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SENATE BILL NO. 437

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice
on February 8, 2012)

(Patron Prior to Substitute—Senator Obenshain)

A BILL to amend and reenact § 25.1-100 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 25.1-230.1, relating to eminent domain; lost profits and access.

Be it enacted by the General Assembly of Virginia:

1. That § 25.1-100 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 25.1-230.1 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 empanelled 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 empanelled.

"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 create any new right or remedy or diminish any existing 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, subject to adjustment using generally accepted accounting principles consistently applied, from a business or farm operation for a period not to exceed three years from the date of valuation that is suffered as a result of a taking of the property on which the business or farm operation is located, provided (i) 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 (ii) 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 as an element of damage 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

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

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

67 § 25.1-230.1. *Lost access and lost profits.*

68 A. *For purposes of this section:*

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

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

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

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

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

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

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

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

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

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

101 D. Any and all liability for lost access and lost profits shall be established and made a part of the
102 award of just compensation for damage to the residue of the property taken or damaged.

103 E. It shall not be a requirement of any bona fide effort to purchase the property pursuant to
104 § 25.1-204 or 33.1-89 that the petitioner include any liability for lost profits in a written offer to
105 purchase the property.

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

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

116 2. That this act shall become effective January 1, 2013, contingent upon the passage of an
117 amendment to the Constitution of Virginia on the Tuesday after the first Monday in November
118 2012 amending Section 11 of Article I of the Constitution of Virginia.