

## **VIRGINIA EMINENT DOMAIN: Frequently Asked Questions<sup>1</sup>**

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### **WHAT IS EMINENT DOMAIN?**

Eminent domain is the government's power to take or damage private property for a public use. The Virginia General Assembly has delegated eminent domain power to local governments (cities, counties, and towns) and utility companies to take property for public utilities and pipelines. An entity that is authorized to take property by eminent domain is called a condemnor.

### **WHAT ARE AN OWNER'S CONSTITUTIONAL RIGHTS?**

Article I, § 11 of the Virginia Constitution contains specific protections for Virginia property owners. First, a condemnor cannot take an owner's property unless the taking is for a public use. Second, when a condemnor takes or damages an owner's property it must pay the owner just compensation. Third, a condemnor cannot deprive an owner of his or her property without due process of law. Thus, even if a condemnor is authorized to take or damage property, it cannot do so unless (1) the taking is for a public use, (2) the owner is paid just compensation, and (3) the condemnor has strictly followed all the requirements and protections of the law. VA. CONST. art. I, § 11.

### **IS A TAKING FOR A PIPELINE A PUBLIC USE?**

Most takings for the construction and maintenance of a pipeline to provide authorized public utilities will qualify as a public use under Virginia law. Article I, § 11 of the Virginia Constitution states: "A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services. In all other cases, a taking or damaging of private

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<sup>1</sup> The information contained in these materials is not a complete statement of the laws and procedures governing eminent domain or pipeline acquisitions in Virginia and should not be used as a substitute for legal advice. The scope of this material is limited to Virginia law and does not cover pipeline takings under federal law. For a more exhaustive review of eminent domain law in Virginia see "Fifty-State Survey: The Law of Eminent Domain" published by First Chair Press and sponsored by the American Bar Association. This publication has a chapter discussing eminent domain law in Virginia.

property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property.” Virginia Code § 1-219.1 defines public use as including takings where “the property is taken for the creation or functioning of any public service corporation, public service company, or railroad [or] the property is taken for the provision of any authorized utility service by a government utility corporation.”

## **WHAT IS JUST COMPENSATION?**

Just compensation is designed to make an owner whole for the losses caused by the taking or damaging of his or her property; the goal of just compensation is to put an owner in the same monetary position after the taking as he or she would have occupied if the taking had not occurred.<sup>2</sup> The Virginia Supreme Court has declared that just compensation must provide the owner with the “full and perfect equivalent for the property taken or damaged.”<sup>3</sup>

The Virginia Constitution guarantees owners just compensation for property that is “damaged or taken.” VA. CONST. art. I, § 11. Thus, owners are entitled to just compensation not only when their property is physically taken but also when their property is damaged but not physically taken. Additionally, in cases where part of an owner’s property is taken, the owner is entitled to (1) the value of the property that was taken and (2) the loss in value to the owner’s property remaining after the taking. For example, if a condemnor takes one of an owner’s three acres, the owner is entitled to the value of the one acre taken plus any reduction in value to the two acres remaining after the taking.

## **WHO HAS THE POWER OF EMINENT DOMAIN IN VIRGINIA?**

Courts have held that the power of eminent domain is a legislative power belonging to the state.<sup>4</sup> As such, no person or entity, including cities, towns, and counties, can exercise the power of eminent domain unless the state legislature has granted them the power.<sup>5</sup> Even then, the party seeking to exercise the power can only do so for the purposes stated by the legislature and in accordance with the statutory prerequisites and procedures for exercising the power.<sup>6</sup> The Virginia General Assembly has granted eminent domain power to several entities that can take property to construct various types of pipelines, including local governments and utility companies. See VA. CODE § 15.2-1901.1 and 15.2-1902 (counties, cities, and towns); VA. CODE § 56-49 (public utility companies); VA. CODE § 33.1-89 (Virginia Department of Transportation); VA. CODE § 15.2-5114 (water and sewer authorities); VA. CODE § 15.2-5425 (electric authorities); VA. CODE § 21-323 (drainage districts); VA. CODE § 21-166 (sanitation

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<sup>2</sup> Anderson v. Chesapeake Ferry Co., 186 Va. 481, 43 S.E.2d 10 (1947).

<sup>3</sup> Chairman of Highway Comm’n of Virginia v. Fletcher, 153 Va. 43, 47, 149 S.E. 456, 457 (1929).

<sup>4</sup> City of Hopewell v. Norfolk & W. Ry. Co., 154 Va. 19, 25-26, 152 S.E. 537, 538-39 (1930); see also Jeter v. Vinton-Roanoke Water Co., 114 Va. 769, 76 S.E. 921, 925 (1913).

<sup>5</sup> City of Hopewell v. Norfolk & W. Ry. Co., 154 Va. 19, 25-26, 152 S.E. 537, 538-39 (1930).

<sup>6</sup> City of Hopewell v. Norfolk & W. Ry. Co., 154 Va. 19, 25-26, 152 S.E. 537, 538-39 (1930); see also City of Richmond v. Childrey, 127 Va. 261, 103 S.E. 630, 631-32 (1920) (stating that “one claiming the power [of eminent domain] must bring himself strictly within the grant, both as to the extent and manner of its exercise” and that “[t]he requirement of the law must be fulfilled, whether reasonable or unreasonable”).

commissions); VA. CODE § 21-118 (sanitary districts); VA. CODE § 56-464 (telephone and telegraph companies); VA. CODE § 56-231.23 (utility cooperatives).

## **WHAT ARE THE PROVISIONS GOVERNING THE EXERCISE OF EMINENT DOMAIN POWER FOR PIPELINES?**

Public utility companies have the power of eminent domain in Virginia and can take property for approved pipeline projects. VA. CODE § 56-49. Virginia's State Corporation Commission ("SCC") regulates public utility companies, which must comply with the SCC's regulations and guidelines. A public utility company must obtain a certificate of public convenience and necessity from the SCC before it can take property by eminent domain. VA. CODE § 56-49.

For gas pipeline projects, the SCC must consider the effect of the pipeline on the environment, public safety, and economic development before it issues the certificate of public convenience and necessity. VA. CODE § 56-265.2:1(A). The public utility company seeking to construct the gas pipeline must provide written notice of the proposed pipeline project and must file a copy of all plans, specifications, routes, and maps of the proposed pipeline with the SCC. VA. CODE § 56-265.2:1(B). If any interested party requests a public hearing after this information is filed, the SCC will then hold a hearing regarding the gas pipeline project. VA. CODE § 56-265.2:1(C). The SCC may require the public utility company to change the route of the proposed gas pipeline or place other conditions on approval of the project. VA. CODE § 56-265.2:1.

The power of eminent domain does not authorize a condemnor to take or damage an owner's property until after it has paid the owner just compensation. In some instances, however, the legislature has granted an additional power of eminent domain called the quick-take power. The quick-take power is an extraordinary power that allows a condemnor to take an owner's property before it pays the owner just compensation.<sup>7</sup> Pipeline companies or public utility companies do not have quick-take power under Virginia law.<sup>8</sup> VA. CODE § 56-49.

There are a few exceptions to the general rule that prohibits the use of the quick-take power for pipelines or utilities. First, a pipeline company may be able to take immediate possession of an owner's property in an emergency. Thus, before a company can exercise the quick-take power, it must prove, among other things, that an emergency exists. VA. CODE §§ 25.1-207; 25.1-223; 25.1-224. Second, the Virginia Department of Transportation is authorized to relocate pipelines when constructing its road projects, and it may use the quick-take power to relocate pipelines that are in the path of its road projects. VA. CODE §§ 33.1-96; 33.1-119. Third, counties, cities, and towns may use the quick-take power to take property for certain projects that involve pipelines, including "water supply and sewage disposal systems . . . and water, sewer, and

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<sup>7</sup> Under the quick-take power, the condemnor files a certificate at the courthouse and deposits into court what it believes to be the value of the property it has taken and damaged. The filing of this certificate and the deposit of funds gives the condemnor defeasible title to the owner's property, allows the condemnor to immediately take possession of the owner's property, and authorizes the condemnor to evict the owner from his or her own property upon proper notice. The just compensation owed to the owner is not determined or paid until after the condemnor has taken the property.

<sup>8</sup> Issues dealing with quick-take power vary under federal law.

governmentally owned gas, electricity, telephone, telegraph and other utility lines and pipes.”  
VA. CODE § 15.2-1902.

### **What is the step-by-step process of a condemnation?**

#### Prior to condemnation:

- The condemnor must identify the public use for which the property is to be taken or damaged. This includes creating plans for the project and determining what parcels of private property will be acquired for the project.
- The condemnor provides notice of the project to the property owners who may be affected by the project. Notice may be in the form of local government meetings, local television stories, signs posted, letters, flyers, newspaper ads, or direct contact by the condemnor with the property owners.
- If the condemnor believes the value of just compensation is over \$25,000, the condemnor must have the property appraised before beginning negotiations with the property owner. VA. CODE § 25.1-417(2). A determination that the value of the property being acquired is less than \$25,000 may be based upon real estate tax assessments or other objective evidence. In performing an appraisal, the appraiser should:
  - o Visit the property—the property owner has the right to accompany the appraiser on the inspection of the property. VA. CODE § 25.1-417(2).
  - o Take measurements of the property.
  - o Ask for leases applicable to the property or other relevant documents that would assist in the determination of just compensation due for the property acquired or damaged.
- Before it makes the owner an offer for the property taken or damaged and before it initiates any negotiations for the property taken or damaged, the condemnor must (1) give the owner a copy of a title report to the property<sup>9</sup> and (2) “a written statement of, and summary of the basis for, the amount it established as just compensation, and, if an appraisal is required or obtained, such written statement and summary shall include a complete copy of all appraisals of the real property to be acquired that the [condemnor] obtained prior to making an offer to acquire or initiating negotiations for the real property.” VA. CODE § 25.1-204.
- After a condemnor has given the owner the information required before its offer, it must then attempt to purchase the property from the property owner by providing a written offer to purchase the property. VA. CODE § 25.1-204. The condemnor’s offer to purchase the property may not be less than the appraised or assessed value of the property, whichever is greater; the offer can be more than the appraised or assessed value but cannot be less. VA. CODE § 25.1-204.

#### Condemnation proceedings:

- If the property owner and condemnor cannot agree on just compensation, the condemnor must file a Petition for Condemnation to begin the condemnation proceedings. VA. CODE § 25.1-205; 25.1-206. Among other things, the Petition must (a) explain the public use for which the property is being taken or damaged, (b) state the condemnor’s authority to

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<sup>9</sup> The condemnor must give the owner a title report only if it is taking part of the property in fee.

use the power of eminent domain, (c) identify the property being taken or damaged, and (d) describe the public project in sufficient detail to enable the owner to know the extent and impact of the project on his or her property. VA. CODE § 25.1-206. Not only must the Petition contain a “description of the work or improvements to be made” but, in partial takings cases, it must also contain “a plat, drawing or plan, in sufficient detail to disclose fairly the nature of such work or improvements, including specifications, elevations and grade changes, if any, so as to enable the owner of such property to be reasonably informed of the nature, extent and effect of such taking and the construction and operation of such works and improvements.” VA. CODE § 25.1-206. The plat, drawing, or plan must “be attached as an exhibit to the petition.” VA. CODE § 25.1-206.

- The Petition must be served on all owners of the property. VA. CODE § 25.1-209.
- The property owners must file an answer or grounds of defense within 21 days of service of the Petition. VA. CODE § 25.1-213. Failure to file an answer does not preclude an owner from challenging the amount of just compensation at trial, but it may waive an owner’s right to raise any defenses to the condemnation action or to select a jury or commissioners to determine just compensation. VA. CODE § 25.1-214.
- The condemnor has no title to the property until it pays the owner the amount the jury or commissioners determines to be just compensation (or the amount agreed upon by the owner and condemnor). However, the condemnor may move and obtain an order from the court allowing early entry onto the owner’s property if the condemnor can establish that an emergency exists. The condemnor will be required to deposit into court the amount of money it offered the owner, which amount cannot be less than the appraised or assessed value, whichever is greater. VA. CODE § 25.1-224. The owner can then withdraw this money for his or her use. VA. CODE §§ 25.1-224; 25.1-243. The court may also require the condemnor to post a bond to protect the owner’s interests. VA. CODE § 25.1-224. Unlike many governmental entities, public utility companies are not backed by the public trust.
- If an owner raises defenses to the condemnation action, the court will hold a hearing on the defenses before the just compensation trial. VA. CODE § 25.1-219. If the judge rules in favor of the property owner on a defense, the condemnation will not be permitted to go forward.
- If no defenses are raised or a judge rules in favor of the condemnor on the defenses, the property owners and condemnor will schedule a date for the trial on just compensation.<sup>10</sup> VA. CODE § 25.1-219.
- Prior to the scheduled trial date, the parties may serve discovery to obtain documents and information about each party’s valuation of just compensation. Both written discovery (interrogatories, requests for production of documents, and requests for admissions) and depositions are permitted, but discovery is limited to matters that are relevant to the issues in the proceeding, which issues are ordinarily limited to valuation or just compensation. VA. SUP. CT. R. 4:1, 4:5, 4:8, 4:9. If the condemnor initiates discovery, it must pay “all costs” of discovery. VA. SUP. CT. R. 4:1(b)(4)(D). A scheduling order may be entered to determine the dates on which certain information, such as the opinions of

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<sup>10</sup> Setting a trial date does not preclude the parties from settling the case without going forward with the trial. The parties settle the case when they reach an agreement on the price to be paid for the property taken and damaged. Sometimes, a mediator is used to aid the parties in reaching a settlement. Direct negotiations between the parties are also permitted at any time.

expert witnesses, must be disclosed to the opposing party.

- A trial will be held in the circuit court to determine just compensation for the property taken and damaged. This trial may be held in front of a judge (“bench trial”), a five member jury, or a five member commission. In a jury or commissioner trial, each juror or commissioner must reside and own property in the same locale where the property being taken or damaged is located. VA. CODE §§ 25.1-227.1; 25.1-227.2; 25.1-228; 25.1-229. The property owner has the right to request that the trial be held before a jury or before commissioners. VA. CODE § 25.1-213. As part of the trial, the jury and judge accompany the parties to “view” the property. VA. CODE § 25.1-231. This view is part of the evidence the jury, commissioners, or judge may consider in determining the value of the property and just compensation.
- At trial, the jury or commissioners determines the value of just compensation the condemnor must pay the property owner for the property taken and damaged.
- Just compensation may include lost profits to the owner of a business or farm operation. An owner can recover lost profits for up to three years from the date of the taking or valuation. VA. CODE §§ 25.1-100; 25.1-230.1.
- After trial, either party may file exceptions to the award of just compensation and may apply to the Supreme Court of Virginia for an appeal. VA. CODE §§ 25.1-233; 25.1-239.
- Once the amount of just compensation is determined, the condemnor has the right to enter the property upon paying that amount (or the difference in that amount and any amount previously deposited with the court if early entry was granted). The property owner may petition to withdraw those funds, and all of the lienholders and/or creditors with an interest in the property must be notified of the owner’s intent to withdraw the funds. The circuit court may hold a hearing to determine who is entitled to the funds. VA. CODE § 25.1-241.
- Upon entry of a final order in the case, the condemnor acquires indefeasible title to the property taken and becomes the new owner of that property. VA. CODE § 25.1-237.

### **Is the property owner entitled to any additional money or reimbursement?**

- If the amount determined at trial to be just compensation is 30% or more above the condemnor’s last written offer (made within 60 days of receipt of a written appraisal report by the property owner’s appraiser), the court may order the condemnor to reimburse the property owner for all reasonable costs (other than attorney fees) and all reasonable fees and travel costs for up to three experts who testified at trial. VA. CODE § 25.1-245.
- If the condemnor initiates discovery (*i.e.*, first serves interrogatories or requests for production or first requests depositions), it must pay all costs of discovery, including the costs and expenses of the property owner’s experts. VA. SUP. CT. R. 4:1(b)(4)(D).
- If the condemnation action is abandoned (*i.e.*, the condemnor decides not to take certain property or property rights it initially sought to condemn) or if the judge rules in favor of the property owner on a defense to the take and denies the condemnor’s right to take the property, the condemnor must reimburse the property owner for his or her reasonable costs and expenses incurred as a result of the condemnation proceedings, including expert and attorney fees. VA. CODE § 25.1-419.

- Condemnors must also pay reasonable relocation and reestablishment expenses,<sup>11</sup> including:
  - o Actual expenses incurred in moving the owner's business, farm, or personal property. VA. CODE § 25.1-406(1).
  - o Actual direct losses of tangible personal property as a result of moving. VA. CODE § 25.1-406(2).
  - o Actual expenses incurred in searching for a replacement business or farm. VA. CODE § 25.1-406(3).
  - o Actual expenses incurred in reestablishing a farm or business at a new location. VA. CODE § 25.1-406(4).
  - o Additional payments for increased interest costs or debt services costs, closing costs, recording fees, etc. for persons who are forced to move from a home in which they have lived for at least 180 days before the taking. VA. CODE § 25.1-409.

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<sup>11</sup> Relocation benefits apply to owners and tenants.