CHAPTER 702

An Act to amend and reenact §§ 25.1-100 and 25.1-230.1 of the Code of Virginia, relating to eminent domain; calculation of lost profits.

[S 809]

Approved March 30, 2018

Be it enacted by the General Assembly of Virginia:

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

§ 25.1-100. Definitions.

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

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

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

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

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

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

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

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

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

"Lost profits" means a loss of business profits, as defined in § 25.1-230.1, *that is suffered as a result of a taking of the property on which a business or farm operation is located,* subject to adjustment using generally accepted accounting principles consistently applied, from a business or farm operation for a period not to exceed ~~(i)~~ three years from the *later of (i) the* date of valuation ~~if less than~~ *or (ii) the date the state agency or its contractor prevents the owner from using the land or any of the owner's other property rights are taken. The person claiming lost profits is entitled to compensation whether part of the property or* the entire parcel of property is taken ~~or (ii) one year from the date of valuation if the entire parcel of property is taken that is suffered as a result of a taking of the property on which the business or farm operation is located, provided~~. *In order to qualify for an award of lost profits, one of the following conditions shall be met:* (a) the business is owned by the owner of the property taken, or by a tenant whose leasehold interest grants the tenant exclusive possession of substantially all the property taken, or (b) the farm operation is operated by the owner of the property taken, or by a tenant using for a farm operation the property taken, to the extent that the loss is determined and proven pursuant to subsection C of § 25.1-230.1. This definition of the term "lost profits" shall not create any new right or remedy or diminish any existing right or remedy other than to allow the body determining just compensation to consider lost profits in awarding just compensation if a person asserts a right to lost profits in a claim for compensation.

"Owner" means any person who owns property, provided that the person's ownership of the property is 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. The term "owner" shall 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. This definition of the term "owner" shall not affect in any way the valuation of property.

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

"Petitioner" or "condemnor" means any person who possesses the power to exercise the right of

eminent domain and who seeks to exercise such power. The term "petitioner" or "condemnor" includes a state agency.

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

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

"State institution" means any (i) institution enumerated in § 23.1-1100 or (ii) state hospital or state training center operated by the Department of Behavioral Health and Developmental Services.

§ 25.1-230.1. Lost access and lost profits.

A. For purposes of this section:

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

"Business profit" means the average net income for federal income tax purposes for the three years immediately prior to the ~~valuation date of~~ *later of (i) the date of valuation or (ii) the date the state agency or its contractor prevents the owner from using the land or any of the owner's other property rights are taken, for* a business or farm operation located on the property taken.

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

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

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

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

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

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

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

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

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

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

F. In any proceeding in which the owner of a business or farm operation seeks to recover lost profits, the owner shall provide the condemning authority with all federal income tax returns, if any, relating to the business or farm operation for which the owner seeks lost profits for a period of three years prior to the *later of (i) the* valuation date *or (ii) the date the state agency or its contractor prevents the owner from using the land or any of the owner's other property rights are taken,* and for each year thereafter during the pendency of the condemnation proceeding. The condemning authority shall not divulge the information provided pursuant to this subsection except in connection with the condemnation proceeding. *Additionally, unless already named in the petition for condemnation, the*

owner may intervene in the proceeding by filing a motion to intervene accompanied by a petition for intervention setting forth the basis for the lost profits claim under this chapter. Proceedings to adjudicate lost profits may be bifurcated from the other proceedings to determine just compensation if the lost profits claim period will not expire until one year or later from the date of the filing of the petition for condemnation, but such bifurcation shall not prevent the entry of an order confirming indefeasible title to the land interests acquired by the condemning authority.

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