

CHAPTER 2

CONDEMNATION PROCEDURE UNDER TITLE 33.2 AS EXERCISED BY THE COMMISSIONER OF HIGHWAYS¹

2.1 INTRODUCTION

The right to private property is a fundamental right, and no private property is to be taken in Virginia for public uses without just compensation.² The right of eminent domain is “the right on the part of the state to take or control the use of private property for the public benefit when public necessity demands it, is inherent in every sovereignty, and is inseparable from sovereignty, unless denied to it by its fundamental law.”³ The Commissioner of Highways⁴ exercises the right of eminent domain in the Commonwealth to acquire lands deemed to be necessary for the construction, reconstruction, alteration, maintenance and repair of the public highways of the Commonwealth, and other purposes incidental thereto.⁵ Transportation facilities are among the enumerated public facilities for which the use of the power of eminent domain is authorized in Virginia.⁶

2.2 NATURE OF THE POWER OF EMINENT DOMAIN

2.201 Nature and Scope of Power. The power to appropriate private property for public use is an attribute of sovereignty and is essential to the existence of government.⁷ The power of eminent domain does not depend

¹ The chapter has been revised and updated by Nancy C. Auth, a Senior Assistant Attorney General in the Office of the Attorney General, Commonwealth of Virginia, from text originally developed by John J. Beall, Jr. The views expressed do not necessarily reflect those of the Attorney General.

² Va. Code § 1-219.1; Va. Const. art. I, § 11.

³ *Talbot v. Massachusetts Mut. Life Ins. Co.*, 177 Va. 443, 448-49, 14 S.E.2d 335, 336 (1941); *Evans v. Smyth-Wythe Airport Comm’n*, 255 Va. 69, 495 S.E.2d 825 (1998).

⁴ The Commissioner’s title was changed from Commonwealth Transportation Commissioner to Commissioner of Highways by amendment to former Va. Code § 33.1-1 (now § 33.2-200) and § 33.1-3 (now § 33.2-222), effective July 1, 2011.

⁵ Va. Code § 33.2-1001(A).

⁶ Va. Code § 1-219.1.

⁷ *Commonwealth v. City of Newport News*, 158 Va. 521, 164 S.E. 689 (1932).

on a specific grant in the United States Constitution; it is inherent in sovereignty and exists in a sovereign state.⁸ There is no specific grant of eminent domain power in the Virginia Constitution, but it is strongly implied.⁹

2.202 Time and Manner of Exercise and Extent of Power. The right of the state to take private property for a public use lies dormant in the state until legislative action is taken. The time and manner of the exercise and the extent of the state's power is vested solely in the General Assembly.¹⁰ In the wake of *Kelo v. City of New London*,¹¹ the General Assembly acted in 2007 to place clear and specific limits on the use of the power of eminent domain in Virginia.¹² In 2013, an amendment to Article I, § 11 of the Constitution of Virginia became effective that placed in the Constitution many protections that were already in the Code of Virginia. The amendment created additional protections as well, such as requiring condemnors to prove that a use is public and making lost profits and lost access compensable.¹³

2.203 Exercise of Power Strictly Construed. Statutes that confer the power of eminent domain are to be strictly construed.¹⁴

⁸ *Id.*; *Marymount Coll. of Va. v. Harris*, 205 Va. 712, 139 S.E.2d 43 (1964).

⁹ See Va. Const. art. I, § 11.

¹⁰ *Alexandria & Fredericksburg Ry. Co. v. Alexandria & Washington R.R. Co.*, 75 Va. 780, 784 (1881). But see Va. Const. art. I, § 11.

¹¹ 545 U.S. 469 (2005).

¹² Va. Code § 1-219.1.

¹³ The new text for Art. I § 11 replaced language regarding no passage of laws concerning taking or damaging of property for public uses without just compensation with the following:

That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use. Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking. The terms “lost profits” and “lost access” are to be defined by the General Assembly. 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 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. The condemnor bears the burden of proving that the use is public, without a presumption that it is.

The definitions for “lost profits” and “lost access” are in Va. Code § 25.1-100.

¹⁴ *Virginia-Am. Water Co. v. Prince William Cnty. Serv. Auth.*, 246 Va. 509, 519, 436 S.E.2d 618, 624 (1993); *State Hwy. Comm'r v. Hooker Furniture Corp.*, 214 Va. 137, 138, 198 S.E.2d 649, 650 (1973); *Dillon v. Davis*, 201 Va. 514, 519, 112 S.E.2d 137, 141 (1960).

2.204 Delegation of Power.

A. Generally. The General Assembly may delegate its power to its subordinate agencies.¹⁵

B. Delegation of Power to Commissioner. The power of eminent domain is delegated to the Commissioner of Highways, the head of the Department of Transportation. The Commissioner has general power to acquire by purchase, gift, or eminent domain any lands or interest in lands deemed necessary for public highways and purposes incidental thereto for permanent, temporary, continuous, periodic, and future use.¹⁶

C. Limitations on the Commissioner's Power.

1. Agricultural and Forestal Districts. The Commissioner cannot condemn property within an agricultural or forestal district, except in accordance with section 15.2-4313 of the Virginia Code.¹⁷

2. Tramways. Private property cannot be condemned for rights of way upon or across public highways for tramways or railways operated by a person, firm, or chartered company engaged in mining, manufacturing, or lumber harvesting.¹⁸

3. Future Uses. The Commissioner's authority to acquire property for certain future uses is limited because the Commissioner is required to reconvey the acquired property to the original property owner for the price paid, on demand, if the project is not built within certain time limits. Notice requirements are set out in the statute along with exceptions to the ability to demand reconveyance.¹⁹ The right to recovery under section 33.2-1005 extends to successors in interest.²⁰

¹⁵ *Stanpark Realty Corp. v. City of Norfolk*, 199 Va. 716, 101 S.E.2d 527 (1958); *Light v. City of Danville*, 168 Va. 181, 190 S.E. 276 (1937); *Alexandria & Fredericksburg Ry. v. Alexandria & Washington R.R.*, 75 Va. 780 (1881).

¹⁶ Va. Code § 33.2-1001.

¹⁷ Va. Code § 33.2-1002.

¹⁸ Va. Code § 33.2-252.

¹⁹ Va. Code § 33.2-1005.

²⁰ *Commonwealth Transp. Comm'r v. Windsor Indus., Inc.*, 272 Va. 64, 630 S.E.2d 514 (2006).

D. Specific Authority of Commissioner. The Commissioner has specific statutory authority to:

1. Condemn for the interstate systems of highways;²¹
2. Condemn for bypasses in and around cities and incorporated towns;²²
3. Condemn for limited access highways;²³
4. Condemn to establish recreational waysides;²⁴
5. Acquire lands adjacent to scenic highways, but not condemn;²⁵
6. Condemn tracts (acquisition of entire tract of land when only part is used for highway purposes, subject to certain restrictions).²⁶ However, because the 2013 constitutional amendment provides that no more private property than is necessary to achieve the stated public use may be taken, the landowner must consent;
7. Condemn median strips (acquisition of land in median strips of highways for public mass transportation);²⁷
8. Take road materials from streams, rivers, and water courses;²⁸

²¹ Va. Code § 33.2-300.

²² Va. Code § 33.2-318.

²³ Va. Code § 33.2-401

²⁴ Va. Code § 33.2-246.

²⁵ Va. Code § 33.2-408.

²⁶ Va. Code § 33.2-1007. The Commissioner must offer to purchase uneconomic remnants. Va. Code § 25.1-417(A)(9). Under the Constitution of Virginia, no more private property than is necessary to achieve the stated public use may be taken. Va. Const. art. I, § 11. This raises the question of whether the condemnation of an entire parcel under section 33.2-1007 is constitutional when only part of the parcel will be used for a highway project.

²⁷ Va. Code § 33.2-1015.

²⁸ Va. Code § 33.2-1017.

9. Condemn land used as cemeteries;²⁹
10. Permit broadband service providers to install and maintain underground broadband conduit or other communications systems within highway rights-of-way;³⁰
11. Condemn land for sidewalks along highways and bridges;³¹
12. Condemn ferries forming connecting links in a state highway;³²
13. Condemn for projects authorized under the State Revenue Bond Act;³³
14. Condemn for flight strips, airfields, and roads requested by a federal agency;³⁴
15. Condemn for purposes set out in section 33.2-281 *et seq.* of the Virginia Code³⁵ for the establishment, maintenance, improvement, and promotion of public transportation and passenger and freight rail transportation in the Commonwealth. This power can be exercised for the Department of Rail and Public Transportation and “to assist other appropriate entities . . . in the implementation and improvement of passenger and freight rail . . . and public transportation services and the retention of rail corridors for public purposes;”³⁶ and

²⁹ Va. Code §§ 33.2-1031 to -1034.

³⁰ Va. Code § 33.2-1030.

³¹ Va. Code § 33.2-112. The Commissioner is not prohibited from undertaking pedestrian and/or bicycle projects not in conjunction with highway projects. Va. Code § 33.2-111.

³² Va. Code § 33.2-600.

³³ Va. Code §§ 33.2-1702, -1704.

³⁴ Va. Code § 5.1-50.

³⁵ Va. Code § 33.2-1003.

³⁶ Va. Code § 33.2-284.

16. Condemn interests for exchange with a railroad, public utility company, public service corporation or company, political sub-division, or cable television company, when a public improvement uses private land owned by or occupied under a claim of right or with apparent acquiescence of the private owner by one of these entities.³⁷

2.3 LIMITS ON POWER OF EMINENT DOMAIN

2.301 Just Compensation. Property may not be taken or damaged for public use without just compensation.³⁸ Just compensation is defined for proceedings brought by the Commissioner as the value of the property to be taken and the damages, if any, which may accrue beyond the enhancement in value, if any, to such residue by reason of such taking and use by the Commissioner.³⁹ Compensation shall be no less than the value of the property taken, lost profits, lost access, and damages to the residue caused by the taking.⁴⁰ The terms “lost profits” and “lost access” have been defined by the General Assembly pursuant to the Virginia Constitution.⁴¹ Enhancement in value is not offset against the value of the property taken, and if the enhancement in value exceeds the damage, there is no recovery against the landowner for the excess.⁴²

The owner of property is entitled to “just compensation.” He or she is not entitled to receive a bonus beyond such compensation.⁴³ Furthermore, just compensation is not required in every case of financial loss but is limited to losses from identifiable property rights.⁴⁴ Just compensation may include

³⁷ Va. Code § 33.2-1014.

³⁸ See Va. Const. art. I, § 11; Va. Code § 1-219.1.

³⁹ Va. Code § 25.1-230.

⁴⁰ Va. Const. art. I, § 11. For discussions on the impact of the constitutional amendment and related changes to the Virginia Code, see 2012 Op. Va. Att’y Gen. 37 and 2014 Op. Va. Att’y Gen. 18. See also *Commissioner of Hwys. v. Sadler*, Case No. CL14-292, 2016 Va. Cir. LEXIS 39 (Dinwiddie Cir. Ct. Apr. 6, 2016), in which the court held that Article I, § 11 does not create an independent jurisdictional challenge to the Commissioner’s reduced take.

⁴¹ See Va. Code §§ 25.1-100, -230.1.

⁴² Va. Code § 25.1-230.

⁴³ *State Hwy. & Transp. Comm’r v. Parr*, 217 Va. 522, 524-25, 230 S.E.2d 253, 255 (1976); *State Hwy. & Transp. Comm’r v. Allmond*, 220 Va. 235, 239, 257 S.E.2d 832, 834-35 (1979).

⁴⁴ See *Potomac Elec. Power Co. v. Fugate*, 211 Va. 745, 180 S.E.2d 657 (1971).