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SENATE BILL NO. 1421

Offered January 9, 2019

Prefiled January 8, 2019

A *BILL to amend and reenact §§ 25.1-203, 25.1-230, 25.1-230.1, 25.1-312, 25.1-419, 33.2-1011, and 33.2-1024 of the Code of Virginia, relating to eminent domain; entry upon private property; calculation of just compensation; damages.*

Patron—Obenshain

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 25.1-203, 25.1-230, 25.1-230.1, 25.1-312, 25.1-419, 33.2-1011, and 33.2-1024 of the Code of Virginia are amended and reenacted as follows:

§ 25.1-203. Authority of certain condemnors to inspect property; reimbursement for damages; notice prior to entry.

A. In connection with any project wherein the power of eminent domain may be exercised, any locality or any petitioner exercising the procedure set forth in Chapter 3 (§ 25.1-300 et seq.) of this title, acting through its duly authorized officers, agents or employees, may enter upon any property without the written permission of its owner if (i) the petitioner has requested the owner's permission to inspect the property as provided in subsection B, (ii) the owner's written permission is not received prior to the date entry is proposed, and (iii) the petitioner has given the owner notice of intent to enter as provided in subsection C.

B. 1. A request for permission to inspect shall (i) be sent to the owner by certified mail, return receipt requested, delivered by guaranteed overnight courier, or otherwise delivered to the owner in person with proof of delivery; and (ii) be made not less than 15 days prior to the first date of the proposed inspection. A request for permission to inspect shall be deemed to be made on the date of mailing, if mailed, or otherwise on the date of delivery.

2. A request for permission to inspect shall include: (i) the specific date or dates such inspection is proposed to be made; (ii) the name of the entity entering the property; (iii) *the number of persons for whom permission is sought*; (iv) the purpose for which entry is made; and ~~(iv)~~ (v) the testing, appraisals, or examinations to be performed and other actions to be taken.

C. *If the owner's written permission is not received within 15 days of the request for permission, then the petition shall provide notice of intent to enter.* Notice of intent to enter shall be sent to the owner by certified mail and be (i) posted at the entryway to the property or at the front door or such other door that appears to be the main entrance of the residence or business located on the parcel upon which the property to be entered is located, if the parcel contains a residence or business; (ii) delivered by guaranteed overnight courier; or (iii) otherwise delivered to the owner in person with evidence of receipt. The notice of intent to enter shall include a copy of the request for permission to inspect and shall be made not less than 15 days prior to the date of intended entry. *The notice of intent to enter shall include (a) the specific date or dates of such intended entry; (b) the name of the entity entering the property; (c) the number of persons intending to enter the property; (d) the purpose for which entry is made; and (e) the testing, appraisals, or examinations to be performed and other actions to be taken, which in no way shall exceed those set forth in the request for permission pursuant to subdivision B 2.* Notice of intent to enter shall be deemed made on the earlier of ~~(a)~~ (1) the date of mailing, if mailed, or ~~(b)~~ (2) on the date of delivery or posting. Any individuals entering the property shall carry identification and shall present such identification upon request of the landowner or his authorized representative.

D. Any entry authorized by this section (i) shall be for the purpose of making surveys, tests, appraisals or examinations thereof in order to determine the suitability of such property for the project, and (ii) shall not be deemed a trespass.

E. The petitioner shall make reimbursement for any actual damages resulting from entry upon the property. In any action filed under this section, the court may award the owner his reasonable (i) ~~attorneys' attorney~~ fees, (ii) court costs, and (iii) fees for ~~no more than~~ *at least* three expert witnesses testifying at trial if: ~~(a) the court finds that the petitioner maliciously, willfully, or recklessly damaged the owner's property; or (b) the court awards the owner actual damages in an amount 30 percent or more greater than the petitioner's final written offer made no later than 30 days after the filing of an answer in circuit court or the return date in general district court.~~ A proceeding under this subsection shall not preclude the owner from pursuing any additional remedies available at law or equity.

F. The requirements of this section shall not apply to the practice of land surveying, as defined in

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SB1421

§ 54.1-400, when such surveying is not involved in any eminent domain or any proposed eminent domain matter.

§ 25.1-230. Measure of just compensation; oaths of members of body determining just compensation.

A. The body determining just compensation shall in each case ascertain the amount of just compensation to which a party is entitled as follows:

1. If the condemnation proceeding is brought utilizing the procedure set forth in Chapter 3 (§ 25.1-300 et seq.) of this title or §§ 33.2-1018 through 33.2-1029, the body determining just compensation shall ascertain (i) the value of the property to be taken and (ii) the damages, if any, which that may accrue to the residue beyond the specific enhancement in value, if any, to such residue caused by reason of such the taking and public use by the petitioner; however, (i) such enhancement in value shall not be offset against the value of the property taken, and (ii) if such for which it is condemned. Such enhancement in value shall exceed not be offset against the value of the property taken, and if such enhancement in value exceeds the damage damages, there shall be no recovery against the landowner for such excess; and

2. In any other condemnation proceeding, the body determining just compensation shall ascertain the value of the property to be taken and the damages, if any, to any other property beyond the peculiar benefits, if any, to such other property, by reason of such taking and use by the petitioner.

In determining the market value of the property before the taking, the body determining just compensation may consider everything a buyer and seller in the marketplace would reasonably consider, but may not consider any increase or decrease in the fair market value of the property caused by the public use for which the property is being acquired, or by the likelihood that the property would be acquired for such public use, other than that due to physical deterioration within the reasonable control of the owner.

In determining the market value of the residue after the taking, the body determining just compensation may consider everything a buyer and seller in the marketplace would reasonably consider, including the public use for which the property is being acquired, but may not consider any general enhancement the residue experiences in common with surrounding properties as a result of the public use.

Nothing in this subsection shall make evidence of tax assessments admissible as proof of value in an eminent domain proceeding.

B. Before executing their duties, each member of the body determining just compensation shall take an oath before an officer authorized by the laws of this the Commonwealth to administer an oath that he will faithfully and impartially ascertain the amount of just compensation to which a party is entitled.

§ 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 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 as provided in subsection A 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 circuitry 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.

§ 25.1-312. Reformation, alteration, revision, amendment, or invalidation of certificate.

A. No reformation, alteration, revision, amendment, or invalidation shall be made to a recorded certificate for any purpose without the prior consent of the court wherein such certificate is recorded.

B. The court shall have jurisdiction to:

1. Reform, alter, revise, amend, or invalidate, in whole or in part, any certificate; and

2. Correct mistakes in the description of the property affected by such certificate, the name or names of the owner or owners in the certificate, or any other error that may exist with respect to such certificate for any other purpose.

C. A petition filed by the authorized condemnor with the court setting forth any error made in such certificate, or the necessity of any change therein, shall be deemed sufficient basis for the reformation, alteration, revision, amendment, or invalidation in whole or in part of such certificate.

D. The court may enter an order permitting the reformation, alteration, revision, amendment or invalidation, in whole or in part, of the certificate. Such order, together with any revised certificate that may be necessary, shall be recorded in the clerk's office in the same manner required for the recordation of a certificate. The filing of any certificate pursuant to the provisions of this section shall not alter the date of taking as established by the recordation of the original certificate pursuant to § 25.1-307 as to any property that is included in the amended certificate. An amended certificate shall not include any property not included in the original certificate.

E. Nothing in this section shall be construed to prohibit or preclude any person ~~damaged by reason of a mistake in, or the invalidation of, a certificate from showing the damage suffered by reason of such mistake or invalidation from recovering damages~~ in a condemnation proceeding *resulting from such reformation, alteration, revision, amendment, or invalidation.*

§ 25.1-419. Reimbursement of owner for costs when taking is abandoned or denied.

The court ~~having jurisdiction of in which~~ a condemnation proceeding is instituted by a state agency to acquire real property by condemnation shall award the owner of any right, title, or interest in such real property such sum as will, in the opinion of the court, reimburse such owner for his reasonable

costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if (i) the final judgment is that the state agency cannot acquire the real property by condemnation or (ii) the proceeding taking is abandoned by the state agency, *in full or in part*. The award of such sums ~~will~~ *shall* be paid by the state agency that sought to condemn the property.

§ 33.2-1011. Right to enter on land to ascertain its suitability for highway and other transportation purposes; damage resulting from such entry.

A. The Commissioner of Highways, through his duly authorized officers, agents, or employees, may enter upon any land in the Commonwealth for the purposes of making examination and survey thereof, including photographing; testing, including soil borings or testing for contamination; making appraisals; and taking such actions as may be necessary or desirable to determine its suitability for highway and other transportation purposes or for any other purpose incidental thereto. Such officers, agents, or servants shall exercise care to protect any improvements, growing crops, or timber in making such examination or survey. *Such officers, agents, or servants may enter upon any property without the written permission of its owners if (i) the petition has requested the owner's permission to inspect the property as provided in subsection B, (ii) the owner's written permission is not received prior to the date entry is proposed, and (iii) the petition has given the owner notice of intent to enter as provided in subsection C.*

B. Notice shall be sent to the owner by mail, at the address recorded in the tax records, not less than 15 days prior to the first date of the proposed entry. Notice of intent to enter shall be deemed made on the date of mailing.

C. The notice shall include the anticipated date such entry is proposed to be made and the purpose of such entry. Any entry authorized by this section shall be for the purposes of making examination and survey thereof, including photographing; testing, including soil borings or testing for contamination; making appraisals; and taking such other actions as may be necessary or desirable to determine the suitability of such property for highway and transportation purposes, and shall not be deemed a trespass.

D. Notwithstanding the provisions in subsections A and B, nothing shall preclude entry prior to the anticipated date of entry specified in the notice if the property owner or his designated representative agrees to or requests a date of entry prior to the date of entry specified in the notice.

E. The Commissioner of Highways, through his duly authorized officers, agents, or servants, shall make reimbursement for any actual damages to real or personal property resulting from entry upon the property. In any action filed under this section, the court may award the owner his reasonable attorney fees, court costs, and fees for no more than three expert witnesses testifying at trial if (i) the court finds that the Commissioner of Highways maliciously, willfully, or recklessly damaged the owner's property and (ii) the court awards the owner actual damages in an amount 30 percent or more greater than the final written offer of the Commissioner of Highways made no later than 30 days after the filing of an answer in circuit court or the return date in general district court. A proceeding under this subsection shall not preclude the owner from pursuing any additional remedies available to the landowner. *1. A request for permission to inspect shall (i) be sent to the owner by certified mail, return receipt requested, delivered by guaranteed overnight courier, or otherwise delivered to the owner in person with proof of delivery and (ii) be made not less than 15 days prior to the first date of the proposed inspection. A request for permission to inspect shall be deemed to be made on the date of mailing, if mailed, or otherwise on the date of delivery.*

2. A request for permission to inspect shall include (i) the specific date or dates such inspection is proposed to be made; (ii) the name of the entity entering the property; (iii) the number of persons for whom permission is sought; (iv) the purpose for which entry is made; and (v) the testing, appraisals, or examinations to be performed and other actions to be taken.

C. *If the owner's written permission is not received within 15 days of the request for permission, then the petition shall provide notice of intent to enter. Notice of intent to enter shall be sent to the owner by certified mail and be (i) posted at the entryway to the property or at the front door or such other door that appears to be the main entrance of the residence or business located on the parcel upon which the property to be entered is located, if the parcel contains a residence or business; (ii) delivered by guaranteed overnight courier; or (iii) otherwise delivered to the owner in person with evidence of receipt. The notice of intent to enter shall include a copy of the request for permission to inspect and shall be made not less than 15 days prior to the date of intended entry. The notice of intent to enter shall include (a) the specific date or dates of such intended entry; (b) the name of the entity entering the property; (c) the number of persons intending to enter the property; (d) the purpose for which entry is made; and (e) the testing, appraisals, or examinations to be performed and other actions to be taken, which in no way shall exceed those set forth in the request for permission pursuant to subdivision B 2. Notice of intent to enter shall be deemed made on the earlier of (1) the date of mailing, if mailed, or (2) the date of delivery or posting. Any individuals entering the property shall carry identification and shall present such identification upon request of the landowner or his authorized representative.*

244 D. Any entry authorized by this section (i) shall be for the purpose of making surveys, tests,
245 appraisals, or examinations thereof in order to determine the suitability of such property for the project
246 and (ii) shall not be deemed a trespass.

247 E. The petitioner shall make reimbursement for any actual damages resulting from entry upon the
248 property. In any action filed under this section, the court may award the owner his reasonable (i)
249 attorney fees, (ii) court costs, and (iii) fees for at least three expert witnesses testifying at trial if the
250 court finds that the petitioner damaged the owner's property. A proceeding under this subsection shall
251 not preclude the owner from pursuing any additional remedies available at law or equity.

252 F. The requirements of this section shall not apply to the practice of land surveying, as defined in
253 § 54.1-400, when such surveying is not involved in any eminent domain or any proposed eminent
254 domain matter.

255 **§ 33.2-1024. Reformation, alteration, revision, amendment, or invalidation of certificate.**

256 Upon the recordation of such certificate, no reformation, alteration, revision, amendment, or
257 invalidation shall be made for any purpose without the prior consent of the court wherein such
258 certificate is recorded. The court shall have jurisdiction to reform, alter, revise, amend, or invalidate in
259 whole or in part any certificate; to correct mistakes in the description of the property affected by such
260 certificate; to correct the name of the owner in the certificate; to correct any other error that may exist
261 with respect to such certificate; or for any other purpose. A petition filed by the Commissioner of
262 Highways with the court setting forth any error made in such certificate, or the necessity of any change
263 therein, shall be deemed sufficient basis for the reformation, alteration, revision, amendment, or
264 invalidation in whole or in part of such certificate. The court may enter an order permitting the
265 reformation, alteration, revision, amendment, or invalidation in whole or in part, and such order, together
266 with any revised certificate that may be necessary, shall be recorded in the current deed book. The filing
267 of any certificate pursuant to the provisions of this section shall not alter the date of taking as
268 established by the filing of the original certificate pursuant to § 33.2-1021 as to any land that is included
269 in the amended certificate, and no such amended certificate shall include any land not in the original
270 certificate. Nothing in this section shall be construed to prohibit or preclude any person ~~damaged thereby~~
271 ~~from showing in the proper proceeding the damage suffered by reason of such mistake or the~~
272 ~~invalidation of a certificate of deposit as provided in this section from recovering any damages in a~~
273 ~~condemnation proceeding resulting from such reformation, alteration, revision, amendment, or~~
274 ~~invalidation.~~