

A Property Owner's Guide to the Condemnation Process and Just Compensation in the Commonwealth of Virginia

This may be the first time your property has been taken by condemnation. If so, this guide should give you a basic understanding of what is involved in the condemnation process. While we trust this guide will prove helpful to you during your case, there are some important matters, which we ask that you keep in mind:

The questions and answers in this guide are -- by necessity -- general and not intended to apply specifically to your case. The facts of every case vary. Please utilize this guide as it was intended to be used: as a general overview and not a precise opinion on any particular issue in your case.

This guide should not serve as a substitute for consultation with an attorney. Whenever you have a specific question about the condemnation process or the particulars of your case, always discuss it with a qualified eminent domain attorney. This summary is intended to serve as only one of several means of providing you with the information you need to understand your case and enable you to make well-informed decisions.

What is condemnation?

Condemnation is the power to take private property for a public purpose. The power of condemnation is also known

as the power of eminent domain.

Who can take my property?

Federal, state and local governments have the power to condemn private property, and this power has been delegated to many governmental agencies. Thus, the Virginia Department of Transportation may have the power to condemn your property. The government has also delegated the power of eminent domain to public utilities and in certain, very limited situations to private companies and individuals.

Can the state take my property for any reason?

No. The condemning authority may only take your property for a public use, not a private use.

Who decides whether the condemnation of my property is for a public or private purpose?

Only a judge can decide. Even if the condemning authority believes the condemnation is for a public purpose, a judge can rule otherwise and deny the government the right to take your property.

How will I know whether the government really wants to take my property?

In most cases, you will learn far in advance of the proposed construction date of a project which may require the taking of your property. Your first knowledge of the project may come from reading a newspaper article or talking to a neighbor.

In many cases, the public agency will hold a public hearing at which the agency will describe the boundaries of the project, so that you will be able to determine whether your property is needed for the project.

Generally, condemning authority will also generally give you a written notice that your property is needed and will give you a written offer to purchase your property prior to filing a condemnation action.

Does the government or condemning authority have the power to take my property?

It depends. The state or condemning authority has the power of eminent domain. Many counties and most cities in Virginia also have the power of eminent domain. In addition, many state and local governmental agencies and public utilities have the power of eminent domain.

While a specific governmental body or public utility may have the power of eminent domain, that does not necessarily mean that it has the right to take your specific property.

If you do not want your property taken, only the court can require that your property be condemned. For example, the Virginia Department of Transportation claims that it needs a portion of your property to construct a road, it may not take your property unless you give your consent or the court enters an order allowing the taking.

If you do not consent to the condemnation, the condemning authority must prove to the court that your property is reasonably necessary for a public project. The burden on the landowner challenging a condemnation is very high. While condemning authorities have most often prevailed in litigation to take property, there have been several occasions in which the courts have denied the condemning authorities the right to take the property they seek. In June 2006, the Virginia Supreme Court held that the Norfolk Redevelopment and Housing Authority did not have the right to take the property of C&C Real Estate.

Should I be doing anything before my property is condemned?

Is your property likely to be affected by a highway or other government taking? If it is, the time to act is now, not after the process is has begun.

Once the taking actually occurs and papers are filed, it may be too late to make critical decisions that could have an impact on your ultimate compensation. Documents establishing the legal status of ownership and any leasehold interests, for example, should be reviewed and sometimes modified up front. Under your attorney's

guidance, input from an appraiser or other consultants can often be obtained quite inexpensively. Your response to preliminary overtures from government representatives can affect the final outcome.

The impact of a road project often involves more than initially meets the eye. Beyond the value of the square footage taken, often overlooked are such things as environmental problems and a serious reduction in value of the property that remains.

In general, it is wise for an owner to seek the advice of an attorney when considering precondemnation actions, since the actions a property owner takes before the property is condemned may help or hurt the case.

The property owner should avoid taking positions, especially written positions, which may be used against him or her in the condemnation proceeding. If the property owner contests the tax assessment, for example, stating that the property is worth less than the county's or city's estimate, that appeal may be used against the property owner if, in the condemnation case, the property owner asserts a higher value.

The property owner should avoid contracts of sale or sale offers that might attach a value to the property before a condemnation proceeding. The property owner should avoid appraising the property before consulting with a lawyer.

Be careful, also, if you attend a public hearing about an upcoming project. These hearings are a good source of information for property owners. They can provide helpful information about the scope and time of public projects.

Remember, however, that any statement you make may be used later if you go to trial. Recently in the Norfolk Circuit Court trial of Commonwealth Transportation Commissioner of Virginia v. DAWA Corp., at law number CL99-1293, the Virginia Department of Transportation (VDOT) attempted to use a property owner's statement at a public hearing against the property owner at trial. The property owner gave a brief written statement at a public hearing and commented favorably on some aspects of the proposed project. At the trial, VDOT attempted to use those statements against the property owner.

Leases and other agreements signed by the property owner prior to condemnation may reduce the portion of the final award to which the property owner will be

ultimately entitled. The property owner's attorney should be consulted on condemnation clauses contained within these documents. Further, the property owner should never produce leases, contracts, offers, and bids to the condemning authority without seeking the advice of an attorney.

The property owner should maintain the appearance and condition of the property. Visual impressions, even to sophisticated professionals, are important, and the condemning authority's appraisers will be inspecting the property long before it is condemned. The property owner should always keep the property looking as good as possible and never defer maintenance. Landscape and curb appeal are important. Improvements made to the property will affect its fair market value, upon which just compensation is based.

Favorable land use permits often enhance the value of the property. Where it is practical and prudent, the securing of a rezoning, plat approval, or building permit may result in a higher valuation of the property. The property owner should not interrupt development plans solely because of a pending condemnation. The decision of whether to apply for land use permits must always be weighed against the effect that a potential denial will have on the case. It is thus wise to seek the advice of an attorney before proceeding with a land use application.

How is the property appraised?

Appraisers generally use three methods of appraisal to estimate the value of real estate: the market approach, the cost approach and the income approach.

Appraisers also determine, during partial takings by the condemning authority, the extent, if any, of damages to the remaining property.

Often the greatest element of compensation is not for the property taken, but for damages to the remainder. This is particularly true in road-widening cases and instances where the condemning authority is only acquiring an easement. It is important that you retain an appraiser who understands the concept of damage to the remainder and will include this damage in his or her appraisal.

If I don't agree with the condemning authority's offer, who decides how much money I get?

In Virginia, state law allows the landowner to elect a jury to determine the amount of compensation to be paid to the owner who loses his or her property through condemnation. The jury panel must all be landowners. The jury determines the amount of the award, which may include damages.

Whether you choose a randomly selected jury or a panel of appointed commissioners is a tactical decision that you should make in consultation with your attorney.

A Condemnation Jury

The property owner has the right to choose between a judge and a jury of property owners to determine the amount of just compensation that the condemning authority owes the property owner for taking his or her property and damaging the value of the remainder.

Each circuit court has a jury commissioner responsible for providing to the court and parties to the condemnation a random list of real property owners from the city or county who qualify to serve on a condemnation jury. The circuit court will summon a panel of potential jurors from the random list of owners. Through a process of questioning potential jurors, called voir dire, the court and the attorneys for the property owner and the condemning authority will ultimately decide on thirteen impartial jurors from whom the property owner and the condemning authority will select five. The property owner and the condemning authority will each have the right to strike four potential jurors from the panel of thirteen. The five remaining potential jurors will serve as the condemnation jury.

Unlike other civil juries, condemnation juries are empowered to act with a majority. Hence, any three of the condemnation jurors have the power to decide the amount of just compensation the condemnor owes the property owner.

Do I pay taxes on my award?

It depends. A condemnation is considered an involuntary conversion and is treated differently from other sales and other cases.

You will have a period of time to reinvest the proceeds of the case and defer your tax obligation until a later date.

If a portion of your award is considered severance damages (compensation for damages to property you continue to own), you may be able to defer the payment of taxes on that portion of our award until you sell the property.

Portions of the award attributable to interest are taxed as ordinary income.

The tax-deferral benefits of condemnation are also available to sales in lieu of condemnation. You may thus defer the payment of taxes on a sale to the condemning authority even if you settle the dispute without the government being required to file a condemnation action. An accountant or tax lawyer is usually needed for deferring taxes on condemnation proceeds.

Top Eminent Domain Abuses

The following is a list compiled by our attorneys of ten abuses of the power of eminent domain. Every day in the District of Columbia, Maryland and Virginia, residents and property owners are being hurt by othe unjust use of the power of eminent domain. These are just a few of the numerous examples of the way that condemning authorities abuse private property owners.

1) Cumberland County School Board v. John and Mary Meeks

On October 29, 2001, the Board of Supervisors of Cumberland County approved the sale of an abandoned school buiding to the Meeks for their high bid of \$110,000. The Meeks' bid was one of only two bids offered at the public auction, the other being for just \$1.00.

When the Meeks bought the property in 2001 the property was vacant, unrentable, and the buildings were deteriorating and in need of renovation and repair. Among the problematic conditions existing at the time of the Meeks' bid in 2001 the following conditions stand out:

the roofs leaked, leading to an accumulation of standing water, mold and mildew throughout the buildings; nearly three-fourths of the windows were broken and/or missing; many of the toilets had not been flushed in several years; the heating system did not work; the plumbing system did not work and many pipes were broken; due to the leaking roof the ceiling tiles had become moldy and many were missing; the stage in the auditorium had rotted through due to leaks in the roof; assorted books, papers, trash, desks and gym equipment were left throughout the building; spare rolls of insulation had been left in the auditorium and absorbed water, leaving them full of mold and mildew; the locks on the outside doors were either missing or inoperable, leaving the building unsecured; many of the light fixtures, both inside and outside the building, were not in working order; the concrete walkways surrounding the building had acquired a thick covering of mold; the shrubbery had become overgrown; the yard had barely been maintained; the mortar around many of the windows had rotted away; and pools of standing water had accumulated in the basements.

After purchasing the property, the Meeks made substantial renovations to the building and removed the above listed deficiencies in the property at great personal cost. Prior to condemnation the Meeks had completed substantial renovations to the property and had incurred over \$400,000 in acquisition and renovation costs as well as their enormous investment of time. The renovations drastically changed the nature of the building from one that was deteriorating and unrentable in 2001 to one in good condition and being leased to several different entities in 2006.

It was in March of 2006 that the Cumberland County School Board decided that it wanted its newly renovated school building back to use again as a school. But rather than pay the Meeks for their expenses in renovating the buildings, the School Board sought to force a bargain sale upon the Meeks by offering them \$200,000. The Meeks were rightly offended by the offer and brought in Waldo & Lyle as counsel. In February of 2007 a jury in Cumberland County awarded the Meeks \$850,000, some 425% above the School Board's offer.

2) Norfolk Housing and Redevelopment Authority v. C and C Real Estate, Inc.

In 1987, the Norfolk City Council directed Norfolk Redevelopment and Housing Authority (NRHA) to examine C and C's property to determine whether

governmental intervention was needed to rehabilitate the area. NRHA's conservation plan, adopted by City Council in 1988, included a description of the property C and C came to own, which NRHA had determined was blighted. City Council authorized NRHA to acquire the property if the blight was not improved. However, no notice of the chance to remove the blight was given to C and C or their predecessors.

In December of 1999, NRHA sent C and C Real Estate a letter stating NRHA's intent to acquire the property. NRHA made offers to buy the property, but C and C refused to sell. One of the reasons C and C rejected NRHA's offer was NRHA's refusal to compensate Andrews for the going business, despite the fact that it could not be relocated. In 2003, the Authority passed a resolution to condemn the property, fifteen years after the adoption of NRHA's conservation plan.

In 2004, Waldo & Lyle challenged the right of NRHA to condemn C & C Real Estate's property, even though there had been no cases since 1956 in which a housing authority in Virginia had been denied the right to take private property. After one and a half years of legal battles and circuit court hearings, Norfolk Circuit Court Judge John Morrison held that the NRHA was not authorized to condemn, as NRHA had not given C and C Real Estate the required one-year notice to correct blight.

NRHA appealed the decision to the Supreme Court of Virginia where the court affirmed the circuit court's holdings: the language of the NRHA's plan was overbroad and, therefore, did not allow for acquisition of C & C Real Estate's property. The Court held that NRHA had a duty to provide C & C Real Estate with notice and an opportunity to correct any existing deficiencies prior to initiating any condemnation proceedings due to blight. As no such notice had been given, NRHA was not authorized to condemn C & C Real Estate's property.

The Supreme Court of Virginia's decision invalidated portions of an industrial conservation plan that had been in existence for nearly twenty years. For the first time in fifty years, the Court denied a housing authority the right to take property designated in a housing authority plan.

The story should conclude here, but it does not. Under Virginia law C and C, after defeating the effort to take their property, was entitled to recover the attorneys fees it incurred in defending its property and business. The

NHRA disagreed with the law. In a succession of hearings throughout the fall of 2006 the NHRA attempted to deny C and C the lawful reimbursement of its attorneys fees. In February of 2007 the Circuit Court of Norfolk awarded C and C reimbursement of its attorneys fees.

NHRA has appealed this award to the Virginia Supreme Court. As of this writing the Court has not yet agreed to hear this appeal.

3) Virginia Department of Transportation (VDOT) v. Game

Mr. Game ran one of the most successful grocery stores in Newport News, Virginia. Game's Farmers' Market specialized in fresh county produce and had a specialty butcher shop. VDOT offered Mr. Game \$28,000 to take most of the parking spaces at the front door of his grocery store. Mr. Game fought VDOT, and VDOT hired two appraisers to go to Court to say that he was not entitled to more than \$28,000. Mr. Game won over thirty-two times the amount of the original offer that VDOT had proposed. 72-year-old Earl Game pledged to support eminent domain reform in Virginia as his life-long goal and project. Today, you can still reach him at his store, where property owners from all over Virginia call him for advice about condemnation. Mr. Game was awarded \$760,845.99, 2717% above VDOT's final offer.

4) Roanoke Redevelopment and Housing Authority v. Claytor

The Claytor family owned an entire city block in Roanoke. In 1976, the Roanoke Redevelopment and Housing Authority adopted a redevelopment plan and designated the entire block that the Claytors owned for condemnation. The Redevelopment Authority even went so far as to negotiate an option to sell the Claytor property to someone else.

When the redevelopment plan expired in 2001, 25 years after it was adopted, the Claytors sued the Redevelopment and Housing Authority, and the judge ruled that the Housing Authority was required to pay just compensation for placing the Claytor property under the cloud of condemnation for 25 years.

The Housing Authority eventually paid the Claytors a judgment of \$281,590, plus interest in the amount of \$71,661.70.

5) East Tennessee Natural Gas Co. (ETNG) v. 34

Property Owners

Duke Energy, a Fortune 500 company, trading as ETNG, obtained permission from the Federal Government to condemn the property of over thirty property owners in Carroll, Henry, Patrick, Smythe, and Wythe Counties. Mr. Harold Hart and Mr. Larry Ball were among those property owners whose property was taken. Duke Energy claimed that the highest and best use for the taken property was farmland and offered Mr. Hart and Mr. Ball roughly \$30,000 as “just” compensation for the taken property. The property owners disagreed and offered evidence that, prior to the pipeline’s construction, the County had marketed their property as land appropriate for industrial use. A unanimous jury found that the property’s highest and best use was industrial and awarded Mr. Hart and Mr. Ball \$1,825,000.

6) Virginia Department of Transportation (VDOT) v. Burris

In 1999, the Virginia Department of Transportation came to Mr. Burris and offered to buy his 16 acres of wetlands in Suffolk for \$42,000. A new road ran across a very small portion of his land. Mr. Burris wondered why VDOT was paying \$42,000 for all of his property. Mr. Burris, with the help of his lawyers, found out that VDOT needed his wetlands because it had destroyed wetlands constructing its new road and the law required VDOT to replace the destroyed wetlands as wetlands mitigation. VDOT had not told Mr. Burris his wetlands were very valuable. Through a trial, Mr. Burris was awarded \$531,000 for his wetlands. VDOT tried to deprive Mr. Burris of \$489,000 that the Constitution guaranteed him.

7) Virginia Department of Transportation (VDOT) v. Stull

The Stull family owned and operated a second-generation dairy farm in the mountains of Virginia . The family originally purchased the dairy farm with barns and buildings, some of which were built approximately seventy years earlier. VDOT, in an effort to straighten a curve in a road, condemned all five of the dairy barns and structures that made up the heart of the working dairy farm.

Although the structures worked effectively and allowed two families to support themselves in the dairy business, VDOT claimed that, because they were old, the total value of all the buildings was only \$75,000. A unanimous jury disagreed, and awarded the property owners \$368,432, nearly 500% of VDOT’s final offer

8) City of Suffolk v. Beamon

Mr. William Beamon was a successful entrepreneur who

had renovated a historic building in downtown Suffolk, VA. He owned and operated record and clothing stores on the first floor and lived in and rented out apartments on the second floor. The City of Suffolk condemned Mr. Beamon’s property, claiming that it was needed for future courthouse parking. Mr. Beamon fought the initial taking of his property, and the court invalidated the first condemnation. Although the building had recently been renovated, the City offered Mr. Beamon less than \$20,000 for the entire property. The amount offered to Mr. Beamon was less than the tax-assessed value of his property. Mr. Beamon eventually settled for many times the amount originally offered by the City of Suffolk.

9) Virginia Department of Transportation (VDOT) v. Jones

VDOT took Mr. Jones parking lot in front of his shop by filing a certificate with the court and paying \$88,060. The \$88,060 was determined by VDOT’s appraiser to be the just compensation for the property, and VDOT approved the appraisal as fair compensation. The legal effect of filing the certificate was to transfer ownership of the property to VDOT. Mr. Jones believed VDOT was wrong and contested the matter. A year later VDOT, filed suit to finalize determination of value. A month before the trial, VDOT hired a second appraiser who lowered the value to \$26,000, and filed a notice that it would offer only the testimony of the second appraiser at trial. Mr. Jones was furious, and at the trial he tried to show the results of VDOT’s first appraisal. “Not so fast,” said the judge. “VDOT gets to choose which expert it will use, and you can’t comment on the first appraisal for \$88,060.” The jury returned an award of \$112,500 never knowing how VDOT had abused the system.

10) City of Hampton v. Ottofaro

The Ottofaro family owned rental property near Mercury Boulevard in Hampton, VA. The City wanted to transfer the property to the Industrial Development Authority (IDA) for a \$129,000,000 commercial entertainment complex near the Hampton Coliseum. When the Ottofaros refused to sell for the price offered, the property was taken by “quick-take,” and the house was immediately bulldozed, while the case was still unresolved in court.

A road was built using 18% of the property, but the remaining 82% was turned over to the Industrial Development Authority. The IDA then leased the remaining Ottafaro land to a Maryland developer for a Bass Pro Shop, a Lowes, and other commercial development. Mr. Ottofaro fought the City of Hampton in court, but a Hampton judge

ruled that this transfer of private property for commercial development was legal. He then appealed the case to the Virginia Supreme Court. In a split decision, the Court ruled that because the property was long-term leased to the IDA and was not going to be sold, this transfer of the Ottofaro property to a private developer was legal. After losing his property, Mr. Ottofaro attempted to obtain just compensation in court. For the trial, however, the City replaced their original appraisal with one showing the property to be worth \$40,000 less than they had previously offered. The trial judge would not allow evidence of the lower appraisal to be admitted.

11) Virginia Department of Transportation (VDOT) v. Warwick Lodge

The Warwick Masonic Lodge was built on a site comprised of more than two acres at the intersection of J. Clyde Morris Boulevard and Warwick Boulevard in Newport News, Virginia. VDOT filed a quick-take and attempted to force the Lodge out of the Lodge building. The Lodge went to court to obtain the money that VDOT had deposited, so that they could purchase a new facility. VDOT refused to allow the Lodge use of its money, however, claiming a title problem with the property.

The lodge requested relief in the circuit court, but a circuit court judge ruled that the lodge had to pay VDOT rent at over \$4,000 per month, even though they were not allowed the money VDOT had deposited with the court to purchase a new building. Later VDOT, admitted it had made a title mistake, but refused to waive rent.

The Lodge eventually settled with VDOT.

12) Norfolk Redevelopment and Housing Authority v. Instruments East

The Norfolk Redevelopment and Housing Authority decided to condemn the area surrounding a testing laboratory that had been doing business in the location for many years. The demolition activity consumed many months, causing noise, dust, deposits of debris, street closures and general deterioration of the area. Finally, in demolishing the building next door, the Authority's contractor pushed a brick wall over onto the laboratory and cracked its structural wall.

The owner of the testing laboratory, whose business had been virtually destroyed, filed suit for inverse condemnation, alleging that the Authority had effectively taken his property as a part of its redevelopment project. The court dismissed the suit, ruling in effect that the owner had to wait until the Authority got around to filing its own

condemnation suit for the property before the owner could recover the value of the property. The value of the property continued to plummet and the NRHA ignored the property owners' plight.

The Short Answers to Frequently Asked Questions:

What is the Power of Eminent Domain?

The Government, its agencies, and certain monopolies have the power to take an individual's property for a public purpose, so long as they pay the individual just compensation.

What is just compensation?

Just compensation is the amount of money needed to place the owner in the same financial position in which the owner would have been had the government or its agencies not condemned the owner's property for a public purpose. Fair market value for property taken is only one basis for determining just compensation. Principles of equity and fundamental fairness also govern the determination of what amount of money constitutes just compensation. The value of property taken is based on the highest and best use of the property, which is not necessarily its existing use at the time of the take. For example, land used for agriculture may be valuable as a residential subdivision or for commercial uses. The owner is entitled to the highest value.

When can the condemning authority take your property?

The government or its agents cannot take an owner's property until it makes a bona fide offer for the property and, after that, files with the court a pleading for taking the property and serves the pleading on the owner. In Virginia, if the value of the property taken is \$10,000.00 or more, the condemning authority must prepare a bona fide appraisal and give a copy of it to the property owner.

What if the government takes only part of the owner's property?

When the government makes a partial take, the owner is entitled to just compensation for the property condemned and any decrease in the value of the property remaining after the partial taking of property. Moreover, if the government takes the use of the property temporarily, the property owner is entitled to compensation equal to the rental value of the property temporarily taken for the

duration of the take and for damage to the value of the remainder during the time of the temporary taking.

What happens when the government immediately takes property and deposits money with the court to pay the owner for the property taken and damaged?

Procedures are available for property owners to withdraw the money the government deposits with the court and still retain the right to seek additional compensation by trial if the amount deposited is inadequate to compensate the owner justly.

What should a property owner do before the government takes property for a public purpose and condemnation has yet to begin?

1. Maintain the property, including all building structures and landscape, in the same manner if you were attempting to sell the property on the open market and showing the property to potential buyers. If you paint the property or make any other alterations, use colors that are conservative and modest.
2. Maintain a single notebook with a running log of all conversations with the condemning authority or its agents. Write the name of any persons you speak to, the date and the time of the conversation, and the content of the conversation.
3. Save all correspondence and documents the condemning authority provides to you in one folder. Keep all information that you receive in this folder.
4. DO NOT sign anything. Condemning authorities often try to take more rights in a settlement than they have the right to take by law. For example, a condemning authority such as a gas company may have the legal right to construct one pipeline on your property, but it may attempt to reach a settlement giving it the right to construct two pipelines.
5. Regardless of whether your tax assessment increases dramatically, DO NOT contest the tax assessment. The assessed value of your property does NOT represent the fair market value of the property. The eminent domain appraisal done for purposes of just compensation is not the same as the appraisal done for tax assessment purposes. Consequently, the tax assessment is inadmissible at trial against the landowner unless the landowner has contested the tax assessment.
6. Consult an attorney regarding the filing of any subdivision plats or other documents that may be filed on record.
7. DO NOT change or alter any nonconforming uses, such as signs, which have been grand fathered under

the zoning laws.

8. Consult an attorney about title to the property being taken and title to any adjacent properties that may be used in connection with the property being taken.
9. Consult an attorney regarding any leases that are on the property. Condemnation provisions in the leases may have significant effect on condemnation proceedings.
10. Take photographs of the property on a nice sunny day so that the pictures are clear, crisp and pleasant.
11. DO NOT obtain an appraisal before consulting an attorney. An eminent domain appraisal done for the purpose of just compensation requires special skill and knowledge.
12. Continue to make all necessary repairs that do not require you to expend a substantial amount of money. Think in terms of what repairs you would make if you were selling your property to private a party