has run, but many localities do wait before constructing improvements to accommodate the owner. Even though time-barred from contesting a right of entry, a landowner may still raise jurisdictional defenses to the exercise of the eminent domain power. *In re Lunn*, 17 Va. Cir. 212 (Loudoun Cnty. 1989).

Pursuant to Va. Code § 25.1-1905(B), the county must also:

1. Institute the condemnation action 120 days after completion of the work. The statute does not specify a consequence for waiting beyond the 120-day period. A property owner could compel filing the condemnation action by proceeding for a writ of mandamus, however.
2. Pay into court the estimated fair market value.
3. Use due diligence to prevent damage to the property, including crops and pastures, and "so far as possible," exhaust other ways of acquiring rights-of-way without condemnation.

As an alternative, a county may adopt a resolution or ordinance, following a public hearing, declaring its intent to take specified property for the authorized purposes, the reasons it is necessary to take the property prior to condemnation proceedings, and the amount of compensation and damages offered. Va. Code § 15.2-1905(C). Unlike under Va. Code § 15.2-1905(B), all of the procedural requirements of Va. Code § 25.1-300 et seq. would apply.

#### **4-7.03(c) Deposit of Estimated Compensation & Damages Before Entry**

If a condemnor enters upon and takes possession of property prior to or after the institution of condemnation proceedings, it must deposit its estimate of the fair value of the land to be taken and the damages, if any, or file a certificate of deposit for such amount. Any person entitled thereto may petition the court to be paid his pro rata share of all or any part of such fund deposited, and the costs of filing such petition or otherwise drawing the funds shall be taxed against the condemnor.<sup>25</sup> Va. Code §§ 25.1-224, 25.1-305, and 25.1-310. The acceptance of such payment does not preclude such person from appealing any decision rendered in condemnation proceedings. Va. Code § 25.1-311. If the sum deposited is greater or less than the amount finally determined by the decision in such proceeding or by an appeal, the amount of the increase or decrease shall be paid by or refunded to the condemnor. Va. Code §§ 25.1-315 and 25.1-316. If the amount finally determined is less than the amount deposited and the landowner has drawn down the funds on deposit pursuant to Va. Code § 25.1-310, the landowner is responsible for repayment to the condemning authority with interest. Va. Code § 25.1-316. If the amount finally determined is more than the amount deposited, the condemning authority is responsible for paying interest on the difference between

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<sup>25</sup> The amount deposited must be at least the greater of any required appraisal or the real estate tax assessment if the entire parcel for which the assessment was made is sought to be acquired. Va. Code § 25.1-305(B).

the deposited amount and the final amount from the date of take to the date of determination. Va. Code § 25.1-315.

#### **4-7.03(d) Initiated Trial**

The owner of property subject to a quick-take may petition for the appointment of commissioners or the empanelment of a jury to determine just compensation if the condemnor has not completed construction “after a reasonable time for such construction has elapsed,” or if no condemnation proceedings have been instituted within sixty days after the completion of construction, 180 days after the condemnor has taken possession of the property, or 180 days after the recordation of the certificate. Va. Code § 25.1-318(A). The owner bears the burden of demonstrating the amount of just compensation due, and the condemnor shall reimburse the owner for fees and costs charged by a lienholder, including filing fees and attorney fees, incurred in filing the petition. Va. Code § 25.1-318(B).

#### **4-7.04 Entry After Commissioner’s Report Filed**

In the ordinary case, the condemnor may enter upon the property to be condemned for the purpose of constructing its works when the commissioners’ report or jury award has been filed and the condemnor has paid into court the amount awarded notwithstanding further proceedings in the case. Va. Code § 25.1-238.

## **4-8 DETERMINATION OF JUST COMPENSATION**

The issue of just compensation is normally determined by either a condemnation jury or a panel of commissioners. Va. Code §§ 8.01-187, 25.1-220, 25.1-227.1, 25.1-227.2, 25.1-228, 25.1-229, and 25.1-318. However, just compensation may be determined by the court if all parties agree or if the landowner, after notice, fails to appear, respond, or request either a jury or commissioners. Va. Code §§ 25.1-213 and 25.1-220.

### **4-8.01 Appointment of Commissioners**

#### **4-8.01(a) Qualifications**

All commissioners shall be disinterested freeholders<sup>26</sup> and residents of the county or city wherein the property or the greater portion of the property to be condemned is situated. No person shall serve as a commissioner for more than one full week within any three-month period, unless agreed to by the parties. Va. Code § 25.1-227.1(B).

#### **4-8.01(b) Selection**

The condemnor and landowner may agree to submit either five or nine qualified persons to act as commissioners. Va. Code § 25.1-227.2(A). If the parties do not agree, each party shall submit a list of eight persons or, in the absence of a list, the court may submit a list on behalf of a party. Va. Code § 25.1-227.2(B). The court then selects thirteen potential commissioners from the lists with at least two alternates, who must be summoned at least thirty days before the trial. If nine are selected from these lists, each party then has two preemptory strikes. If a landowner has filed no answer, then the court may subpoena five persons to serve as commissioners.<sup>27</sup> Va. Code § 25.1-227.2(E).

#### **4-8.01(c) Grounds for Setting Aside Awards**

Awards have been set aside under the commissioner system where:

1. The landowner gave commissioners lodging, food, and liquor during trial. The Supreme Court set aside the award without regard to any

<sup>26</sup> Freeholders include owners of condominium units. Va. Code § 25.1-100.

<sup>27</sup> In VDOT condemnations, billboard owners are deemed to be owners. Va. Code § 25.1-227.2(G).



actual influence on the award. *New River, Holston & W. R. Co. v. Honaker*, 119 Va. 641, 89 S.E. 960 (1916).

2. The landowner entertained the commissioners, and the commissioners discussed the landowner's financial condition with the landowner's lawyers before making their report. *Va.-W. Power Co. v. Kessinger*, 122 Va. 135, 94 S.E. 186 (1917).
3. Panel members were treated to food and entertained by the landowner. The Court applied the general rule in civil litigation of setting aside jury verdicts where any jury member is entertained by someone interested in the suit. *Griffin v. Tomlinson*, 155 Va. 150, 154 S.E. 483 (1930).
4. One commissioner had previously been paid to appraise the same property by the condemnor. *Collins v. Pulaski Cnty.*, 201 Va. 164, 110 S.E.2d 184 (1959).
5. One commissioner owned property next to the property to be condemned, and the commissioner had been asked by the landowner to serve on the panel. *May v. Crockett*, 202 Va. 438, 117 S.E.2d 648 (1961).
6. Several commissioners read a newspaper article describing negotiations to buy the parcel before hearing the case (including the amount of the offer made by the city). *Siegfried v. City of Charlottesville*, 206 Va. 271, 142 S.E.2d 556 (1965).
7. One commissioner was disputing the valuation of his property by the State Highway Department in another county. *Commonwealth Transp. Comm'r v. DuVal*, 238 Va. 679, 385 S.E.2d 605 (1989).
8. There was "mere" contact by the landowner's attorney with a commissioner before the trial. *Id.*
9. Commissioners had litigated with condemnor over the use of their property and had made statements in depositions that county had a "personal vendetta" against property owners and that county staff was "arrogant and power-hungry." *Chesterfield Cnty. V. Kavanaugh*, No. CL95-1224 (Chesterfield Cnty. Cir. Ct. 1998).
10. A commissioner was a client of the attorney representing the landowners, and the commissioner had used the same appraiser as the landowner in a previous condemnation. *City of Virginia Beach v. Giant Square Shopping Ctr.*, 255 Va. 467, 498 S.E.2d 917 (1998).
11. Ownership of an adjacent parcel and recent settlement of an acquisition with the condemning authority is a present financial interest so intimately related to the issue of compensation that a potential commissioner could not "sit indifferent in the cause." *Commonwealth Transp. Comm'r v. Chadwell*, 254 Va. 302, 491 S.E.2d 723 (1997).

#### 4-8.01(d) Grounds Rejected for Setting Aside Awards

Objections under the commissioner system have been overruled where:

1. Persons recently acted as commissioners, because they can be disinterested and are not disqualified from acting as commissioners again. *Whitworth v. State Highway Comm'r*, 209 Va. 95, 161 S.E.2d 698 (1968).
2. A commissioner had a “mere” friendship or ongoing business relationship with a party, since it did not involve financial interests related to issues commissioners would decide. Since a party to a condemnation is unlikely to select an enemy as a prospective commissioner, it is clear that the General Assembly concluded that friendship, standing alone, is not sufficient grounds for disqualification. *State Highway & Transp. Comm’r v. Dennison*, 231 Va. 239, 343 S.E.2d 324 (1986). The Virginia Supreme Court has held that a business’s customers cannot be per se excluded, *First Bank & Trust Co. v. Commonwealth Transp. Comm’r*, 263 Va. 451, 559 S.E.2d 633 (2002), and that the sale of personal insurance policies on the construction of buildings for the landowner on adjacent property did not ultimately relate to the parcel being acquired. *State Highway & Transp. Comm’r v. Dennison*, 231 Va. 239, 343 S.E.2d 324 (1986).
3. A commissioner had business dealings with an expert witness and an ongoing business relationship with the landowner because neither relationship creates a direct or indirect interest in the property sufficient to disqualify the commissioner for cause. *State Highway & Transp. Comm’r v. Cardinal Realty Co.*, 232 Va. 434, 350 S.E.2d 660 (1986). *But see May v. Crockett*, 202 Va. 438, 117 S.E.2d 648 (1961) (stating concern about the integrity of the system).
4. A commissioner was pastor of the landowner’s church, his personal friend, and would get an indirect financial benefit from his tithe to the church. *Commonwealth Transp. Comm’r v. Branch*, 16 Va. Cir. 50 (Chesterfield Cnty. 1989).
5. The Court did not reach a decision on the issue of whether a commission’s decision was valid when one of the commissioners slept through the presentation of evidence. *Dillon v. Davis*, 201 Va. 514, 112 S.E.2d 137 (1960).
6. Commissioners made an excessive award, misunderstood the court’s instructions, and proceeded under erroneous principles of law. *Va. Elec. & Power Co. v. Shaffer*, 209 Va. 418, 164 S.E.2d 590 (1968).
7. Commissioners were right-of-way agents for other condemning authorities.
8. Commissioners are employees of other government agencies who might deal with the county VDOT engineer.
9. Commissioners’ award was based on what they thought the landowner “deserved,” and the commissioners purposely refused to follow the court’s instruction to use the Virginia definition of fair market value in making their award. *Cnty. of Chesterfield v. Busch*, No. CL03-1078 (Chesterfield Cnty. Cir. Ct. 2005).

Many of the relationships between potential commissioners and participants in a condemnation case that have historically been tolerated in Virginia would, if existing in a normal civil jury trial, result in striking the juror for cause.

#### **4-8.02 Appointment of a Jury**

##### **4-8.02(a) Qualifications**

If the landowner selects a jury, jury commissioners, established pursuant to Va. Code § 8.01-336 et seq., randomly select condemnation jurors. The qualifications for condemnation jurors are the same as for civil juries (e.g., must be residents, etc.), except that they must also be freeholders. Va. Code § 25.1-228. Freeholder status is to be noted on the jury list by the jury commissioners. Va. Code §§ 8.01-345, 8.01-346, and 25.1-229(A).

##### **4-8.02(b) Selection**

On the day set for trial, jurors who appear are called to be sworn based on their voir dire until a disinterested and impartial panel is obtained. Any juror may be stricken for cause. From the impartial panel the judge randomly selects thirteen jurors. From this panel of thirteen jurors, each party has four peremptory strikes. The court may appoint alternate jurors. Five persons from a panel of not fewer than thirteen jurors constitute a jury in a condemnation case. If fewer than seven jurors remain prior to the exercise of peremptory strikes, the trial may proceed and be heard by less than five jurors provided the parties agree. However, no trial may proceed with fewer than three jurors. Va. Code § 25.1-229(B).

Voir dire is conducted in the same manner as in other civil juries. Va. Code § 8.01-358. Trial judges in civil cases in Virginia typically do not permit extensive voir dire.

Either party may challenge a juror for cause. Existing law on striking “commissioners” for cause is likely to remain relevant even when a jury is used. However, given the random selection process under Va. Code § 25.1-229, there is likely to be little chance of the type of financial or locational relationships that can occur when the parties chose commissioners.

#### **4-8.03 Objections to Juror or Commissioner Based on Discriminatory Motive**

In *Commonwealth Transportation Commissioner v. Thompson*, 249 Va. 292, 455 S.E.2d 206 (1995), the Virginia Supreme Court held that the United States Supreme Court’s decision in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), which prohibited racial discrimination in jury selection, applies to peremptory challenges to condemnation commissioners. *Batson* was extended to gender discrimination in *J.E.B. v. Alabama*, 511 U.S. 127, 114 S. Ct. 1419 (1994). Thus, a condemnor or owner must be able to articulate a race- or gender-neutral explanation for striking any proposed juror or commissioner if challenged under *Batson* or *J.E.B.* *Batson* motions questioning strikes for racial or gender reasons are now common in trials using randomly chosen juries.

#### **4-8.04 Conduct of Jurors and Commissioners at Trial**

The behavior of both parties and their counsel toward jurors or commissioners in eminent domain trials should be the same as toward jurors in any other civil trial.

The accepted approach is that all jurors or commissioners must view the property and hear the evidence, but only a majority of the full jury or panel of commissioners is necessary to sign the report setting the value. A minority report may be filed but need not be. See *Dillon v. Davis*, 201 Va. 514, 112 S.E.2d 137 (1960).

Jurors or commissioners summoned or empaneled receive the amount authorized by Va. Code § 17.1-618 (currently \$50.00 each day) for their attendance, travel, and other costs, such costs to be paid by the condemnor. Va. Code § 25.1-235.

#### **4-8.05 Issues Determined by the Jury, Commissioners, or Court When Setting Value**

##### **4-8.05(a) Date of Valuation**

By statute, the date of valuation is as of the time of the lawful taking or the date of the filing of the petition, whichever occurs first. Va. Code § 25.1-100.<sup>28</sup> See also, however, Va. Code § 25.1-107, which provides for an earlier date of valuation than the filing of the petition if the property has been “downzoned” within a conservation or redevelopment area or was downzoned within five years before the creation of a conservation or redevelopment plan. If there is a factual dispute regarding the date of the take, the jurors or commissioners make the determination of date of take. Generally, there will be no factual dispute, and the take date will be determined as a matter of law by the court.

In condemnations by housing authorities, if the value of the take was higher on the date of the public announcement than on the date the proceeding was instituted, and the depreciation in value is due to such public announcement, such depreciation or “damage” is recoverable if the court finds that there was an “unreasonable delay” in instituting condemnation. Estimated unpaid taxes for any higher value during the delay period may be offset against the award. The court may also consider the effect on market value of pending zoning or variance applications. See Va. Code § 36-27; *Hunter v. Norfolk Redev. & Hous. Auth.*, 195 Va. 326, 78 S.E.2d 893 (1953). A civil jury awarded \$281,590 in compensation for “lost value” after a housing authority threatened to condemn property for a continuous twenty-year period but failed to do so. *Claytor v. Roanoke Redev. & Hous. Auth.*, 95 Va. Cir. 527 (City of Roanoke 2004).

##### **4-8.05(b) Just Compensation**

There is no burden of proof on either the condemnor or the landowner to prove the value of the property being taken. *Hamer v. Sch. Bd. of Chesapeake*, 240 Va. 66, 393 S.E.2d 623 (1990). Thus, if neither side presents evidence of the value of the take, the jury or commissioners’ panel must still make an award. The body determining compensation, whether jury, commissioners, or judge, shall determine (i) the value of the property to be taken, and (ii) the damages, if any, that may accrue to the residue beyond the specific enhancement in value, if any, to such residue by reason of such taking and use. Va. Code § 25.1-230(A). Such enhancement in value shall not be offset against the value of the property taken, and if such enhancement in value exceeds the damages, there shall be no recovery against the landowner for such excess. *Id.* The conclusion of the jurors or commissioners need not be unanimous, and a majority of the jurors may act in the name of the jury. Va. Code § 25.1-229. Enhancements that may reduce damages to the residue must be direct and not shared in common with the general public. Damages may not be speculative but must flow directly from the taking. *State Highway & Transp. Comm’r v. Lanier Farm, Inc.*, 233 Va. 506, 357 S.E.2d 531 (1987).<sup>29</sup> Since just compensation for a taking is fair market value, just compensation for a temporary taking is fair rental value during the construction period. *Anderson v. Chesapeake Ferry Co.*, 186 Va. 481, 43 S.E.2d 10 (1947).

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<sup>28</sup> In an inverse condemnation declaratory judgment proceeding, however, the date of valuation is the date determined by the court to be the date the property was taken or damaged by the acts of the government. Va. Code § 8.01-187.

<sup>29</sup> Although the case construes the statutory term “peculiar benefits,” which was subsequently deleted from the statute and replaced by “specific enhancement,” the same analysis should apply.

In a condemnation by the United States of three parcels of property owned by Arlington County to expand Arlington National Cemetery, the trial judge awarded compensation based not on traditional “just compensation” principles but on the alternate concept available in federal condemnations of “substitute facilities.” Under the substitute facilities concept, the federal condemnor builds equivalent facilities as those taken from the landowner as the measure of just compensation. On appeal, the Fourth Circuit ruled that the trial judge erred by considering the value of the parcels as a single unified property constituting only an interconnected roadway, without considering the potential value of other parts of the property for development or other valuable purposes. The judge should have applied the substitute facilities theory to each individual parcel from which the take occurred. *United States v. 8.929 Acres*, 36 F. 4th 240 (4th Cir. 2022).

In determining the market value of the property before the taking, the deciding body may consider everything a buyer and seller in the marketplace would reasonably consider, except any increase or decrease in the fair market value of the property caused by the public use for which the property is being acquired (or for which it is anticipated to be acquired), other than that due to physical deterioration within the reasonable control of the owner. Va. Code § 25.1-230(A).

In determining the market value of the residue after the taking, the deciding body may consider everything a buyer and seller in the marketplace would reasonably consider, including the public use for which the property is being acquired, but may not consider any general enhancement the residue experiences in common with surrounding properties as a result of the public use. Va. Code § 25.1-230(A).

Tax assessments are not proof of value in an eminent domain proceeding. *Id.*

#### **4-8.05(c) View and Other Evidence in Determining FMV and Damages**

The body determining just compensation must view both the property being condemned and other property not taken from which it is being severed. The view is in the presence of the sheriff or his deputy and the parties or one representative of each party. The judge is to accompany the jurors or commissioners on the view upon motion of either party. The view cannot be considered “as the sole evidence in the case.” Va. Code § 25.1-231.

After the view, the court, commissioners, or jurors “hear the testimony in open court on the issues joined.” Va. Code § 25.1-232.

If introduced at trial, contracts between the parties concerning the construction, operation, or maintenance of the condemnor’s project, maintenance of crossings, or the condemnor’s agreement to make payments for future damages must be made a part of the report. Upon confirmation of the report, such agreements become covenants running with the land. Va. Code § 25.1-236. However, a contract between the condemnor and a contractor to restore an easement after installation of a utility line would not be made part of the record even if the contract was breached. See *Chesterfield Cnty. v. Jewett*, No. CL89-518 (Chesterfield Cnty. Cir. Ct. 1991).

In a case where the only evidence of value for a water easement was \$30,000 from the condemnor’s appraiser, the jury could properly award \$6,000 when the appraiser testified that appraisers used different percentages of fee value when valuing easements. *MSO, Inc. v. Cnty. of Chesterfield*, No. CL03-1084 (Chesterfield Cnty. Cir. Ct. 2005).

#### **4-8.05(c)(1) Elements of Value That May Be Considered**

Elements that may be considered in determining the value of the take or damages to the residue may include:

1. *Loss of access.*<sup>30</sup> Just compensation includes any reduction in value for lost access to the residue beyond any specific enhancements in value. Loss of access is defined as “a change of vehicular or pedestrian access to property that is caused by a public use project for which the eminent domain power has been exercised against the property and which results in a diminution in the value of the property.” Va. Code § 25.1-100. Only property owners whose property has been subject to a condemnation may claim loss of access. Previously, cases deciding compensability of lost access were based on the concept of “material impairment” that no longer exists. See, e.g., *Hooked Grp., LLC v. City of Chesapeake*, 298 Va. 663, 842 S.E.2d 413 (2020) (landowner’s loss of one point of ingress and egress caused by the city’s closure of a road was not compensable because it did not constitute a “material impairment” of direct access<sup>31</sup> to the property, since the landowner is entitled only to “reasonable access” to property). Since the value of lost access caused by condemnation is recoverable as damages in an eminent domain action, a parcel landlocked by condemnation cannot give rise to any implied grant of an “easement by necessity” over the land of others. *Clifton v. Wilkinson*, 286 Va. 205, 748 S.E.2d 372 (2013).
2. *Lost profits.* Lost profits is defined as a loss of profits or expected profits suffered by a business or farm operation as a result of a taking or damaging of part or all of the property on which the business or farm operation is operated. Va. Code § 25.1-100. The calculation of lost profits is for a period of three years from the later of the date of valuation or the date the state agency or its contractor prevents the owner from using the land or other property rights are taken. *Id.* The burden is on the owner to prove with a reasonable certainty the amount of lost profits is directly and proximately caused by the taking or damaging. The owner must also demonstrate the loss could not reasonably be prevented by relocation or by reasonably prudent measures. The owner must also demonstrate the loss is not included in relocation assistance or duplicated in other compensation. The loss shall be determined in accordance with generally accepted accounting principles applied on a consistent basis. *Id.*; Va. Code § 25.1-230.1(C). Lost profits must be set forth specifically in the award of just compensation. Va. Code § 25.1-230.1(D).

Condemning authorities are not required to include lost profits in a bona fide written offer to purchase the property prior to condemnation. Va. Code § 25.1-230.1(E). Landowners making a lost profits claim must provide condemning authority with tax returns for the three years period prior to date of take or the date the condemning authority prevents the owner from using the land and for each year thereafter during the pendency of the condemnation proceeding. The condemning authority shall not divulge the information provided in this subsection except in connection with the condemnation proceeding.

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<sup>30</sup> Whether any change in access arising out of a take constitutes compensable lost access is a decision made by the decision-maker/fact-finder on the issue of just compensation and is not a legal determination to be made by the court. 2014 Op. Va. Att’y Gen. 18.

<sup>31</sup> Virginia Code §§ 25.1-100 and 25.1-230.1 were significantly changed by the General Assembly as of July 1, 2022. The access alleged to be lost is no longer required to be “material” or “direct.”

Va. Code § 25.1-230.1(F). Proceedings to adjudicate lost profits may be bifurcated from the determination of just compensation. Va. Code § 25.1-230.1(F). No action for inverse condemnation for lost profits or lost access is available when the impact to the property by any interference or interruption is for a period of fewer than seven days. Va. Code § 25.1-230.1(G).

If lost profits are proved and the owner of the property and the business or farm are the same, then any enhancements or peculiar benefit is offset against both damage to the residue and lost profits. Va. Code § 25.1-230.1(D).

3. *Comparable sales.* Evidence of comparable sales may be admitted. *Helmick Family Farm v. Comm'r of Highways*, 297 Va. 777, 832 S.E.2d 1 (2019). The appraiser locates sales of similar property, then makes upward or downward adjustments to these sales prices based on differences in the subject property. The appraiser should adjust the sale price of each comparable appropriately. Factors that cause adjustments, upward or downward, include differences in size, shape, topography, frontage, and zoning. Compare cases cited in section [4-8.05\(c\)\(3\)\(2\)](#).
4. *Amount of rent.* The amount of rent paid by the tenant to a landowner is admissible to prove the value of the condemned land. *Gray & Gregory v. GTE S., Inc.*, 261 Va. 67, 540 S.E.2d 498 (2001); *May v. Dewey*, 201 Va. 621, 112 S.E.2d 838 (1960). The judicial rulings modify the general rule that the sum paid by a condemnor for similar land is inadmissible because it is usually not a fair indication of market value. However, the lease that generated the rental income must be the result of an arm's length transaction and not the result of collusion. The fact that leases were fifteen years old when the condemnation was filed did not make the leases too remote in time to provide a reasonable basis for valuing the parcels.
5. *Value of structures owned by a tenant.* Although the value of a leasehold is not a component of just compensation, the fair market value of any buildings, structures, or improvements owned by a tenant are to be included in the valuation as if they were owned by the landowner. Va. Code § 25.1-421; *Lamar Corp. v. Commonwealth Transp. Comm'r*, 262 Va. 375, 552 S.E.2d 61 (2001); *Lamar Corp. v. City of Richmond*, 241 Va. 346, 402 S.E.2d 31 (1991); *Exxon Corp. v. M & Q Holding Corp.*, 221 Va. 274, 269 S.E.2d 371 (1980); see also Va. Code § 25.1-234. The value of a lessee's billboard structure is included in the value of the property even when the lessee retained the right to remove the structure at any time. Either sales comparison or income methods of valuation are admissible. 2001 Op. Va. Att'y Gen. 138 (cost approach for valuation of billboards not valid method).
6. *Future development plans.* In *Helmick Family Farm v. Commissioner of Highways*, 297 Va. 777, 832 S.E.2d 1 (2019), evidence of the reasonable probability of a favorable rezoning is relevant to determining fair market value. Recognizing that line drawing is required to distinguish between evidence of a "reasonable probability" of future development and "remote and speculative" evidence (see section [4-8.05\(c\)\(3\)](#)). Factors to be considered in determining the reasonableness of a rezoning include: rezoning of nearby property;



growth patterns; changes in the use and character of the neighborhood; market demand; any sales of similar properties that reflect anticipated zoning; physical characteristics of the area; and age of the zoning ordinance. In this case, such factors were sufficient to create a jury issue on the reasonable probability of rezoning although (1) no application was pending at the time; (2) comprehensive plan designated property as commercial; (3) nearby land was used for light industrial purposes; (4) board of supervisors routinely approved applications to change from agricultural to commercial zoning; and (5) property had road frontage and water and sewer services.

Evidence of potential development of the parcel for subdivision purposes as a non-speculative measure of fair market value of the parcel as a whole can be considered, although the “developmental” approach may not be used to support a landowner’s evaluation. *Stafford Reg’l Airport Comm’n v. Lawrence*, 39 Va. Cir. 179 (Stafford Cnty. 1996). In *Commonwealth v. Fairbrook Business Park Associates*, 244 Va. 99, 418 S.E.2d 874 (1992), the Virginia Supreme Court held that if the condemnor introduces evidence of the landowner’s development plans, then the landowner may introduce evidence of damages to the residue based on the frustration of his plans. Evidence of damages arising from future development must be reasonably foreseeable in a reasonable time frame. Similarly, in *Lynch v. Commonwealth Transportation Commissioner*, 247 Va. 388, 442 S.E.2d 388 (1994), the Virginia Supreme Court held that evidence of development plans that demonstrate the property’s potential, the adaptability and suitability for its highest and best use, and the impact of the taking on the residue was admissible in light of the existing conditions and circumstances.

7. *Adjustment or increased development costs for residue.* Reasonable costs of adjusting the residue of the property to the new conditions, sometimes referred to as increased development costs, are admissible. *Lynch v. Commonwealth Transp. Comm’r*, 247 Va. 388, 442 S.E.2d 388 (1994); *State Highway & Transp. Comm’r v. Allmond*, 220 Va. 235, 257 S.E.2d 832 (1979). The increased relocation costs of a proposed interior road are a proper factor in determining the value of residue before and after a take, although they cannot be remote or speculative. *Comm’r of Highways v. Karverly, Inc.*, 295 Va. 380, 813 S.E.2d 322 (2018) (LGA filed an amicus brief); *Revocor Corp. v. Commonwealth Transp. Comm’r*, 259 Va. 389, 526 S.E.2d 4 (2000).
8. *Damage to adjacent parcels.* If the adjacent parcels meet the “unity of lands” doctrine of unity of use, physical unity, and unity of ownership, *Va. Elec. & Power Co. v. Hylton*, 292 Va. 92, 787 S.E.2d 106 (2016), and *Va. Elec. & Power Co. v. Webb*, 196 Va. 555, 84 S.E.2d 735 (1954), the adjacent parcel will be subject to being “damaged” as if the “take” of the entire parcel was a partial take. To constitute “unity of use,” there must be an actual, permanent, and present joint use of all the parcels as of the date of take, not a joint use that might occur at some future date. *Commonwealth Transp. Comm’r v. Glass*, 270 Va. 138, 613 S.E.2d 411 (2005). Unity of ownership does not exist when adjacent tracts are owned by separate corporations, even if the corporations are wholly owned by the same

people. *Bogese, Inc. v. State Highway & Transp. Comm'r*, 250 Va. 226, 462 S.E.2d 345 (1995). In a complicated procedural setting, the Virginia Supreme Court upheld a \$3 million verdict for loss of visibility to the residue of the property containing a store. Somewhat confusingly, the Court ended its opinion by stating that “we do not decide whether a landowner, whose real property is the subject of a condemnation proceeding, may recover damages for loss of visibility to the residue of the real property.” *Commonwealth Transp. Comm'r v. Target Corp.*, 274 Va. 341, 650 S.E.2d 92 (2007); see also *Va. Elec. & Power Co. v. Hylton*, 292 Va. 92, 787 S.E.2d 106 (2016) (expressly leaving unresolved whether and to what extent loss of visibility is a compensable damage to the residue); *City of Chesapeake v. Dominion SecurityPlus Self Storage, L.L.C.*, 291 Va. 327, 785 S.E.2d 403 (2016).

9. *Changes in use*. Changes in the highest and best use resulting in increased value of the property based on reasons unrelated to the construction of the project for which the land was being condemned are relevant. *Commonwealth Transp. Comm'r v. DuVal*, 238 Va. 679, 385 S.E.2d 605 (1989).
10. *Certain inconveniences, fears, and concerns*. The inconvenience to the future operation of a business created by the construction of the improvements can be considered, although such “inconvenience” must be measurable and not speculative. Also to be considered are smoke, cinders, dust, dirt, and the possibility of fire on the residue property due to the use to be made by the condemnor of the property, *S. Ry. Co. v. Fitzpatrick*, 129 Va. 246, 105 S.E. 663 (1921),<sup>32</sup> and the cutting of trees, if heating and cooling systems within buildings on the residue will be adversely impacted by increased “solar load.” *Chesterfield Cnty. v. Kavanaugh*, No. CL95-1224 (Chesterfield Cnty. Cir. Ct. 1995). Other elements of damages that affect fair market value based on the particular use to be made by the condemnor of property being taken, for example, include use as a dog pound and the effect of noise pollution, increased darkness, change in shadow characteristics, reduced views, and other aesthetic issues resulting from the improvements to be constructed.

#### **4-8.05(c)(2) Waiver of Damages**

In *City of Chesapeake v. Dominion SecurityPlus Self Storage, L.L.C.*, 291 Va. 327, 785 S.E.2d 403 (2016) (LGA filed an amicus brief), the Supreme Court held that rights to damages may be waived by contract. As a condition to receiving a variance, a subdivision plat contained a “note” that reserved a designated area for future “purchase” by the city. The note further stated that the purchase value of the reserved designated area was the fair market value at the date of the city’s exercise of its right to purchase, without compensation for any improvements within the area. Further, the owners would not have “any claims for damage . . . to the residue . . . by reason of said purchase.”

Subsequently the landowner refused to sell the property to the city, and the city effected a taking by eminent domain of the reserved designated area plus an additional 2,000 square feet. The circuit court awarded damages to the residue for loss of access and loss of visibility. On appeal, the landowner raised three arguments: (1) the “note”

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<sup>32</sup> *Query*: Is the aesthetic effect of a sewage treatment plant an element of damage to the residue?

was not applicable because the city did not “purchase” the property; (2) only damages to the residue that were “foreseeable” at the time of recordation could be waived, and loss of access and visibility were not anticipated at that time; and (3) the “note” was voided by acquisition of property outside of the reserved designated area.

The Supreme Court rejected all of the landowner’s arguments. It found that the subdivision plat constituted a valid contract. The Court stated that as the landowner rebuffed the city’s attempt to purchase the property, the note on the plat constituted a contract and applied to acquisition by eminent domain. The Court refused to impose a term of foreseeability on the waiver of damages, which it held to be “broad.” The Court also held that the acquisition of property in addition to the reserved area did not void the waiver, as the waiver had no application to that additional property. Damages to the residue could not be awarded for that take, however, as the landowner had failed to present any evidence that any of the awarded damages could be apportioned to that additional take. The Court declined to decide whether and to what extent loss of visibility is a compensable damage to the residue in condemnation. In contrast, the opinion in *HMK Corp. v. Chesterfield County*, 637 F. Supp. 710 (E.D. Va. 1986), *aff’d*, 828 F.2d 1071 (4th Cir. 1987), held that a landowner could not waive the statutory method of establishing value.

#### **4-8.05(c)(3) Elements of Value That May Not Be Considered**

Elements that should not be considered in determining the value of the take or damages to the residue because they have been judicially determined as speculative or unrelated to the valuation of the property include:

1. *Loss of forms of access or the nature of access* may not be considered except as provided by statute (see generally section 4-8.05(c)(1)). *State Highway Comm’r v. Easley*, 215 Va. 197, 207 S.E.2d 870 (1974). *But see State Highway & Transp. Comm’r v. Dennison*, 231 Va. 239, 343 S.E.2d 324 (1986) (court admitted evidence of damage to the residue resulting from a reduction in access); *Smith v. State Highway & Transp. Comm’r*, 4 Va. Cir. 223 (Scott Cnty. 1984). The trial court improperly allowed evidence of “circuitous access” when the widening of a road created a barrier preventing left turn access into the property. *State Highway Comm’r v. Howard*, 213 Va. 731, 195 S.E.2d 880 (1973).<sup>33</sup> In a taking to construct a right-hand turn lane, the trial court excluded evidence of damages to the residue caused by high school student traffic using the turn lane to access another road leading to a high school because the county had not condemned the owner for either the access road or the high school. *Cnty. of Chesterfield v. Busch*, No. CL03-1078 (Chesterfield Cnty. Cir. Ct. 2005). The Fifth Amendment requirement of just compensation “does not include the diminution in value of the remainder” of the parcel “caused by the acquisition and use of adjoining lands” not owned by the landowner for a related project. *Campbell v. United States*, 266 U.S. 368, 45 S. Ct. 115 (1924).
2. *Certain comparable sales*<sup>34</sup> that were remote in location, disparate in size, different in zoning classification, furnished with water and sewer

<sup>33</sup> The statutory revisions to Va. Code §§ 25.1-100 and 25.1-230.1 may have changed this long-standing body of case law.

<sup>34</sup> For other cases involving comparable sales, see *Gray & Gregory v. GTE S., Inc.*, 261 Va. 67, 540 S.E.2d 498 (2001); *May v. Dewey*, 201 Va. 621, 112 S.E.2d 838 (1960); and *Collins v. Pulaski Cnty.*, 201 Va. 164, 110 S.E.2d 184 (1959).

services, and had greatly differing public access<sup>35</sup> are not considered. However, appraisal handbooks suggest that comparables occurring after the date of the take are, nevertheless, admissible so long as the normal requirements of “comparability” apply such as closeness in time and the use of proper adjustments for differences between the parcels. Evidence of a sale by a landowner to a buyer having the right of eminent domain, that occurred prior to a condemnation for an adjacent parcel by the same condemnor was not a “fair market value” transaction that could be used as a comparable sale because the sale was not: (a) voluntary; (b) free from compulsion; or (c) by way of compromise as perceived not by just the landowner but also by the condemnor. *Dean v. Bd. of Cnty. Sup’rs of Prince William Cnty.*, 281 Va. 536, 708 S.E.2d 830 (2011); *cf. State Highway Comm’r v. Bell*, 5 Va. Cir. 467 (Richmond Cnty. 1976). An appraisal based on an imagined and speculative parcel rather than the actual parcel was properly disallowed by the trial court. However, an award that was only 20 percent of the appraised amount testified to by the only appraiser was upheld when there was testimony that the lower award was consistent with more limited values allowable in accepted appraisal techniques. *Dean v. Bd. of Cnty. Sup’rs of Prince William Cnty.*, 281 Va. 536, 708 S.E.2d 830 (2011); *MSO, Inc. v. Cnty. of Chesterfield*, No. CL03-1084 (Chesterfield Cnty. Cir. Ct. 2005); *cf. State Highway Comm’r v. Bell*, 5 Va. Cir. 467 (Richmond Cnty. 1976).

3. *Assessed value for tax purposes.* Even though the assessed value for tax purposes is inadmissible at trial because it is not probative of fair market value, Va. Code §§ 25.1-305(E), 25.1-417(C) (requirement that tax assessment be the basis for an offer if higher than the appraised value does not make such an assessment admissible as proof of value in an eminent domain proceeding), the assessed value may be introduced as a prior inconsistent statement made by an expert witness testifying as to fair market value when the witness’s firm had participated in the county-wide tax assessment. Va. Code §§ 25.1-305(E), 25.1-417(C); *Russell v. Commonwealth Transp. Comm’r*, 261 Va. 617, 544 S.E.2d 311 (2001) (4-3).
4. *Frustration of future plans or future damages.* Frustration of future plans such as loss of goodwill or difficulty in relocating, which is a loss personal to the owner and not a loss to the land itself, *State Highway & Transp. Comm’r v. Lanier Farm, Inc.*, 233 Va. 506, 357 S.E.2d 531 (1987), future damages unless reflected in the current fair market value, *Va. Elec. & Power Co. v. Farrar*, 205 Va. 244, 135 S.E.2d 807 (1964) (holding that the construction of a dam that potentially could, but may not, cause future flooding is not an element of damages), and the value of property after future development or after development of property in the vicinity of the property are not relevant to valuation. *Appalachian Power Co. v. Johnson*, 137 Va. 12, 119 S.E. 253 (1923). Nor can there be testimony as to value based on future expenditures and improvements. *See Richmond & Petersburg Elec. Ry. v. Seaboard Air Line Ry.*, 103 Va. 399, 49 S.E. 512 (1905). A use

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<sup>35</sup> But see *Richfood, Inc. & Safe-Chester Assocs. v. Cnty. of Chesterfield*, No. CL98-1228 (Chesterfield Cnty. Cir. Ct. 1998), where the plaintiff sought a reduction in assessed value for a large food warehouse and cold storage facility. Since the only comparable facilities were out-of-state in North Carolina and Georgia, the court allowed testimony on their fair market value.

must be contemplated at the time of the taking for evidence related to it to be admissible. *Va. Elec. & Power Co. v. Hylton*, 292 Va. 92, 787 S.E.2d 106 (2016) (surface mine plans not created until discovery). In *Appalachian Power Co. v. Anderson*, 212 Va. 705, 187 S.E.2d 148 (1972), the Virginia Supreme Court rejected the introduction of a plat showing the parcel developed into a trailer park when at the time of the condemnation the property had not then been subdivided, utilities had not been extended to the proposed future trailer sites, and streets and driveways had not been laid off.<sup>36</sup> Likewise, in *Palmyra Associates, LLC v. Commissioner of Highways*, 299 Va. 377, 851 S.E.2d 743 (2020), the Court affirmed the lower court's refusal to admit site plans as evidence of damages to the residue where the plans depicted a proposed commercial development, were prepared ten years before the taking, and had never been approved by the County. Nor did the lower court err in striking the testimony of the property's co-owner regarding the loss to the residue where his estimate was based on the loss of a speculative future building pad site.

5. *Gross sales and remote or speculative profits* beyond those statutorily allowed (see sections 4-8.05(c)(1) & (2)) resulting from future expenditures or improvements should not be part of establishing current value. However, if the market value is based upon a use different from the present use, "the expenditures and improvements necessary to allow the property to achieve its maximum potential" must also be considered. *Arlington Cnty. Bd. v. Ginsberg*, 228 Va. 633, 325 S.E.2d 348 (1985); accord *Fruit Growers Express Co. v. City of Alexandria*, 216 Va. 602, 221 S.E.2d 157 (1976) (holding that undeveloped property may not be valued on per-lot basis since it does not take into account the expense of clearing, improving, constructing streets, paying taxes and interest, or selling the property and because such computation of value is too uncertain and conjectural to be fairly computed). These holdings preclude the "developmental" approach to appraisals where the appraiser divides raw land into lots, applies the sell-off value per lot, deducts developmental costs, and applies a discount rate to arrive at a present value of the whole. See, e.g., *Colonial Pipeline Co. v. Lohman*, 207 Va. 775, 152 S.E.2d 34 (1967); *Stafford Reg'l Airport Comm'n v. Lawrence*, 39 Va. Cir. 179 (Stafford Cnty. 1996); see also *City of Virginia Beach v. Oakes*, 263 Va. 510, 561 S.E.2d 726 (2002) (no damage to the residue based on speculative rents from nonexistent building for which zoning change would be required). An appraisal of an easement will be stricken as speculative if the appraiser assumed that a commercial property's highest and best use would be as subdivided into smaller lots and the appraiser then cumulated the value of smaller easements for each assumed subdivided lot. *MSO, Inc. v. Cnty. of Chesterfield*, No. CL03-1084 (Chesterfield Cnty. Cir. Ct. 2005). Gross sales are inadmissible to prove the fair market value of business property being taken. *Commonwealth Transp. Comm'r v. Newcomb*, 75 Va. Cir. 488 (Amherst Cnty. 2007) (citing *State Highway Comm'r v. Donelson*, 221 Va. 822, 273 S.E.2d 814 (1981)).
6. *Adjustment costs contingent on uncertain future acts.* Adjustment costs are an element of damage to the residue of the property, when

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<sup>36</sup> But see section 4-8.05(c)(1)(6), explaining when future development plans are admissible.

the residue's highest and best use is as "assemblage" requiring acquisition of additional property and the ultimate developability of the property is contingent on future events, such as road construction and right-of-way acquisition beyond the control of the owner. *Wammco, Inc. v. Commonwealth Transp. Comm'r*, 251 Va. 132, 465 S.E.2d 584 (1996). The cost of replacement land and improvements thereon are not recoverable as damages to the residue or cost of adjusting residue to new conditions. *Commonwealth Transp. Comm'r v. Am. Serv. Ctr.*, 45 Va. Cir. 76 (Arlington Cnty. 1997). An award based on appraisal testimony that assumes incorrect zoning restrictions will be set aside (appraiser assumed a 35-foot setback instead of a 75-foot setback). However, if counsel fails to restate an objection that the trial court reserved a ruling on during trial before submission to the commissioners, the objection will be deemed waived. *Jimenez v. Commonwealth*, 241 Va. 244, 402 S.E.2d 678 (1991); *Commonwealth Transp. Comm'r v. Hurley*, 24 Va. Cir. 19 (Loudoun Cnty. 1991).

7. *Mineral deposits.* The existence of mineral deposits on condemned land may be an element of value to be considered in determining the fair market value of the property, but the separate value of the mineral deposits themselves, and the future rents and royalties that would be received for them when and if they are removed from the land, are inadmissible for proving either the value of the property taken or damage to the residue. *Va. Elec. & Power Co. v. Hylton*, 292 Va. 92, 787 S.E.2d 106 (2016); compare *Va. Uranium, Inc. v. Commonwealth*, 105 Va. Cir. 421 (Wise Cnty. 2020) (moratorium on uranium mining technically constituted an unconstitutional taking because owners could not reap value of mineral rights but since the moratorium was a proper exercise of the police power the landowners were not eligible for compensation for a taking). Damages to the residue for lost value related to strip-mining where the landowner owns surface but not underlying mineral rights are not allowed. *E. Tenn. Nat. Gas Co. v. Riner*, 239 Va. 94, 387 S.E.2d 476 (1990).
8. *Adjustment expenses for the property being taken.* However, adjustment expenses may be considered in determining diminution in the market value of the residue but may not exceed the difference between the residue's pre-take and post-take value. *Revocor Corp. v. Commonwealth Transp. Comm'r*, 259 Va. 389, 526 S.E.2d 4 (2000); *State Highway & Transp. Comm'r v. Allmond*, 220 Va. 235, 257 S.E.2d 832 (1979). Adjustment expenses are not allowable when the adjustment included the installation of equipment that did not exist prior to the take. *Commonwealth Transp. Comm'r v. Newcomb*, 75 Va. Cir. 488 (Amherst Cnty. 2007) (citing *City of Staunton v. Aldhizer*, 211 Va. 658, 179 S.E.2d 485 (1971)).
9. *Certain inconveniences, concerns, fears, and "stigma."* Damages caused by negligent or unskilled construction by the condemnor's contractor or the temporary annoyance or inconvenience arising from the construction activity, *Ryan v. Davis*, 201 Va. 79, 109 S.E.2d 409 (1959), and damages based on feared failure of storm water detention pond maintained by the locality, when such failure would only result from negligence or criminal activity, *City of Virginia Beach v. Oakes*, 263 Va. 510, 561 S.E.2d 726 (2002), should not be considered. Condemnor's evidence of possible contamination from a

leak or rupture of a gas pipeline inadmissible because of speculative nature of claim and because principles of eminent domain not applicable to tortious or unlawful conduct. Moreover, evidence of damages from “environmental stigma” caused by locating gas line near residential use inadmissible because not possible to quantify market impact. *Va. Natural Gas, Inc. v. Colonna’s Ship Yard, Inc.*, 104 Va. Cir. 331 (City of Norfolk 2020). Damages not allowed also include the retail cost of replacing trees or soil not properly returned to a sewer easement by the contractor, or stigma associated with construction of sewer line within easement, *Chesterfield Cnty. v. Jewett*, No. CL89-518 (Chesterfield Cnty. Cir. Ct. 1991), and any expense or “annoyance” to the owner to defend the case. *State Highway Comm’r v. Kreger*, 128 Va. 203, 105 S.E. 217 (1920). Evidence that the residue was damaged because of an owner’s fear of an explosion associated with the condemnor’s natural gas pipeline was properly excluded, because the witness did not have the necessary expertise and his opinion was “pure speculation” was not relevant, *Kipps v. Va. Nat. Gas, Inc.*, 247 Va. 162, 441 S.E.2d 4 (1994), nor was public fear of high voltage transmission lines. *Chappell v. Va. Elec. & Power Co.*, 250 Va. 169, 458 S.E.2d 282 (1995). Public perception of “stigma” associated with temporary demolition easement is speculative. *Comm’r of Highways v. Kim*, No. CL19-3320 (Spotsylvania Cnty. Cir. Ct. 2022).

10. *Restrictions in use.* Restrictions in use because of a trust agreement should not be considered, unless the land is so committed to that use that it is not economically feasible to put the land to other uses. The market value is to be determined by considering all possible uses to which the land is susceptible, not just the uses to which a particular owner may be restrained. Moreover, the amount of land taken relative to the amount left has little relevance to determining just compensation. *Fairfax Cnty. Park Auth. v. Va. Dep’t of Transp.*, 247 Va. 259, 440 S.E.2d 610 (1994). Nor is a breach of a restrictive covenant caused by a take relevant to the value determination. *Fugate v. Martin*, 208 Va. 529, 159 S.E.2d 669 (1968). However, *Meagher v. Appalachian Electric Power Co.*, 195 Va. 138, 77 S.E.2d 461 (1953), indicates that when a condemnor violates a restrictive covenant, there has been a compensable taking.
11. *Rights and privileges already acquired by the condemnor.* In *Virginia Electric & Power Co. v. Patterson*, 204 Va. 574, 132 S.E.2d 436 (1963), the commissioners were told to include in the valuation only the right to install underground pipe and cable, because the company already owned an easement for surface power lines. Furthermore, in *Chesterfield County v. Jewett*, No. CL89-518 (Chesterfield Cnty. Cir. Ct. 1991), the county already owned an impoundment easement allowing the clearing of trees, so the commissioners could not value that loss as part of a sewer easement.
12. *Vegetation.* Individual value of lost trees and other appurtenances (so-called arborists’ theory of fair market value).
13. *Miscellaneous.* Taking of a septic drain field site, when the remaining parcel must be developed using public sewer, *Gattis v. Chesterfield Cnty.*, No. CL97-978 (Chesterfield Cnty. Cir. Ct. 1998), and value that assumes inconsistent uses such as single family residential along a



river as well as mineral value as a sand and gravel quarry should not be considered.

## 4-9 CONDUCT OF JUST COMPENSATION TRIAL

### 4-9.01 Presentation of Evidence

The trial is conducted like a civil trial by jury.<sup>37</sup> The judge presides and rules on the evidence in accordance with applicable law. See *Tiller v. Norfolk & W. Ry.*, 201 Va. 222, 110 S.E.2d 209 (1959). The condemnor has the right to open and close the trial. *Hamer v. Sch. Bd. of Chesapeake*, 240 Va. 66, 393 S.E.2d 623 (1990). An expert appraiser hired by the landowner cannot be compelled to testify on behalf of the condemnor. *State Highway & Transp. Comm'r v. Urban*, 18 Va. Cir. 534 (Henrico Cnty. 1982) (citing *Cooper v. Norfolk Redev. & Hous. Auth.*, 197 Va. 653, 90 S.E.2d 788 (1956)). Statements during closing argument by the condemnor's lawyer to "be fair to yourself" and to "paying your money" were improper and justified a mistrial. Such statements could not be cured by a cautionary instruction of the judge. *Hamer v. Sch. Bd. of Chesapeake*, 240 Va. 66, 393 S.E.2d 623 (1990).

### 4-9.02 Expert Witnesses

Generally, expert witnesses may testify as to value where special knowledge or expertise of such witnesses will help a jury determine value. *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979); *Noll v. Rahal*, 219 Va. 795, 250 S.E.2d 741 (1979). The expert need not have formal education regarding the matter, and the matter need not be part of a science, art, learned profession or highly technical occupation. Virginia Code § 8.01-401.1 gives experts latitude in forming and testifying to opinions. The acceptance of an expert witness is in the discretion of the trial court, and experts need not be highly qualified or "have all the knowledge possible . . . in his class." *Norfolk & W. Ry. Co. v. Anderson*, 207 Va. 567, 151 S.E.2d 628 (1966); see *Commissioner of Highways v. Karverly, Inc.*, 295 Va. 380, 813 S.E.2d 322 (2018) (LGA filed an amicus brief), in which the trial court abused its discretion by not allowing the expert's opinion that there was no damage to the residue because the condemnor's expert should be allowed to explain why relocation or adjustment of improvements would not be necessary to continue the existing commercial use.

In addition to professional appraisers, real estate agents or builders can qualify to testify as to value unless the facts show unfamiliarity with the subject property or surrounding property values. The expert witness's knowledge may be derived from buying and selling, valuing, and managing real estate in the area where the particular property is situated, especially if accompanied by a knowledge of sales of similar property. *State Highway Comm'r v. Williams*, 168 A.2d 233 (N.J. App. Div. 1961).

Virginia Code § 54.1-2011 requires all persons holding themselves out as professional appraisers to meet certain licensing standards administered by the State Real Estate Appraiser Board. Virginia Code § 54.1-2010 provides certain exceptions to the licensing requirement such as employees of governmental units. While the Virginia Supreme Court held in *Lee Gardens Arlington Ltd. Partnership v. Arlington County Board*, 250 Va. 534, 463 S.E.2d 646 (1995), that a real estate broker may not testify for compensation on the value of real property in a court proceeding under the professional appraiser requirements, Va. Code § 54.1-2010 was subsequently amended and now declares that the statute does not "proscribe the powers of a judge to determine who may qualify as an expert witness to testify in any legal proceeding." As there was some lower court confusion between *Lee Gardens* and the 1995

<sup>37</sup> For a useful look at how trial judges are taught to conduct eminent domain trials in Virginia, see *Virginia Civil Benchbook for Judges and Lawyers* §§ 11.01[1]-[16], App. 21 (Matthew Bender, ed., 2016).

amendment, the Supreme Court in a tax assessment dispute determined that a trial court may qualify a person as an expert witness to testify regarding the value of real estate without regard to whether the witness is in compliance with the Virginia licensure statute, although that status is relevant in assessing the prospective expert's qualifications. *Va. Int'l Gateway, Inc. v. City of Portsmouth*, 298 Va. 43, 834 S.E.2d 234 (2019); see also *Metamining, Inc. v. Barnette*, No. 2:12CV00024 (W.D. Va. June 26, 2013) (Virginia law with regard to the admission of expert testimony regarding real property is not binding in federal court).

However, expertise in one field does not qualify one as an expert even in a closely related field. In *Virginia Electric & Power Co. v. Lado*, 220 Va. 997, 266 S.E.2d 431 (1980), an appraiser could not testify as to the physical dangers from an electric transmission line. Likewise, expertise in one area of a particular field does not qualify that person as an expert in other areas of that field. In *Norfolk & Portsmouth Traction Co. v. Ellington's Administrator*, 108 Va. 245, 61 S.E. 779 (1908), testimony from a trolley motorman was rejected in determining the proper method of constructing track crossovers.

In construing Va. Code § 8.01-401.1, the Virginia Supreme Court has held that an expert may not testify as to hearsay opinions on which he or she relied to render the expert opinion even though the opinion itself is admissible. *McMunn v. Tatum*, 237 Va. 558, 379 S.E.2d 908 (1989) (hearsay opinions of physicians not called as witnesses excluded); see also *Bowers v. Huddleston*, 241 Va. 83, 399 S.E.2d 811 (1991) (handwriting expert does not qualify as a disinterested witness for the purpose of probating a will); *Norfolk Traction Co. v. Ellington's Adm'r*, 108 Va. 245, 61 S.E. 779 (1908) (testimony from a trolley motorman was rejected in determining the proper method of constructing track crossovers). Most real estate appraisers rely on many hearsay sources to estimate value, including government officials and cost manuals, but should avoid relying on the opinions of other appraisers not called as witnesses.

#### 4-9.03 Instructions

The use of instructions to guide decisions of civil juries is a firmly established practice, although it is not directly mentioned in Title 25.1.<sup>38</sup> The practice varies somewhat across Virginia, but the majority approach is for the court to give the instructions at the end of the evidence. Use of a preliminary instruction should be considered if testimony that might be misunderstood or misconstrued is expected.

Subjects covered by instructions include:

1. General duties of the commissioners or jurors and the nature of eminent domain proceedings.
2. The definition of fair market value to guide setting the value of the property
3. or property interest being taken.<sup>39</sup> Consider an instruction telling the jury that the condemnor is presumed to fully use all rights being acquired.

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<sup>38</sup> See 2 *Virginia Model Jury Instructions-Civil*, ch. 46, "Eminent Domain" (2009) (commonly used or modified by practitioners); Patrick J. Rohan & Melvin A. Reskin, *3B Condemnation Procedures and Techniques: Forms* pt. 2, app. C-3(b)(I).

<sup>39</sup> The attorney should consider a "comparable sales" instruction about how comparable sales information should or should not be used.

4. Method of determining damage, if any, to the property not actually taken. The landowner has the burden of proving damage to the residue. *Ryan v. Davis*, 201 Va. 79, 109 S.E.2d 409 (1959); see *Town of Rocky Mount v. Hudson*, 244 Va. 271, 421 S.E.2d 407 (1992) (landowner has burden of proving damage, and the amount of such damage, to the residue by a preponderance of evidence); *West v. Anderson*, 186 Va. 554, 42 S.E.2d 876 (1947). However, *Virginia Electric & Power Co. v. Webb*, 196 Va. 555, 84 S.E.2d 735 (1954), indicates that commissioners may award damages without hearing evidence on damages if they believe from their view alone that construction and operation of the facilities will damage the residue. Of course, damages may not be speculative or in common with other nearby tracts. *Tidewater Ry. Co. v. Cowan*, 106 Va. 817, 56 S.E. 819 (1907). The proper test of damages is the difference in value of the remainder land before and immediately after the take. *State Highway & Transp. Comm'r v. Linsly*, 223 Va. 437, 290 S.E.2d 834 (1982). In addition, the effect of extinguishing easements of direct access is relevant in determining the value of the residue. Commissioners may consider every present or future circumstance that affects its present value if those factors are not speculative. *Appalachian Power Co. v. Anderson*, 212 Va. 705, 187 S.E.2d 148 (1972); *Colonial Pipeline Co. v. Lohman*, 207 Va. 775, 152 S.E.2d 34 (1967). It is proper in considering damages to the residue to consider the expense of adjusting property to the changed conditions brought about by the taking, although such costs may not be recovered as separate items of damage. *City of Staunton v. Aldhizer*, 211 Va. 658, 179 S.E.2d 485 (1971); accord *Dressler v. City of Covington*, 208 Va. 520, 158 S.E.2d 660 (1968) (holding that it was not error to exclude the cost of cleaning up the landowner's front yard, and it was harmless error to exclude the cost of constructing a retainage wall). The cost of restoring the residue land to a condition that will make it available for use is a proper element of damages but not to the degree necessary to carry out the activity on the original parcel. *City of Staunton v. Aldhizer*, 211 Va. 658, 179 S.E.2d 485 (1971). The property owner is obligated to minimize or mitigate damage to the residue. In *Bradshaw v. State Highway Commissioner*, 210 Va. 66, 168 S.E.2d 129 (1969), the Court held that the state need not pay the cost of minor restoration to gasoline pumps because the repair was the landowner's duty.
5. The manner of determining enhancement against damages to the residue. The condemnor has the burden of proof of showing peculiar benefits or general enhancement to the residue property offsetting damages due to the take. See also *Belvin v. State Highway Comm'r*, 7 Va. Cir. 438 (City of Richmond 1974) (lessees unable to occupy leased dwelling after taking a septic drain field for a highway may not claim relocation assistance under the Relocation Assistance and Real Property Acquisition Act of 1972 because (1) they have not moved; (2) the dwelling was not taken; and (3) the owner had already been compensated for the taking of the drain field).
6. Expenses of moving personal property of the property owner. Virginia still follows the minority rule that such expenses are compensable. *Exxon Corp. v. M & Q Holding Corp.*, 221 Va. 274, 269 S.E.2d 371 (1980) (Court held that a lessee is entitled to compensation for damage to removable improvements by condemnation); see *Bristol Redev. & Hous. Auth. v. Farmbest, Inc.*, 215 Va. 106, 205 S.E.2d 406

(1974); *City of Richmond v. Old Dominion Iron & Steel Corp.*, 212 Va. 611, 186 S.E.2d 30 (1972); *City of Richmond v. Williams*, 114 Va. 698, 77 S.E. 492 (1913). But see Va. Code §§ 25.1-406, 25.1-407, and 25.1-408 (Relocation Assistance and Real Property Acquisition Policies) for the manner of paying for certain relocation expenses incurred before the valuation of the take.

7. Weight to be given to the view and use of other evidence by the jurors or commissioners in setting just compensation. Landowners should consider a "common knowledge" instruction. The view is not to be considered by the court, commissioners, or jurors as "the sole evidence in the case," *Bunch v. State Highway & Transp. Comm'r*, 217 Va. 627, 231 S.E.2d 324 (1977) and *State Highway Comm'r v. Foster*, 216 Va. 745, 222 S.E.2d 780 (1976), although the view may be the only evidence for damages. See *Va. Elec. & Power Co. v. Webb*, 196 Va. 555, 84 S.E.2d 735 (1954).
8. Weight to be given to expert and nonexpert opinion testimony and determination of credibility of witnesses. The weight to be given oral or documentary testimony in determining fair market value is generally left to the reasonable discretion of the jurors or commissioners. A party is not bound by the testimony of its own witness. *May v. Malcolm*, 202 Va. 78, 116 S.E.2d 114 (1960). An expert witness must show sufficient knowledge, skill, or experience to make him or her competent as an expert on the subject matter that he or she is testifying about: for example, a real estate appraiser was not qualified to testify on the potential hazards of an electric transmission line. *Va. Elec. & Power Co. v. Lado*, 220 Va. 997, 266 S.E.2d 431 (1980).
9. If representing the condemnor, the attorney should consider a separate instruction on weight to be given the landowner's testimony on fair market value.
10. Procedure used to prepare the jurors'/commissioners' report on value, stating that quotient awards are forbidden and that the report setting value need not be a unanimous decision of the jury or commissioners' panel.

Submission of an instruction, even if rejected by the court, may constitute a waiver of any post-award objection that would be inconsistent with the proffered instruction. *Commonwealth v. Fairbrook Bus. Park Assocs.*, 244 Va. 99, 418 S.E.2d 874 (1992).

#### **4-9.04 Written Report of the Award**

The jury or commissioners' panel makes findings in a written report filed with the court. Va. Code § 25.1-232. If it does not report within a "reasonable time" after submission of the case, or reports that it is unable to make an award, or the award is set aside for fraud, misconduct, or other reason, a new trial is ordered without further notice. Va. Code § 25.1-242.

#### **4-9.05 Action by the Court Upon the Report**

##### **4-9.05(a) Award Is Prima Facie Correct**

This topic is addressed in Va. Code § 25.1-233.

In *Watts v. State Highway Commissioner*, 202 Va. 166, 115 S.E.2d 899 (1960), the Virginia Supreme Court emphatically stated its reluctance to modify the amount of condemnation awards. See also *State Highway Comm'r v. Carter*, 216 Va. 639, 222 S.E.2d 776 (1976).

#### **4-9.05(b) Final Order**

The judge may confirm or set aside the report "forthwith." Va. Code § 25.1-233(A). Costs are taxed against the petitioner, which may include a survey fee for the landowner not to exceed \$7,500. If the condemnation occurs pursuant to §§ 25.1 or 33.2 (VDOT) and the landowner is awarded an amount that is 25 percent or greater than the condemning authority's initial written offer pursuant to § 25.1-204, the court may order the condemning authority to pay to the owner those (i) reasonable costs, other than attorney fees, and (ii) reasonable fees and travel costs, including reasonable appraisal and engineering fees incurred by the owner, for up to three experts or as many experts as are called by the condemning authority, whichever is greater, who testified at trial. Va. Code § 25.1-245.1.

The costs outlined in Va. Code § 25.1-245.1 shall not apply if the condemning authority is a public service company, public service corporation, railroad pursuant to the delegation of the power of eminent domain granted in Title 56, or government utility corporation, as defined by § 1-219.1, involving easements adjudged at less than \$10,000. Va. Code § 25.1-245.1.

#### **4-9.05(c) Exceptions to the Report**

Any party may file written exceptions before the court confirms or sets aside the report or, in any event, no later than ten days "after the rendering of the report." Va. Code § 25.1-233(B).

#### **4-9.05(d) Court's Ability to Set Aside the Report**

The trial court's power over the report is "the same power . . . it now has over verdicts of juries in civil actions." *Id.* However, absent fraud, the report must be confirmed if "no . . . cause exists which would justify setting aside or modifying a jury verdict in civil actions." *Id.* A trial judge may set aside a verdict and order a new trial to avoid a result that shocks the conscience, and the authority to grant a new trial "should be used" because judges should be more than mere referees between litigating parties. *Johnson v. Smith*, 241 Va. 396, 403 S.E.2d 685 (1991). A commissioners' award was upheld by the trial judge where the Virginia Department of Transportation assessor valued the property at \$100 with no damages and the commissioners returned an award of \$100 for the take and \$15,000 damages and also where VDOT made an offer of \$80,000 and the commissioners awarded \$900,000. See *State Highway Comm'r v. Shokes*, 5 Va. Cir. 189 (City of Winchester 1984) (trial court may set aside award of commissioners and order remittitur if award exceeds any reasonable construction of the evidence; where commissioners failed to discount existing prescriptive right of way and where the court was without evidence to value remittitur, it may order a new trial); see also *State Highway & Transp. Comm'r v. Sovran Bank Trustee*, No. LK-1845-1 (City of Richmond Cir. Ct. 1988) (court reduced an award of \$803,000 to \$256,816 because there was insufficient evidence to support the award; even though the state only took 0.45 acre of a 3.24-acre site, the award exceeded the total fair market value of the entire site by \$319,908).

#### **4-9.05(e) Exceptions Based on Improper Conduct of Jurors/Commissioners**

If any written allegation of fraud, collusion, corruption, or improper conduct is made by either party, the judge is to summon the jurors or commissioners and question them regarding the allegations. *Va. Elec. & Power Co. v. Shaffer*, 209 Va. 418, 164 S.E.2d 590

(1968).<sup>40</sup> A mere allegation of improper conduct without specific facts supporting the allegation is insufficient to compel court inquiry into misconduct. The opportunity to take exception cannot be used for a fishing expedition. Improper conduct does not include granting an excessive award, misunderstanding instructions, or following erroneous principles of law. *Id.* Allegations that one commissioner characterized the landowner's appraiser as a "crook" who was trying to line his pockets at the expense of the county or that the director of planning disclosed the county's offer and the property owner's demand in a newspaper article after the trial and after the filing of the commissioners' report were insufficient to support a new trial under Va. Code § 25-46.21 (now § 25.1-233). *State Highway & Transp. Comm'r v. Garland*, 223 Va. 701, 292 S.E.2d 355 (1982); see *Chesterfield Cnty. v. Gilliam*, No. 2706 (Chesterfield Cnty. Cir. Ct. 1977) (merely alleging improper conduct by the commissioners, consisting of three commissioners having had lunch with the landowner, was insufficient to establish improper conduct for this condemnation; the court noted, however, that the decisions should not be construed as weakening the duty to avoid "even the appearance of impropriety").

## 4-10 POST-AWARD ISSUES AND APPEAL

### 4-10.01 Procedure for Appeal

If the report is confirmed, altered, or modified, any aggrieved party may appeal by following the same procedure for appeal as "provided by law and the Rules of Court applicable to civil cases." Va. Code § 25.1-239. A notice of appeal must be filed within thirty days after confirmation of the report. A writ of supersedeas suspending the award may be granted in the same manner as for other civil cases. *Id.*; see *Dwyer v. Town of Culpeper*, 297 Va. 204, 825 S.E.2d 79 (2019) (an order confirming a jury's award of just compensation is final for purposes of determining the deadline to appeal even though the order states the "court shall retain jurisdiction" since such statement only applies to the court's jurisdiction to distribute funds and adjudicate any controversy over distribution). In *Board of Supervisors of Prince William County v. Parsons*, 245 Va. 489, 428 S.E.2d 905 (1993), the Virginia Supreme Court held that the supersedeas affects only the enforceability, not the finality, of an appealable order and thus does not postpone the beginning of the thirty-day withdrawal time limit in a condemnation case authorized by then § 25-46.34, now § 25.1-250, of the Code of Virginia.

### 4-10.02 New Trial Order Unappealable

If the report is set aside and new jurors or commissioners are appointed, the case is tried again. Neither party may appeal that order.

### 4-10.03 Distribution of Award Paid into Court

#### 4-10.03(a) Undisputed Title and Distribution of Proceeds

Upon the award being paid into court and the confirmation of the report in the manner provided in Va. Code. § 25.1-237, the interest or estate of the owner or owners in the property taken or damaged shall terminate and they shall have such interest or estate in the fund and any interest accrued thereon so paid into court as they had in the property so taken or damaged. All liens by a deed of trust, judgment or otherwise upon such property or any interest therein shall be transferred to the fund so paid into court. If the court is satisfied that the persons having an interest therein are before the court, the court shall make such distribution of such money and any interest accrued thereon

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<sup>40</sup> See, however, *County of Chesterfield v. Busch*, No. CL03-1078 (Chesterfield Cnty. Cir. Ct. 2005), where two commissioners refused to sign the report and sent letters to the county attorney documenting that the three other commissioners ignored the court's instructions by including damages because students going to a nearby high school would "speed" when using the property being condemned for a turn lane and the turn lane would be used for "racing" and "zooming" to the high school.

as to it may seem proper, having due regard to the interest of all persons therein, and in what proportions such money is properly payable. Va. Code § 25.1-240(A).

The court must determine if there are any persons or classes of persons vested with a superior right or claim of title to the land or estate or interest therein condemned or in the proceeds of the condemnation award. If the court is satisfied, it may direct the fund and any interest accrued be disbursed among the persons entitled thereto *after* payment of any taxes. Va. Code § 25.1-240(B).

Taxes owed on the property must be paid before distribution of the award. This solves distribution problems when delinquent taxes exceed the award. In addition, if the owner has already paid taxes for the year of the take, the condemnor must reimburse the owner for the pro-rata portion of taxes from the date of take or date of possession to the date of paying the final award. Va. Code § 15.2-1904(I).

Upon “settlement or final determination,” funds shall be payable to the owner or, upon request, the owner’s attorney, within thirty days of settlement or final determination pursuant to Va. Code § 25.1-247.1. Failure to pay such funds within thirty days results in an award of attorney’s fees and interest from the date the funds became due. *Id.*

#### **4-10.03(b) Disputed Title and Distribution of Proceeds**

If there is a dispute as to title or distribution of proceeds, the court must order a separate hearing on those issues and may appoint a commissioner in chancery, for good cause shown, to take evidence upon conflicting claims. Customarily, the court will make these determinations. As an example, the trial court ruled that proceeds from the condemnation of real property held by a trust were considered income based on the specific language of the trust agreement, even though the Uniform Principal and Interest Act would characterize such new funds as principal. *Riverside Healthcare Ass’n v. Forbes*, 281 Va. 522, 709 S.E.2d 156 (2011). In distributing an award to bond holders, a court must honor contractual provisions such as agreeing to pay the award directly to the bond holders and paying call premiums and interest in addition to the principal. *Mfrs. Tr. Co. v. Roanoke Water Works Co.*, 172 Va. 242, 1 S.E.2d 318 (1939). Final orders by the commissioner affecting distribution of the proceeds are appealable. The cost of the commissioner is taxed as a cost to the condemnor if needed to determine proper distribution to someone under a disability. However, the cost of resolving other disputes over ownership is paid by those raising the issue unless the award is less than \$500, in which case the condemnor must pay the cost of resolving the dispute. Va. Code § 25.1-241.

Any order for distribution shall conserve and protect the rights of such parties in and to the fund and any interest accrued thereon. Va. Code § 25.1-240(D).

#### **4-10.03(c) Unknown Owners**

Although Va. Code § 25.1-241 contemplates no further proceedings on the issue of just compensation, the existence of unknown owners creates a controversy within the meaning of this section. 1977-78 Op. Va. Att’y Gen. 81. If, after a hearing, the court cannot determine entitlement to the proceeds, the case must be continued until enough evidence exists to establish the shares of known owners. The disposition of funds for unknown property owners is governed by statutes applicable to unclaimed funds. See Va. Code § 55.1-2500 et seq. (disposition of unclaimed property).

#### **4-10.03(d) Title Controversies**

Condemnation jurors or commissioners do not determine title controversies or related issues. Such issues are determined by the court in order to distribute money paid into the court for property taken or damages to its residue. Va. Code §§ 25.1-219, 25.1-222,



25.1-240, and 25.1-241. Virginia Code § 25.1-243 is also used to resolve disputes arising out of the withdrawal of deposits pendente lite.

#### 4-10.03(e) Property Subject to a Lease

There is a single award for property rights taken even when subject to a lease. A tenant under a lease with a term of twelve months or longer may intervene and participate in the proceeding for the sole purpose of offering evidence of the value of the property being taken or damaged to the same extent as his landlord or the owner if not less than 10 days prior to the date for the trial of the issue of just compensation, such tenant shall file his petition for intervention, in the manner provided in Va. Code § 25.1-221. Such petition for intervention shall include (1) a verified copy of the lease under which he is in possession, and (2) an affidavit by the tenant or his duly authorized agent or attorney, stating:

1. that he claims an interest in the award; and
2. that he desires to offer admissible evidence concerning the value of the property being taken or damaged.

Evidence of the value of the leasehold is not allowed. Va. Code §§ 25.1-234, 33.2-1001; *see also Lamar Corp. v. Commonwealth Transp. Comm'r*, 262 Va. 375, 552 S.E.2d 61 (2001); *Lamar Corp. v. City of Richmond*, 241 Va. 346, 402 S.E.2d 31 (1991); *May v. Dewey*, 201 Va. 621, 112 S.E.2d 838 (1960); *Va. Elec. & Power Co. v. Haycox*, 17 Va. Cir. 87 (City of Va. Beach 1989).

The distribution rights of the Tenant are determined in a separate post-award proceeding under Va. Code §§ 25.1-240 and 25.1-241. *See Exxon Corp. v. M & Q Holding Corp.*, 221 Va. 274, 269 S.E.2d 371 (1980).

#### 4-10.04 Vesting of Title

As applicable to the “slow-take” procedure, vesting of title is addressed in Va. Code § 25.1-237. As applicable to the “quick-take” procedure, vesting of title is addressed in Va. Code § 25.1-308 and 25.1-314.

When the “quick-take” procedure is used, title is vested, albeit defeasibly, with the condemnor, and pro rata tax abatement is effective upon recordation of the certificate. Va. Code § 25.1-308; 1984-85 Op. Va. Att’y Gen. 376. Compare the rights of entry available to political subdivisions under Va. Code §§ 15.2-1904 and 15.2-1905. “Upon . . . recordation [of the certificate], the interest . . . of the owner of the property . . . shall terminate and the title to such property . . . shall be vested [defeasibly] in the [condemnor].” Va. Code § 25.1-308. The clerk of court has the affirmative duty to record the order, plat, and description of the property in the deed book of the locality where the property is located. The deed is indexed in the names of the parties, and the condemnor must pay the appropriate recording fees. Va. Code § 25.1-247.

#### 4-10.05 Withdrawal of Deposit After Award but Prior to Additional Proceedings<sup>41</sup>

A landowner, guardian, or conservator may petition the court to withdraw without prejudice his or her share of the money paid into court after the award of just

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<sup>41</sup> Va. Code §§ 25.1-240, 25.1-241, and 25.1-243; *see Lynch v. Commonwealth Transp. Comm'r*, 247 Va. 388, 442 S.E.2d 388 (1994). *See also Lynch v. Commonwealth Transp. Comm'r*, 255 Va. 227, 495 S.E.2d 247 (1998) (addressing liability issues when final award less than preliminary award).

compensation, even though further proceedings will occur in the trial court or on appeal, subject to the following conditions:

1. The property owner or person with a property interest may withdraw 50 percent of his or her share without a surety bond; or
2. An owner may withdraw over 50 percent of his share by providing a surety bond in an amount set by the court not exceeding twice the excess over 50 percent. The bond is to secure repayment of the amount withdrawn over the amount of compensation as finally determined by the court, commissioners' panel, or the jury, plus interest as calculated under Va. Code § 25.1-243. The condemnor must receive or waive twenty-one days' notice of any petition to withdraw money and may file objections to the applicant's right to the fund or the sufficiency of the proposed bond.

Directors of a dissolved company are liable for any deficiency when drawdown exceeds the final award, where at the time of agreeing to distribution of corporate assets, the owners have knowledge of the possibility that the condemnation award will be less than the amount distributed under the "drawdown" order. For that reason, the owners cannot rely on the contrary advice of their attorneys. *Commonwealth Transp. Comm'r v. Matyiko*, 253 Va. 1, 481 S.E.2d 468 (1997).

When a landowner appeals only the portion of the award setting damages, the amount of the bond will be set by looking at the total deposited including the value of the take and damages. *State Highway Dep't v. Pace*, 14 Va. Cir. 444 (Henrico Cnty. 1979).

Any controversy over distributing pendente lite money paid into the court is resolved in the same way as questions involving the proper distribution of the final award. See *State Highway & Transp. Comm'r v. Levine*, 5 Va. Cir. 144 (City of Va. Beach 1984) (where husband/owner and former spouse/noteholder each claimed money deposited with the circuit court clerk for the taking of property encumbered by a deed of trust, the court held that the condemnation proceeds should be distributed in accordance with the deed of trust).

The amount of any deposit with the court or certificate amount or any amount withdrawn by the landowner may not be referred to at trial on the issue of just compensation. Va. Code § 25.1-311.

#### 4-10.06 Interest

Interest is addressed in Va. Code §§ 25.1-244, 25.1-315, and 25.1-316.

The condemnor is required to pay interest on any excess of the final award over the amount paid into court to obtain the right of entry, from the date of entry or if a certificate of deposit from the filing of the certificate until the time such excess is paid into court and is available for distribution. Interest accruing after July 1, 2003, cannot be less than the judgment rate of interest established by Va. Code § 8.01-382. Va. Code §§ 25.1-244 and 25.1-315. If the petitioner exercised the right pendente lite to enter into and take possession of the land or other property to be taken or damaged as provided in Va. Code § 25.1-224 (see section [4-7.02](#)), the owner is additionally entitled to receive interest at the general account's primary liquidity portfolio rate. Va. Code § 25.1-244(B).

In *Board of Supervisors of Prince William County v. Parsons*, 245 Va. 489, 428 S.E.2d 905 (1993), the Virginia Supreme Court held that if the condemnor appeals,

interest accrues from the date of the Supreme Court's decision on whether to accept a petition for appeal, not thirty days after the entry of the order confirming the commissioner's report.

"Time of entry" refers to the date entry was authorized. *City of Richmond v. Old Dominion Iron & Steel Corp.*, 212 Va. 611, 186 S.E.2d 30 (1972). For a quick-take, "time of entry" means the date of filing the certificate of deposit. *State Highway & Transp. Comm'r v. Trustees of Parsonage*, 220 Va. 402, 258 S.E.2d 503 (1979). Date of takefrom which interest runs is the date the court order is entered allowing entry by the county and not the date of an earlier letter notifying the property owner that the county had adopted a resolution authorizing entry and acquisition by eminent domain. *Chesterfield Cnty. v. Kavanaugh*, No. CL95-1224 (Chesterfield Cnty. Cir. Ct. 1995).

No interest is allowed for delays caused by exceptions to the report filed by an owner and not sustained by the court. *State Highway & Transp. Comm'r v. Gordon*, 222 Va. 712, 284 S.E.2d 593 (1981). No interest is allowed the landowner from the date of overruling exceptions to the commissioners' report until the case is final on appeal. Va. Code § 33.2-1026; *State Highway & Transp. Comm'r v. Cardinal Realty Co.*, 232 Va. 434, 350 S.E.2d 660 (1986).

Interest payable to the landowner is reduced by the amount of interest earned in the interest-bearing account. Va. Code § 25.1-244(E).

If the amount awarded in a condemnation proceeding is less than that paid during a quick-take proceeding, and the funds have been distributed, the interest on the amount the condemnor is entitled to receive is calculated at the general account's primary liquidity portfolio rate. Va. Code § 25.1-216.

#### **4-10.07 Dismissal**

##### **4-10.07(a) By the Condemnor Prior to Commencement of Trial**

Dismissal is addressed in Va. Code §§ 25.1-248 through 25.1-251.

The condemnor may have the case dismissed as a matter of right, if it has not taken possession and:

1. The motion to dismiss is made before the trial of just compensation has begun. If the case is dismissed at that stage, the condemnor must pay reasonable expenses actually incurred by the landowner in preparation for the trial; or
2. The motion to dismiss is made after the trial has begun and before the award has been paid into court or before the time for noting an appeal has elapsed. The condemnor must pay the landowner's actual expenses (so long as the court determines that they are reasonable) including attorney fees, witness fees, expert witness fees not exceeding three experts, and other expenses and compensation for the time spent because of the trial.

##### **4-10.07(b) By the Condemnor After an Award at Trial**

The condemnor may reject an award and reject title only if it has not taken possession of the condemned property. A condemnor's right to reject an award expires thirty days from the order confirming the report. In *Board of Supervisors of Prince William County v. Parsons*, 245 Va. 489, 428 S.E.2d 905 (1993), the Court noted that, unlike condemnation acts in other states that extend a condemnor's right to withdraw the proceedings after it has lost an appeal to a higher court, Virginia limits the right to

withdraw at a point before the time for noting an appeal, specifically thirty days after the order confirming just compensation is entered.

A circuit court has held that the condemnor could not dismiss the case after the fee owner and condemnor had reached a settlement when a tenant (billboard lessee) had previously intervened pursuant to Va. Code § 25.1-234. *City of Roanoke Redev. & Hous. Auth. v. Stegall*, 81 Va. Cir. 256 (City of Roanoke 2010).

#### **4-10.07(c) By the Landowner**

The landowner may have the case dismissed as a matter of right and recover certain expenses if the condemnor fails to pay the award into the court within thirty days of the order. Va. Code § 25.1-250; *Williams v. Fairfax Cnty. Redev. & Hous. Auth.*, 227 Va. 309, 315 S.E.2d 202 (1984). If any such expenses are not paid within 30 days of the entry or such order, judgment therefore shall be entered against petitioner.

#### **4-10.07(d) By Stipulation**

Before title has vested, the parties may have the case dismissed by joint stipulation. Va. Code § 25.1-251; *Williams v. Fairfax Cnty. Redev. & Hous. Auth.*, 227 Va. 309, 315 S.E.2d 202 (1984).

#### **4-10.07(e) Reinstitution of a Condemnation Action After Dismissal**

All dismissals are without prejudice unless otherwise provided in the order. The condemnor may then reinstitute condemnation proceedings at any time.

### **4-10.08 Costs and Fees**

#### **4-10.08(a) Litigation**

Costs and fees are addressed in Va. Code §§ 25.1-235, 25.1-240, 25.1-241, 25.1-242, 25.1-245.1, 25.1-247.1, 25.1-248, 25.1-249, 25.1-250, 25.1-251, and 25.1-419.

Except as otherwise provided, the condemnor pays all costs of the litigation, as follows:

1. Summoned jurors or commissioners receive an allowance as set out in Va. Code § 17.1-618. Va. Code § 25.1-235. Jurors do not receive additional compensation for mileage or expenses.
2. The condemnor shall pay up to \$7,500 of the cost of the owner's survey, or more, if ordered by the court. Va. Code § 25.1-245.1(B).
3. If the award exceeds the initial written offer by the condemnor by 25 percent or more, the court may order the condemnor to pay to the owner (i) reasonable costs, other than attorney fees, and (ii) reasonable fees and travel costs, including reasonable appraisal and engineering fees incurred by the owner, for up to three experts or as many experts as are called by the condemnor, who testified at trial, whichever is greater. Va. Code § 25.1-245.1(C). These cost provisions do not apply to condemnation actions initiated by a public service company, public service corporation, or railroad involving easements valued at less than \$10,000.<sup>42</sup> Va. Code § 25.1-245.1(E).

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<sup>42</sup> A trial judge's order confirming a jury award in a condemnation case that included language that the landowner "reserves the right to pursue his claim for reasonable expert costs" was not specific enough for the trial court to retain jurisdiction of the case after twenty-one days had expired

- a. The Virginia Supreme Court has held that a trial court correctly refused to tax attorney fees as costs when the case went to trial, just compensation was awarded, and the state took title to the property. *Ryan v. Davis*, 201 Va. 79, 109 S.E.2d 409 (1959).
4. Any costs of a new trial based upon exceptions filed by the condemnor.
5. Landowner's reasonable expenses if the condemnor dismisses the proceeding prior to taking title.
6. Fees of a general receiver for a circuit court may not be charged to the condemnor. 1979-80 Op. Va. Att'y Gen. 166. *But see Loudoun Cnty. Bd. of Sup'rs v. Lunn*, 24 Va. Cir. 13 (Loudoun Cnty. 1990) (condemnor required to pay costs of a general receiver).
7. Virginia Code § 25.1-419 provides that a landowner is entitled to attorney, appraisal, and engineering fees if a condemnation action by a state agency, in full or in part, is abandoned or dismissed. *Norfolk Redev. & Hous. Auth. v. C & C Real Estate, Inc.*, 72 Va. Cir. 464 (City of Norfolk 2007).

The statute regarding costs is to be liberally construed to "ensur[e] that owners receive the full measure of just compensation to which they are constitutionally entitled, without that amount being reduced by the costs of asserting their constitutional right to just compensation." Va. Code § 25.1-245.1(F).

#### 4-10.08(b) New Trial

The costs of a new trial are assessed to the owner if the trial was ordered because the first award of just compensation was insufficient and the second award is for the same or a lesser total amount. The landowner is responsible for paying to the condemnor any excess he or she has received, with interest as well as any difference in the amount deposited for early entry by certificate or otherwise, from the date of the original payment until the excess is repaid to the condemnor by the owner. Interest accruing after July 1, 2003, is paid at the judgment rate of interest established by Va. Code § 8.01-382. Va. Code § 25.1-244; *Norfolk Redev. & Hous. Auth. v. C & C Real Estate, Inc.*, 72 Va. Cir. 464 (City of Norfolk 2007).

#### 4-10.08(c) Grantor's Tax

Virginia Code § 58.1-811 exempts deeds to governments from payment of the grantor's tax. 1979-80 Op. Va. Att'y Gen. 349.

## 4-11 RIGHT OF OWNER TO REPURCHASE

Pursuant to Va. Code § 25.1-108, if a condemnor (other than VDOT) declares property surplus, the condemnor must offer the property for repurchase to the former owner, heirs or assigns.<sup>43</sup> Further, for most acquisitions, if the property is the subject of a certificate or petition filed after July 1, 2011, the condemnor must declare the property surplus and offer it for repurchase if (1) the work and improvements specified in the condemnation petition have not been let to contract or construction has not commenced within twenty years, and the property is not otherwise in public use as limited by Va. Code § 1-219.1 (see section 4-3.01), or (2) at any time the property is not used or

from the final order in order to consider a dispute over costs owed to the landowner. *Commonwealth Transp. Comm'r v. Mohamed*, 80 Va. Cir. 294 (Fairfax Cnty. 2010).

<sup>43</sup> The requirement to allow repurchase by the former owner does not apply to property acquired by condemnation before July 1, 2005. *Puryear v. Town of Ashland*, 86 Va. Cir. 501 (Hanover Cnty. 2013).

needed for the public use for which the property was taken or as a public use as limited by Va. Code § 1-219.1. The former property owner can make a written demand for repurchase if the conditions in (1) or (2) occur.

The amount of the offer to sell must be the price paid by the condemnor plus 6 percent annual interest and, at the discretion of the condemnor, the fair market value of any improvements made by the condemnor. A landowner may not waive his right to the offer of repurchase. Notice and newspaper publication of the repurchase offer are required. If no written response is received from the former owner within six months of notice, the right to repurchase is deemed waived. Since there is no common law right to repurchase, any right to repurchase must comply with the requirements of Va. Code § 25.1-108. *Puryear v. Town of Ashland*, 86 Va. Cir. 501 (Hanover Cnty. 2013).

*Kalergis v. Commissioner of Highways*, 294 Va. 260, 805 S.E.2d 395 (2017), addressed VDOT's obligation to reconvey property upon the exercise by the landowner of the right to repurchase. Virginia Code § 33.2-1005(A) provides that if a demand is made after twenty years of inactivity, VDOT shall reconvey the property upon "payment of the original purchase price, without interest." As the improvements to the property were demolished and removed, the original landowner sought to repurchase the property for the original appraised value of the land, which was significantly less than the original purchase price, arguing that the "purchase price" was for what was being reconveyed, in this case the unimproved land. The Court rejected that argument and held that the landowner must pay the full original purchase price to reclaim the property, not its fair market value or its original appraisal amount.

The repurchase powers in Va. Code § 25.1-108<sup>44</sup> differ from the repurchase for highway condemnations set out in § 33.2-1005(A). *Kalergis* would have had a different outcome under Va. Code § 25.1-108.

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<sup>44</sup> "The offer to sell shall be made in writing by the condemnor at the price paid by the condemnor to the former owner plus interest at the annual rate of 6 percent, provided that the condemnor may increase the price by the fair market value of the condemnor's improvements, determined at the time the offer to sell is made. In no case shall the price established by the condemnor exceed the fair market value of the property at the time the offer to sell is made."