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1 SENATE BILL NO. 1435

2 AMENDMENT IN THE NATURE OF A SUBSTITUTE
 3 (Proposed by the House Committee on Appropriations
 4 on February 18, 2015)

(Patron Prior to Substitute—Senator Deeds)

5 A *BILL to amend and reenact §§ 25.1-100 and 25.1-230.1 of the Code of Virginia, relating to eminent*
 6 *domain; lost profits and just compensation.*

8 Be it enacted by the General Assembly of Virginia:

9 1. That §§ 25.1-100 and 25.1-230.1 of the Code of Virginia are amended and reenacted as follows:
 10 § 25.1-100. Definitions.

11 As used in this title, unless the context requires a different meaning:

12 "Appraisal" means a written statement independently and impartially prepared by a qualified
 13 appraiser setting forth an opinion of defined value of an adequately described property as of a specific
 14 date, supported by the presentation and analysis of relevant market information.

15 "Body determining just compensation" means a panel of commissioners empanelled pursuant to
 16 § 25.1-227.2, jury selected pursuant to § 25.1-229, or the court if neither a panel of commissioners nor a
 17 jury is appointed or empanelled.

18 "Court" means the court having jurisdiction as provided in § 25.1-201.

19 "Date of valuation" means the time of the lawful taking by the petitioner, or the date of the filing of
 20 the petition pursuant to § 25.1-205, whichever occurs first.

21 "Freeholder" means any person owning an interest in land in fee, including a person owning a
 22 condominium unit.

23 "Land" means real estate and all rights and appurtenances thereto, together with the structures and
 24 other improvements thereon, and any right, title, interest, estate or claim in or to real estate.

25 "Locality" or "local government" means a county, city, or town, as the context may require.

26 "Lost access" means a material impairment of direct access to property, a portion of which has been
 27 taken or damaged as set out in subsection B of § 25.1-230.1. This definition of the term "lost access"
 28 shall not diminish any existing right or remedy, and shall not create any new right or remedy other than
 29 to allow the body determining just compensation to consider a change in access in awarding just
 30 compensation.

31 "Lost profits" means a loss of business profits, *as defined in § 25.2-230.1*, subject to adjustment
 32 using generally accepted accounting principles consistently applied, from a business or farm operation
 33 for a period not to exceed (i) three years from the date of valuation *if less than the entire parcel of*
 34 *property is taken or (ii) one year from the date of valuation if the entire parcel of property is taken* that
 35 is suffered as a result of a taking of the property on which the business or farm operation is located,
 36 provided (i) (a) the business is owned by the owner of the property taken, or by a tenant whose
 37 leasehold interest grants the tenant exclusive possession of substantially all the property taken, or (ii) (b)
 38 the farm operation is operated by the owner of the property taken, or by a tenant using for a farm
 39 operation the property taken, to the extent that the loss is determined and proven pursuant to subsection
 40 C of § 25.1-230.1. This definition of the term "lost profits" shall not create any new right or remedy or
 41 diminish any existing right or remedy other than to allow the body determining just compensation to
 42 consider lost profits in awarding just compensation if a person asserts a right to lost profits *as an*
 43 *element of damage* in a claim for compensation.

44 "Owner" means any person who owns property, provided that the person's ownership of the property
 45 is of record in the land records of the clerk's office of the circuit court of the county or city where the
 46 property is located. The term "owner" shall not include trustees or beneficiaries under a deed of trust,
 47 any person with a security interest in the property, or any person with a judgment or lien against the
 48 property. This definition of the term "owner" shall not affect in any way the valuation of property.

49 "Person" means any individual; firm; cooperative; association; corporation; limited liability company;
 50 trust; business trust; syndicate; partnership; limited liability partnership; joint venture; receiver; trustee in
 51 bankruptcy or any other person acting in a fiduciary or representative capacity, whether appointed by a
 52 court or otherwise; club, society or other group or combination acting as a unit; the Commonwealth or
 53 any department, agency or instrumentality thereof; any city, county, town, or other political subdivision
 54 or any department, agency or instrumentality thereof; or any interstate body to which the
 55 Commonwealth is a party.

56 "Petitioner" or "condemnor" means any person who possesses the power to exercise the right of
 57 eminent domain and who seeks to exercise such power. The term "petitioner" or "condemnor" includes a
 58 state agency.

59 "Property" means land and personal property, and any right, title, interest, estate or claim in or to

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60 such property.

61 "State agency" means any (i) department, agency or instrumentality of the Commonwealth; (ii) public
62 authority, municipal corporation, local governmental unit or political subdivision of the Commonwealth
63 or any department, agency or instrumentality thereof; (iii) person who has the authority to acquire
64 property by eminent domain under state law; or (iv) two or more of the aforementioned that carry out
65 projects that cause persons to be displaced.

66 "State institution" means any (i) educational institution enumerated in § 23-14 or (ii) state hospital or
67 state training center operated by the Department of Behavioral Health and Developmental Services.

68 **§ 25.1-230.1. Lost access and lost profits.**

69 A. For purposes of this section:

70 "Business" shall have the same meaning as set forth in § 25.1-400.

71 "Business profit" means the average net income for federal income tax purposes for the three years
72 immediately prior to the valuation date of a business or farm operation located on the property taken.

73 "Direct access" means ingress or egress on or off a public road, street, or highway at a location
74 where the property adjoins that road, street, or highway.

75 "Farm operation" shall have the same meaning as set forth in § 25.1-400.

76 B. The body determining just compensation shall include in its determination of damage to the
77 residue any loss in market value of the remaining property from lost access caused by the taking or
78 damaging of the property. The body determining just compensation shall ascertain any reduction in
79 value for lost access, if any, that may accrue to the residue (i) beyond the enhancement in value, if any,
80 to such residue as provided in subdivision A 1 of § 25.1-230, or (ii) beyond the peculiar benefits, if any,
81 to such other property as provided in subdivision A 2 of § 25.1-230, by reason of the taking and use by
82 the petitioner. If such peculiar benefit or enhancement in value shall exceed the reduction in value, there
83 shall be no recovery against the landowner for such excess. The body determining just compensation
84 may not consider an injury or benefit that the property owner experiences in common with the general
85 community, including off-site circuitry of travel and diversion of traffic, arising from an exercise of the
86 police power. The body determining just compensation shall ensure that any compensation awarded for
87 lost access shall not be duplicated in the compensation otherwise awarded to the owner of the property
88 taken or damaged.

89 C. The body determining just compensation shall include in its determination of ~~damage to the~~
90 ~~residue just compensation~~ lost profits to the owner of a business or farm operation conducted on the
91 property taken only if the owner proves with reasonable certainty the amount of the loss and that the
92 loss is directly and proximately caused by the taking of the property through the exercise of eminent
93 domain and the following conditions are met:

94 1. The loss cannot be reasonably prevented by a relocation of the business or farm operation, or by
95 taking steps and adopting procedures that a reasonably prudent person would take and adopt;

96 2. The loss will not be included in relocation assistance provided pursuant to Chapter 4 (§ 25.1-400
97 et seq.);

98 3. Compensation for the loss will not be duplicated in the compensation otherwise awarded to the
99 owner of the property taken or damaged; and

100 4. The loss shall be determined in accordance with generally accepted accounting principles applied
101 on a consistent basis.

102 D. Any and all liability for lost access ~~and lost profits~~ shall be established and made a part of the
103 award of just compensation for damage to the residue of the property taken or damaged, *and any and*
104 *all liability for lost profits shall be set forth specifically in the award. In a partial acquisition, in the*
105 *event that the owner of the property being condemned and the owner of the business or farm operation*
106 *claiming lost profits are the same, then any enhancement or peculiar benefit shall be offset against both*
107 *damage to the residue and lost profits.*

108 E. It shall not be a requirement of any bona fide effort to purchase the property pursuant to
109 § 25.1-204 or 33.2-1001 that the petitioner include any liability for lost profits in a written offer to
110 purchase the property.

111 F. In any proceeding in which the owner of a business or farm operation seeks to recover lost
112 profits, the owner shall provide the condemning authority with all federal income tax returns, if any,
113 relating to the business or farm operation for which the owner seeks lost profits for a period of three
114 years prior to the valuation date and for each year thereafter during the pendency of the condemnation
115 proceeding. The condemning authority shall not divulge the information provided pursuant to this
116 subsection except in connection with the condemnation proceeding.

117 G. Nothing in this section is intended to provide for compensation for inverse condemnation claims
118 for temporary interference with or interruption of a business or farm operation other than that which is
119 directly and proximately caused by a taking or damaging of property through the exercise of eminent
120 domain.