INTERIM REPORT
OF THE JOINT SUBCOMMITTEE EXAMINING

THE CURRENT MEANS AND ADEQUACY OF COMPENSATION TO VIRGINIA CITIZENS WHOSE PROPERTIES ARE TAKEN THROUGH THE EXERCISE OF EMINENT DOMAIN

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

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Division of Legislative Services

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C. Maureen Stinger, Staff Attorney
Michelle Montgomery, Operations Staff Assistant

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EXECUTIVE SUMMARY

Senate Joint Resolution 271 and House Joint Resolution 491, adopted by the 1999 Session of the General Assembly, established a joint subcommittee "to study the current means and adequacy of compensation to Virginia citizens whose properties are taken through the exercise of eminent domain." The joint subcommittee is directed to study (i) the methods by which such eminent domain is exercised and (ii) the means by which compensation is provided or obtained. The resolutions charge the joint subcommittee with making recommendations concerning both issues, advising whether current statutes are adequate to furnish the means and methods of compensation in view of an evolving public utility market.

Though the recitations in the resolutions are directed primarily at the exercise of the power of eminent domain by public utility companies providing electricity service, the mandate for the study is sufficiently broad to require the joint subcommittee to examine the procedures governing all condemnations in Virginia. The joint subcommittee invited all interested persons with complaints about the existing procedures to suggest ameliorative changes.

During its first year the joint subcommittee held six meetings and conducted three public hearings. The joint subcommittee considered testimony from national and local experts on eminent domain law, representatives of agencies and utilities that exercise eminent domain power, citizens who have had or will have property taken through eminent domain, and examined uniform eminent domain laws and the laws of other states. The first meeting attempted to provide an overview of the existing law and an introduction to major issues. The theme of the second meeting was condemnations for electric transmission lines. The third meeting's theme was highway condemnations. Following the second and third meetings, the joint subcommittee conducted evening public hearings. A third public hearing, held in Newport News in October, introduced a new set of concerns involving condemnations by housing and redevelopment authorities. All of the public hearings were well-attended and notable for the passionate interest of the attendees in the issues being addressed in the study. The joint subcommittee held three work sessions to consider the information presented at prior meetings and hearings and to formulate recommendations for changes in the law.

The main theme of the criticism levied against the current procedures was that the "playing field" between condemnors and property owners is slanted in favor of the condemnor. The chief example cited was that even when a property owner proves in court that the condemnor's offer was not adequate and the court awards the owner just compensation, the owner is not fully compensated because litigation expenses must be paid from the amount awarded as just compensation. Other complaints included the lack of information provided to property owners; the execution of the process itself (delays in owners receiving payment, delay in commencement of projects after owners have been notified that their property will be taken); damages to property not physically taken; and the inadequacy of compensation to business owners, including tenant-operated businesses, for relocation and business losses.

The complexity of the issues precluded the joint subcommittee from completing its work prior to the 2000 Session of the General Assembly. Though decisions on several difficult issues

have been postponed until the study's second year, the joint subcommittee offered the following recommendations to the 2000 Session of the General Assembly:

Recommendation 1: *The joint subcommittee's study of Virginia's eminent domain laws should be continued for a second year. (Included in Senate Joint Resolution 37)*

Recommendation 2: *The current commissioner system, where each party nominates six persons for service on the five-member commission charged with determining the amount of compensation, should be replaced with a jury system, with a majority of the members owning real property in the locality. (Included in Senate Bill 453)*

Recommendation 3: *Condemnors should be require to provide a copy of their appraisal of the property with their offer to purchase the condemnee's property. (Included in Senate Bill 453)*

Recommendation 3: *The maximum that a court may require a condemnor to reimburse a condemnee for the cost of a survey of his property should be increased from $100 to $1,000. (Included in Senate Bill 453)*

Recommendation 4: *The condemnor should be required to conduct a title search of the property before making an offer to purchase or filing a certificate of take, in order to avoid delays in payments to condemnees. (Included in Senate Bill 453)*

Recommendation 5: *The Department of Transportation should provide a copy of its report on the status of title to the condemnee when it makes an offer to purchase property. (Included in Senate Bill 453)*

Recommendation 6: *The Department of Transportation should be required to use licensed real estate appraisers in conducting its valuations for property acquisitions. (Included in Senate Bill 453)*

Recommendation 7: *Tenants with a lease term of 12 months should be permitted to intervene in an eminent domain proceeding. (Included in Senate Bill 453)*

Recommendation 8: *The Uniform Relocation Assistance and Real Property Acquisition Policies Act should not be restricted to projects carried out with federal or state financial assistance. (Included in Senate Bill 63)*

Recommendation 9: *The Uniform Relocation Assistance Act's $10,000 cap on payments for business relocation expenses should be removed, and the existing cap on payments for the dislocation of a business or farm, in lieu of actual relocation expenses, should be raised from $20,000 to $50,000. (Included in Senate Bill 63)*

Recommendation 10: *The Commonwealth Transportation Board should be prohibited from using the power of eminent domain to acquire any portion of the property of an existing commercial establishment, or any interest therein, for the purpose of controlling or limiting*

access to commercial establishments located within 300 feet of an interstate highway. (Included in Senate Bill 110)

Recommendation 11: *A housing authority should be required to acquire real property that it has identified for redevelopment within 36 months after announcement of the redevelopment plan. If a housing authority decides against acquiring real property identified for redevelopment, it shall reimburse the owner of such property his reasonable expenses related to the proposed acquisition of his property, upon request. (Included in House Bill 1145)*

Recommendation 12: *The Senate Finance and the House Appropriations Committees should examine the feasibility of transferring the responsibility for acquiring property for highway purposes from the Department of Transportation to the Department of General Services. The Committees should also examine the potential benefits and drawbacks of providing that costs of land acquisition for highway purposes be paid for by general fund appropriations, rather than from revenues currently dedicated to highway construction purposes. (Included in Senate Joint Resolution 38)*

Among the difficult issues that the joint subcommittee concluded were in need of additional study were the advisability of requiring the condemnor to pay litigation expenses of the condemnee and whether a condemned business should be compensated for lost profits.

In the course of its first year of work the joint subcommittee has attempted to maintain a balanced perspective between the public's interest in building needed facilities and the rights of individuals who are required to give up their property in order to build projects that are intended to benefit the greater community. The joint subcommittee has worked to ensure that the Commonwealth's procedures will give property owners neither a windfall nor less than fair value for what is taken from them. Injustices result from both underpayments and overpayments for property taken through exercise of the power of eminent domain.

The interests of the public in constructing beneficial projects in a timely and affordable manner need to balance with the interests of citizens in protecting their private property rights. Owners of property should not have to bear more than their proportionate share of the costs of any public project. Yet Virginia's eminent domain laws should not allow someone to use them to extort a windfall from other taxpayers or prevent the construction of beneficial projects.

An underlying issue in the arguments heard throughout this study has been the appropriate jurisprudential approach. Traditionally, condemnation awards are payments for the property that is taken for the public use; therefore, the market value of condemned property is the paramount issue. Critics of this approach argue that the impact of the taking on an owner's home or business are legitimate issues that should be considered in determining the amount of compensation. The gap between these perspectives is the source of much of the dissatisfaction with the current system that was expressed by citizens who spoke at the public hearings.

Over the course of the 2000 interim, the joint subcommittee will continue to examine the issues not resolved by its initial recommendations, and will determine whether further changes to Virginia's eminent domain laws are appropriate.

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REPORT OF THE JOINT SUBCOMMITTEE STUDYING THE CURRENT MEANS AND ADEQUACY OF COMPENSATION TO VIRGINIA CITIZENS WHOSE PROPERTIES ARE TAKEN THROUGH THE EXERCISE OF EMINENT DOMAIN

To: The Honorable James S. Gilmore, III, Governor of Virginia
and
The General Assembly of Virginia

Richmond, Virginia
April 2000

I. INTRODUCTION

The 1999 Session of the General Assembly adopted Senate Joint Resolution 271 (Appendix A) and House Joint Resolution 491 (Appendix B). The resolutions, which are nearly identical, establish a 13-member joint subcommittee to study the current means and adequacy of compensation to Virginia citizens whose properties are taken through the exercise of eminent domain. The joint subcommittee is directed to study (i) the methods by which eminent domain is exercised and (ii) the means by which compensation is provided or obtained. The joint subcommittee is directed to make recommendations concerning both issues, advising whether current statutes are adequate to furnish the means and methods of compensation "particularly in an evolving public utility market" (as worded in SJR 271) and "in an evolving public utility market" (as worded in HJR 491).

Though the directive in the resolutions is sufficiently broad to require a study of all instances of condemnation under state law, the recitations are directed primarily at the exercise of the power of eminent domain by public utility companies providing electricity service. The resolutions recite that acquisitions for some infrastructure construction projects, such as electric power transmission lines, may negatively affect the values of properties located near to, but outside of, the acquired right-of-way corridor; that construction of large electric transmission lines will devalue properties located close to the right-of-way corridor; and that in some instances the compensation paid is not adequate enough for a homeowner to purchase another comparable home.

The joint subcommittee directed its examination at the condemnation process, and avoided trying to measure the objective adequacy of the compensation awarded in specific takings of property. Despite complaints regarding specific condemnations, the joint subcommittee did not attempt to revisit decisions of condemnors and courts.

The joint subcommittee was chaired by Senator Madison E. Marye of Montgomery County, who patroned SJR 271. Delegate James M. Shuler of Montgomery County, patron of HJR 491, was elected vice chairman. Other legislative members of the joint subcommittee were Senator Charles J. Colgan of Prince William County, Senator Thomas K. Norment, Jr. of James

City County, Senator John Watkins of Chesterfield County, Delegate L. Preston Bryant, Jr. of Lynchburg, Delegate H. Morgan Griffith of Salem, Delegate Riley E. Ingram of Hopewell, Delegate Gladys B. Keating of Fairfax County, and Delegate Brian J. Moran of Alexandria. Joseph T. Waldo of Norfolk and John McLeod, III of Blacksburg were appointed as citizen members by the Speaker of the House, and Philip J. Infantino III of Chesapeake was appointed as a citizen member by the Senate Committee on Privileges and Elections. At the first meeting, Senator Watkins disclosed for the record that he is involved in condemnation proceedings with the Commonwealth and Chesterfield County.

II. EXISTING EMINENT DOMAIN PROCEDURES

A. CONSTITUTIONAL PROVISIONS

The power of the sovereign government to condemn property for a public use is restricted by Article I, § 11 of the Virginia Constitution, which provides that "the General Assembly shall not pass any . . . law whereby private property shall be taken or damaged for public uses, without just compensation, the term 'public uses' to be defined by the General Assembly."

A similar provision is contained in the Fifth Amendment to the federal Constitution, which states that "nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment provides that no state shall "deprive any person of . . . property, without due process of law . . .."

Decisions of the Virginia Supreme Court have helped define what constitutes a compensable taking of, or damage to, property under Article I, § 11. Cases interpreting provisions of this clause may be categorized by several of its words and phrases.

1. "Taking"

A compensable taking requires transfer of ownership of an interest in the property or a physical invasion of such an interest. For example, the filing of a lis pendens and institution of condemnation proceedings do not constitute a compensable taking, even when it diminishes the value of the property. Bartz v. Board of Supervisors, 237 Va. 669, 379 S.E.2d 356, 358 (1989). A regulation or restriction on use, for benefit of the public, is not a taking unless it deprives owner of substantially all economic value. See, e.g., Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992). The joint subcommittee did not address the issue of regulatory takings.

2. "Damaged"

The requirement that the state compensate owners for damage to their property was added to the Virginia Constitution in 1902. Prior to that time, the language was similar to that in the federal Constitution, which speaks only to compensation in the case of a taking of property.

Five years after the "damage" clause was added to the Constitution, the Virginia Supreme Court attempted to enunciate what constituted compensable damage to property. The court recognized two such instances: (i) Every physical injury to property, whether by noise, smoke,

gases, vibration or otherwise, and (ii) every case where there is a direct physical obstruction or injury to the right of user or enjoyment of private property, causing special pecuniary damage to the owner, for which an action at common law would lie. Tidewater Railway Co. v. Shartzer, 107 Va. 562 (1907). The court noted that there need be no physical invasion of the owner's real property; the owner may recover if the improvements would amount to a private nuisance at common law, or is the cause of substantial damage, though consequential. Noise becomes actionable "when it is so great as to become a nuisance to property in the vicinity." 107 Va. at 570. However, the court stressed that there must be "a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment." 107 Va. at 571. In addition, "[t]he property itself must suffer some diminution in substance, or be rendered intrinsically less valuable, by reason of the public use." 107 Va. at 571-572.

In a factually related case several years later, the court reaffirmed that casting smoke, cinders, dust and dirt by a railroad company upon the property of an adjoining owner of land is a damage within the meaning of the Constitution. "So far as it injuriously affects the plaintiff's property, the company has no right to be there without making just compensation." Southern Railway Co. v. Fitzpatrick, 129 Va. 246, 252-253 (1921).

In other cases the court has stressed that some damage to the property or an interest in it, as opposed to the owner's affinity to the property, must be found before compensation will be required. In Lambert v. City of Norfolk, 108 Va. 259 (1908), the plaintiff sued city for the loss in value of property due to establishment of a cemetery adjacent to her land. The court held that her claim for "damages rest entirely upon sentimental consideration and the prejudice that some people have living near a cemetery." 108 Va. at 262. The 1902 amendment to the Constitution did not create any new right incident to land, but was providing a right of action, which, before the enactment of this provision, did not exist when the injury was inculcated under legislative authority. "The meaning of the word 'damaged' was neither enlarged or restricted by the Constitution." 108 Va. at 265 Mere depreciation caused by the proximity of a public improvement affords no grounds for redress. 108 Va. at 267.

More recent decisions have affirmed the proposition that the mere decline in value of property in the vicinity of a government activity does not constitute a compensable damage. A property owner is not protected from a decline in the value of his property resulting from a government decision to put neighboring public property to a lawful though unattractive use. R.I.S.E., Inc. v. Kay, 768 F. Supp. 1141 (E.D. Va. 1991); Ancarrow v. City of Richmond, 600 F. 2d 443 (4th Cir.), cert. denied, 444 U.S. 992 (1979).

The nature of the injury that must be suffered to give rise to a claim of constitutional damage to property was addressed in City of Lynchburg v. Peters, 156 Va. 40 (1931). A doctor whose property abutted a closed street was held not to be entitled to damages for inconveniences shared with the general public, which differ in degree only and not in kind. Here, the plaintiff did not show that he suffered special damages from the action of the city in closing streets to build a stadium. (156 Va. at 49). The constitutional amendment adding the "damage" provision must be limited to cases where the corpus of the owner's property itself, or some appurtenant right or easement connected therewith, or by the laws annexed thereto, is directly affected, and is also specially affected (that is, in a manner not common to the property owner and to the public

at large); and such direct and special injury must be such as to depreciate the value of the owner's property. An owner cannot recover for destruction of peace and quiet, or impairment in the market value of his property, if he has not shown any special damage to himself.

City of Lynchburg v. Peters is cited by Nichols on the Law of Eminent Domain (§ 6.08[2]) as supporting the general rule across the country that when there is no appropriation of land (where damages are asserted in the absence of a taking claim), consequential damages must be special and peculiar to the impacted property. Even if the consequential damage sustained by a landowner is different in degree from that sustained by others, no recovery is allowed. The positions of other states regarding the issue of compensation for the devaluation of property resulting from the condemnation of nearby property is addressed in part III J of this report.

3. "Public Use"

Article I, § 11, limits the state's power to acquire private property through exercise of the power of eminent domain to instances where the property is acquired for a public use, as opposed to use by a particular individual. The General Assembly is specifically authorized by this clause to define what constitutes a public use, and has exercised this power to define certain takings as public purposes. See, e.g., §§ 15.2-1900 and 36-48.

Pursuant to its authority to determine what constitutes a public use, the General Assembly has declared certain types of taking to be for a public purpose. For example, in § 33.1-92 the acquisition of residue parcels is defined to have a public purpose. Whether a use is "public" is a judicial question determined by the character of each use. Light v. City of Danville, 168 Va. 181, 190 S.E. 2d 276 (1937).

4. "Just Compensation"

The method of ascertaining what constitutes the just compensation to which the owner of property taken or damaged is entitled hinges in large measure on the extent and type of taking and the nature of the property interest affected. For example, the measure of adequate compensation for the physical appropriation of an entire parcel of land differs from that used when a portion of an owner's total property interest is taken. Likewise, the rules differ when the fee simple, rather than an easement, in the land is acquired.

For a taking of property in full, the owner is entitled to the full equivalent in money of the property taken, not to exceed the market value, at the time of the taking. The fair market value of the property has been defined as the price which one, under no compulsion to sell, is willing to take for property and which another, under no compulsion to buy, is willing to pay. Tremblay v. State Highway Commissioner, 212 Va. 166, 183 S.E. 2d 141 (1971).

For a taking of a portion of a parcel of land, the owner is entitled to the fair market value for the portion appropriated. In addition, he is entitled to damages to the residue of the parcel flowing from the taking, to the extent that the damage exceeds all benefits to be derived in respect to such residue from the work to be constructed or the purpose to which the land to be taken is to be appropriated. The Virginia Supreme Court has announced: "In every eminent

domain case involving a partial taking, the measure of damages to the residue of the property not taken is the difference in the fair market value immediately before and immediately after the taking." East Tennessee Natural Gas Co. v. Riner, 239 Va. 94, 100, 387 S.E. 2d 476, 479 (1990); Town of Rocky Mount v. Hudson, 244 Va. 271, 273, 421 S.E. 2d 407, 408 (1992).

In determining compensation for damage to a residue, or severance damages, both present and future circumstances that actually affect the value of the property at the time of taking may be considered. Remote and speculative profits and advantages are not to be considered. The present actual value of the land with all its adaptations to general and special uses, and not its prospective, speculative or possible value, based on future expenditures or improvements, is to be considered. Compensation is to be awarded upon the basis of its highest and best use, having regard to the existing business demands of the community or such as may reasonably be expected in the near future. Appalachian Power Co. v. Anderson, 212 Va. 705, 187 S. E. 2d 148 (1972).

When property is damaged but no portion of the parcel is appropriated (as, for example, when there is a physical invasion by smoke or cinders), the measure of damages is the difference in the fair market value immediately before and immediately after the damage, which is same general principle that is applied in measuring damages to the residue of a parcel when there is a partial taking. However, the requirement that such damage be special and peculiar to the impacted property is rarely satisfied.

Relocation expenses may be an element of constitutionally-required compensation. In Richmond v. Old Dominion Iron and Steel, 212 Va. 611, 186 S.E. 2d 30 (1972), the court held that the requirement for "just compensation" means that reasonable moving costs be allowed. This holding preceded the adoption of the Uniform Relocation Assistance Act, and has been mooted in cases involving condemnations involving state and federal funds.

Courts recognize that an appraisal of property may be based on one or a combination of three methods: the direct sales comparison approach; the cost approach; and the income approach, in which the net operating income is capitalized at a rate that reflects current rates of return from competing investments.

Calculating the requisite amount of compensation due when an easement, or the right to occupy and use property for certain purposes, is acquired involuntarily may be difficult. Data regarding voluntary transfers of similar interests involving similar properties are not likely to be readily ascertainable. Courts have held that the market value of the easement is to be determined by (i) fixing the value of the fee of the land on which an easement is located and (ii) attributing a percentage of this full value to the easement taken. The percentage is determined by the extent to which the easement rights interfere with the highest and best use of the property. Colonial Pipeline v. Lohman, 207 Va. 775, 152 S.E.2d 34 (1967).

5. "Property"

When a portion of a tract of land is taken by eminent domain, the owner is entitled to recover for the damage to the remainder of that tract, but not for damages to separate or

independent tracts. The question of which land held by the owner of a condemned parcel constitutes the remainder, or residue, of such condemned land can be important. If all of the land is deemed to constitute a unit of land with the condemned property, the remaining land constitutes the residue, for which the owner may be entitled to damages based on its diminution in value. If it is held to be a separate parcel, its owner will not be allowed compensation for a decline in its fair market value.

Under the unity of lands doctrine, an owner may be compensated for damage to other tracts of land caused by a taking if there exists unity of use, physical unity, and unity of ownership. All of the three elements of the unity doctrine must be met in order for the owner to be prevail. For example, where the remainder of a parcel of land is titled in name of a partnership that had the same equity owners as the condemned portion, the Virginia Supreme Court has ruled that unity of ownership does not exist. Bogese v. State Highway Commission, 250 Va. 226, 462 S.E. 2d 345 (1995).

In Virginia Electrical Power Company v. Webb, 196 Va. 559, 84 S.E. 2d 735 (1954), Webb owned a parcel that adjoined a parcel over which the power company sought an easement. It could not be said as a matter of law that the adjoining parcel was likely to be damaged by construction of the transmission lines; therefore, the parcel did not need to be included in the condemnation petition. However, the adjoining parcel would have to be included in the petition if both parcels constituted "a unity of property" within the rule that there is such a connection or relocation of adaptation, convenience, and actual and permanent use as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcels left. In this case, there was no unity because the parcels were not used for same purpose.

B. STATUTORY PROVISIONS

The procedures to be followed in many types of eminent domain proceedings are set forth in the General Condemnation Act (Chapter 1.1 [§ 25-46.1 et seq.] of the Code of Virginia). However, provisions relating to condemnations by specific agencies, authorities, and local governments are distributed throughout the Code of Virginia.

1. General Condemnation Act

The General Condemnation Act (the "Act") applies to all proceedings for the condemnation of property under the power of eminent domain, unless otherwise specifically provided by law. (§ 25-46.2). The Act requires additional procedural steps and limitations for specific types of condemnations. For example, property that is within an agricultural and forestal district cannot be condemned until the procedures set forth in §§ 15.2-4312 and 15.2-4313 are followed. (§ 25-46.2:2). Pursuant to § 25-46.6, General Assembly consent is required prior to taking lands of (i) any state university, college, or other seminary of learning; (ii) any state hospital or the institutions for the deaf and blind; or (iii) any cemetery or burial ground, or any part thereof, established prior to the date of the charter of the petitioner proposing to condemn. The lands of any other university, incorporated college, or other seminary of learning shall be subject to condemnation for the purposes of public highways, except (i) lands within 500 feet of

any school building and (ii) land that surrounds the school buildings and is used at such time as a campus, park, or athletic field.

The Act provides that no proceedings shall be undertaken to condemn property until a bona fide but ineffectual effort has been made to purchase the property sought to be condemned from the owner, if the owner is known and legally competent to act. In 1998, a provision was added requiring that the "bona fide effort shall include a written statement to the owner which explains the factual basis for the condemnor's offer." (§ 25-46.5).

The condemnor's offer need not be the full appraised value unless § 25-248 of the Uniform Relocation Assistance Act applies. The Virginia Supreme Court has held that it need not be the fair market price, for that is to be determined in the condemnation proceeding if the parties fail to agree. It need not be the figure likely to be accepted. It need be only a figure likely to preserve the framework for further negotiations. Where the condemnor's offer is based upon a value fixed by a professional appraisal, it is not frivolous and fully satisfies the requirement of this section. Norfolk Redevelopment & Hous. Auth. v. Baylor, 214 Va. 1, 197 S.E.2d 335 (1973). Mere incorrectness in the amount of the offer, without a showing of bad faith, is insufficient to make out a violation of this section. State Hwy. & Transp. Comm'r v. Herndon, 225 Va. 380, 302 S.E.2d 55 (1983).

If the parties are unable to negotiate the terms of a sale, the condemnor may initiate condemnation proceedings by filing a petition in the proper court. (§ 25-46.9). Requirements for a condemnation petition are set out in § 25-46.7. Upon filing the petition, the petitioner must notify the owners within 21 days of its filing and of the petitioner's intention to apply to the court for the appointment of commissioners to ascertain just compensation for the property to be taken or affected as a result of the taking.

The notice may also include notice of the petitioner's application for the right of entry for the purpose of constructing its works or improvements on the property sought to be condemned, as provided in § 25-46.8. The court must find at a hearing that (i) prior entry is required by a public necessity or an essential public convenience and (ii) the interests of the owners of such property will be adequately protected by the payment into court for the benefit of the owners of the amount of the offer made under § 25-46.5. An owner may apply to withdraw his share of the funds deposited. If the petitioner enters upon the property and does any work or causes any damage to the property, it cannot thereafter abandon the condemnation proceedings without the consent of the owner.

The next notable step in the procedure set out in the Act is the determination of just compensation. Eminent domain proceedings are unique in that the amount of compensation is set by a commission rather than by a jury. (§ 25-46.19). If the parties cannot agree upon the names of the commissioners, then each party submits the names of six freeholders. The court selects the names of nine persons and two alternates from the lists submitted by the parties. Once nine qualified persons are selected, the petitioner and the owners each have two peremptory challenges.. The remaining five are appointed commissioners.

The commissioners are required to take an oath that they will faithfully and impartially ascertain what will be (i) the value of the property to be taken and (ii) 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, as of the first of the time of the taking or the date the petition is filed. (§ 25-46.20) The procedure for the commissioners to determine the compensation is set out in § 25-46.21. Elements of the process include viewing the property and hearing testimony on issues of valuation.

Expert witnesses may testify as to value where special knowledge or expertise of the witness will help determine value. In Virginia Electric and Power Company v. Lado, 220 Va. 997, 226 S.E. 2d 431 (1980), the court spelled out limits on the testimony an appraiser may provide with respect to dangers associated with electrical power lines. The power company filed a petition in condemnation for construction of an electric transmission line, and the parties disagreed about the damage the line would do to the balance of the owner's property. The owner's expert testified that the easement totally destroyed the value of a man-made lake because the proximity of the power line rendered recreational use "hazardous." The court said that the real estate appraiser testifying for the owner was not qualified to testify to any potential danger that the transmission line posed to users of the lake. He "was an expert on real estate values, but he was not an expert on electricity. Upon retrial, his testimony should be confined within the limits of his expertise." 220 Va. at 1005.

The commission's report is prima facie correct and entitled to great weight. If no fraud, collusion, corruption or improper conduct entered into the report of the commissioners, or no other cause exists that would justify setting aside or modifying a jury verdict in civil actions, the court will confirm the report. Exceptions to the report may be made within 10 days after its filing. Upon payment into court of the amount ascertained by the court as compensation and damages to the property owners, title to the property condemned vests in the petitioner. (§ 25-46.24) Appeals from the court's order establishing just compensation may be made to the Supreme Court. (§ 25-46.26)

2. Miscellaneous Provisions

Chapter 5 (§ 25-232.01 et seq.) of Title 25 contains several miscellaneous procedural statutes relating to the condemnation process. Section 25-232.01 requires that the location of all roads to be constructed with both state aid and county or district funds shall first be approved by the appropriate local county road authorities. Cities and towns may acquire by condemnation any lands or rights-of-way necessary for providing watersheds or for laying water pipes, and counties may so acquire such lands or rights-of-way within their borders.

Electric authorities cannot take property from corporations having the power of eminent domain unless the State Corporation Commission certifies that a public necessity, or an essential public convenience, so requires. In no event shall one corporation take by condemnation proceedings any property of another corporation possessing the power of eminent domain. If the Commission approves a condemnation, it shall establish whether any payment for stranded investments is appropriate. (§ 25-233).

A political subdivision or state agency authorized to enter upon and take possession of property shall deposit with the clerk of the court such sum as it estimates to be the fair value of the land to be taken and the damages, if any, before entering upon the land. A person entitled to payment may be paid his pro rata share of 90 percent of such fund deposited. (§ 25-234).

3. Uniform Relocation Assistance and Real Property Acquisition Policies Act

Chapter 6 (§ 25-235 et seq.) of Title 25 sets out the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1972 (the "Uniform Act"). The Uniform Act requires additional payments and imposes additional procedural requirements when a "state agency" as defined in § 25-238 undertakes a project with federal or state funds. Rights of a property owner under the Uniform Act are separate and distinct from an owner's constitutional rights to just compensation for takings and damages. (§ 25-235.1).

Virginia's adoption of the Uniform Act was a condition to its receipt of federal funds. Federal agencies may not provide funds for state projects involving condemnation without first receiving "satisfactory assurances" that displaced persons will be given such relocation payments and assistance as are required to be paid by a federal agency under the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P. L. 91-464; 42 U.S.C. §§ 4601-4655).

The Uniform Act defines state agency as "any department, agency or instrumentality of the Commonwealth; or any public authority, municipal corporation, local governmental unit or political subdivision of the Commonwealth; or any department, agency or instrumentality of any public authority, municipal corporation, local government unit, political subdivision of the Commonwealth, or two or more of any of the aforementioned and any person who has the authority to acquire property by eminent domain under state law and who carries out projects with federal or state financial assistance that cause people to be displaced." (§ 25-238). Federal guarantees or insurance are not deemed to be federal funds. Also, federal revenue sharing funds paid to localities are not federal or state funds under the Act. (1973-74 Op Att'y Gen. at 304).

The Uniform Act requires fair and reasonable relocation payments to displaced persons for (i) reasonable moving expenses, (ii) direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, (iii) reasonable expenses in searching for a replacement business, and (iv) actual reasonable expenses necessary to reestablish a displaced farm, nonprofit organization or small business at its new site, but not to exceed $10,000 in accordance with criteria established by the state agency. (Subsection A of § 25-239).

Eligible displaced persons alternatively may elect to accept the payment of a fixed payment for loss of a business or farm in an amount to be determined according to criteria established by the state agency, but not less than $1,000 nor more than $20,000. This alternative allows persons who do not wish to undertake the relocation of their business to nonetheless receive payment for its loss.

The Uniform Act contains separate provisions requiring compensation for residents of condemned dwellings. State agencies must make an additional payment equal to the difference

between the reasonable cost of a comparable replacement dwelling and the amount paid for his dwelling to any person who is displaced from a dwelling actually owned and occupied by him. (§ 25-240) Additional payments also address any increased interest costs and other debt service costs which such person is required to pay for such comparable replacement dwelling, and closing costs. Persons not eligible for the additional payments to qualified homeowners are eligible for up to 42 months of the cost of renting a comparable dwelling. (§ 25-241).

A relocation assistance advisory program is established to provide assistance to displaced persons. If a person occupying property immediately adjacent to the real property acquired is caused "substantial economic injury" because of the acquisition, the state agency may offer such person relocation advisory services. (§ 25-242).

The dollar amounts stated in the Act are automatically adjusted to conform to future revisions of corresponding monetary benefits under the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act. (§ 25-247.1). This provision has been construed to override the $22,500 statutory limit under § 25-240 on payments to displaced homeowners.

The Uniform Act also established "general rules of conduct" for the acquisition of real property by a state agency. (§ 25-248). The rules of conduct require that:

- An agency shall make every reasonable effort to acquire expeditiously real property by negotiation.
- Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property.
- Before initiating negotiations, the state agency shall establish an amount which it believes to be just compensation and shall make a prompt offer to acquire the property for the full amount. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. The owner shall be given a written statement of the amount established as just compensation. The just compensation for the real property acquired and for damages to remaining real property shall be separately stated.
- The construction of a public improvement shall be scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling, or to move his business or farm operation, without at least 90 days' written notice from the agency concerned, of the date by which such move is required.
- The state agency shall not either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.
- No agency shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.
- If the acquisition of part of a property would leave its owner with an uneconomic remnant, the agency shall offer to acquire the entire property.

State agencies are required by the Uniform Act to reimburse the owner for expenses necessarily incurred for (a) recording fees in conveying such real property to the state agency; (b) penalty costs for prepayment for any preexisting mortgage; and (c) the pro rata portion of real property taxes on the real property. (§ 25-249). State agencies are also required to reimburse owner for costs and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred because of the condemnation proceedings, when condemnation proceeding is abandoned or a court's decision halts a proposed condemnation. (§ 25-250).

4. Inverse condemnations

An inverse condemnation proceeding is instituted by a property owner to determine whether the state has taken or damaged his property. It is so named because it is the "inverse" of a condemnation proceeding where the condemnor institutes an action to take title to property and determine just compensation. The Virginia Supreme Court has held that if the owner of private property, which is damaged but not taken, is not a party to the proceeding to condemn the property of another, and his rights have not been passed upon, he may maintain an action at law to recover just compensation. Southern Railway Co. v. Fitzpatrick, 129 Va. 246 (1921)

Section 8.01-187 provides that if compensation has not been paid, or any action taken to determine the compensation, within 60 days following a determination that a taking or damage has occurred, the court may appoint commissioners to determine the compensation. When an owner prevails against a state agency in a declaratory judgment proceeding under this section, the owner must be reimbursed for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred because of such proceeding. (§ 25-251).

5. Condemnations by Department of Transportation

The Commonwealth's right to exercise the power of eminent domain may be delegated by statute to subordinate agents (such as the Commonwealth Transportation Commissioner), to subordinate units of government (such as local governments and independent authorities), and to public service companies (including railroad and utility companies).

The Commonwealth Transportation Commissioner is vested with the power to condemn such lands deemed to be necessary for the construction of the public highways of the Commonwealth. (§ 33.1-89). An offer to purchase is required, and the Uniform Act applies with respect to offers made by the Commonwealth Transportation Commissioner.

Offers for payment of compensation for property taken and damages to property not taken shall separately state (i) the property to be taken and the amount of compensation offered therefor and (ii) the nature of the prospective damage or damages and the amount of compensation offered for each such prospective damage. In negotiating with a property owner with respect to payment for prospective damage to property not taken, the Commissioner shall ensure that the owner is properly informed as to the type and amount of foreseeable damage and/or enhancement.

The Commissioner is authorized to acquire the entire tract of land or any part thereof (not exceeding two acres) if (i) the remainder of such tract can no longer be utilized for the purpose for which the entire tract is then being utilized, (ii) the project will leave the remaining portions without a means of access to a public highway, or (iii) the resulting damages to the remainder of such tract, lying outside the proposed right-of-way, will approximate or equal the fair market value of such remaining lands. (§ 33.1-91 through 33.1-93). The Commissioner may also enter upon any land in the Commonwealth for the purposes of making an examination and survey. (§ 33.1-94).

Under the quick-take procedure authorized under Title 33.1, the Commissioner (or other unit of government authorized to use this procedure) pays into court such sum as he estimates is the fair value of the land taken and damage done, based on a bona fide appraisal, before entering upon, or taking possession of, such land. Upon recordation of the certificate in the clerk's office, the interest or estate of the owner of such property shall terminate, and defeasible title to such property vests in the Commonwealth. The owner receives the same interest or estate in the funds held on deposit by virtue of the certificate as he had in the property taken or damaged. All liens are transferred to the deposited funds. Any person entitled to compensation may petition the court for the distribution of the funds. Acceptance of such payment does not limit the amount to be allowed by a commissioner in a condemnation proceeding. If the Commissioner and the owner are unable to agree as to the compensation or damage, the Commissioner shall institute condemnation proceedings. The final order confirming the award confirms the defeasible title to the land in the Commonwealth.

The measure of compensation for damage to remaining property is offset by the enhancement in value of the remaining property of the landowner by reason of the construction or improvement contemplated or made by the Commissioner. (§ 33.1-130) Any enhancement in value is not to be offset against the value of the property taken. If such enhancement in value exceeds the damage, there is no recovery against the landowner for the excess. If the Commissioner has not instituted condemnation proceedings within (i) 60 days after completion of the construction of the highway project, or (ii) one year after he has entered upon and taken possession of the property, the property owner may petition the circuit court for the appointment of commissioners to determine just compensation for property taken and damages. (§ 33.1-132)

Issues relating to the exercise of the Department of Transportation's condemnation power are addressed at Part III H of this report.

6. Condemnations by Housing Authorities

Redevelopment and housing authorities have been delegated the right to acquire by exercise of the power of eminent domain any real property which may be necessary for the purposes of such authority. (§ 36-27). An authority may exercise the power of eminent domain in the manner provided in the General Condemnation Act. The commissioners before whom condemnation proceedings are conducted may hear evidence as to the value of the property, including the owner's appraisal and the effect that any pending application for a zoning change, special use permit application or variance application may have on the value of the property.

The court may also determine whether there has been unreasonable delay in the institution of the proceedings after public announcement by the condemnor of a project that necessitates acquisition of land by the condemnor. If the court determines that such unreasonable delay has occurred, it shall instruct the commissioners to allow any damages sustained during and because of such delay, in addition to and separately from the fair market value thereof. Damages shall not exceed the actual diminution, if any, in fair market value of the land in substantially the same physical condition over the period of the delay.

The authority is required to send by certified mail, postage prepaid, to at least one of the owners of every parcel of property to be acquired pursuant to such plan a notice advising such owner that (i) the property owned by such owner is proposed to be acquired and (ii) such owner will have the right to appear in any condemnation proceeding instituted to acquire the property and present any defense that such owner may have to the taking. The authority shall also provide a certificate of the appraiser's opinion of the fair market value, together with two comparable property sales, if available, of the property to be acquired.

7. Condemnations by Public Service Corporations

The general grant of condemnation authority for public utility purposes is contained in § 56-49. Certain public service companies have the power to acquire, by the exercise of the right of eminent domain, any lands necessary for all its necessary business purposes, for its use in serving the public, whenever the corporation cannot agree on the terms of purchase or settlement with any such person. Proceedings shall be conducted in the manner provided by the General Condemnation Act and are subject to the provisions of § 25-233.

Corporations are prohibited from condemning any strip of land for a right-of-way within 60 feet of the dwelling house of any person except (i) when the court having jurisdiction of the condemnation proceeding finds, after notice and a hearing thereon, that it would otherwise be impractical, without unreasonable expense, to construct the proposed works of the corporation at another location; or (ii) in case of occupancy of the streets or alleys, public or private, of any county, city or town, in pursuance of permission obtained from the local governing body; or (iii) in case of occupancy of the highways, with permission from the authorities having jurisdiction. Corporations that have not been (i) allotted territory for public utility service by the State Corporation Commission or (ii) issued a certificate to provide public utility service, shall acquire lands or easements by eminent domain for electric lines only after obtaining any certificate of public convenience and necessity required for such lines, facilities, works or purposes.

Issues relating to the implementation of the procedure for condemnations by public service companies providing electric service are addressed in Part III E of this report.

C. RECENT EMINENT DOMAIN LEGISLATION

In addition to passing SJR 271 and HJR 491, the 1999 Session of the General Assembly adopted House Joint Resolution 490, patroned by Delegate Robinson. The resolution requested the Department of Transportation to study certain right-of-way acquisition issues and the process by which it provides benefits and relocation assistance to businesses as defined and provided for

under the Uniform Act. In carrying out this two-year study, the Department was directed to make recommendations concerning means to protect the interests of the Commonwealth and those of landowners while also providing for compensation to gasoline retail outlet owners and operators who are unable, with reasonable facility, to relocate their businesses displaced as the result of the Department's acquisition of the property on which the businesses were located. The Transportation Research Council is in the process of conducting the study on behalf of the Department, and its report is due in October 2000. A draft of the Council's research proposal is attached as Appendix C.

Another study from the 1999 Session, House Joint Resolution 573, was introduced by Delegate Tata. The resolution, which was referred to the Department of Transportation by Speaker's letter, would have established a joint subcommittee to study all aspects of Virginia's condemnation process with particular attention to those areas that may be unduly burdensome to citizens. The resolution focused on two issues in Virginia's condemnation law: (i) when a condemning authority files a certificate of take but then delays filing the condemnation suit, thereby creating a prolonged period of anxiety and uncertainty; and (ii) when a condemning authority threatens the use of eminent domain, thereby causing a property owner to incur legal expenses, then drops any attempt to obtain the property with no compensation to the property owner. VDOT representatives met with Delegate Tata to discuss his concerns on May 12, 1999. Based on their impression that the study being conducted pursuant to HJR 491 and SJR 271 should provide ample opportunities to address the issues, they concluded that no further action is necessary on HJR 573.

Enacted in the 1999 Session, House Bill 1881 (patroned by Delegate Keating) and Senate Bill 899 (patroned by Senator Colgan) amended §§ 25-233 and 56-49 to clarify that public service corporations that have not been (i) allotted territories for public utility service by the State Corporation Commission or (ii) issued certificates to provide public utility service, may not acquire property through eminent domain for lines and other facilities until they have obtained from the Commission the requisite certificates of public convenience and necessity required for such lines and facilities. The bill also clarified the petition and public hearing requirements applicable to condemnations by public service corporations and electric authorities established pursuant to the provisions of Chapter 54 (§ 15.2-5400 et seq.) of Title 15.2.

House Bill 1297, introduced in the 1998 Session by Delegate Hall, amended § 36-27 regarding condemnations by housing authorities. The measure requires the commissioners to hear evidence on the value of the condemned property including, but not limited to, the owner's appraisal. Housing authorities were also required to provide at least one of the property owners notice of their legal rights and an appraisal conducted by a licensed real estate appraiser. The notice from the locality was specifically precluded from serving as the basis for eligibility for relocation benefits.

Senate Bill 641, patroned by Senator Mims in the 1998 Session, amended § 25-46.5 to require that a condemnor's bona fide effort to purchase a property shall include a written statement to the owner that explains the factual basis for the condemnor's offer.

House Bill 221, also patroned by Senator Mims, would have allowed the court to award reasonable attorneys' fees and other costs to the property owner if the amount of compensation awarded exceeds the amount offered by the petitioner as part of its bona fide offer to purchase the property. This measure was carried over to the 1999 Session, and was not reported.

In 1998, Senator Watkins introduced Senate Bill 662, which provided for the selection of condemnation commissioners by the jury commissioner. The commissioners would have been required to be disinterested freeholders of property within the jurisdiction. This alternative system would have been effective when a county having a county manager form of government is the condemnor, or the Commonwealth Transportation Commissioner is the condemnor in (i) any county with the urban county executive form of government, or in a city adjacent to or completely surrounded by such a county, or in a county contiguous to any such county, or in a city adjacent to or completely surrounded by such a contiguous county, or in any town within such contiguous county, or (ii) any county having a population of between 200,000 and 220,000 as determined by the 1990 census. The bill would have expired on July 1, 2003. The bill was carried over to the 1999 Session, and did not pass. Further discussion of experiments with alternative commissioner selection legislation is set forth in Part III A of this report.

Delegate Keating introduced House Joint Resolution 173 in the 1998 Session. The resolution would have established a nine-member joint legislative subcommittee to examine the use of eminent domain powers by public service companies. The joint subcommittee was charged to examine (i) whether or not public policy still requires that public service companies be allowed to continue using the power of eminent domain to the same extent permitted in the past; (ii) whether suitable alternatives, such as increasing the use of existing poles and facilities, may exist; and (iii) the feasibility of placing authority at the appropriate level of government to offer better protection to the affected landowners from unnecessary or ill-advised condemnations. The resolution did not pass, and the Speaker asked the House Corporations, Insurance and Banking Committee to study the issues.

D. SELECTED PROVISIONS OF LAWS OF NEIGHBORING STATES

In conjunction with its review of Virginia's statutory condemnation procedures, the joint subcommittee received information regarding selected provisions of the corresponding statutes of neighboring states.

1. North Carolina

Prior offer to purchase: In North Carolina, a condemnor is not required to make a prior purchase offer as a condition to condemning property. (§ 40A-4).

Who determines amount of compensation: The clerk of court appoints three disinterested residents of the locality to serve as commissioners. If any party excepts to the commissioners' findings, they shall be entitled, on appeal to superior court, to have the amount of compensation determined by a jury unless trial by jury has been waived by all parties. (§ 40A-29).

Litigation expenses: The court may in its discretion make an award to owners to reimburse them for charges paid for appraisers, engineers and plats (if they testify as witnesses or are introduced as evidence). If the condemnor loses on basis of authority to condemn property, or abandons the action, the court shall award the owner such sum that will reimburse the owner for reasonable costs, disbursements, expenses (including attorney, appraisal and engineering fees) and any loss because he was unable to transfer title to the property from the date of filing of the complaint.

Measure of just compensation: The measure for a complete taking is its fair market value. If the taking is of less than the entire tract, the measure of compensation is the greater of either (i) amount by which the "before" value exceeds its fair market value immediately after, or (ii) fair market value of the property taken. The cost of removal of personal property shall be considered as an element to be compensated. (§ 40A-64).

Uniform Act: North Carolina's version of the Uniform Relocation Assistance and Real Property Acquisition Policies Act applies to state or political subdivisions or agencies. It covers moving expenses, replacement housing, and relocation assistance. It does not spell out any "acquisition policies" or require a prior purchase offer. (§ 133-5 et seq.).

2. Maryland

Prior offer to purchase: In Maryland, a condemnation action commences with the filing of a complaint that includes a statement that parties are unable to agree as to the value of the property. (Rule 12-205).

Who determines amount of compensation: A trial by jury is held unless otherwise elected by the parties. (Rule 12-207).

Litigation expenses: The plaintiff pays all costs, including per diem to jurors, recordation costs, and "an allowance, as fixed by the court, for the reasonable legal, appraisal, and engineering fees actually incurred by the defendant because of the condemnation proceeding, if the judgment is for the defendant on the right to condemn." (Rule 12-106). If a condemnation proceeding is abandoned, defendant is entitled to recover from the plaintiff the reasonable legal, appraisal and engineering fees actually incurred by the defendant because of the condemnation proceeding. (Rule 12-109).

Measure of just compensation: Where part of a parcel is taken, the owner receives the fair market value of the part taken plus any severance damages to the residue. The severance damages are reduced to the extent of the value of the special (particular) benefits to the remainder arising from the condemnor's future use of the part taken. (Rule 12-104). Consequential damages may only be paid to an owner who suffers a loss of a part of his property through condemnation, and not to the owner of property not taken unless it is rendered useless.

Uniform Act: Maryland's version of the relocation assistance law applies to any "displacing agency," which includes public agencies and private utility companies having the right to acquire real property with federal assistance or through the use of eminent domain or by

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Litigation expenses: The court may in its discretion make an award to owners to reimburse them for charges paid for appraisers, engineers and plats (if they testify as witnesses or are introduced as evidence). If the condemnor loses on basis of authority to condemn property, or abandons the action, the court shall award the owner such sum that will reimburse the owner for reasonable costs, disbursements, expenses (including attorney, appraisal and engineering fees) and any loss because he was unable to transfer title to the property from the date of filing of the complaint.

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Uniform Act: North Carolina's version of the Uniform Relocation Assistance and Real Property Acquisition Policies Act applies to state or political subdivisions or agencies. It covers moving expenses, replacement housing, and relocation assistance. It does not spell out any "acquisition policies" or require a prior purchase offer. (§ 133-5 et seq.).

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Who determines amount of compensation: A trial by jury is held unless otherwise elected by the parties. (Rule 12-207).

Litigation expenses: The plaintiff pays all costs, including per diem to jurors, recordation costs, and "an allowance, as fixed by the court, for the reasonable legal, appraisal, and engineering fees actually incurred by the defendant because of the condemnation proceeding, if the judgment is for the defendant on the right to condemn." (Rule 12-106). If a condemnation proceeding is abandoned, defendant is entitled to recover from the plaintiff the reasonable legal, appraisal and engineering fees actually incurred by the defendant because of the condemnation proceeding. (Rule 12-109).

Measure of just compensation: Where part of a parcel is taken, the owner receives the fair market value of the part taken plus any severance damages to the residue. The severance damages are reduced to the extent of the value of the special (particular) benefits to the remainder arising from the condemnor's future use of the part taken. (Rule 12-104). Consequential damages may only be paid to an owner who suffers a loss of a part of his property through condemnation, and not to the owner of property not taken unless it is rendered useless.

Uniform Act: Maryland's version of the relocation assistance law applies to any "displacing agency," which includes public agencies and private utility companies having the right to acquire real property with federal assistance or through the use of eminent domain or by

negotiation. (Rules 12-202 through 12-206) However, when the displacing agency is not receiving federal or state financial assistance, the agency may elect not to comply with the requirements of the Relocation Assistance and Land Acquisition Policies Law. (Rule 12-207). The real property acquisition policies state that a displacing agency "shall be guided to the greatest extent feasible by the policies set forth in this section." The policies are similar to those in Virginia's Uniform Act, and require that the condemnor make "every reasonable effort to acquire expeditiously the real property by negotiation."

3. West Virginia

Prior offer to purchase: In West Virginia, there is no statutory requirement for the condemnor to offer to acquire property as a condition to instituting eminent domain proceeding.

Who determines amount of compensation: Just compensation and damages are fixed by five disinterested freeholders appointed as commissioners. The five commissioners are drawn from 13 disinterested freeholders nominated by the court. Each side makes four preemptory strikes to reduce the panel to five. (§§ 54-2-5 and 54-2-6). Either party may file exceptions to the commissioners' report and demand that the question of compensation and damages be ascertained by a jury of 12 freeholders. (§ 54-2-10).

Litigation expenses: Generally the costs of a condemnation proceeding in the trial court are paid by the condemnor. In every condemnation proceeding in an appellate court, costs shall be recovered in such court by the party substantially prevailing. (§ 54-2-16a).

Uniform Act: Under West Virginia's Uniform Relocation Assistance and Real Property Acquisition Policies Act, an "acquiring agency" means the state, political subdivision and persons carrying out a program with federal financial assistance. Each acquiring agency is required to adopt rules and regulations to implement the provisions of the federal acts, including the carrying out of all procedures and the making of all financial assistance payments, relocation assistance payments, replacement housing payments, loans and expense reimbursement payments required by such federal acts. (§ 54-3-3).

4. Tennessee

Prior offer to purchase: Tennessee's act does not require the condemnor to make a prior offer.

Who determines amount of compensation: Value is determined by five-person jury, unless parties agree on another number. They may be nominated by the court, selected by consent of the parties, or summoned by the sheriff. (§§ 29-16-108, 29-16-109).

Litigation expenses: If the amount of compensation awarded at the trial exceeds the amount assessed by the condemnor and paid into court, the condemnor shall pay the costs of the proceeding; if it exceeds the amount awarded, the bill of costs may be taxed against the defendants. (§ 29-17-812).

Measure of just compensation: Elements of damage include the value of the lands or rights taken, without deduction, but incidental benefits may be taken into consideration in calculating incidental damages. Reasonable expenses of moving chattels is included in incidental damages. Condemnors are required to reimburse owners for recordation taxes, prepayment penalties, and the pro rata share of real estate taxes. (§ 29-16-114).

Uniform Act: The Uniform Relocation Assistance Act (in the Public Planning and Housing Title) applies to any "state agency," defined as department or agency of the state when carrying out projects with or without federal assistance, or when providing state financial assistance. (§ 13-11-103). Tennessee's version of the Uniform Act does not include acquisition policies analogous to Virginia's § 25-248.

5. Kentucky

Prior offer to purchase: Condemnor is required (in most cases) to attempt to agree to acquire property with the owner prior to condemning it. (§ 416.550).

Who determines amount of compensation: Upon filing of the petition, the court appoints three "impartial householders of the county who are owners of land" as commissioners to view the land and award a sum as will fairly represent the reduction in market value of the entire property, all or a portion of which is sought to be condemned, said sum being the difference between the market value of the entire property immediately before the taking and immediately after the taking. (§ 416.580). If party takes exception to the valuation of the property, the question as to compensation will be tried by a jury. (§ 416.620).

Litigation expenses: The costs involved are borne by department or agency. (§ 416.560).

Uniform Act: The state, any political subdivision or other public or private entity subject to federal Uniform Relocation Assistance and Real Property Acquisition Policies Act undertaking a project resulting in the acquisition of real property or persons being displaced from their homes, business, or farms may provide relocation assistance and make relocation payments as may be necessary to comply with the federal act. (§ 56.620). In 1988, detailed provisions regarding the amount of assistance to be provided were repealed. Kentucky's version of the Uniform Act does not include acquisition policies analogous to Virginia's § 25-248.

III. MAJOR ISSUES EXAMINED BY THE JOINT SUBCOMMITTEE

A. COMMISSIONER SYSTEM

The joint subcommittee was advised to review the process for selecting commissioners in condemnation cases. The debate over the process of selecting commissioners involves more than the amount of awards. The most frequent criticism of the commissioner system was the method by which commissioners are selected. Under current law, each party selects six freeholders. Critics observed that it is an anomaly to allow parties to pick the persons who will be deciding factual issues. The ability to select one's neighbors and friends to decide the fair market value of property raises concerns that the system is perceived as fostering favoritism and bias.

A related concern involves the method by which the panel of nine persons is selected from the list of 12 nominees. Typically four commissioners are selected from each party's list of six nominees. One party will end up with five, and the other four, of its selections in the panel of nine. Each side may exercise two peremptory strikes, resulting in the five persons who will decide issues of compensation. Judges have reportedly selected which party's nominee will be the ninth person by flipping a coin or other random method. Critics charge that the public's credibility in the system is threatened when a coin toss decides which party's nominees will be in the majority on the commission.

In 1991, the General Assembly instituted a limited pilot program testing an alternate process for highway condemnations. Under Senate Bill 724, in Fairfax County and adjacent localities, condemnation commissioners were to be drawn by the jury commissioner from a panel of landowners summoned for jury duty. The pilot program was scheduled to expire in 1993. During the 1993 Session, the General Assembly, with the passage of House Bill 640, extended the pilot program's expiration until 1994, and added highway condemnations in Chesterfield and Henrico Counties to the pilot program. In 1994, Senate Bill 136 extended the pilot program until 1996, and expanded it to include all types of condemnation proceedings in Henrico County.

Two years later, House Bill 819, as it passed the General Assembly, pushed the pilot program's expiration date back three years, to 1999. However, the Governor proposed an amendment, which was agreed to at the reconvened session, that extended the measure's sunset by only one year, to 1997. In 1997, two bills were considered. House Bill 2838, which would have instituted the jury system statewide, was defeated. Senate Bill 1168, as enrolled, extended the sunset only for Henrico County. The bill was vetoed, so the legislation expired on its scheduled sunset date of July 1, 1997, and the process reverted to the system used elsewhere in the Commonwealth.

The 1991 legislation required the Department of Transportation to report on whether data indicates that the current system is resulting in higher condemnation costs. The final report of the Virginia Transportation Research Council (1997) concluded that the current system has cost the Commonwealth notably more than has the jury system. However, the small number of jury cases prevented the authors from drawing statistically valid comparisons. A copy of the abstract from the final report is attached as Appendix D.

All but one of the states adjacent to Virginia provide that the question of just compensation in a condemnation case will be ultimately decided by a jury. In North Carolina, West Virginia, and Kentucky, a jury is impaneled if either party disputes the finding of a panel of commissioners. Maryland provides for a jury to determine compensation. In Tennessee, just compensation is determined by a five-member jury. However, its members are nominated by the court, selected by consent of the parties, or summoned by the sheriff.

B. BUSINESS LOSSES

As a general rule in Virginia, the owner of a business is not constitutionally entitled to compensation for its loss of profits or decrease in the business' value attributable to a condemnation. Several theories have been advanced for this approach. The Virginia Supreme Court has held that in condemnation cases "[p]rofits or losses from business are too speculative and uncertain to be considered in determining value unless attributable to the intrinsic nature of the property." Ryan v. Davis, 201 Va. 79, 109 S.E.2d 409 (S. Ct. 1959); Richmond, etc., R. Co. v. Chamblin, 100 Va. 401, 406, 41 S.E. 750 ("[D]amages to the trade or business of the landowner are generally too remote to be a subject of damages, because they depend upon contingencies too uncertain and speculative to be allowed.").

Evidence of the rent paid by the tenant to a landlord is admissible as tending to prove the value of the land under an income approach, but testimony as to the gross sales or to the percentage thereof from which the rent was computed is not admissible. May v. Dewey, 201 Va. 621, 112 S.E.2d 838 (1960).

While it is proper to show how the property is used, it is usually improper to go into the profits of the business carried on upon the property. Damages cannot be allowed for injuries to the business. The obvious reason for this is that the owner is entitled only to the value of the property taken and damages to the remainder, if any. Fonticello Co. v. Richmond, 147 Va. 355, 368, 137 S.E. 458 (1927)

Defenders of Virginia's current system have pointed out that the condemnor is required to pay for the property that it is acquiring, but it is not acquiring the displaced business. Such items as lost profits and business goodwill are viewed as personal to the owner of the property, and not to the property itself. As the Virginia Supreme Court has held, "Ordinarily, such frustration of plans, like loss of good will, loss of profits, and difficulty of relocating, is a loss personal to the owner, or to the business conducted on the land by the owner, not attributable to the land itself." State Hwy. & Transp. Comm'r v. Lanier Farm, Inc., 233 Va. 506, 357 S.E.2d 531 (1987).

However, business goodwill or going concern value is recognized as a valuable asset for purposes of taxation, divorce and business torts. Several states have legislated changes to provide compensation for business losses. Alaska allows business owners to recover "reasonably certain" lost profits as an element of damages during a relocation period incurred due to the state's exercise of its eminent domain power. State v. Hammer, 550 P.2d 820 (Alaska 1976).

California Civ. Proc. Code § 1263.510 allows recovery for loss of goodwill, if the property owner shows that loss cannot be prevented by relocating the business, and compensation for goodwill will not be included in payments under another provision of law. Goodwill is defined as benefits that accrue to a business as a result of location, reputation for dependability, skill or quality and any other circumstances resulting in retention or acquisition of new patronage.

The Uniform Eminent Domain Code, prepared by the National Conference of Commissioners on Uniform State Laws in 1974, includes a provision, similar to California's statute, authorizing compensation for goodwill:

> Section 1016. [Loss of Goodwill]
> (a) In addition to fair market value determined under Section 1004, the owner of a business conducted on the property taken, or on the remainder if there is a partial taking, shall be compensated for loss of goodwill only if the owner proves that the loss (1) is caused by the taking of the property or the injury to the remainder, (2) cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill; (3) will not be included in relocation payments under Article ___, and (4) will not be duplicated in the compensation awarded to the owner.
> (b) Within the meaning of this section, "goodwill" consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill, or quality, and any other circumstances resulting In probable retention of old or acquisition of new patronage.

Other states allowing recovery for lost business profits or business interruption include Florida (Fla. Stat. § 73.071), Georgia (Bowers v. Fulton County, 146 S.E. 2d 884 (1966)), Louisiana (Huckabay v. Red River Waterway Commission, 663 So. 2d 414 (La. App. 2d Cir. 1995)), Maryland (Board of Education v. Hughes, 317 A.2d 485 (Md. 1974)), Michigan (Department of Transportation v. McNabb, 516 N.W.2d 83 (Mich. 1994)), Vermont (Vt. Stat. Ann. Tit. 19 § 501), and Wyoming (Wyo. Stat. § 1-26-713).

C. LITIGATION EXPENSES

1. Introduction

Although in the middle and latter part of the nineteenth century a number of states adopted statutes requiring payment of the landowner's attorney's fees in eminent domain proceedings, most of these statutes were subsequently repealed so that by the 1950s the general American rule was that in eminent domain proceedings brought by a public body, attorney's fees were not paid to a landowner's attorney. Since then there has been a trend toward adoption of statutes authorizing payment of such litigation expenses either in all, or at least some, instances. Geoffrey Dobson, Payment of Attorney Fees in Eminent Domain and Environmental Litigation (Transportation Research Board, ALI/ABA 1979), p. 703.

The vast majority of states currently allow persons whose property is taken by exercise of the power of eminent domain to recover attorneys' fees or other litigation expenses in limited circumstances. The most typical situations where states (including Virginia) allow the recovery of litigation expenses are when the state dismisses condemnation proceedings, is held not to be authorized to condemn the property, or is successfully sued in an inverse condemnation proceeding. The adoption of much of the legislation requiring payment of a landowner's attorney's fees in these circumstances is attributable to the federal Uniform Relocation

Assistance Act and the Federal Acquisition Policies Act, which require procedures allowing payments in like circumstances as a condition for federal funding of certain projects.

The basis for state requirements for payment of a condemnee's attorney's fees varies widely. One state (Montana) has a constitution that specifically requires payment of litigation expenses as an element of just compensation. A few states (including Florida and Idaho) have held by judicial decision that the constitutional requirement for payment of just or fair compensation requires payment of the condemnee's attorney fees. In most states, attorneys' fees may not be awarded unless specifically authorized by statute.

Many states provide generally that the condemnor is required to pay the court costs associated with condemnation proceedings. In the vast majority of these jurisdictions, including Virginia, "costs" have been deemed to include such things as filing fees and compensation of commissioners or jurors. In Idaho and Kansas, however, costs have been held to include the condemnee's attorney's fees.

Another difficulty in categorizing the laws of other states is that not all condemnors are treated the same. Several states (including Oklahoma and North Carolina) allow the payment of attorneys' fees in litigation arising out of condemnations by certain condemnors but not others.

Some statutes cap that the amount of litigation expenses at specified dollar amounts or at a percentage of the benefit provided to the condemnee. Some states limit the award to amounts based on the regular hourly rate and the time spent on the trial and preparation, thereby precluding contingency fee arrangements. A review of other states' statutes did not uncover any provisions, such as Virginia's workers' compensation law, that limit the total amount of fees that an attorney may charge his client to amounts awarded by the court.

2. Litigation Expenses in Virginia

The Virginia Supreme Court held in Ryan v. Davis, 201 Va. 79, 109 S.E.2d 409 (1959), that "costs" should be confined to statutory fees to which officers, witnesses, jurors, commissioners, and others are entitled for their services. They should not be extended to every conceivable cost and expense incurred by a party engaged in litigation. In the absence of specific statutory authorization, a trial court is not authorized to assess the condemnor with the condemnee's attorney's fees.

Several Virginia statutes provide for the payment of attorney's fees and other litigation expenses in certain circumstances. Under § 25-46.34, payment of the fees of attorneys and expert witnesses is allowed if eminent domain actions are abandoned. Section 25-250 of the Uniform Act provides that if the final judgment in a condemnation proceeding is that the real property cannot be acquired by condemnation or the proceeding is abandoned, the owner shall be reimbursed for reasonable expenses "including reasonable attorney, appraisal and engineering fees, actually incurred because of the condemnation proceedings." Section 25-251 provides that litigation expenses are payable to successful plaintiffs in inverse condemnation actions. Under § 25-46.32, the court may in its discretion tax as a cost a fee for a survey for the landowner, not to exceed $100.

3. Uniform Eminent Domain Code

The Uniform Eminent Domain Code states at § 1205 (b):

> If the amount of compensation awarded to the defendant by the judgment, exclusive of interest and costs, is equal to or greater than the amount specified in the last offer of settlement made by the defendant under Section 708, the court shall allow the defendant his costs under subsection (a) and in addition his litigation expenses in an amount not exceeding the greater of _____ dollars or [25] percent of the amount by which the compensation awarded exceeds the amount of the plaintiff's last offer of settlement made under Section 203 or 708.

An optional provision of the Uniform Eminent Domain Code provides:

> [(c). If the amount of compensation awarded to the defendant by the judgment, exclusive of interest and costs, is equal to or less than the amount specified in the last offer of settlement made by the plaintiff under Section 708, the defendant shall not be entitled to his costs incurred after the date of service of the offer.]

This provision of the Uniform Eminent Domain Code has not been adopted by any state.

4. Federal Equal Access to Justice Act

Condemnees may, in limited circumstances, recover costs and attorney's fees from the federal government under the Equal Access to Justice Act (28 U.S.C. § 2412). However, courts have been hesitant in awarding attorneys' fees in condemnation cases. Nichols on Eminent Domain, § 15.03 [1]. The Act generally provides that a prevailing party, other than the federal government, may recover fees and costs in any action brought by the federal government unless the court determines that the government's position was substantially justified or that special circumstances make such an award unjust. To be a "party," an individual cannot have a net worth of more than $2 million, and a business entity's net worth cannot exceed $7 million.

The Act provides that, in condemnation cases, a party has prevailed if the amount of the final judgment "is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trail on behalf of the government." 28 U.S.C. § 2412(2)(H). This has been construed to mean that the prevailing party is the one whose testimony in court is closest to the award. United States v. 5,507.38 Acres of Land, 832 F.2d 882 (5th Cir. 1987).

In order to determine whether the government's position was substantially justified, the Tenth Circuit has listed the following factors for court consideration: (i) the reasonableness and reliability of the government's appraisals introduced into evidence, based on the qualifications of the appraiser, the impartiality of the appraiser, the reasons why the government's appraisal differs from the landowner's, and awards and sales of similar property in the area at the time in question;

(ii) a comparison of the government's appraisal, the offer made, and proof of valuation at trial; and (iii) any other relevant evidence. Nichols, supra, § 15.03[2].

5. Laws of Other States

An estimated 22 states either require, or give courts the discretion to order, the payment of at least a portion of the attorneys' fees and other litigation expenses incurred by a prevailing condemnee in a dispute over the amount of just compensation. Appendix E summarizes the provisions of the laws of states regarding payment of the condemnee's litigation expenses in condemnation cases. The disparity of approaches and wide range of details renders difficult any attempt to categorize the positions of other states. With risk of oversimplifying states' approaches, the laws of states may be sorted into four types: (i) the condemnor is required to pay litigation expenses when the condemnee prevails in a dispute over the amount of compensation; (ii) the courts has discretion, but is not required, to award litigation expenses to the condemnee; (iii) the condemnee may recover some litigation expenses, such as fees of appraisers and other expert witnesses, but not attorney's fees; and (iv) litigation expenses are not allowed in litigation involving the amount of just compensation to be paid by the condemnor, but may be allowed in other specified circumstances.

(i) Payment is required in all cases when the condemnee prevails

Fourteen states (Alaska, Florida, Indiana, Iowa, Maine, Michigan, Montana, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Washington, and Wisconsin) require the condemnor to pay all or some portion of the condemnee's litigation expenses when the condemnee prevails in a dispute over the amount of just compensation to which it is entitled. A variety of measures is used to determine whether a condemnee has prevailed. Several of these statutes require, or use as a factor in determining the amount of the award, that the award at trial be more than the condemnor's final offer. Often the margin between the award and the final offer must exceed a certain percentage of the final offer.

(ii) Courts have discretion to award litigation expenses

Eight states (California, Delaware, Idaho, Kansas, Louisiana, Nebraska, New York, and North Dakota) give courts the discretion to require the condemnor to pay the condemnee's litigation expenses if the condemnee prevails in a dispute over the amount of compensation. Often such statutes limit the court's authority to direct such payments to situations where the factfinder's award exceeded the condemnor's offer by a specified percentage.

(iii) Condemnees are allowed to recover fees of expert witnesses, including appraisers, but are not authorized to recover attorney's fees

Five states include provisions requiring or authorizing the payment of some of the condemnee's litigation expenses, other than attorneys' fees, in compensation disputes. These states are Colorado, Connecticut, Minnesota, New Hampshire, and North Carolina, where the court has discretion to require payment of the costs of an appraiser or engineer who testifies as a witness or produces materials introduced as evidence.

(iv) Litigation expenses are not allowed in litigation over the amount of just compensation, but may be allowed in other specified circumstances.

In a plurality of states, litigation expenses are not allowed in litigation involving only general valuation disputes. However, condemnors are required to pay a condemnee's expenses in other situations. Specific circumstances under which a condemnor may be required to pay such expenses include (i) bad faith by the condemnor, (ii) unjustified abandonment of the condemnation proceeding, (iii) a finding that the condemnor lacked authority to condemn the property, (iv) the condemnee prevails in an inverse condemnation action, or (v) the condemnor fails to pay a condemnation award within a specified period.

Twenty-two other states, in addition to Virginia, appear to fit this description. They include Alabama, Arizona, Arkansas, Georgia, Hawaii, Illinois, Kentucky, Maryland, Massachusetts, Mississippi, Missouri, Nevada, New Jersey, New Mexico, Ohio, Rhode Island, Tennessee, Texas, Utah, Vermont, West Virginia, and Wyoming.

6. Effect of Award of Attorneys' Fees

The joint subcommittee's primary concerns with requiring condemnors to pay the litigation expenses of condemnees were that requiring the condemnor to pay a condemnee's litigation expenses may increase the cost of land acquisition and reduce the percentage of acquisitions acquired by negotiated purchase. In Florida, for example, where total right-of-way expenditures totaled $330 million in fiscal year 1988, almost $35 million was spent on landowner attorney fees and $9 million was spent on landowner appraiser fees (Appendix F).

The Florida supreme court decided in Dade County v. Brigham, 47 So. 2d 602 (Fla. 1950), that that attorneys' fees are payable to condemnees. Following this decision, the percentage of properties acquired by negotiated purchase was reduced from 90 percent before 1950 to 20 percent by 1957. See Los Angeles v. Ortiz, 6 Cal. 3d 141, 98 Cal. Rptr. 454, 490 P.2d 1142 (1971). According to data from Florida's Department of Transportation, the state's negotiation rate was 64 percent in fiscal year 1997 and 58 percent in fiscal year 1998.

Geoffrey Dobson, former Chief Counsel to the Florida Department of Transportation, attempted in the mid-1970s to determine whether there is a correlation between the allowance of litigation costs and the ratio of properties acquired by purchase as opposed to those acquired by condemnation. A survey was made of states covering the period 1974-1976 and the data was compared to data obtained in 1971 and previous years. The results are set out in Table 1. He concluded that "[a] review of the various states fails to reflect any clear pattern between those that pay such fees and those that do not. At least some states paying fees have a more favorable record than other states which do not." G. Dobson, supra, at 725-726.

Table 1: Percentage of Acquisitions by Purchase, 1974-1976

States Paying Fees		States Not Paying Fees	
Oregon	88	Alabama	66
Nebraska	79	Connecticut	62
Iowa	90	Hawaii	40
Alaska	80	Minnesota	65
Florida	33*		

* Average of 1973-74 figure of 43%, 1974-75 figure of 47%, and 1975-76 figure over 15 months of 8%.

Part of the increase in the percentage of Florida's acquisitions that required litigation was attributed to the fact that Florida had enacted a statute recognizing business damages as a separate element of damages in condemnation proceedings. A review of data from California, Pennsylvania and Louisiana, which had recently adopted attorneys' fees provisions, indicates, though not conclusively, that the percentage of parcels acquired by negotiations will decline but not significantly upon the adoption of such a provision. Id. at 728-729.

D. ALTERNATIVE DISPUTE RESOLUTION OPTIONS

Several states allow the use of mediation, arbitration, or other alternative dispute resolution techniques in disputes involving condemnation awards. However, alternative dispute resolution techniques are not used in situations where the condemnee disputes the condemnor's authority to condemn his property; such a dispute requires a judicial determination. Concerns regarding alternative dispute resolution methods in condemnation disputes include (i) the cost of the mediator or mediation panel (both the amount and who should bear the cost); (ii) reluctance of parties to disclose trial strategies; and (iii) the authority of representatives to bind their principal at mediation conferences. (Nichols on Eminent Domain, §§ 25.05-§25.07).

The eminent domain statutes of Virginia and most other states do not address the use of arbitration or mediation. However, the states have laws of general applicability establishing procedures for the use of alternative dispute resolution when directed by the court or when agreed upon by the parties.

1. Mediation

Mediation is a form of assisted settlement conference in which an impartial person (the mediator) acts as a neutral catalyst to facilitate communication between parties to promote reconciliation or settlement. The mediator does not impose his own judgement on the parties. In a mediation, both parties can offer whatever evidence, argument or legal analysis they wish. The mediator then works to find common ground and facilitate a resolution agreeable to all involved.

Mediation has been sanctioned as a pre-litigation negotiation settlement device for the acquisition of private property for public use in Florida. Section 371.271 of the Florida Code provides that mediation is non-binding and available prior to or subsequent to the filing of the eminent domain action, and the evidence of the negotiations themselves, as well as evidence elicited during mediation, is not admissible in the trial proceeding. According to Nichols on Eminent Domain, the Florida statute constitutes the most recent and comprehensive embrace of mediation in an eminent domain context.

Utah state law provides that the Private Property Ombudsman may, "if appropriate and requested to do so by one of the parties, mediate disputes between private property owners and government entities that involve taking issues." U.C.A. 63-34-13(g).

Louisiana law (L.S.R.A. tit. 3, Art. § 3610) makes court mandated mediation available to resolve disputes between a property owner and a governmental entity where it is claimed that governmental action has caused damage to a parcel of private agricultural property.

2. Arbitration

Arbitration is a forum in which each party submits its case, voluntarily or pursuant to a contractual agreement, to an impartial, private, unofficial third party (the arbitrator), who renders a specific award. If the parties use binding arbitration, the award of the arbitrator is biding and enforceable in the same manner as any contract obligation. If the parties use non-binding arbitration, the award only serves as the basis of the parties' further settlement negotiations. Specific provision is made for arbitration in the Uniform Eminent Domain Code (Section 1501) and Alabama statutes. Utah Statutes § 63-34-13 provides that, if requested to do so by the private property owner, the Private Property Ombudsman may conduct or arrange arbitration for disputes between private property owners and government entities that involve takings issues law, actions for eminent domain or disputes about relocation assistance. This process can be more formal than mediation, with sworn witnesses, subpoenas, formal evidence and legal analysis, but still less formal than the courts. The result is binding if previously agreed to be so by each party, or if the arbitration is ordered by the Private Property Ombudsman and the result is not appealed to court within 30 days.

Pennsylvania utilizes a "board of viewers" procedure, which is analogous to non-binding arbitration, to hear valuation disputes. Each county has a standing three-member board of viewers, who are paid by the locality. The dispute is presented to the board of viewers by the parties at an informal hearing. The viewers then render their decision, but either party may appeal and have the dispute heard de novo by a judge or jury.

E. CONDEMNATIONS BY VIRGINIA'S ELECTRIC UTILITIES

As previously noted, § 56-49 gives public service companies the power to acquire lands needed for necessary business purposes, for its use in serving the public, by the exercise of the right of eminent domain. The power may be exercised when the corporation cannot agree on the terms of purchase or settlement with the owner. Proceedings are to be conducted in accordance with the General Condemnation Act. The General Assembly has imposed certain limits on takings by public service corporations. For example, land cannot be taken for a right-of-way within 60 feet of the dwelling house of any person unless a court finds that it would be impractical, without unreasonable expense, to construct the facility at another location.

The State Corporation Commission is required to regulate aspects of the exercise of the eminent domain power by the public service companies under the Utility Facilities Act (§ 56-265.1 et seq.). Section 56-265.2 provides that public service corporations with the power of

eminent domain must obtain a certificate of convenience and necessity prior to constructing facilities for use in public utility service, except ordinary extensions or improvements in the usual course of business. An overhead transmission line of 150 kV or more, or a line to be constructed outside the company's authorized service area, would not be considered ordinary, and a certificate would be required. The Commission also retains limited jurisdiction in over condemnations for "ordinary" facilities through rate cases, approval of financing transactions, and its general overview of utility operations.

The Attorney General has interpreted "ordinary extensions or improvement" as those which merely improve the facilities by which the utility serves customers in its assigned area. A certificate is not needed for "ordinary extensions or improvements in the usual course of business within the territory in which the [public utility] is lawfully authorized to operate," unless the extension or improvement involves construction of an overhead transmission line of 150 kV or more. If the line is to be constructed outside the company's authorized service area, it would not be considered ordinary or usual. If it is within the company's authorized service area, a certificate will be required unless the proposed line is an ordinary extension or improvement in the usual course of business. 1989 Op. Atty. Gen. Va. 302 (November 30, 1989).

The Commission is required to determine that (i) the line is needed and (ii) the corridor or route the line is to follow will reasonably minimize adverse impact on the scenic assets, historic districts and environment of the area concerned. It is directed to establish such conditions as may be desirable or necessary to minimize adverse environmental impact. It may also consider the effect of the proposed facility on economic development within the Commonwealth. Other necessary findings include that such facilities (i) will have no material adverse effect on the rates of a regulated public utility; (ii) will have no material adverse effect on reliability of electric service; and (iii) are not otherwise contrary to the public interest. If requested, the Commission holds hearings on these issues.

Under § 56-46.1, the Commission is required to consider environmental factors in approving construction of electrical utility facilities. Subsection B of § 56-46.1 specifically provides that in the case of any application that is filed with the Commission in 1991 and 1992 for approval of a line of 500 kilovolts or more, any portion of which is proposed for construction west of the Blue Ridge Mountains, the Commission shall determine that the applicant will reasonably accommodate requests to wheel or transmit power from new electric generation facilities constructed after January 9, 1991.

In a case involving Commission's approval of 765 kV power line (Jackson's Ferry to Axton), the court held that the Commission met its obligation to establish conditions to minimize environmental impact by adopting Federal Power Commission guidelines. The court noted that the Commission used a two-step process to determine that the route will reasonably minimize adverse impact on environment. First, it held a hearing on the need for the line. Next, it held a series of hearings concerning the location of the line. Citizens for the Preservation of Floyd County v. Appalachian Power Co., 219 Va. 540, 248 S.E. 2d 797 (1978).

Other provisions in existing law (i) allow the Commission to establish reasonably practical conditions to minimize adverse environment and public safety impacts of natural gas

transmission or distribution pipelines when a certificate of convenience and necessity is required (§ 56-265.2:1); (ii) authorize the joint use of easements (§ 56-259); and (iii) prohibit exculpatory provisions involving liability for injuries sustained by any person or property from the operation of or any failure or defect in utility line (§ 56-260.1).

The joint subcommittee reviewed the Commission's guidelines for minimum requirements for transmission line applications. As part of its review of a proposed line's impact on scenic, environmental, and historic features, the Commission receives information on the proposed easement's effect on the "viewshed," which may involve computer-generated views through the seasons or inflating balloons at the height of proposed facilities in order to determine its visual impact. Utilizing Federal Energy Regulatory Commission guidelines for the protection of natural, historic, scenic, and recreational values in the design and location of rights-of-way and transmission facilities, the Commission seeks to ensure that mitigation measures are adopted. Such mitigation measures as "bundling" of lines are also suggested in order to reduce the noise from high voltage transmission lines.

Electric utility companies provided the joint subcommittee with information detailing how the these statutory requirements are implemented in their operations. They also sought to alleviate concerns regarding their property acquisition policies. A spokesperson for Virginia Power asserted that the system is working reasonably well and that the property owners it has been dealing with think it is a fair process. When the company must exercise the power of eminent domain, the law is designed to protect property owners as well as the utility. While eminent domain is used only as a last resort, it is available when needed to protect the public and ensure the reliable transmission and distribution of electricity. Without this power, a small group of property owners could jeopardize customers' rights to efficient service.

Virginia Power testified that it selects power line routes that have the least impact both on the environment and the community. Existing facilities and rights-of-way are used whenever possible. Routes must be approved by state or local government bodies before beginning construction. The company is able to negotiate agreements for easement acquisition with the overwhelming majority of owners. In recent years, between three and five percent of the right-of-way needed for transmission lines has been acquired by condemnation, and many of these condemnations were "friendly" cases where court proceedings were necessary to resolve title defects, unknown heirs, or other legal complications. Landowners are offered the difference between the value of the property before and after the taking occurs, with adjustments reflecting that the owner can continue to use the easement site for limited purposes. To avoid ill will, additional expenses, and inconvenience, the company prefers to negotiate with a property owner until reaching a mutually beneficial agreement. In determining just compensation, some compensation is paid for reasonable buffer areas on either side of the right-of-way. The company provides consideration for small, unusable parcels created by the taking.

R. Daniel Carson, Jr., of American Electric Power-Virginia (AEP) lauded the company's long record of acting responsibly in acquiring power line rights-of-way. Current law, it was asserted, balances the rights and interests of affected landowners with those of public and private agencies that must build facilities. Therefore, the joint subcommittee was urged to carefully consider any changes to the law that might be suggested during the study.

AEP has acquired less than five percent of the transmission line easements acquired during the past 25 years through condemnation; the balance has been acquired by negotiations with property owners. During that period, AEP has constructed 318 miles of transmission lines in Virginia at line voltages of 138 kV and above. Easements have been acquired from 1,609 property owners, of which 54 involved court proceedings. Easements for 765 kV transmission lines were obtained from 714 property owners, of which 42 involved court proceedings (Appendix G).

AEP questioned the validity of the premises in some of the "Whereas" clauses in SJR 271 and HJR 491. One clause recites that the location of electric power transmission lines within the viewshed of parcels devalues the parcels even when located outside the utility's right-of-way. To refute the perception that such properties are devalued by locations within sight of transmission lines, Mr. Carson cited the U.S. Forest Service's 1996 draft environmental impact statement (DEIS) for AEP's current proposal for a 765 kV line, which concludes (at 4.11-10) that "significant property value effects are probably unlikely because most of the alternative corridors traverse rural acreage." (Appendix H) The DEIS also notes that effects on specific properties can vary widely because of many factors, and that conclusions about potential property value effects would be speculative and premature.

The procedure by which AEP acquires the necessary rights-of-way for the construction of transmission lines begins with an application to the Commission which states the reasons for the line's construction and the preferred and alternate corridors for its route. For a 765 kV line route, a 1,000-foot-wide corridor is identified, within which the company may work with landowners to precisely identify the line and its 200-foot-wide right-of-way. Once the precise location is determined, the company determines who owns the affected parcels and contacts them to obtain permission to conduct a survey. Sales of comparable parcels are reviewed to determine fair market valuations. The difference in the fair market values of the parcel before and after the installation of the facility is used as a guideline for determining what AEP should offer to pay for the easement. AEP tries to evaluate each property on the basis of its unique features, taking into account all relevant factors that may affect the value of the requested right-of-way.

If AEP is unable to reach an agreement with a property owner, it will retain the services of an independent licensed appraiser to perform a market analysis to aid in determining the value of the easement. This analysis will be conducted completely independently of that done by AEP. If the independent appraiser concludes that the value is greater than that initially estimated by the utility, AEP will re-contact the owner and offer the higher amount. If it is less, the company will renew the higher first offer. If this fails, the company will make a final effort to acquire the easement, which includes (i) a written statement explaining the factual basis for the offer, (ii) the final written offer confirming what AEP is offering in exchange for the easement, and (iii) the message that the next step is for the parties to engage in a condemnation proceeding. If it is rejected, the condemnation process is initiated.

AEP varies its regular procedure to address special circumstances. For example, when acquisition of an easement would so affect the property as to leave very little utility for the owner, AEP will acquire the fee simple interest in the land that is affected by the proposed power

line. In addition, if owners desire, AEP purchases homes when any part of the home lies within 100 feet of the edge of the 200-foot-wide right-of-way. In such cases the company may also offer to buy the entire parcel at the landowner's request. A third option provides for the company to acquire and pay for an easement, with the owner remaining in the home. If within a year after the line is energized the owner decides that he or she does not want to continue to reside in the home, AEP will purchase the dwelling and land at its fair market value, less any sum already paid for the easement. Finally, AEP will accommodate a landowner's reasonable request to relocate the dwelling to another location on the landowner's property, to the extent feasible. Other concerns with which the company will work with owners include interference with radio and television reception and static shocks.

Mark Tubbs of the Virginia, Maryland & Delaware Association of Electric Cooperatives advised the joint subcommittee that all of the cooperatives in the Commonwealth, except for Old Dominion Electric Cooperative (ODEC), were distribution cooperatives. As such, they do not build or operate transmission lines. The distribution cooperatives have not exercised the eminent domain power to bring energy to their retail customers. ODEC does not own any transmission facilities, and relies on the facilities of other utilities for transmission of its power.

F. FEAR AS AN ELEMENT OF DAMAGES IN TRANSMISSION LINE TAKINGS

The resolutions establishing the joint subcommittee recite that several owners of property potentially affected by proposed electric power transmission construction expect that such construction will devalue properties located close to the right of way corridor. The expectation that the proximity of the electric transmission lines will devalue property is attributed in part to fear of adverse health affects from electric and magnetic fields (EMF). The joint subcommittee examined whether current research supports fear associated with the health affects of high power transmission lines should be considered in determining the just compensation payable upon condemnation of rights-of-way for such purposes.

The General Assembly has required the State Health Department to monitor the health effects of high voltage transmission lines since 1984. Since then the Department has issued 13 reports summarizing ongoing research on this topic. At the joint subcommittee's July 21, 1999, meeting, Dr. Khizar Wasti summarized the results of the 1999 report by the National Institute of Environmental Health Sciences (NIEHS) on health effects from exposure to power-line frequency EMF, as well as other recent studies. The NIEHS study concluded that the scientific evidence suggesting that EMF exposures pose any health risk is weak. Individual epidemiological studies demonstrate a fairly consistent pattern of a small, increased risk with increasing exposure. However, the lack of connection between this evidence and the epidemiological studies severely complicates the interpretation of these results. EMF exposure cannot be recognized as entirely safe because of weak scientific evidence that exposure may cause a leukemia hazard, though this finding was labeled "insufficient to warrant aggressive regulatory concern." (Appendix I)

Other studies of the possible health effects neither prove nor disprove a link between cancer and EMF. Of 130 occupational studies, 57 showed an increased risk of cancer while 73 showed no increased risk. The current state of knowledge about the health effects of EMF was

summarized as follows: While some epidemiological studies imply a possible link between EMF and certain types of cancer (notably leukemia and brain cancer), other studies tend to impugn such a relationship. Studies incriminating exposure to EMF as a cause of cancer are only suggestive, and the results reported in many studies are devoid of statistical significance.

Moreover, the extent to which high voltage transmission lines contribute to daily exposure to EMF is difficult to assess. Other sources--wall wiring, light fixtures, and other appliances--also produce EMF, and cumulative exposure from these sources may far exceed that from transmission lines. Dr. Wasti concluded that it is difficult to "prove the negative" of establishing that EMF has no adverse effects on human health. As the health effects of EMF are unknown, a safe distance from high voltage transmission lines cannot be established. Dr. Wasti noted that at a distance of 100 feet, exposure from transmission lines falls into background levels of EMF.

Though the issue of whether EMF adversely affects human health is beyond the scope of the joint subcommittee's study, the existence of public fears of power lines, and the reasonableness of any such fears, have been raised in litigation involving damages to the residue of parcels over which power line easements are acquired. Courts in other states have generally adopted one of three approaches to the issue. Courts in a minority of states have held that fear can never be an element of damages. In the second group of states, an intermediate view has been adopted under which an award is permissible where fear depresses property values, as long as the fear is reasonable. The third, majority view is that reasonableness of the fear is irrelevant, and that an award is permissible where fear depresses a property's value.

The majority's view is expressed in Criscuola v. Power Authority, 81 N.Y. § 649, 621 N.E.2d 1195, 602 N.Y.S. § 588 (1993). The court held that "there should be no requirement that claimant, as a separate and higher component of its market value proofs, must establish the reasonableness of a fear or perception of danger or of health risks from exposure to high voltage power lines. The issue in a just compensation proceeding in whether or not the market value has been adversely affected. This consequence may be present even if the public's fear is unreasonable. Whether the danger is a scientifically genuine or verifiable fact should be irrelevant to the central issue of its market value impact. . . . Claimants should have to connect the market value diminution of the property to the particular fear in much the same manner that any other adverse market effects are shown, e.g., by proffering evidence that the market value of property across which power lines have been built has been negatively affected in relation to comparable properties across which no power lines have been built."

Virginia's position on this issue is unclear. In Appalachian Power Co. v. Johnson, 137 Va. 12, 119 S.E. 253 (1923), commissioners awarded $2,500 for taking of lands and rights, but found no damage to residue of property. The court noted that "the commissioners could have properly taken into consideration the effect of the fear of the line breaking down and injuring persons and property ... if the liability to such injury in fact depreciated the market value of the property." Based on this case, Virginia had been cited as one of the states allowing recovery based on fear of electric power lines.

However, Kipps v. Virginia Natural Gas, 247 Va. 162, 441 S.E. 2d 4 (1994), and Chappell v. Virginia Electric and Power Company, 250 Va. 169, 458 S.E. 2d 282 (1995), appear to limit the scope of Appalachian Power Co. v. Johnson. In Chappel, a 230 kV transmission line crossed one corner of plaintiff's farm. The trial court excluded evidence of public fear emanating from the presence of high voltage power lines and the effect of that fear on the market value of his property. The court did not agree that Johnson is controlling precedent. "Nevertheless, we need not decide whether a landowner in a proceeding to condemn an easement for an electric transmission line may be entitled to compensation for diminution in the market value of the remaining land attributable to fears of prospective purchasers. . . . Speculative matters should not be considered by commissioners in determining just compensation." In this case, the landowner's witness relied on a published article describing a range of effects on the value of residential property caused by high voltage power lines, but failed to quantify any damage to the fair market value of the specific property attributable to the high voltage transmission lines. Accordingly, the court's decision may have left open the question of the proper view regarding compensability for damages caused by prospective purchasers' fears of power lines.

Woodrow L. Hanson, president-elect of The Appraisal Institute, proposed at the joint subcommittee's July 21 meeting that the public's fear of power transmission lines, whether or not it is rational or scientifically supportable, should be considered as a factor in determining a property's fair market value, measured as the price which one, under no compulsion to sell, is willing to take for property and which another, under no compulsion to buy, is willing to pay. He suggested that transmission lines have a greater impact on valuation when a property's highest and best use is for residential purposes. In many jurisdictions, assessing the reduction in value of the residue of a parcel in a power line easement condemnation case involves the public's fear of sustained exposure to EMF. In Florida, it has been recognized that there is no demonstrative impact of EMF beyond 250 feet from a power line, yet the public's fear exists beyond that distance. The diminution in value from power lines can be illustrated in contracts to purchase land, where the negotiated values for acreage varies according to proximity to the lines. Mr. Hanson recommended that in a condemnation of an easement for a power transmission line where an expert witness' opinion meets the applicable burden of proof, based on comparable sales and market analysis, and is not speculative, then full compensation to the condemnee should include loss in value attributable to fear. Otherwise, the property owner will be forced to bear a portion of the cost of the property's acquisition. The perceptions of people count in determining fair market value, because the prices paid in comparable transactions reflect the perceptions of both the buyers and sellers.

G. EFFECT OF THE VIRGINIA ELECTRIC UTILITY RESTRUCTURING ACT

Both resolutions recognize that the restructuring of Virginia's electric utility industry may effect condemnations for electric transmission line rights-of-way. William G. Thomas of Hazel & Thomas, representing Virginia Power, advised the joint subcommittee at its July 21 meeting that the restructuring of Virginia's electric utility industry will limit the circumstances under which public service corporations providing electricity will be able to exercise the power of eminent domain. Under the Electric Utility Restructuring Act (Senate Bill 1269 of 1999), electricity generation services will be deregulated effective January 1, 2002. After that date, the

right of eminent domain may not be exercised in conjunction with the construction or enlargement of any utility facility whose purpose is the generation of electric energy. The generation and distribution of electricity will continue to be regulated by the State Corporation Commission, and the restructuring law makes no changes in the eminent domain powers utilities can exercise for expanding or improving transmission and distribution facilities.

Though the restructuring of the electric utility industry has been compared to the restructuring of the telecommunications industry, the new suppliers and marketers of electricity will not be recognized as public utility companies and thus will not have the power of eminent domain. By contrast, competitive local exchange carriers are certificated by the Commission and will have the same condemnation powers as other public utilities.

Glen Besa, Director of the Virginia Chapter of the Sierra Club, cautioned the joint subcommittee that the compensation provided to property owners should be examined closely. With the passage of the Restructuring Act, the Commonwealth will be exercising its eminent domain power to aid companies in getting their power to customers in other states. As long as a utility company can condemn property to build a power transmission line without paying full compensation to its owner, building new transmission lines will be more attractive than other alternatives. The new lines could adversely affect the region's tourism industry. Mr. Besa suggested that before approving the exercise of eminent domain powers, he suggested that the State Corporation Commission should compel utilities to investigate the possibility of retrofitting or expanding the capacity of existing lines.

H. CONDEMNATIONS BY VIRGINIA DEPARTMENT OF TRANSPORTATION

Stuart A. Waymack, VDOT's Right of Way and Utilities Director, provided the joint subcommittee with an overview of the procedure used by the Commonwealth in acquiring land for highway projects. The procedures followed by the Department exceed the minimum safeguards required by state statutes in several instances. Though the Code is silent as to what must be included in an appraisal, VDOT complies with provisions of federal law. While the state does not require its appraisers to be licensed, VDOT requires its appraisers, including staff and consultants, to be licensed. Condemnation appraisals require the appraisers to have an engineering background and knowledge of construction procedures. When an appraisal is completed, a VDOT representative visits the owner, explains the project's engineering features, provides copies of plans, and answers questions. The principal reasons that VDOT has to use the eminent domain power, according to Mr. Waymack, are an owner's unreasonable expectations or the existence of a title defect precludes negotiating a transfer.

Spokespersons for the Virginia Department of Transportation stressed that the vast majority of persons from whom it acquired property had satisfactory dealings with the agency, evidenced by the fact that from fiscal year 1996 through fiscal year 1999, almost 80 percent of the parcels acquired annually are purchased by agreement, and of those acquisitions which required the filing of a certificate of take, an agreement was reached with the owner in over 80 percent of the cases (Appendix J). On average, the amount of compensation is ultimately fixed by a court trial in fewer than 100 of the 2,500 takings for state highway purposes each year.

VDOT spends approximately $2.5 million annually on appraisals in connection with highway projects (Appendix K). Another $2 million is spent by the agency annually on outside attorneys' fees and costs (Appendix L). During the past five fiscal years, VDOT's expenditures on acquiring rights of way has ranged from 16 to 24 percent of its construction expenditures. In 1999, $178.6 million was spent to acquire rights of way (Appendix M).

I. CONDEMNATION OF OUTDOOR ADVERTISING STRUCTURES

Representatives of outdoor advertising businesses complained to the joint subcommittee that current condemnation procedures do not provide for adequate protection of their investments. Many of the concerns arise as a result of Virginia's adherence to the undivided fee rule. Under this doctrine, the value of a leasehold interest in property is subsumed in the value of the whole parcel. In a condemnation proceeding, the condemnor is required to pay the value of the property's appropriated property's undivided fee. Compensation to which the holders of various interests in the property, including any tenant, may be entitled is determined in a separate proceeding and ultimately paid from the amount paid by the condemnor for the entire bundle of legal rights that comprises the fee interest.

Outdoor advertisers complained that existing law does not adequately compensate them for the value of their lease. Generally, the advertising firm leases land from the fee owner under an agreement that provides that the advertiser will build and subsequently own the billboard structure. If the land is condemned, the land's value may be determined based, under the income approach, on the stream of rent paid by the advertising firm to the owner of the land. However, the fees paid by clients to the outdoor advertiser for the use of the billboard's face are not used in determining the amount of just compensation to which the owner of the land is entitled.

In Lamar Corp. v. Richmond, 241 Va. 346 (1991), the court affirmed Virginia's adherence to the undivided fee rule. A tenant outdoor advertising firm is not entitled to a separate condemnation proceeding to determine the compensation to be paid for the taking of the tenant's property interests. Any taking of or damage to the tenant's leasehold is compensable from the award made for the property as a whole. As between the condemnor and the advertising company, structures attached to the condemned real estate but owned by the advertising company are real estate, even if, as between the landlord and the lessee they may be personal property. The value of the sign is included in the total award made for the freehold, even if the tenant has the right or obligation to remove the structures at the end of the lease term. The tenant is entitled to a share of the total award and to a subsequent proceeding to determine the appropriate amount of that share.

In Virginia, a tenant is entitled to compensation for fixtures installed or erected by him which are included in property taken by condemnation, if the tenant has the right to remove them at the end of the lease term. Foodtown, Inc. v. State Highway Commissioner, 213 Va. 760 (1973). As a general rule, the loss of personal property is not compensated (though moving expenses may be payable) because by definition it is removable. Leases for signs often provide that the lessee owns the sign and may remove it at its discretion. Billboard sign structures generally are treated as real estate in condemnation proceedings because the taking of land includes all that is attached to it, and billboards are permanently affixed to the land. Nichols on

Eminent Domain (at § 23.03). After noting that the Lamar decision follows this general rule, the treatise observes that "[t]he court recognized the tenant's Hobson's Choice. If the tenant acquiesces in the sign becoming part of the real property by virtue of its annexation, the landlord will reap a windfall as the one compensated for the sign when the land is condemned. If the tenant retains ownership, it is considered to be his personal property that may be treated as noncompensable when land is taken."

A tenant generally is entitled to be compensated for the fair market value of his leasehold as improved with the permanent billboard structure. Nichols on Eminent Domain § 23.04. The value of a leasehold interest is often determined by calculating the amount by which the premises would rent for in the market exceeds the rent the tenant is required to pay over the remaining term of the lease, which difference is referred to as the "bonus value." The bonus value measures the benefit of the bargain made by the tenant with his landlord.

The fair market value of billboard signs has been determined the same as any other improvement to land. All recognized appraisal approaches (cost, income, and comparable sales) have been allowed in various jurisdictions. The cost approach ascertains the reproduction cost, less depreciation. However, comparable replacement sites are not always available, especially along federally funded highways.

Under the income approach, the loss of income attributable to the signs and the property involved is determined. This is contrary to Virginia's use of the income approach, which provides that an appraisal based on income must consider income from the property but not from an operating business that may be displaced because of the taking. In May v. Dewey, 201 Va. 621, 633, 112 S.E.2d 838 (1960), the court observed that the value of the lease was admissible for the purpose of showing the value of the owner's property, and that any income or profit that the tenant might make on the property leased from the owner was not material evidence. Evidence of the rent paid by the tenant to a landlord is admissible as tending to prove the value of the land, but testimony as to the gross sales or to the percentage thereof from which the rent was computed is not admissible. In Virginia, evidence of the amount of gross sales or receipts of a business operated on condemned property is inadmissible in a condemnation proceeding. Highway Commissioner v. Donelson, 221 Va. 822, 273 S.E. 2d 814 (1981). The same result was reached in Morgan Signs v. Commonwealth Department of Transportation, 723 A. 2d 1096 (Pa. Cmwlth 1999), where the appellate court reversed the trial court's award of $130,000 for the taking of five billboards. While rents may be capitalized, other income attributable to a business conducted on the taken land may not. Income from the billboards was viewed as business income, not as rent.

The third method of determining value is the use of comparable sales. Data on sales of individual signs are rare because they are rarely transferred by publicly recorded deed. However, an income-based unit of measurement called a "gross rent multiplier" has been used in Washington, Arkansas, Arizona, and Minnesota. Under this methodology, if ten billboards generating $100,000 gross annual rental income are sold for $400,000, the gross rent multiplier is four. The value of a particular sign is determined by multiplying the sign's annual rental income by the applicable multiplier. Nichols on Eminent Domain § 23.04 [4].

J. COMPENSATION FOR DEVALUATION TO ADJACENT PROPERTIES

Whether just compensation must be paid for property that declines in value as the result of a condemnation turns on whether any part of the damaged parcel has been appropriated. To generalize, if a portion, no matter how small, of a single parcel is taken, then the owner must be compensated for the decline in the fair market value of the residue of the parcel, net of any increase in value resulting from the construction of the improvements. However, the owner of property near the appropriated property would be entitled to compensation for any loss in the value of his property.

In response to concerns that this rule's "all or nothing" approach appears to raise issues of fairness, staff was directed to review how other states address the issue of compensation for property that is "damaged" in the sense that it declines in value as the result of the condemnation of land that is near the affected property.

Neither the common law, the federal Constitution, nor the constitutions of the original 13 states provided for compensation for damage to land resulting from construction of a public improvement if the allegedly damaged land was not actually acquired or invaded by the governmental authority. Industrialization and urbanization caused a legislative reassessment of this rule. Substantial uncompensated injuries often resulted from roadway grade alternations and similar improvements. In response, most states, including Virginia, amended their Constitutions to ensure the payment of compensation for damage to property as well. Nichols on Eminent Domain § 6.

Despite adopting the term "damage," courts have held that a decline in the value of property alone does not constitute damage giving rise to a right to compensation. Under the widely adopted Damages Clause construction adopted by the Illinois Supreme Court in Rigney v. Chicago, 102 Ill. 64 (1882), compensable damage occurs if (i) there is a nuisance or other injury that would be actionable at common law or (ii) if there has been a physical disturbance of a property right and the injury suffered by the landowner is special and not of the type sustained by the public generally. If a claim for the diminution in the value of property is asserted independently of a taking of property, the consequential damage is not compensable unless it is substantial and special and peculiar to the impacted property. If the damage is of a type similar to that suffered by the public in general or by other neighboring landowners, even if different in degree, the cases generally hold that no compensation is required. Only in cases of complete deprivation of access, elimination of all economically beneficial uses, or effective "destruction" of a property interest involved do the courts appear willing to stray from this general principle. Even these cases, however, may be viewed as rather classic examples of special and peculiar damage and thus as representative of the application of the rule.

This rule has been criticized as unfairly favoring the property owner who has a small portion of his land taken. Such an owner is entitled to full compensation for "severance damages," or the diminution in value of his remaining land, while an adjacent, similarly impacted landowner is not compensated. Some authors have suggested that compensation should be extended to cases in which no property is taken if a public improvement causes an ascertainable depreciation in the fair market value of the impacted land. However, this view has

been widely rejected. In the absence of any actual taking, claims for depreciation in value of properties near a public improvement project have been denied absent some independent basis for compensation. Reasons offered in support of this conclusion include:

- The belief that the multiplicity of actions which would result from such an expansive interpretation of "damage" would increase the cost of public improvement projects beyond tolerable levels;
- The recognition in the case of private activities that, in the absence of physical invasion, appreciation and depreciation in property values from development of neighboring properties is a natural, common, and inevitable occurrence that does not give rise to a cognizable claim;
- The lack of historical support for the position that compensation should be payable for the devaluation of adjacent parcels; and
- Recognition that, despite the textual distinction, the concepts of "taking" and "damages" are closely related, which casts doubt on arguments that state legislatures intended in adopting their Damages Clauses to significantly expand the universe of cognizable claims and thus incur substantial increases in the costs of public improvement projects.

According to the editors of Nichols on Eminent Domain, "It is difficult to argue with the rationale underlying the special and peculiar damage requirement. In the absence of such a rule, every public improvement project would involve a potential multiplicity of actions by landowners asserting that they have suffered a diminution in the value of their property rights as a result of a project which may be physically remote from the allegedly impacted land." The rule recognized by the cases, while arguably drawing an arbitrary distinction, appears to represent a workable and generally fair resolution of the consequential damage issue.

Under this widely accepted rule, damages to abutting or neighboring properties from the construction or use of public improvements may be compensable in two circumstances: (i) direct physical injuries and (ii) damages resulting from discontinuance, impairment, obstruction, or alteration of the public improvement.

Construction of a public improvement may cause a direct damage to a neighboring property even though no part of that property is formally appropriated for the improvement project. Under a variety of constitutional and statutory provisions, such damages are generally compensable. Common examples of direct damage in the absence of a taking include the impairment of lateral support resulting from excavation on adjoining lands incident to the public improvement project and the drying up of wells resulting from such excavation activities. Other forms of physical damage which may exist absent an appropriation of any part of the impacted land include damages resulting from (i) the redirection or increase in volume of surface water deposited upon the affected property, (ii) the deposit of dust, soot, or cinders, and (iii) noise. However, compensation for damage from noise is not required when it is no different in kind from the damage sustained by neighboring properties. The court in Felts v. Harris County, 915 S.W.2d 482 (Tex. 1996) stated, however, that under exceptional circumstances traffic noise could be actionable if it so significant that it impaired the ownership interest in property.

A substantial impairment, obstruction, alteration or discontinuance of a roadway or access to it may significantly affect the market value of both abutting and neighboring lands. Impairment of access to a public roadway adjoining private property is subject, in substance, to the same Takings Clause analysis as physical invasion cases. The interest of the abutting landowner in the adjoining street is usually recognized as a "property" interest and thus, in appropriate circumstances, compensation must be paid for governmental interference with that interest. Thus, if the only means of access to private property is access across other private property, the taking of the property encumbered by the private access easement or the right of passage may constitute a taking of the adjacent land.

Non-abutting landowners generally do not have a right to compensation for discontinuance of area streets if access to public roadways remains after the governmental action. Even under statutes or constitutional provisions that provide for compensation for "damage" to land, such cases often do not involve the substantial, special and peculiar injury usually held necessary for recovery. In most cases, circuity of access, diversion of traffic, and inconvenience are not compensable. While the law may provide some protection to access to property in general, it does not protect any particular access route. Damages are not allowed where the disturbance to the highway merely causes the owner to travel a short distance farther in order to reach the system of streets. In re Appropriations of Land of Mitchell, 209 Pa. Super. 288, 228 A.2d 53, 56-57 (1967). Installation of a medial barrier that eliminated left turns and that resulted in detour of approximately 1.25 miles has been held to not constitute a substantial or unreasonable interference with access to the property. Appeal of Dept. of Transportation, 644 A.2d 1274 (Pa. Commw. Ct. 1994).

However, in some cases, compensation has been required when there is a substantial deprivation of access. In Palm Beach County v. Tessler, 538 So. 2d 846.850 (Fla. Dist. Ct. App. 1989), when construction of a retaining wall limited access to commercial property and beauty salon, creating "tedious and circuitous route" through residential streets, the court held that a taking had occurred despite existence of an alternative access route. In Jackson Gear Co. v. Dept. of Transp., 657 A.2d 1370 (Pa. Commw. Ct. 1995), a detour of between six and eleven and one-half miles required by the erection of a medial barrier directly in front of the subject property was held to constitute a permanent unreasonable interference with the owner's right of access to the property, and compensation was required.

IV. JOINT SUBCOMMITTEE ACTIVITIES

A. INFORMATIONAL MEETINGS

1. June 24, 1999, Richmond

The joint subcommittee's first meeting was dedicated to familiarizing members with Virginia's laws governing the procedures that must be followed when the Commonwealth or its agent exercises the power of eminent domain. After staff presented an overview of applicable constitutional, statutory, and case law, the State Corporation Commission's Office of General Counsel described the Commission's role in siting facilities of public utility companies.

John J. Beall, Jr. of the Office of the Attorney General and Francis "Sandy" Cherry, an experienced practitioner of eminent domain law, identified several issues relating to condemnation law for the joint subcommittee's consideration. The joint subcommittee was asked to review the process for selecting commissioners in condemnation cases. Other issues cited as potential areas for examination include:

- Reciprocity in liability for payment of discovery costs;
- Delays in processing payments to owners who settle on compensation amounts in highway condemnation cases;
- Limiting the additional payments provided by the Uniform Relocation Assistance Act to condemnations for projects involving state or federal payments; and
- Assistance available to businesses disrupted, but not relocated, by condemnations.

2. July 21, 1999, Salem

The joint subcommittee's second meeting focused on issues relating to condemnations, the acquisition of property for electric transmission lines and related public utility facilities. Issues addressed at the meeting included the health effects of high-voltage transmission lines, the effects of the Virginia Electric Utility Restructuring Act, and the perspectives of electric utility companies regarding the condemnation process.

The meeting also featured presentations by Woodrow L. Hanson, president-elect of The Appraisal Institute, and Toby Prince Brigham, a Florida practitioner and chair of the American Law Institute-American Bar Association's Committee on Eminent Domain and Land Valuation Litigation. Mr. Hanson's comments focused on issues relating to the valuation of condemned property. He expressed amazement at two aspects of Virginia's condemnation process: The absence of an allowance for payment of expert witnesses or attorneys, and the method of selecting commissioners to determine just compensation.

Mr. Brigham offered his critique of the condemnation process. He asserts that the ownership of property gives citizens power, and a system that allows condemnors to use the powers of the state against individual landowners upsets the system of checks and balances contemplated by the Founding Fathers. He advocated a system that ensures that individual condemnees are not forced to pay more than other citizens generally for a project that requires the exercise of the eminent domain power. Mr. Brigham identified eight issues for consideration by the joint subcommittee:

- Speedy trials will ensure that condemnors do not use delays to coerce landowners into accepting less than the property's fair market value.
- Jury trials will ensure that one side does not have greater access to a favorable result than the other.
- Mutual discovery by the parties, with an exchange of appraisals, will help avoid "trial by ambush."
- Mandatory, nonbinding mediation in valuation disputes will result in settlements in most cases, thereby saving time and money.

- Payment of the condemnee's reasonable appraiser's fees in all cases, and of his reasonable attorney's fees if the amount awarded exceeds the condemnor's final offer, will allow landowners to participate on an equal footing with the government in compensation disputes.
- Allowing any factor that causes the fair market value of residual property to decline in value, including fear of EMF and effects of visual blight, should be compensable.
- Condemnors should be required to compensate landowners whose property is not taken if condemnations of nearby property devalue their land by damaging their views, to the same extent as if the condemnors were taking a scenic easement.
- If a business cannot be relocated to a new site and damages are otherwise unavoidable, its owner should be compensated for the loss of his business enterprise.

3. August 24, 1999, Manassas

The third meeting of the joint subcommittee focused on issues relating to condemnations for state highway purposes. Additional information was also provided regarding the extent to which other states require condemnors to pay condemnees' litigation expenses.

Gideon Kanner, professor of law emeritus at Loyola University of Los Angeles, provided the joint subcommittee with a scathing critique of current eminent domain jurisprudence. The constitutional requirement that just compensation be paid as a condition of a taking of private property for public use "bears little relation to reality." The compensation awarded by courts falls short of being just. Eminent domain thus remains a "dark corner of the law." While averring that the award of just compensation is to put condemnees in the same pecuniary position they would have occupied had there been no taking, courts nonetheless refuse to compensate property owners for certain demonstrable elements of loss, including business loses and litigation expenses. This anomaly was described by Professor Kanner as "particularly morally intolerable" in the context of current redevelopment condemnations which are often not for any real public use but rather for private enrichment of other private businesses.

Professor Kanner attributed this "ethical and logical mess" to the historical development of American eminent domain jurisprudence. During the 1950s, condemnation activity increased dramatically, due largely to interstate highway construction and neighborhood redevelopment projects. In response, Congress enacted legislation requiring payment of certain relocation expenses. However, these payments are rarely sufficient to allow one-location business proprietors to relocate and reopen. He observed that Virginia's eminent domain laws are similar to those of many other states about 50 years ago. Changes in eminent domain laws have been enacted in response to concerns that have surfaced as condemnations have increased. In past decades, the centers of eminent domain litigation were in the Northeastern states and Florida. Recently, rapid growth in Southeastern states has increased the number of condemnation-related disputes. Consequently, states in this region are revisiting their eminent domain laws.

With respect to reimbursement of the condemnee's litigation expenses, Professor Kanner stressed that a citizen should not have to pay to prove that the government is wrong. The defendants in an eminent domain proceeding have not done anything wrong and have been dragged into litigation against their will. Professor Kanner praised Louisiana's amendment to the

state constitution, under which landowners are entitled to be compensated for the full extent of their loss. He also recommended an examination of Kansas legislation that requires landowners to be paid 125 percent of the fair market value if the taking ultimately is for use by a private entity. With respect to declines in value of property resulting from the destruction of a view caused by a project developed on nearby property, Professor Kanner suggested that the damage should be compensable if the activity would constitute a nuisance at common law.

Speaking on behalf of VDOT, Stuart Waymack acknowledged that some improvements can be made to the condemnation process. It was also acknowledged that some unease regarding eminent domain procedures is due to the fact that condemnations involving federal or state funds must comply with the panoply of procedural safeguards incorporated in the Uniform Relocation Assistance Act. Conversely, condemnations by private entities and by local condemnors for projects not using federal funds are not required to comply with the Uniform Act.

Mr. Waymack cited the payment of relocation expenses for displaced businesses as an issue in need of review. The limits may not allow full compensation of relocation expenses in many cases, and VDOT does not have the same flexibility to exceed the cap on business relocation expenses as it has with residential relocations. This issue is currently being studied by VDOT under HJR 490. Other issues of possible review include (i) requiring prompt payment to landowners of sums agreed upon as compensation for takings and (ii) replacing the current commissioner system with a jury system.

Robert E. Barton, who has conducted appraisals in condemnation cases for both landowners and condemning agencies for more than 30 years, noted two distinguishing difficulties in eminent domain valuations. First, many appraisers do not want to conduct condemnation appraisals because of the possibility that they will have to testify in an adversarial court proceeding. Second, partial acquisitions in road right-of-way cases require valuations of the residue parcel. This can be difficult because the imposition of the road often leaves the property configured differently than parcels that might be used as comparable sites. As a result, there is greater opportunity for appraisers to disagree as to the value of the residue.

Mr. Barton advocated increasing the use of mediation in eminent domain matters. At times, appraisals may not be correct, or owners may have an unrealistic view of their property's worth. Regardless of the reason the parties have not agreed upon the land's value, mediation offers the opportunity to answer questions and to focus on the basis for each party's opinion regarding valuation. Involving an impartial third party mediator may facilitate resolutions and avoid litigation costs. He joined the chorus critical of the current commissioner system, which was characterized as unfair to Virginia's taxpayers. Objectivity is not possible when the parties nominate the commissioners who decide questions of compensation. He cited instances where attorneys nominate their employees' spouses to serve as commissioners in cases they are trying.

Mr. Barton agreed that the current caps on payments to businesses dislocated by eminent domain are unfair. If an enterprise goes out of business, its payment is capped at $20,000, and if it relocates it is eligible for up to $10,000 for reestablishment costs plus allowances to relocate personal property. When asked about payment of litigation expenses, he stated that landowners should be reimbursed for expert witness fees but not attorney's fees.

B. PUBLIC HEARINGS

1. July 21, 1999 -- Salem

The joint subcommittee held three evening public hearings for citizens of Virginia to voice their concerns about the current state of the law regarding eminent domain. At the first public hearing, the subcommittee heard from residents of Bland, Botetourt, Franklin, Giles, Montgomery, Roanoke, and Wythe Counties, and the cities of Roanoke and Salem. Citizens shared personal stories about past experiences with the eminent domain process and concerns about potential projects that would require exercise of eminent domain in Southwest Virginia, namely the AEP 765 kV power lines and the proposed I-73 highway. Most speakers also offered suggestions for modifying eminent domain law in Virginia. The theme among all concerns was that current Virginia law does not provide a "level playing field" for condemnor and condemnee.

2. August 24, 1999 -- Manassas

Twenty-three citizens voiced their concerns with Virginia's eminent domain procedures at the joint subcommittee's second public hearing. Most of the concerns expressed involved condemnation by the state Department of Transportation. Several of the speakers criticized the attitude of VDOT employees who, it was asserted, have the attitude that they are in control and do not have to listen to citizens.

VDOT recently unveiled a proposal to widen Interstate 81 from Winchester to Bristol, a 20-year project. The proposal calls for a controlled access area extending 300 feet beyond each highway access ramp. This policy, according to Michael O'Connor of the Virginia Petroleum Marketers & Convenience Store Association, would force the closure of dozens of businesses. Mr. O'Connor reported that West Virginia did not use this policy when interstate highways there were recently widened. Though the construction will not commence for several years, the policy is having a chilling effect on retailers within the 300-foot zone.

A spokesperson for Defenders of Property Rights criticized the Virginia Supreme Court's decision in Lamar v. City of Richmond, supra, on grounds that it unfairly prevents billboard companies from being compensated for the full going concern value of their business property. The VDOT planning process was criticized by citizens whose properties were devalued by road location decisions. A frequently cited example was Linton Hall Road, which is having cul-de-sacs built at both ends near its intersection with Route 29. As a result, access to businesses is difficult. This result could have been avoided and, under current law, the affected landowners are without adequate recourse.

Several speakers decried the displacement of businesses operated by tenants forced to relocate. Other criticized the judicial prohibition on awarding compensation for loss of future business earnings. Several landowners criticized what they saw as irrational valuations by VDOT consultants.

However, an appraiser who has consulted for VDOT noted that, in the majority of cases, VDOT has bent over backwards to be fair to property owners. He suggested three changes to improve the process: (i) replacing the commissioner system with a jury system; (ii) allowing only licensed appraisers to testify in court as to values; and (iii) adopting technical changes to address issues appraisers must deal with, including security of access and median rights.

3. October 6, 1999 -- Newport News

At the third public hearing conducted by the joint subcommittee, nearly 40 citizens expressed their opinions about Virginia's eminent domain procedures. The evening public hearing was held at Christopher Newport University. The tenor of the meeting was epitomized by the remark, "We're not the enemy of progress, and shouldn't be the victim of progress."

Many of the speakers objected to the condemnations in the East Ocean View section of Norfolk by the city's Redevelopment and Housing Authority. This project has been underway for 10 years. It was alleged that, under the power to combat urban blight, modest homes are being displaced in order to develop more expensive residences. In addition to questioning whether such tactic is advancing a public purpose, people complained about delays and unfair valuations. Suggestions to improve the process included limiting the length of time an authority can hold property under condemnation, requiring condemnors to provide owners with a copy of the property's appraisal, and prohibiting condemnors from making an offer to buy land for less than the value determined by an independent appraiser hired by the condemnor.

Delegate Thelma Drake spoke at the hearing to suggest several issues for consideration: (i) condemning unblighted property of homeowners; (ii) consideration of mortgages on property; (iii) delays in acquiring property identified for future condemnation; (iv) reduced assessments and condemnation blight; and (v) fear of being forced off properties on short notice.

Not all of the speakers criticized exercises of the eminent domain power. The Richmond and Norfolk Redevelopment and Housing Authorities testified that the power of eminent domain is an important tool in removing slums and blight. Half of the eminent domain cases initiated by the Norfolk Authority involve title defects that preclude a voluntary transfer. With respect to the criticism that the system allows private property to be condemned to benefit other private businesses, it was averred that the current eminent domain laws are not broken and do not need to be "fixed." A spokesman for the Norfolk authority opposed suggestions that the condemnor should pay the landowner's litigation expenses. He acknowledged that changes might be appropriate in two areas. First, to limit condemnation blight, authorities might be required to make an offer to purchase land for a project within five years of its announcement. Second, the process for appointment of commissioners could be improved.

The suggestions for changes to Virginia's eminent domain laws offered by the speakers at the three public hearings are included in the Appendix N.

C. WORK SESSIONS

1. November 16, 1999

At its August 24 meeting, the joint subcommittee directed staff to prepare a list of recommendations heard by the joint subcommittee for review in making decisions regarding any changes to current law. The compendium of suggested changes advocated by speakers at the previous business meetings and public hearings is attached as Appendix N.

In order to facilitate the joint subcommittee's task of considering the range of suggestions made during its first year of work, the list of suggested changes was used to prepare a series of questions for joint subcommittee consideration. The series of questions, organized by subject, served to organize the members' consideration of the various recommendations for changes to Virginia's eminent domain laws. A copy of the series of questions is attached as Appendix O. The joint subcommittee proceeded to review the questions and asked staff to draft legislation, for review by the members at a later meeting, that would implement several changes to the existing condemnation procedures. At the first work session, staff was directed to prepare amendments to statutes to accomplish the following:

- Replace the current commissioner system with a jury system.
- Authorize a trial court, in its discretion, to require the condemnor to pay the condemnee's litigation expenses if the compensation awarded exceeds the condemnor's highest offer by 15 percent or more.
- Raise the statutory limit for compensation for a survey conducted by the condemnee from $100 to $1,000.
- Expand the Uniform Relocation Assistance Act provisions in the Code of Virginia to apply to all types of condemnations.
- Remove the caps on business relocation expenses.
- Eliminate the requirement that tenants have leases of longer than 12 months as a condition to intervening in the taking proceedings.
- Require condemnors to conduct a title search of the property before making an offer to purchase or filing a certificate of take, in order to avoid delays in payments to condemnees.

2. December 10, 1999

At its second work session, the joint subcommittee continued the process of reviewing the issues identified at the business meetings and public hearings during its first year of study. The joint subcommittee asked staff to draft legislation, which was reviewed at the January 10 work session, that would:

- Allow tenants that own billboards or similar improvements on leased land to be compensated for the fair market value, determined by comparable sales or other valuation approaches, of their improvements.
- Require VDOT to use licensed real estate appraisers in conducting its valuations for property acquisitions.

- Require condemnors to pay for the reasonable cost of a licensed appraisal conducted for the condemnee in all takings, regardless of whether the condemnation results in litigation.
- Require condemnors to provide copies of appraisals of the property with their offer to purchase.
- Prohibit a condemnor from re-filing condemnation proceedings within 18 months after it dismisses condemnation proceedings against the same owner over the same property.
- Extend the distance from a dwelling that land can be acquired for a right-of-way for a 765 kV transmission line from 60 to 100 feet.
- Prohibit the Commonwealth Transportation Board from acquiring any existing business within 300 feet of the exit point of the interstate system solely for the construction of controlled access.

The joint subcommittee decided that the appropriate response to the many complaints voiced at public hearings regarding the "attitude" of VDOT employees would be to relay the concerns to the Secretary of Transportation and Commissioner of Transportation by letter. Staff was directed to prepare a draft letter for review at the January 10 meeting.

The joint subcommittee also requested the preparation of a resolution that would continue the study for another year and a resolution directing the finance and appropriations committees to examine whether land acquisitions should be transferred from VDOT to the Department of General Services and paid for from the general fund. Mr. Cherry submitted an analysis of the items identified at the first two work sessions for possible action (Appendix P).

3. January 10, 2000

The joint subcommittee's third work session began with presentations prepared in response to requests by members at the preceding meeting for additional information on the use of alternative dispute resolution techniques in eminent domain disputes and the laws of other states regarding compensation for the devaluation of property resulting from the condemnation of nearby land. The presentations were followed by a review of draft language addressing the issues identified by members at the previous two work sessions as being appropriate for deeper examination. A copy of the drafts addressing the legislative changes for which draft language was requested at the November 16 work session is attached as Appendix Q, and the December 10 work session is attached as Appendix R. The issues were reconsidered, debated, and frequently revised during the course of the January 10 meeting.

a. Replacing the existing commissioner system with a jury system.

The joint subcommittee endorsed replacing the current commissioner system with a jury system. The draft legislation replacing the commissioner system with a jury system was based on Senate Bill 724 of the 1991 Session, which instituted the pilot program for a jury system in certain localities. At the November 16 work session, a proposal to remove the requirement that members of the panel be property owners failed on a 5-5 vote. After additional discussion of the appropriate qualifications for serving on a condemnation jury, the joint subcommittee voted 4-0

to endorse draft legislation that would adopt a jury system to determine the amount of just compensation in condemnation disputes, with the requirement that a majority of the members of the panel be owners of real property in the jurisdiction where the condemned property is located.

b. Litigation expenses.

The joint subcommittee addressed two proposals relating to litigation expenses. The first proposal would authorize a trial court, in its discretion, to require the condemnor to pay the condemnee's litigation expenses if the compensation awarded exceeds the condemnor's highest offer by 15 percent or more. Several members expressed concerns that providing for payment of condemnees' legal fees would increase litigation. The joint subcommittee voted 6-3 to delay a decision on this issue until the study's second year.

The second proposal called for increasing the statutory limit for compensation for a survey conducted by the condemnee from $100 to $1,000. This proposal was unanimously approved, despite the comment of Mr. Cherry that this change may actually reduce payments for surveying costs. In some cases, he offered, survey costs are reimbursed on a "per-pin" basis.

c. Uniform Relocation Assistance Act.

Two distinct issues were placed before the joint subcommittee in its consideration of the Uniform Act. The first change provided for extending the scope of the Uniform Act to apply to all condemnations. Currently its provisions requiring payment of relocation assistance as well as the general rules of conduct for the acquisition of real property by a state agency. As amended, the Uniform Act would apply in the case of any exercise of the power of eminent domain that causes people to be displaced, and removes the condition that the project receive federal or state financial assistance. This measure was endorsed by the joint subcommittee with no objections and one abstention.

The second proposal pertaining to the Uniform Act removed the existing caps on the amounts of relocation expenses to be paid in connection with a business relocation. The maximum payment authorized for reasonable relocation expenses for a displaced farm, nonprofit organization or small business at its new site had been $10,000, in accordance with criteria established by the state agency. The joint subcommittee agreed to the removal of the $10,000 limit, with the condition that the expenses be necessarily incurred in re-establishing the displaced farm, nonprofit organization or small business at its new site. The joint subcommittee reinserted the existing provision for payments to displaced businesses that elect not to relocate, though it agreed that the maximum payments allowed in such circumstances should be raised from $20,000 to $50,000. Though the statutory cap on residential relocation expenses of $22,500 has been superceded by federal requirements that the Commonwealth pay all reasonable expenses, the joint subcommittee voted to leave this existing cap untouched.

d. Tenancy length as a condition to lessee's intervention in proceeding.

The members had earlier agreed to eliminate the requirement that a tenant have a lease term of longer than 12 months as a condition to intervening in an eminent domain proceeding.

After hearing that such a change would require notification to all tenants in all situations, the joint subcommittee endorsed a change to the proposal, originally suggested by Mr. Infantino, that would allow tenants to intervene if their lease term is 12 months or longer.

e. Payment delays/ title searches.

The joint subcommittee heard concerns that the owners of property acquired by VDOT frequently face long delays in receiving payments for their property. One cause cited for the delays was the practice of negotiating acquisitions prior to conducting examinations of title to confirm that legal title is vested in the person with whom the agency had been dealing. To address this, it was suggested that VDOT be required to research the ownership issue before committing itself to paying compensation to condemnees. While this idea was endorsed by the joint subcommittee, Mr. Waldo asked that the agency be required to give to the landowner a copy of its title report concurrently with its offer to purchase the property. Other members objected to the implied obligation that VDOT conduct a 60-year title search in each instance prior to negotiating with an owner. The joint subcommittee agreed to a proposal that VDOT supply a copy of what title information it has on hand, but that it not be obligated to do a 60-year title examination.

f. Allow tenants that own billboards or similar improvements on leased land to be compensated for the fair market value, determined by comparable sales or other valuation approaches, of their improvements.

At the December 10 meeting, members of the joint subcommittee asked that staff draft language that would allow tenants that own billboards or similar improvements on leased land to be compensated for the fair market value, determined by comparable sales or other valuation approaches, of their improvements. Sandy Cherry pointed out that the proposal would abandon the undivided fee rule in Virginia. Spokesmen for the outdoor advertising industry complained that they are not being compensated for the value of their business, which has greater value than the land and physical sign structure. Senator Watkins expressed concerns that the draft language could apply to structures other than billboard signs, and asked that it be rewritten to apply only to signs condemned by VDOT. The measure was then tabled temporarily by the joint subcommittee, though interested parties were asked to work on amendments to Title 33.1 that would ensure that the tenants who owned billboards would have the right to present evidence in condemnation proceedings.

g. Require VDOT to use licensed real estate appraisers in conducting its valuations for property acquisitions.

The joint subcommittee agreed that VDOT should be required to use licensed real estate appraisers in conducting its valuations for property acquisitions. The requirement that licensed appraisers be qualified as "certified general" real estate appraisers copied the existing provision applicable to redevelopment and housing authorities.

h. Require condemnors to pay for the reasonable cost of a licensed appraisal conducted for the condemnee in all takings, regardless of whether the condemnation results in litigation.

There was no motion made with respect to language that called for condemnors to pay for the reasonable cost of an licensed appraisal conducted for the condemnee in all takings.

i. Require condemnors to provide copies of appraisals of the property with their offer to purchase.

The joint subcommittee members unanimously approved changes to the condemnation statutes to require condemnors to provide copies of appraisals of the property with their offer to purchase. Currently, appraisals must be prepared if the condemnation is subject to the general rules of conduct for the acquisition of real property under the Uniform Act. The amendment was intended to require that a copy of any appraisal that the condemnor is required to prepare as the basis for an offer be given to the condemnee. If the proposed change to the Uniform Act that extends its application to all condemnations that causes people to be displaced is adopted, then the number of instances where copies of appraisals are be given to landowners would increase.

j. Prohibit a condemnor from re-filing condemnation proceedings within 18 months after it dismisses condemnation proceedings against the same owner over the same property for the same purpose.

The joint subcommittee tabled a proposal that would have prohibited a condemnor from re-filing condemnation proceedings within 18 months after it dismisses condemnation proceedings against the same owner over the same property. Mr. Beall of the Attorney General's Office cited the Virginia Supreme Court's decision in Evans v. Smyth-Wythe Airport Commission, 255 Va. 69 (1998), for the proposition that the sovereign's power to condemn property is not subject to impingement.

k. Extend the distance from a dwelling that land can be acquired for a right-of-way for a 765 kV transmission line from 60 to 100 feet.

The joint subcommittee noted that electric utility companies have implemented the practice of offering to purchase the dwelling of an owner that is within 100 feet of the right-of-way. A spokesman for AEP observed that the measure would codify the company's current practice. The joint subcommittee tabled the proposal.

l. Prohibit the Commonwealth Transportation Board from acquiring any existing business within 300 feet of the exit point of the interstate system solely for the construction of controlled access.

Representatives of businesses located along Interstate 81 sought to prevent VDOT from installing fences or other barriers along the front of establishments within 300 feet of the highway in order to prevent traffic backups during construction to widen the highway. VDOT noted that limited access routes may be installed in order to allow customers to patronize the

affected businesses. The business representatives countered that such barriers were not mandated by federal law, and that the interference on traffic patterns would have a devastating impact on their profitability. Several amendments to the proposal were considered, and were ultimately rejected. The joint subcommittee adopted the proposal with two negative votes.

m. By resolution, continue the study for another year.

The joint subcommittee agreed that its study of eminent domain laws and procedures should be continued for a second year. Recognizing that Delegate Keating would no longer be eligible to serve on the joint subcommittee as a legislative member, the other members agreed to amend the proposed language in order to add one citizen member to the body.

n. By resolution, direct the Senate Finance and House Appropriations committees to examine whether land acquisitions should be transferred from VDOT to the Department of General Services and paid for from the general fund.

Senator Watkins observed that many of the complaints by citizens to the VDOT condemnation process focused on the fact that the agency has an incentive to save money by limiting the amount paid to owners of property taken for highway projects. It was suggested that this perceived conflict may be addressed by making the Department of General Services responsible for conducting the acquisitions and by having the cost of land acquisitions paid for from the general fund rather than from dedicated transportation funding sources. However, it was acknowledged that no decision can be made until the fiscal implications of the idea are explored. The proposed form of a joint resolution directing the money committee staffs to study the issue was approved by the joint subcommittee.

o. Other issues.

In addition to the issues that had been identified as ripe for possible action during the joint subcommittee's two earlier work sessions, the joint subcommittee was also asked to endorse a proposal submitted for consideration by Delegate Drake. The proposal would require housing authorities to move forward with acquisition of necessary properties within 36 months following the commencement of a project. The joint subcommittee agreed to recommend the proposal.

The joint subcommittee concluded its final meeting without considering the draft of the requested letter to the Secretary of Transportation and Commissioner of Transportation. This item of unfinished business may be acted on at a meeting during the second year of the study.

V. LEGISLATIVE ACTIVITY IN THE 2000 SESSION

A. LEGISLATION PROPOSED BY JOINT SUBCOMMITTEE

At its January 10, 2000, work session the joint subcommittee endorsed the introduction of legislation in the 2000 General Assembly to address several perceived shortcomings of the existing procedures governing the exercise of the power of eminent domain. The

recommendations of the joint subcommittee's first year of work were embodied in six pieces of legislation.

1. Senate Bill 453

Senate Bill 453, as introduced, implemented the joint subcommittee's recommendation that issues of valuation in a condemnation case be determined by a jury. A majority of the persons drawn for service on such a jury panel would be owners of real property. The bill also (i) requires a condemnor to provide a copy of its appraisal of the property with its offer to purchase the condemnee's property; (ii) raises the limit for compensation for a survey conducted by the condemnee from $100 to $1,000; (iii) requires condemnors to conduct a title search of the property before making an offer to purchase or filing a certificate of take, in order to avoid delays in payments to condemnees; (iv) requires VDOT to use licensed real estate appraisers in conducting its valuations for property acquisitions; (v) allows tenants whose lease term is 12 months or longer to intervene in an eminent domain proceeding; and (vi) requires VDOT to give property owners a copy of its report on the status of title of the property (Appendix S).

2. Senate Bill 63

Due to the measure's potential for fiscal impact on local governments, Senate Bill 63 was introduced on the first day of the 2000 Session. This bill, which was also patroned by Senator Marye, incorporated the joint subcommittee's recommendation that application of the Uniform Relocation Assistance and Real Property Acquisition Policies Act not be restricted to projects carried out with federal or state financial assistance. It also removed the $10,000 cap on payments for business relocation expenses and raised the existing cap on payments for the dislocation of a business or farm, in lieu of actual relocation expenses, from $20,000 to $50,000 (Appendix T).

3. Senate Bill 110

Senator Marye introduced Senate Bill 110, which implemented the joint subcommittee's recommendation that the Commonwealth Transportation Board be prohibited from using the power of eminent domain to acquire any portion of the property of an existing commercial establishment, or any interest therein, for the purpose of controlling or limiting access to commercial establishments located within 300 feet of an interstate highway (Appendix U).

4. House Bill 1145

Delegate Drake introduced House Bill 1145, which requires that real property identified by a housing authority for redevelopment be acquired by the housing authority within 36 months after announcement of the redevelopment plan. If a housing authority decides against acquiring real property identified for redevelopment, it must pay the property owner's reasonable expenses related to the proposed acquisition of his property, upon request (Appendix V).

5. Senate Joint Resolution 37

The joint resolution continuing this joint subcommittee's study of eminent domain procedures for a second year was introduced by Senator Watkins as Senate Joint Resolution 37 (Appendix W).

6. Senate Joint Resolution 38

Senator Watkins also patroned Senate Joint Resolution 38. This measure embodied the joint subcommittee's recommendation that the Senate Finance and the House Appropriations Committees be directed to examine the feasibility of transferring the responsibility for acquiring property for highway purposes from the Department of Transportation to the Department of General Services. The Committees were also to examine the potential benefits and drawbacks of providing that costs of land acquisition for highway purposes be paid for by general fund appropriations, rather than from revenues currently dedicated to highway construction purposes (Appendix X).

B. ACTIVITY DURING 2000 SESSION

Most of the legislation advocated by the joint subcommittee did not pass unscathed through the 2000 General Assembly Session.

1. Senate Bill 453

Senate Bill 453 was first referred to the Senate Committee for Courts of Justice, where the requirement that a majority of the condemnation jurors be freeholders of property within the applicable jurisdiction was removed. Other Committee amendments struck the new requirement that VDOT appraisals be prepared by certified general real estate appraisers, as well as the existing requirement that appraisals prepared for housing authority condemnations be prepared by certified general real estate appraisers. The Committee reported the bill by a vote of 11-1-1, and the full Senate passed the amended bill by a vote of 32-5-1 on February 7, 2000.

In House of Delegates the bill was referred to the Courts Committee, which, after further amendments, reported the bill 23-0. The House Committee amendments reinserted the provisions that the Senate Courts Committee had deleted, thereby re-instituting the requirements that a majority of the jury panel in a condemnation case be freeholders. However, the House of Delegates rejected the Committee amendments and adopted a floor amendment in the nature of a substitute, offered by Delegate Jackson, which struck all of the provisions amending the existing commissioner system. The substitute for SB 453 passed the House by a vote of 93-5.

The Senate rejected the House substitute, and the bill was referred to a Committee of Conference. The conferees offered a compromise, with which both houses concurred, that gives the owner of the condemned property the option of using either the commissioner system or a jury system (with the majority of jurors being freeholders) to determine disputes regarding the amount of compensation. The conferees' substitute did not incorporate the amendments adopted in the Senate Courts Committee regarding the use of certified general real estate appraisers. The

Governor has proposed an amendment to SB 453 to delete the requirement that VDOT's appraisers be "certified general" appraisers.

2. Senate Bill 63

An amendment in the nature of substitute for Senate Bill 63, which contained the joint subcommittee's recommendations regarding the Uniform Relocation Assistance Act, was reported by the Senate Committee for Courts of Justice. The changes incorporated in the substitute (i) reinstate a cap on the expenses of re-establishing a displaced farm, nonprofit organization, or small business at its new site, but raised the cap from its current level of $10,000 to $25,000; (ii) exempt acquisitions by any public service corporation, municipal corporation, local governmental unit or political subdivision of the Commonwealth, or any department, agency or instrumentality thereof, from the requirement that it obtain or rely upon an appraisal if the official responsible for the acquisition determines that the value of the property being acquired is less than $10,000, based on assessment records or other objective evidence; and (iii) (iii) direct that the provisions in this bill shall not apply to the acquisition of real property that is the subject of a certificate recorded prior to January 1, 2001, in the clerk's office where deeds are recorded; that is the subject of a petition for condemnation filed prior to January 1, 2001; or that is required to construct a project funded by bonds approved prior to July 1, 2000. The Courts Committee's amendment in the nature of a substitute passed the Senate 37-0-1.

The House Committee on Counties, Cities and Towns amended the second enactment clause (described in clause (iii) of the preceding paragraph) to clarify that the exemption applied to projects of a public service corporation, municipal corporation, local governmental unit or political subdivision of the Commonwealth or any department, agency or instrumentality thereof, or two or more of the aforementioned. This Committee also added a provision that the Uniform Relocation Assistance Act shall not apply to the acquisition of less than a fee simple interest in real property by any public service company. The Senate rejected this amendment, and it was dropped when the bill went to a Committee of Conference. The bill was signed by the Governor on April 9, 2000, and is Chapter 851 of the 2000 Acts of Assembly.

3. Senate Bill 110

Senate Bill 110 was rewritten in the Senate Committee for Courts of Justice to prohibit the Commonwealth Transportation Commissioner from exercising the power of eminent domain to acquire any portion of the property of an existing commercial establishment or any interest therein if the sole purpose of such acquisition is to control or limit access to commercial establishments located within 300 feet of any segment of the interstate highway system, except to the extent necessary to meet minimum federal requirements in order for the Commonwealth to be eligible to receive federal funds for interstate highway construction. At those interstate highway interchange locations where the value of land, buildings and improvements has a fair market value of $1 million or more, the Commonwealth Transportation Board shall designate those interchanges as "urban," provided such designation does not conflict with any federal statute or regulation. This act will become effective on July 1, 2001, unless, prior, to that date, the VDOT receives notice from the federal government that the provisions of this act will reduce or jeopardize federal funding of interstate highway construction in the Commonwealth. A House

Transportation Committee substitute revised the bill to provide that the Commonwealth Transportation Board's duty to designate interchanges as "urban" applies only to those interstate highway interchange locations where the value of land, buildings, and improvements within 300 feet of an interstate ramp terminal has a fair market value of $1 million or more. The bill was signed into law by the Governor on April 11, 2000, as Chapter 370 of the 2000 Acts of Assembly. As amended, this bill is identical to House Bill 495, patroned by Delegate Landes.

4. House Bill 1145

House Bill 1145, introduced by Delegate Drake, was referred to the House Committee on General Laws, which acted unanimously to carry the bill over to the 2001 Session.

5. Senate Joint Resolution 37

The resolution continuing the joint subcommittee for a second year was amended in the Senate Rules Committee. Instead of directing that the members duly appointed pursuant to Senate Joint Resolution 271 and House Joint Resolution 491 shall continue to serve, the amended resolution allows new members of the joint subcommittee to be appointed.

6. Senate Joint Resolution 38

The resolution asking the Senate Finance and House Appropriations Committees to examine the feasibility of transferring the responsibility for acquiring property for highway purposes from the Department of Transportation to the Department of General Services, and examine the potential benefits and drawbacks of providing that costs of land acquisition for highway purposes be paid for by general fund appropriations, was rolled into Senate Joint Resolution 170 in the Senate Rules Committee. SJR 170, carried by Senator Marye, requests the Joint Legislative Audit and Review Commission to study the financing of highway maintenance and construction by VDOT. Other issues to be addressed in JLARC's study include the adequacy of funding for highway maintenance and construction activities; the equity of funding provided among the Interstate, primary, secondary and urban highway systems; the adequacy of the Department's management of highway construction and maintenance funds; the adequacy of the Department's staffing and other resources to carry out highway construction and maintenance activities; and the need for, responsibilities of, and budget for an Office of Public-Private Partnership within VDOT's organizational structure.

7. Other Eminent Domain Legislation in the 2000 Session

Several bills relating to the laws pursuant to which the power of eminent domain may be exercised, that were not endorsed by the joint subcommittee established by Senate Joint Resolution 271 and House Joint Resolution 491, were introduced during the 2000 Session of the General Assembly.

At the joint subcommittee's January 10 meeting, legislation was considered but not endorsed addressing compensation to outdoor advertising firms when property on which their signs are located is condemned. Though the proposal under consideration was not acceptable,

the interested parties were asked to work on compromise language. The results of the groups' further work were House Bill 1123, introduced by Delegate Bryant, and Senate Bill 452, introduced by Senator Marye. These bills require the Commonwealth Transportation Commissioner to notify the owner of a building, structure or other improvement if the Commissioner intends to condemn property in a manner that would result in a taking of such improvement. This bill permits the owner of the improvement to present evidence of the fair market value of such improvement in a condemnation valuation proceeding under § 25-46.21. If the owner of such building, structure or improvement is not the owner of the underlying land, then such owner shall not be allowed to proffer any evidence of value which the owner of the underlying land would not be permitted to proffer if the building, structure or improvement were owned by the owner of the underlying land. Both bills were signed into law by the Governor, with Senate Bill 452 enacted as Chapter 822, and House Bill 1123 as Chapter 843, of the 2000 Acts of Assembly.

Though a divided joint subcommittee did not vote to introduce legislation allowing condemnees to recover litigation expenses from the condemnor, Senator Marye patroned, and joint subcommittee members Senator Norment, Delegate Griffith, Delegate Ingram, Delegate Moran, and Delegate Shuler co-patroned, such a bill. Senate Bill 111 is substantively identical to the draft that was presented to the joint subcommittee at its January 10, work session. The bill was passed by indefinitely in the Senate Committee for Courts of Justice on February 2, 2000, by a vote of 8-6.

House Bill 85, introduced by Delegate Morgan, provided that a city or town may condemn property outside of its boundaries only if the property is located in a contiguous locality. The bill was carried over to 2001 in the House Courts of Justice Committee.

Delegate Orrock introduced House Joint Resolution 261, which requests all entities that exercise eminent domain powers to recognize the inestimable intrinsic value of farm and forest lands. This measure passed both houses of the General Assembly.

VI. CONCLUSION

In the course of its first year of work the joint subcommittee has learned to appreciate the complexity of the issues facing those who deal with the Commonwealth's eminent domain laws. It has attempted to maintain a balanced perspective between the rights of individuals who are required by the Commonwealth or one of its designees to give up property rights in furtherance of projects that are intended to benefit the greater community.

The joint subcommittee recognizes the difficulty in legislating procedures that balance the interests of the public in constructing beneficial projects in a timely and affordable manner and the interests of citizens in protecting their private property rights. To that end, provisions of the Constitution provide for payment of just compensation for the taking or damaging of private property. Affected persons should not have to bear more than their proportionate share of the costs of any public project, but Virginia's eminent domain laws should not allow someone to use them to extort a windfall from other taxpayers or prevent the construction of beneficial projects. The joint subcommittee has worked to ensure that the Commonwealth's procedures will give

property owners neither a windfall nor less than a fair value of what is taken from them. Injustices result from both underpayments and overpayments.

An underlying issue in the arguments heard throughout this study has been the appropriate jurisprudential approach. Under a traditional view, condemnation awards are payments for the property that is taken for the public use. It is seen, then, as an *in rem* proceeding, where the value of the property is paramount. Critics of this approach argue that courts and legislatures should view the eminent domain proceeding more as an *in personam* matter, where the circumstances presented by the affected owner -- the impact of the taking on his home and his livelihood -- are legitimate issues in determining the equity of compensatory payments.

Though the joint subcommittee did not get directly involved in debating the merits of these philosophical approaches, it is appropriate to acknowledge that the gap between these perspectives is the source of much of the dissatisfaction with the current system that was expressed by citizens who spoke at the public hearings. The members have observed that many more of the people who addressed the joint subcommittee criticized the current system than praised it. Some fraction of this difference can be attributed to the fact that organizations advocating changes in the current law, such as Citizens for Reform of Eminent Domain, encouraged persons sharing their goals to attend our public hearings. Another reason may be that persons who felt that they were treated fairly in dealings with condemnors are much less likely to speak out in a public forum than are those persons who are convinced that actions by government agencies or big corporations caused them to suffer personal losses.

The joint subcommittee recognizes that its work in 1999 was the beginning of the process of studying the need for reforms in eminent domain laws. During the next year, the joint subcommittee will continue its work of ensuring that the Commonwealth's condemnation procedures adequately protect both public and private interests.

Respectfully submitted,

Senator Madison E. Marye, Chairman
Delegate James M. Shuler, Vice Chairman
Senator Charles J. Colgan
Senator Thomas K. Norment, Jr.
Senator John Watkins
Delegate L. Preston Bryant, Jr.
Delegate H. Morgan Griffith
Delegate Riley E. Ingram
Delegate Gladys B. Keating
Delegate Brian J. Moran
Joseph T. Waldo, Esq.
John McLeod, III
Philip J. Infantino III, Esq.

APPENDIX A

1999 SESSION

ENROLLED

SENATE JOINT RESOLUTION NO. 271

Establishing a joint subcommittee to study the current means and adequacy of compensation to Virginia citizens whose properties are taken through the exercise of eminent domain.

Agreed to by the Senate, February 25, 1999
Agreed to by the House of Delegates, February 25, 1999

WHEREAS, the right of individuals and families to own property, and to use that property for their homes and economic purposes, is fundamental to the American way of life and our country's economic system; and

WHEREAS, the expansion of the state road system and the growth of state corporations, institutions and authorities have impacted on the number of eminent domain proceedings; and

WHEREAS, deregulation of formerly regulated industries, such as natural gas, telecommunications, and electric power, is occurring within Virginia, nationally and globally; and

WHEREAS, many such firms participating in Virginia markets compete nationally and globally as well as within Virginia; and

WHEREAS, a utility's in-state infrastructure may enhance that utility's ability to compete for deregulated markets both within the state and out of state; and

WHEREAS, construction of new utility infrastructure typically requires state-authorized exercise of the power of eminent domain to ensure the utility's ability to purchase needed property from individuals and families who had either (i) purchased such property in open markets with moneys earned from their labor or (ii) inherited such property from family members; and

WHEREAS, real estate property condemnation by utilities under the Commonwealth's eminent domain statutes requires that current owners of such properties relinquish their right to use that property for their own purposes; and

WHEREAS, utilities acquiring property for infrastructure development typically acquire a narrow corridor of up to several hundred feet in width, creating residual parcels of adjacent, nonacquired property along the full length of that corridor; and

WHEREAS, some infrastructure construction projects, such as electric power transmission line construction, may negatively affect the values of properties located near to but outside of the acquired right-of-way corridor; and

WHEREAS, some Virginia public service corporations, when allowed to condemn property, do not typically compensate property owners for devaluation of properties located outside the right-of-way corridor; and

WHEREAS, in some instances in which the entire property is condemned, the compensation is not adequate enough for the homeowner to purchase another comparable home, particularly when the homeowner is a senior citizen living on a limited income; and

WHEREAS, several large electric power transmission projects are currently proposed for areas within Virginia; and

WHEREAS, several owners of property potentially affected by the proposed electric power transmission construction have stated in sworn testimony at public hearings their expectation that such construction will devalue properties located close to the right-of-way corridor; and

WHEREAS, land values in the rural areas of Virginia are increasingly influenced by their residential land-use potential; and

WHEREAS, the serenity and natural beauty of rural lands often contribute to their residential land-use value; and

WHEREAS, that serenity and natural beauty are typically affected negatively by construction of large electric transmission lines; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That a joint subcommittee be established to study the current means and adequacy of compensation to Virginia citizens whose properties are taken through the exercise of eminent domain. The joint subcommittee shall study (i) the methods by which eminent domain is exercised and (ii) the means by which compensation is provided or obtained. The joint subcommittee shall make recommendations concerning both issues, advising whether current statutes are adequate to furnish the means and methods of compensation,

particularly in an evolving public utility market.

The joint subcommittee shall be composed of 13 members, as follows: 4 members of the Senate to be appointed by the Senate Committee on Privileges and Elections; 6 members of the House of Delegates to be appointed by the Speaker of the House, in accordance with the principles of Rule 16 of the Rules of the House of Delegates; and 3 citizens at large, one to be appointed by the Senate Committee on Privileges and Elections and two to be appointed by the Speaker of the House.

The direct costs of this study shall not exceed $9,000.

The Division of Legislative Services shall provide staff support for the study. Technical assistance shall be provided by the State Corporation Commission. All agencies of the Commonwealth shall provide assistance to the joint subcommittee, upon request.

The joint subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 2000 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Implementation of this resolution is subject to subsequent approval and certification by the Joint Rules Committee. The Committee may withhold expenditures or delay the period for the conduct of the study.

APPENDIX B

GENERAL ASSEMBLY OF VIRGINIA -- 1999 SESSION

HOUSE JOINT RESOLUTION NO. 491

Establishing a joint subcommittee to examine the current means and adequacy of compensation to Virginia citizens whose properties are taken through the exercise of eminent domain.

Agreed to by the House of Delegates, February 25, 1999
Agreed to by the Senate, February 23, 1999

WHEREAS, the right of individuals and families to own property, and to use that property for their homes and economic purposes, is fundamental to the American way of life and our country's economic system; and

WHEREAS, the expansion of the state road system and the growth of state corporations, institutions and authorities have impacted the number of eminent domain proceedings; and

WHEREAS, deregulation of formerly regulated industries, such as natural gas, telecommunications, and electric power, is occurring within Virginia, nationally, and globally; and

WHEREAS, many such firms participating in Virginia markets compete nationally and globally as well as within Virginia; and

WHEREAS, a utility's in-state infrastructure may enhance that utility's ability to compete for deregulated markets both within the state and out of state; and

WHEREAS, construction of new utility infrastructure typically requires state-authorized exercise of the power of eminent domain to ensure theutility's ability to purchase needed property from individuals and families who had either (i) purchased such property in open markets with moneys earned from their labor or (ii) inherited such properties from family members; and

WHEREAS, real estate property condemnation by utilities under the Commonwealth's eminent domain statutes requires that current owners of such properties relinquish their right to use that property for their own purposes; and

WHEREAS, utilities acquiring property for infrastructure development typically acquire a narrow corridor of up to several hundred feet in width, creating residual parcels of adjacent, nonacquired properties along the full length of that corridor; and

WHEREAS, some infrastructure construction projects, such as electric power transmission line construction, may negatively affect the values of properties located near but outside of the acquired right-of-way corridor; and

WHEREAS, some Virginia public service corporations when allowed to condemn property do not typically compensate property owners for devaluation of properties located outside the right-of-way corridor; and

WHEREAS, in some instances in which the entire property is condemned, the compensation is not adequate for the homeowner to purchase another comparable home, particularly when the homeowner is a senior citizen living on a limited income; and

WHEREAS, several large electric power transmission projects are currently proposed for areas within Virginia; and

WHEREAS, several owners of properties potentially affected by the proposed electric power transmission construction have stated in sworn testimony at public hearings their expectation that such construction will devalue properties located close to the right-of-way corridor; and

WHEREAS, land values in the rural areas of Virginia are increasingly influenced by their residential land-use potentials; and

WHEREAS, the serenity and natural beauty of rural lands often contribute to their residential land-use value; and

WHEREAS, that serenity and natural beauty are typically affected negatively by construction of large electric transmission lines; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a joint subcommittee be established to examine the current means and adequacy of compensation to Virginia citizens whose properties are taken through the exercise of eminent domain. The joint subcommittee shall study (i) the methods by which such eminent domain is exercised and (ii) the means by which compensation is provided or obtained. The joint subcommittee shall make recommendations concerning both issues,

advising whether current statutes are adequate to furnish the means and methods of compensation in an evolving public utility market.

The joint subcommittee shall be composed of 13 members as follows: 6 members of the House of Delegates to be appointed by the Speaker of the House; and 4 members of the Senate to be appointed by the Senate Committee on Privileges and Elections; and 3 citizens at large, two to be appointed by the Speaker of the House, and one to be appointed by the Senate Committee on Privileges and Elections.

The direct costs of this study shall not exceed $9,000.

The Division of Legislative Services shall provide staff support for the study. Technical assistance shall be provided by the State Corporation Commission. All agencies of the Commonwealth shall provide assistance to the joint subcommittee, upon request.

The joint subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 2000 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Implementation of this resolution is subject to subsequent approval and certification by the Joint Rules Committee. The Committee may withhold expenditures or delay the period for the conduct of the study.

APPENDIX C

DRAFT RESEARCH PROPOSAL

A Review of VDOT's Business Relocation Process

Cherie A. Kyte
Research Scientist

Amy A. O'Leary
Senior Research Scientist

Michael A. Perfater
Research Manager

November 1999

ABSTRACT

Transportation improvements have precipitated the relocation of 270 businesses in Virginia since 1993. Under the business relocation program, which is specified in the federal Uniform Relocation Assistance and Relocation Act of 1970 (1970 Act), VDOT purchases property from business owners and compensates owners and tenants for their actual moving costs. The Act also calls for the provision of some limited funds for the reestablishment of the businesses. These payments have a $10,000 limit. Also allowable are moving expenses, which are not limited beyond reasonable, reimbursable amounts. There has been some question as to whether businesses are being compensated adequately. House Joint Resolution 490 requires that VDOT look into this question, particularly as it pertains to leased service stations. Conversations with Central Office Right of Way and Utilities staff have extended the focus of this project to include all relocated businesses. The Research Council (VTRC) has been requested to conduct a study to address these issues.

Through interviews with VDOT Right of Way staff and others, a survey of other states, and a survey of relocated Virginia businesses, this project will address several questions. Are businesses being compensated adequately? How are the owners/tenants of relocated businesses faring under the existing relocation program and how do they regard the experience? What can be done to improve any or all of the compensation or service aspects of the relocation of businesses in Virginia?

INTRODUCTION

VDOT relocates businesses in order to make way for new roads or other road-related improvements. The current relocation program is dictated by

procedures established by the 1970 Act, which set the maximum amounts covered by the program (Virginia complied with the federal Act in 1972, with the passage of the Uniform Relocation Assistance and Real Property Acquisition Policies Act.). Over the years the provisions of the Act have undergone changes. VDOT's business relocation procedures are described in Section 25-239 of the Code of Virginia and are guided by VDOT's relocation manual (Section 404.03).

House Joint Resolution 490, passed in February 1999 by the Virginia General Assembly, states that Virginia's relocation procedure for businesses, especially leased service stations, falls short of providing them sufficient compensation to relocate. HJR 490 therefore requires that VDOT study certain right-of-way compensation issues and the overall business relocation process. The resolution specifically asks that VDOT consider the effects of the process on gasoline retail outlet owners and operators. It also says that when a service station operator is unable to relocate this may result in a loss of tax revenue to the Commonwealth. The resolution mandates that VDOT contact some representatives from organizations such as the Small Business Administration and/or the gasoline industry. Conversations with VDOT's Right of Way and Utilities Division staff resulted in a decision to expand the study to include all types of relocated businesses, as leased service stations are only one type of tenant business that may be adversely affected by relocation.

Businesses compelled to relocate due to highway construction or improvements are offered the following options:

1.) The moving expenses and reestablishment option, in which moving expenses are actual expenses and are paid after the move – there is no limit on moving costs. The reestablishment payment is limited to no more than $10,000.
2.) The "in lieu of" payment option, which is restricted to the $1,000 to $20,000 range and is usually chosen when the business owner/tenant cannot manage the move financially or cannot find comparable rental space. The payment itself is based on the average net business income over the most recent 2-year period.
3.) The loss of tangible personal property option, which is limited to actual, direct losses incurred as a result of moving or discontinuing the business and is applicable usually when a business chooses not to relocate.

Preliminary research into the business relocation program reveals that the compensation aspects of the current process may indeed fall short on a number of counts. For example, the federal reestablishment cap of $10,000 may be too low. As a result of these perceived shortcomings and the requirement that VDOT study these issues, the VTRC was asked to conduct this research.

PURPOSE AND SCOPE

The purpose of this project is to investigate certain right-of-way acquisition issues, as specified in HJR 490. The resolution states that the study consider and balance the interests of the Commonwealth and the land owners with the need to provide compensation to gasoline retail outlet owners and operators who are unable to relocate their businesses. HJR 490 also specifies that the research include contacting representatives of organizations like the Small Business Association and an organization representing gasoline retailers, refiners, or petroleum distributors. At the request of the Right of Way and Utilities Division, the VTRC will include all types of relocated businesses in the study. The research will help determine whether businesses are sufficiently and reasonably compensated during the relocation process. If this examination shows inadequacies in the provisions for relocating businesses, recommendations will be made to improve the process.

ANTICIPATED BENEFITS

This research effort will result in recommendations that should improve Virginia's business relocation process so that it more reasonably compensates businesses. Businesses may be suffering undue hardships under the current program, resulting in loss of income for the owner/tenant of the business, and loss of taxes to the Commonwealth. Even though the program is a federal one that VDOT needs to comply with, the research may yield opportunities to expand the benefits and make the program fairer. Additionally, research in this area demonstrates VDOT's willingness to listen to the concerns of customers.

METHODS

This project will include a number of tasks. Interviews with VDOT Right of Way agents to get their input concerning necessary improvements will be conducted. Other interviews will include those with representatives from the Virginia Gasoline Marketers Council, and the sponsor of HJR 490, Delegate Robinson. Surveys of other states will be conducted, as it is apparent that a number of states have expanded their business relocation programs beyond the federal limits. A sample of relocated businesses relocated from 1993 will be drawn from the Right of Way database and owners/tenants will be interviewed and/or surveyed. Statistical analysis will be carried out on the survey results.

More specifically, the project will contain the following tasks.

1. Literature Review – The researchers will review the VDOT and Federal Highway Administration (FHWA) relocation procedures and legislation. Reports on residential relocation may provide additional background. Additionally, the researchers will conduct a search of transportation literature.

2. a.) Interviews with VDOT Staff – The researchers will conduct in depth interviews with VDOT Right of Way agents from several districts and other VDOT staff to become familiar with the program's details, to discover how they regard the relocation process and gather suggestions for improvement. b.) Interviews with Others - The researchers will also interview Delegate Robinson and a representative from the Virginia Gasoline Marketers Council in order to understand the impetus behind the legislation. The researchers will also contact FHWA staff for the federal perspective.

3. Create and Assess Data File - Ms. Joy Layne has provided the researchers with information on all businesses involved in relocation since October 1993 (since the last change by FHWA). Since only a handful of these businesses were gas stations it should be relatively straightforward to examine their experiences in isolation. This data should allow us to identify broad trends such as average payment per year, and average payment by business type. Since the database does not contain all of the necessary information, the researchers will obtain other information from the parcel files for each business as needed to do the analysis. These parcel files are located in the Central Office with duplicates at each VDOT District Office. The parcel files contain detailed information on each negotiation, including contact information, which is crucial to the next phase.

4. Select a Sample – A sample will be drawn from the lists of businesses provided by R/W. The sample will be stratified by type of business, payment option chosen by the business, owner/tenant occupied, and possibly the value of the business, to the extent good data is available. A final sampling plan will be devised when the researchers have counts of the number of businesses in different categories.

5. Survey Businesses – The researchers will contact business owners and tenants in the drawn sample. According to the respondents' preference and time constraints, the interviews will be conducted by telephone, in person, or by mail to gain insight into their experiences. Some possible survey questions would be: How satisfied were they? Were they adequately compensated? What changes would they like to see?

6. Analyze Survey Results – The survey responses will be analyzed in terms of relevant variables such as owner or tenant, business type, number of employees, location (district, county, city), ease of finding another site, expenses not covered, amount of compensation in each category, and other variables.

7. Survey Other States – The researchers will contact representatives from transportation departments in other states (through email and phone) to find out about their relocation programs. Some states, such as Delaware and Louisiana, provide compensation well above the federal limits. Valuable insights could be gained regarding the rationale for their modified relocation programs.

Discussions will also include the relative success of these programs and recommendations for Virginia.

8. Prepare final report.

PERSONNEL

The principal investigators for this project are Amy O'Leary, Cherie Kyte, and Michael Perfater from the Research Council's Socioeconomics, Environmental and Transportation Systems Team. Other VTRC staff may be called upon to assist in the surveying of the owners and tenants of relocated businesses.

The study's task force consists of Sam Hester, Beverly Fulwider, and Joy Layne from VDOT's Right of Way and Utilities Division.

WORK SCHEDULE

This project will begin November 1, 1999 and will be completed by October 15, 2000. The time line for the project is as follows:

Task	Nov	Dec	Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sept	Oct
1	—											
2	—	—	—									
3			—	—	—							
4						—						
5							—	—	—			
6									—	—		
7											—	
8												—

APPENDIX D

ABSTRACT

The Virginia Department of Transportation (VDOT) may legally condemn land for road improvements if all purchase negotiations with the landowner fail. If all further negotiations fail, just compensation for the landowner is decided in court by a five-member panel, called a commission. Until 1991, litigants nominated the individuals selected for the panel. Awards unfavorable to the Commonwealth have often occurred when panels had a majority of landowner-nominated commissioners. In 1991, the Virginia General Assembly enacted legislation that required the use of ordinary jurors as panel members in selected areas of the state.

Average (award / certificate of take) values were compared for samples of jury and commission cases held since 1988. The state's total payout (as a percentage of certificate values) for all commission cases was also compared to its total payout for all jury cases completed in a geographic area.

There were no statistically significant differences in the average (award / certificate) values of jury and commission cases heard in VDOT's Northern Virginia District since 1988. The state's total payout for 64 commission cases heard there was 162% of the certificate values, compared to a total payout of 113% for 28 jury cases.

Statistical tests revealed that the average (award / certificate) value for 60 commission cases heard in Chesterfield and Henrico counties was significantly higher than the average for 19 jury cases. The state's total payout for all 60 commission cases was 150% of the corresponding certificate values, while the total payout for all 19 jury cases was 118% of the certificate values.

The authors conclude that the payout comparisons for jury and commission cases, in particular, suggest that the state's costs have been substantially lower when juries have been used. The number of jury cases completed to date is small, however. For that reason, the authors recommend a three-year extension of the legislation, so that the outcomes of the two different panel selection procedures might be more validly compared.

Appendix E -- Laws of States Regarding Payment of Condemnees Litigation Expenses

Alabama -- Though Alabama's eminent domain law follows much of the Uniform Eminent Domain Code, it does not include the provisions of § 1205 (b). Alabama Code § 18-1A-290 provides that reasonable attorneys' fees are to be awarded if the judgment is not paid by the condemnor within the allotted time. Litigation expenses are payable to successful inverse condemnees (§ 18-1A-32) and if the condemnor dismisses a proceeding (§ 18-1A-232). The chapter defines "litigation expenses" as the sum of the costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, necessary to prepare for anticipated or participation in actual probate or circuit court proceedings.

Alaska -- Alaska Rule Civil Procedure 72(k) provides that costs (including appraiser's fee) and attorney's fees incurred by a defendant must be assessed against the plaintiff if:

(1) the taking of the property is denied;

(2) the plaintiff appeals from the master's award and the defendant does not appeal;

(3) the award of the court was at least ten (10) percent larger than the amount deposited by the condemning authority or the allowance of the master from which an appeal was taken by the defendant;

(4) the action was dismissed . . . ; or

(5) allowance of costs and attorney's fees appears necessary to achieve a just and adequate compensation of the defendant.

Attorney's fees allowed under this paragraph must be commensurate with the time expended by the attorney throughout the proceedings.

In Stewart & Grindle v. State, 524 P.2d 1242 (Alaska 1974), the court held that reimbursable costs includes expenses necessarily incurred in connection with the condemnation of property.

Arizona -- Ariz. Rev. Stat. § 11-972: Attorneys' fees are available to defendant upon unsuccessful or abandoned condemnation, and to the successful plaintiff in an inverse condemnation action.

Arkansas -- No attorneys' fees are available to defendant except when the condemnor acts in bad faith.

California -- Cal. Civ. Proc. Code § 1250.410 provides:

(a) At least 30 days prior to the date of the trial on issues relating to compensation, the plaintiff shall file with the court and serve on the defendant its final offer of compensation in the proceeding and the defendant shall file and serve on the plaintiff its final demand for compensation in the proceeding. Such offers and demands shall be the only offers and demands considered by the court in determining the entitlement, if any, to litigation expenses. ...

(b) If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding, the costs allowed pursuant to Section 1268.710 shall include the defendant's litigation expenses.

In determining the amount of such litigation expenses, the court shall consider the offer required to be made by the plaintiff pursuant to Section 7267.2 of the Government Code and any other written offers and demands filed and served prior to or during the trial.

(c) If timely made, the offers and demands as provided in subdivision (a) shall be considered by the court on the issue of determining an entitlement to litigation expenses.

County of Los Angeles v. Ortiz, 6 Cal. 3d 141, 98 Cal. Rptr. 454, 490 P.2d 1142 (1971) -- Payment of fees is policy, not constitutional question, and in the absence of statutory authority forwarding litigation costs the trail court had properly disallowed the expert witness fees.

Colorado -- Col. Rev. Stat. § 38-1-122: If the court finds that the petitioner is not authorized to acquire the real property sought, it shall award reasonable attorney fees, in addition to any other costs, to the owner. The Code states that this section shall not "be construed as limiting the ability of a property owner to recover just compensation, including attorney fees, as may otherwise be provided by law." In Department of Health v. Hecla Mining Co., 781 P.2d 122 (Colo. Ct. App. 1989), the state supreme court held that a landowner could not recover attorney's fees because there was no express statutory authority for recovery of attorney's fees against the state.

By general statute, expert witness fees are taxed as costs. State constitutional guarantees of just compensation requires that condemnor be paid his costs as well as the fair value of his property. Leadville Water Co. v. Parkville Water Dist., 164 Colo. 362, 436 P.2d 659 (1974). The amount must be reasonable and is within the discretion of the trial court. In Denver Joint Stock Land Bank v. Board of County Com'rs, 105 Colo. 366, 428 P.2d 708 (1967), the court held that a general statute allowed court to award fees to the condemnee's appraiser.

Connecticut -- Conn. Gen. Stat. Ann. § 48-17a provides that courts shall reimburse the condemnee his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees actually incurred in the condemnation proceeding if the state agency is ruled to be ineligible to acquire the property or the proceeding is abandoned.

Section 48-26, added in 1967, provides that when, in the exercise of the power of eminent domain by any public or private corporation, the award of compensation, damages or benefits by any court exceeds the amount last offered, the court may order the condemnor to pay the reasonable appraisal fees and reasonable fees for expert testimony incurred by the property owner in connection with such proceeding.

Delaware -- Del. Code Ann. tit. 10, § 6111: Fees of counsel or of experts retained by any party may not be taxed as costs under any circumstances upon any of the parties or considered in determining the issue of just compensation, except as follows:

(1) At any time prior to the day before the compensation trial of a condemnation proceeding begins, the plaintiff shall serve upon the defendant(s) an offer to allow judgment to be taken against the plaintiff, in accordance with the terms of the offer, exclusive of court costs and interest. If the defendant(s) accept the offer by serving a written notice of acceptance upon the plaintiff, either party may then file the offer and notice of acceptance with the court, together with proof of service thereof, and thereupon the prothonotary shall enter the notice of acceptance as if it were the final award pursuant to § 6108 of this title. An offer not accepted prior to the swearing of the commissioners pursuant to § 6108(c) of this title shall be deemed withdrawn, and evidence thereof is not admissible except in a later proceeding to determine costs pursuant to this section. The fact that an offer is made but not accepted shall not preclude a subsequent offer.

(2) If the award of just compensation, exclusive of interest, is closer to the highest valuation evidence provided at trial on the defendant's behalf than the plaintiff's offer made under subsection (a) of this section, the defendant may apply for an order for the plaintiff to pay the defendant's reasonable litigation expenses, including reasonable attorney, appraisal, engineering or other expert witness fees actually incurred because of the compensation trial, by serving on the plaintiff and filing with the prothonotary a verified application therefor within 15 days after the final confirmed condemnation award. The application shall show cause why the defendant is entitled to an award pursuant to this subsection; state the amount sought; and include an itemized statement under oath from an attorney or expert witness representing or appearing at trial on behalf of the defendant stating the fee charged, the basis therefor, the actual time expended and all actual expenses for which the recovery is sought. If requested by any party, or upon its own motion, the court may hear the parties with respect to the matters raised by the application

and determine the amount of litigation expenses to be awarded. Any expenses awarded by the court pursuant to this subsection shall be paid within 30 days of the court's final order. The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny such award, to the extent that the defendant, during the course of the proceeding, engaged in conduct which unduly and unreasonably protracted the final resolution of the action, or to the extent the court finds that the position of the plaintiff was substantially justified, or that special circumstances make an award of expenses unjust. In no event shall the amount of the expenses awarded pursuant to this subsection exceed the amount awarded as just compensation.

(3) If the award of just compensation, exclusive of interest, is lower than the plaintiff's offer made under subsection (a) of this section, the plaintiff may apply for an order for the defendant to pay the plaintiff's reasonable litigation expenses incurred after the service of the offer, excluding attorney fees but including reasonable appraisal, engineering or other expert witness fees actually incurred because of the condemnation trial, by serving on the defendant and filing with the prothonotary a verified application therefor within 15 days after the final confirmed condemnation award. The application shall show cause why the plaintiff is entitled to an award pursuant to this subsection; state the amount sought; and include an itemized statement under oath from an attorney or expert witness representing or appearing at trial on behalf of the plaintiff stating the fee charged, the basis therefor, the actual time expended, and all actual expenses for which the recovery is sought. If requested by any party, or upon its own motion, the court may hear the parties with respect to the matters raised by the application and determine the amount of litigation expenses to be awarded. Any order of the court awarding expenses pursuant to this subsection shall be filed with the prothonotary and, unless appealed within 30 days, shall be a final order. Any expenses awarded by the court pursuant to this subsection may be deducted from the award of just compensation, unless payment of the expenses awarded is otherwise made within 30 days of the court's final order. The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny such award, to the extent that the plaintiff, during the course of the proceeding, engaged in conduct which unduly and unreasonably protracted the final resolution of the action, or to the extent the court finds that the position of the defendant was substantially justified, or that special circumstances make an award of expenses unjust. In no event shall the amount of the expenses awarded pursuant to this subsection exceed the amount awarded as just compensation.

District of Columbia -- D.C. Code Ann. § 16-1321: Owners are entitled to be reimbursed for their attorneys' fees if condemnation proceedings are abandoned.

Florida -- In Dade Co. v. Brigham, 47 So. 2d 602 (Fla. 1950), the court held that statute requiring that all costs of proceedings be borne by petitioner must be construed, in light of constitutional considerations, to include expert witness fees.

Fla. Stat. Ann. § 73.091 provides:

(1) The petitioner shall pay attorney's fees as provided in § 73.092 as well as all reasonable costs incurred in the defense of the proceedings in the circuit court, including, but not limited to, reasonable appraisal fees and, when business damages are compensable, a reasonable accountant's fee, to be assessed by that court.

(2) At least 30 days prior to a hearing to assess costs under this section, the condemnee's attorney shall submit to the condemning authority for each expert witness complete time records and a detailed statement of services rendered by date, nature of services performed, time spent performing such services, and costs incurred, and a copy of any fee agreement which may exist between the expert and the condemnee or the condemnee's attorney.

(3) In assessing costs, the court shall consider all factors relevant to the reasonableness of the costs, including, but not limited to, the fees paid to similar experts retained in the case by the condemning authority or other parties and the reasonable costs of similar services by similarly qualified persons.

(4) In assessing costs to be paid by the petitioner, the court shall be guided by the amount the defendant would ordinarily have been expected to pay for the services rendered if the petitioner were not responsible for the costs.

(5) The court shall make specific findings that justify each sum awarded as an expert witness fee.

Fla. Stat. Ann. § 73.092 provides:

(1) Except as otherwise provided in this section, the court, in eminent domain proceedings, shall award attorney's fees based solely on the benefits achieved for the client.

(a) As used in this section, the term "benefits" means the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney. If no written offer is made by the condemning authority before the defendant hires an attorney, benefits must be measured from the first written offer after the attorney is hired.

1. In determining attorney's fees in prelitigation negotiations, benefits do not include amounts awarded for business damages unless the business owner provided to the condemning authority, upon written request, prior to litigation, those financial and business records kept by the owner in the ordinary course of business.

2. In determining attorney's fees subsequent to the filing of litigation, if financial and business records kept by the owner in the ordinary course of business were not provided to the condemning authority prior to litigation, benefits for amounts awarded for business damages must be based on the first written offer made by the condemning authority within 120 days after the filing of the eminent domain action. In the event the petitioner makes a discovery request for a defendant's financial and business records kept in the ordinary course of business within 45 days after the filing of that defendant's answer, then the 120-day period shall be extended to 60 days after receipt by petitioner of those records. If the condemning authority makes no written offer to the defendant for business damages within the time period provided in this section, benefits for amounts awarded for business damages must be based on the difference between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hired an attorney.

(b) The court may also consider nonmonetary benefits obtained for the client through the efforts of the attorney, to the extent such nonmonetary benefits are specifically identified by the court and can, within a reasonable degree of certainty, be quantified.

(c) Attorney's fees based on benefits achieved shall be awarded in accordance with the following schedule:

1. Thirty-three percent of any benefit up to $250,000; plus
2. Twenty-five percent of any portion of the benefit between $250,000 and $1 million; plus
3. Twenty percent of any portion of the benefit exceeding $1 million.

(2) In assessing attorney's fees incurred in defeating an order of taking, or for apportionment, or other supplemental proceedings, when not otherwise provided for, the court shall consider:

(a) The novelty, difficulty, and importance of the questions involved.

(b) The skill employed by the attorney in conducting the cause.

(c) The amount of money involved.

(d) The responsibility incurred and fulfilled by the attorney.

(e) The attorney's time and labor reasonably required adequately to represent the client in relation to the benefits resulting to
the client.

(f) The fee, or rate of fee, customarily charged for legal services of a comparable or similar nature.

(g) Any attorney's fee award made under subsection (1).

(3) In determining the amount of attorney's fees to be paid by the petitioner under subsection (2), the court shall be guided by the fees the defendant would ordinarily be expected to pay for these services if the petitioner were not responsible for the payment of those fees.

(4) At least 30 days prior to a hearing to assess attorney's fees under subsection (2), the condemnee's attorney shall submit to the condemning authority and to the court complete time records and a detailed statement of services rendered by date, nature of services performed, time spent performing such services, and costs incurred.

(5) The defendant shall provide to the court a copy of any fee agreement that may exist between the defendant and his or her attorney, and the court must reduce the amount of attorney's fees to be paid by the defendant by the amount of any attorney's fees awarded by the court.

Georgia -- Bowers v. Fulton County, 227 Ga. 814, 183 S.E. 2d 347 (1971), holds that attorney's fees and expenses of litigation are not embraced within just compensation for land taken by eminent domain.

In Dept. of Transportation v. Woods, 269 Ga. 53, 494 S.E. 2d 507 (1998), the Supreme Court agreed with the lower appellate court that the state Constitution of 1983 and the frivolous litigation statute, O.C.G.A. §9-15-14, would allow a trial court to award attorneys fees in a condemnation case. There must be improper conduct, lack of substantial justification, or intent to delay or harass before court may award attorneys fees. But the Supreme Court held that the trial court could not award fees in this case on the basis that the DOT had offered less than half the amount determined by a jury to be just and adequate compensation.

The Georgia version of the Uniform Relocation Assistance Act (§ 22-4-7) requires payment of litigation expenses if the proceedings are abandoned or if it is determined that the condemnor lacked authority to condemn the property. Section 22-4-8 provides for their payment to successful plaintiffs in inverse condemnation actions.

Hawaii -- Rev. Stat. §§ 101-27, 113-3, 206-6, and 516-23: Attorneys' fees are to be awarded upon abandonment, dismissal or unsuccessful condemnation, or if lands are not acquired within twelve months of commencement of proceedings for specific land development tracts. They are also payable to a successful inverse condemnee.

Idaho -- Code Ann. §§ 7-718: Costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides in the discretion of the court.

Section 12-121 provides that in any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees.

In Ada County Highway District v. Acarrequi, 105 Idaho 873, 673 P.2d 1067 (1983), the court held that in condemnation cases costs and fees are available to condemnees in the trial court's discretion. Factors to be considered in deciding whether to award fees include whether the verdict exceeds the condemnor's last timely offer by ten percent.

Illinois -- 735 ILCS 5/7-111 and 735 ILCS 5/7-123 provide for payment of the condemnee's attorney's fees upon abandonment, dismissal or unsuccessful condemnation, or if the condemnor fails to make the required payment within the required time period.

Indiana -- Ind. Code § 32-11-1-10: Litigation expenses not to exceed $2,500 may be awarded: "The costs of the proceedings shall be paid by the plaintiff, except that in case of trial the additional costs thereby caused shall be paid as the court shall adjudge. However, if, in case of trial, the amount of

damages awarded to the defendant by the judgment, exclusive of interest and costs, is greater than the amount specified in the last offer of settlement made by the plaintiff under section 8.1 of this chapter, the court shall allow the defendant his litigation expenses in an amount not to exceed twenty-five hundred dollars ($2,500)."

Iowa -- Code Ann. §6B-33 provides that "The applicant shall pay all costs of the assessment made by the commissioners and reasonable attorney fees and costs incurred by the condemnee as determined by the commissioners if the award of the commissioners exceeds one hundred ten percent of the final offer of the applicant prior to condemnation. The applicant shall file with the sheriff an affidavit setting forth the most recent offer made to the person whose property is sought to be condemned. . . . The applicant shall also pay all costs occasioned by the appeal, including reasonable attorney fees to be taxed by the court, unless on the trial thereof the same or a less amount of damages is awarded than was allowed by the tribunal from which the appeal was taken."

§ 6B-34 provides that "Should the applicant decline, at any time after an appeal is taken as provided in section 6B.18, to take the property and pay the damages awarded, the applicant shall pay, in addition to the costs and damages actually suffered by the landowner, reasonable attorney fees to be taxed by the court."

Kansas -- Stat. Ann. § 26-509 provides in part: "Whenever the plaintiff condemner shall appeal the award of court appointed appraisers, and the jury renders a verdict for the landowners in an amount greater than said appraisers' award, the court may allow as court costs an amount to be paid to the landowner's attorney as attorney fees."

In Wichita v. B G Products, 252 Kan. 367, 845 P.2d 649, the court interpreted a statute awarding reasonable expenses to include attorney fees.

Kentucky -- Attorney's fees are available upon an unsuccessful or abandoned condemnation proceeding.

They may also be payable when proceedings are blatantly illegitimate and, when instigated, raise the specter of undue harassment and expense for a private citizen. Bernard v. Russell County, 747 SW2d 610 (Ky. App.).

Louisiana -- La. Rev. Stat. Ann. § 19:8 provides that after a condemnee's compensation is determined, the court shall determine the highest offer the condemnor made to the condemnee before trial. If the amount is less than the compensation awarded, the court may award reasonable attorney's fees.

Section 19:201 requires the payment of reasonable attorneys' fees if condemnation proceedings are abandoned or the condemnor is held not to be allowed to take the property.

State v. Barineau, 225 La. 341, 72 So 2d 869 (1954), holds that state constitution requires condemnor to pay the condemnee's costs as an element of damages. Fee paid to a real estate appraiser would be included in costs. Expert witness fees may also be awarded, based on the relative usefulness of the testimony. State v. Nelken, 628 So.2d 1279 (La. Ct. App. 1993).

Maine -- Me. Rev. Stat. Ann. tit. 23, § 157 provides:

The court shall determine the same by a verdict of its jury or, if all parties agree, by the court without a jury or by a referee or referees and shall render judgment for just compensation, with interest where such is due, and for costs in favor of the party entitled thereto; except that if the department appeals and if the department does not prevail, interest where such is due and costs shall be paid by the

department and the owner or owners shall be reimbursed by the department for a reasonable attorney's fee. [1971, c. 593, § 22 (amd).]

Maryland -- Md. Code Ann. § 12-106, -108, -109: Costs, which must be paid by the condemnor, include reasonable legal, appraisal, and engineering fees actually incurred if the judgment is for the condemnee on the right to condemn or if proceedings are abandoned.

Massachusetts -- Attorneys' fees are generally not awarded.

Michigan -- Mich. Comp. Laws Ann. §§ 213.66 (Uniform Condemnation Practices Act) provides:

(1) Except as provided in this section, an ordinary or expert witness in a proceeding under this act shall receive from the agency the reasonable fees and compensation provided by law for similar services in ordinary civil actions in circuit court, including the reasonable expenses for preparation and trial.

(2) If the property owner, by motion to review necessity or otherwise, successfully challenges the agency's right to acquire the property, or the legal sufficiency of the proceedings, and the court finds the proposed acquisition improper, the court shall order the agency to reimburse the owner for actual reasonable attorney fees and other expenses incurred in defending against the improper acquisition.

(3) If the amount finally determined to be just compensation for the property acquired exceeds the amount of the good faith written offer under section 5, the court shall order reimbursement in whole or in part to the owner by the agency of the owner's reasonable attorney's fees, but not in excess of 1/3 of the amount by which the ultimate award exceeds the agency's written offer as defined by section 5. The reasonableness of the owner's attorney fees shall be determined by the court. If the agency or owner is ordered to pay attorney fees as sanctions under Michigan court rule 2.403 or 2.405, those attorney fee sanctions shall be paid to the court as court costs and shall not be paid to the opposing party unless the parties agree otherwise.

(4) If the agency settles a case before entry of a verdict or judgment, it may stipulate to pay reasonable attorney and expert witness fees.

(5) Expert witness fees provided for in subsection (1) and this subsection shall be allowed with respect to an expert whose services were reasonably necessary to allow the owner to prepare for trial. For the purpose of subsection (1) and this subsection, for each element of compensation, each party is limited to 1 expert witness to testify on that element of compensation unless, upon showing of good cause, the court permits additional experts. The agency's liability for expert witness fees shall not be diminished or affected by the failure of the owner to call an expert as a witness if the failure is caused by settlement or other disposition of the case or issue with which the expert is concerned.

(6) An agency shall not be required to reimburse attorney or expert witness fees that are attributable to an unsuccessful challenge to necessity or to the validity of the proceedings.

In Department of Transportation v. Randolph, (Mich. App. No. 191288, July 10, 1998), the court noted that MCL 213.66(3) and MSA 8.265(16)(3) provide for an award of "reasonable" attorney fees subject to a statutory maximum of one-third of the difference between the ultimate award and the agency's written offer. The trial court is required to make an independent review and determine, on the basis of the record in the case, what constitutes a reasonable attorney fee. The burden of proving the reasonableness of the fee award rests with the party claiming compensation. In determining the reasonableness of a fee award, the trial court must consider the eight factors listed in MRPC 1.5(a):

> (1) [T]he time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount of time involved and the results obtained; (5) the time limitations imposed by the client or by the

circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

The court identified three purposes of the fee-shifting provision of the state's law: "First, awarding attorney fees will assure that the property owner receives the full amount of the award, placing the owner in as good a position as that occupied before the taking. Second, the fee structure penalizes agents of the condemnor for deliberately low offers because a low offer may result in the condemnor paying the owner's litigation expenses as well as its own. Third, the fee provision provides a performance incentive to the owner's attorney, because the fee awarded is directly proportional to the results achieved by counsel."

Minnesota -- Minn. Stat. Ann. § 117.195 provides that when the proceeding is dismissed for nonpayment or discontinued by the petitioner, the owner may recover from the petitioner reasonable costs and expenses, including attorneys' fees.

Section 117.175 (b) provides: "The court may, in its discretion, after a verdict has been rendered on the trial of an appeal, allow as taxable costs reasonable expert witness and appraisal fees of the owner, together with the owner's reasonable costs and disbursements. No expert witness fees, costs or disbursements shall be awarded to the petitioner regardless of who is the prevailing party." The owner need not be the prevailing party in order to obtain reimbursement for such fees. In re Minneapolis Community Development Agency, 447 N.W.2d 891 (Minn. App. 1990)

Mississippi -- Miss. Code Ann. § 11-27-37 provides: "In case the plaintiff shall fail to pay the damages and costs awarded to the defendant within ninety days from the date of the rendering of the final judgment . . . , or in case the suit shall be dismissed by the plaintiff except pursuant to settlement, or the judgment be that the plaintiff is not entitled to a judgment condemning property, the defendant may recover of the plaintiff in an action brought therefor all reasonable expenses, including attorneys' fees, incurred by him in defending the suit."

Missouri -- There is no specific provision for payment of attorneys' fees. Mo. Stat. § 523.070 provides that the court, "as to any costs made by subsequent litigation, may make such order as in its discretion may be deemed just."

Montana -- Section 29 of Article II of Montana's Constitution states:

"Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails."

Mont. Code Ann. § 70-30-305 requires the condemnor, within 30 days after an appeal is perfected from the commissioner's award or report or not more than 60 days after waiver of appointment of condemnation commissioners, to submit to condemnee a written final offer of judgment for the property to be condemned, together with necessary expenses of condemnee then accrued. If at any time prior to 10 days before trial the condemnee serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance, together with proof of service thereof, and thereupon judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible at the trial except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer.

In the event of litigation and when the private property owner prevails by receiving an award in excess of the final offer of the condemnor, the court shall award necessary expenses of litigation to the condemnee.

Necessary expenses of litigation are defined in 70-30-306 as reasonable and necessary attorney fees, expert witness fees, exhibit costs, and court costs. Reasonable and necessary attorney fees are the customary hourly rates for an attorney's services in the county in which trial is held. Reasonable and necessary attorney fees shall be computed on an hourly basis and may not be computed on the basis of any contingent fee contract entered into after July 1, 1977. Reasonable and necessary expert witness fees may not exceed the customary rate for the services of a witness of such expertise in the county in which trial is held. *See also* State v. Standley Bros., 215 Mont. 475, 699 P.2d 60 (1985).

Nebraska -- Neb. Rev. Stat. § 76-720 provides:

If an appeal is taken from the award of the appraisers by the condemnee and the amount of the final judgment is greater by fifteen percent than the amount of the award, or if appeal is taken by the condemner and the amount of the final judgment is not less than eighty-five percent of the award, or if appeal is taken by both parties and the final judgment is greater in any amount than the award, the court may in its discretion award to the condemnee a reasonable sum for the fees of his or her attorney and for fees necessarily incurred for not more than two expert witnesses. On any appeal by the condemner, the condemner shall pay all court costs on appeal. If appeal is taken by the condemnee only and the final judgment is not equal to or greater than the award of the appraisers, the court may in its discretion award to the condemner the court costs incurred by the condemner, but not attorney or expert witness fees.

If an appeal is taken to the district court and the district court finds that the condemner did not negotiate in good faith with the property owner or there was no public purpose for taking the property involved, the court shall award to the condemnee a reasonable sum for the fees of his or her attorney and the condemner shall pay all court costs on appeal.

The changes made to this section by Laws 1995, LB 222, apply to any action pending on March 30, 1995, or filed on or after such date.

Nevada -- Nev. Rev. Stat. § 37.180 provides for attorneys' fees upon abandonment or unsuccessful condemnation, or if the plaintiff is successful in an inverse condemnation suit.

New Hampshire -- § 498-A:26-a provides that "If neither the condemnor nor the condemnee appeals from the award of the board as provided in RSA 498-A:27, the board shall award costs to the prevailing party."

In Hayes v. State, 109 N.H. 353, 252 A2d 431 (1969), the court held that an amendment to a general statute governing costs operated to enlarge the costs allowable against the State under a condemnation statute authorizing the award of costs to the prevailing party so as to include expert witness fees "on motion and order of the court."

New Jersey -- N.J. Stat. Ann. § 20:3-26 (b) provides that if the court renders final judgment that the condemnor cannot acquire the real property by condemnation or, if the condemnation action is abandoned by the condemnor, then the court shall award the owner . . . such sum as will reimburse such owner for his reasonable costs, disbursements and expenses actually incurred, including reasonable attorney, appraisal, and engineering fees. Subsection (c) provides for the payment of a plaintiff's reasonable costs, disbursements, and expenses, including reasonable appraisal, attorney and engineering fees actually incurred, in inverse condemnation actions.

New Mexico -- N.M. Stat. Ann. § 42A-1-25 requires courts to award reasonable attorney's fees when the condemnor has abandoned the condemnation proceeding, the proceeding is dismissed for any reason other than a bona fide settlement, or the condemnor is determined not to have the authority to take the property sought.

New York -- Em. Dom. Proc. L. § 701 states that "In instances where the order or award is substantially in excess of the amount of the condemnor's proof and where deemed necessary by the court for the condemnee to achieve just and adequate compensation, the court, upon application, notice and an opportunity for hearing, may in its discretion, award to the condemnee an additional amount, separately computed and stated, for actual and necessary costs, disbursements and expenses, including reasonable attorney, appraiser and engineer fees actually incurred by such condemnee. The application shall include affidavits of the condemnee and all parties that have incurred expenses on the condemnee's behalf, setting forth inter alia the amount of the expenses incurred."

Such litigation expenses are also payable by the condemnor to the condemnee if condemnation proceedings are abandoned or ruled to be unauthorized and in inverse condemnation proceedings, as provided in § 702.

Yonkers v. Zedler, 118 NYS2d 70 (1952 Sup.), held that provision allowing recovery of reasonable and necessary expenses and disbursements should be construed broadly to include expenses of expert witness testimony.

North Carolina -- N.C. Gen. Stat. 40A-8 provides: The court in its discretion may award to the owner a sum to reimburse the owner for charges he has paid for appraisers, engineers and plats, provided such appraisers or engineers testify as witnesses, and such plats are received into evidence as exhibits by order of the court. Subsection (b) provides that if condemnor loses on basis of authority to condemn property, or abandons the action, court shall award the owner such sum that will reimburse the owner for reasonable costs, disbursements, expenses (including attorney, appraisal and engineering fees) and any loss because he was unable to transfer title to the property from the date of filing of the complaint. Such litigation expenses are also compensable in an inverse condemnation action.

Note that § 160A-503 (10) requires payment of reasonable counsel fees in takings of nonresidential redevelopment areas under the Urban Redevelopment Act.

North Dakota -- N.D. Cent. Code § 32-15-32 authorizes the court in its discretion to award reasonable "actual or statutory costs," and attorneys' fees in all judicial proceedings arising from eminent domain actions. If the condemnee/ defendant appeals a decision and loses, it may be taxed with the costs on appeal.

In Cassady v. Souris River Telephone Co-op, 520 N.W.2d 803 (N.D. 1994), the state supreme court held that whether to award attorneys' fees, and the amount of the fees, are within the discretion of the trial court, and the owner's contingency fee arrangement did not control the trial court's award.

Ohio -- Ohio Rev. Code Ann. § 163.21 provides that attorney's fees, witness fees, and other actual expenses are awarded if the condemnation is unsuccessful or is abandoned. A similar provision is set out at § 163.62.

Oklahoma -- Okla. Stat. Ann. title 27, § 11 provides for reimbursement to a landowner of "reasonable attorney, appraisal and engineering fees, actually incurred because of condemnation proceedings" when the jury's award exceeds the court-appointed commissioners' award by ten percent. This section is applicable if the project uses federal, state, or local funds.

Title 66, § 55 specifically allows for the reimbursement of appraisal, engineering, and expert witnesses' fees when the jury award exceeds ten percent of the court appointed commissioners' award. This provision applies to both private corporations and state agencies.

In Williams Natural Gas Co. v. Perkins, 952 P.2d 483 (Okla. 1997), it was held that the condemnee was entitled to attorneys' fees and costs despite the fact that the condemnor's offer exceeded the jury's award because it was greater than the commissioners' award.

Oregon -- Or. Rev. Stat. § 35-275 provides that private condemnors must pay attorney's fees. Under § 35-346, attorney's fees, costs, disbursements, and other reasonable expenses are awarded when there is a trial and the award by the trial court is greater than the highest offer, or if the first offer by the condemnor is made in bad faith. If the defendant prevails on appeal from the trail court, it is entitled to attorney's fees.

Pennsylvania -- Pa. Stat. Ann. tit. 26, § 1-610 provides: "The owner of any right, title, or interest in real property acquired or injured by an acquiring agency, who is not eligible for reimbursement of such fees . . . shall be reimbursed in an amount not to exceed five hundred dollars ($500) as a payment toward reasonable expenses actually incurred for appraisal, attorney and engineering fees."

Such fees are also payable if proceedings are abandoned or if the plaintiff is successful in an inverse condemnation case.

Rhode Island -- No provision for the payment of litigation expenses in general eminent domain proceedings could be located.

South Carolina -- S.C. Code § 28-2-510 (B) provides that if the compensation awarded for the property, exclusive of interest, is at least as close to the highest valuation of the property as that attested to at trial on behalf of the condemnor, a landowner is deemed to have "prevailed." A landowner who prevails in the trial of a condemnation action, in addition to his compensation for the property, may recover his reasonable litigation expenses. The application for payment of expenses must include an itemized statement from an attorney or expert witness stating all actual expenses for which recovery is sought. The court then conducts a separate hearing on the request for expenses and issues an appropriate order. The amount requested may be reduced or denied if the court finds that the landowner engaged in conduct which unduly and unreasonably protracted the final resolution of the action, if the condemnor's position was substantially justified, or that special circumstances make an award unjust.

Also, if the court finds that the condemnor does not have the right to take the property, or did not raise and litigate the right to take issue in good faith, the landowner's reasonable costs and litigation expenses shall be paid to the landowner.

South Dakota -- S.D. Codified Laws § 21-35-23 provides that if the amount of compensation awarded to the condemnee is twenty percent greater than the condemnor's final offer, and if the total award exceeds $700, the court shall allow reasonable attorney fees and compensation for not more than two expert witnesses, all as determined by the court.

Under § 21-35-22, expenses and fees, including attorney's fees, shall be paid to the condemnee if the condemnor dismisses proceedings.

Tennessee -- Tenn. Code Ann. § 29-17-812 provides that attorney, appraiser, and engineering fees shall be paid to the owner if the condemnor abandons the proceedings or is held to be unauthorized to acquire the property by condemnation.

Texas -- Tex. Prop. Code Ann. § 21.019 provides for the payment of "reasonable and necessary fees for attorneys, appraisers, and photographers and for the other expenses incurred by the property owner" if the condemnor dismisses a proceeding.

§ 21.047 provides:

(a) Special commissioners may adjudge the costs of an eminent domain proceeding against any party. If the commissioners award greater damages than the condemnor offered to pay before the proceedings began or if the decision of the commissioners is appealed and a court awards greater damages than the commissioners awarded, the condemnor shall pay all costs. If the commissioners' award or the court's determination of the damages is less than or equal to the amount the condemnor offered before proceedings began, the property owner shall pay the costs.

(b) A condemnor shall pay the initial cost of serving a property owner with notice of a condemnation proceeding. If the property owner is ordered to pay the costs of the proceeding, the condemnor may recover the expense of notice from the property owner as part of the costs.

(c) A court that has jurisdiction of an eminent domain proceeding may tax $10 or more as a reasonable fee for each special commissioner as part of the court costs of the proceeding.

Note that the Texas legislation does not define "costs" as including attorneys' fees and other litigation expenses.

Utah -- Code Ann. § 78-34-16 provides that attorney's fees are awarded upon abandonment.

Vermont -- Vt. Stat. Ann. 19 § 230 provides that attorney's fees are awarded to successful plaintiffs in inverse condemnation cases.

Virginia -- § 25-46.34 allows the payment of attorneys' and expert witness fees is actions are abandoned:

(a) If no hearing has begun in the trial of the issue of just compensation for the taking or damaging of property or property interest and the petitioner has not already acquired the title or a lesser interest or estate in or taken possession of such property, the petitioner may upon motion obtain, as a matter of right, an order dismissing the proceeding as to such property, which order shall also provide except in a settlement by agreement of the parties that the petitioner shall pay such owner or owners their reasonable expenses which have been actually incurred by them in preparing for the trial on the issue of just compensation, in such amounts as the court deems just and reasonable.

(b) At any time after a hearing has begun in the trial of the issue of just compensation for the taking or damaging of any property or property interest, the petitioner not having already acquired the title or a lesser interest or estate in or taken possession of such property, or paid the amount of just compensation into court, and before the time for noting an appeal from any final order upon a report of just compensation, the petitioner may, upon motion, obtain as a matter of right an order dismissing the proceedings as to such property, which order shall also provide that the petitioner shall pay such owner or owners for the following expenses which have been actually incurred by them in such amounts as the court deems just and reasonable: attorney's fee, witness fees including reasonable expert witness fees, not exceeding three, and other reasonable expenses and compensation for time spent as a result of the condemnation proceedings. If any such expenses are not paid within thirty days of the entry of such order, judgment therefor shall be entered against the petitioner.

(c) In the event the petitioner fails to pay to the parties entitled thereto, or into court, the amount of the award of just compensation before the time for noting an appeal from any final order upon the report of just compensation, the owner or owners of the property to be taken or affected may, upon

motion, obtain as a matter of right an order dismissing the proceeding as to such property, which order shall also provide that the petitioner shall pay such owner or owners his expenses as provided in subsection (b) of this section. If any such expenses are not paid within thirty days of the entry of such order, judgment therefor shall be entered against the petitioner.

(d) Before the vesting of title, or a lesser interest or estate in any tract or parcel of land in the manner prescribed in this chapter, the proceedings may be dismissed, in whole or in part, as to any such property upon the filing of a stipulation of dismissal by the parties affected thereby; and, if such parties so stipulate, the court may vacate any order that has been entered.

Under the Uniform Relocation Assistance Act, § 25-250 states: Where a condemnation proceeding is instituted by a state agency, on or after April 10, 1972, to acquire real property for such use and (1) the final judgment is that the real property cannot be acquired by condemnation or (2) the proceeding is abandoned, the owner of any right, title or interest in such real property shall be paid 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. The award of such sums will be paid by the state agency which sought to condemn the property.

The Uniform Act also provides that such expenses are payable to successful plaintiffs in inverse condemnation actions:

§ 25-251: Where a declaratory judgment proceeding is instituted pursuant to § 8.01-187 by the owner of any right, title or interest in real property because of use of his property, on or after April 10, 1972, in any program or project undertaken by a state agency the court, rendering a judgment for the plaintiff in such proceeding and awarding compensation for the taking of property, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will, in the opinion of the court or the Attorney General, as the case may be, reimburse such plaintiff for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred because of such proceeding.

Washington -- Wash. Rev. Code Ann. § 8.25.070 provides:

(1) Except as otherwise provided in subsection (3) of this section, if a trial is held for the fixing of the amount of compensation to be awarded to the owner or party having an interest in the property being condemned, the court shall award the condemnee reasonable attorney's fees and reasonable expert witness fees in the event of any of the following:

(a) If condemnor fails to make any written offer in settlement to condemnee at least thirty days prior to commencement of said trial; or

(b) If the judgment awarded as a result of the trial exceeds by ten percent or more the highest written offer in settlement submitted to those condemnees appearing in the action by condemnor in effect thirty days before the trial.

(2) The attorney general or other attorney representing a condemnor in effecting a settlement of an eminent domain proceeding may allow to the condemnee reasonable attorney fees.

(3) Reasonable attorney fees and reasonable expert witness fees authorized by this section shall be awarded only if the condemnee stipulates, if requested to do so in writing by the condemnor, to an order of immediate possession and use of the property being condemned within thirty days after receipt of the written request, or within fifteen days after the entry of an order adjudicating public use whichever is later and thereafter delivers possession of the property to the condemnor upon the deposit in court of a warrant sufficient to pay the amount offered as provided by law. In the event, however, the condemnor does not request the condemnee to stipulate to an order of immediate possession and use prior to trial, the

condemnee shall be entitled to an award of reasonable attorney fees and reasonable expert witness fees as authorized by subsections (1) and (2) of this section.

(4) Reasonable attorney fees as authorized in this section shall not exceed the general trial rate, per day customarily charged for general trial work by the condemnee's attorney for actual trial time and his or her hourly rate for preparation. Reasonable expert witness fees as authorized in this section shall not exceed the customary rates obtaining in the county by the hour for investigation and research and by the day or half day for trial attendance.

(5) In no event may any offer in settlement be referred to or used during the trial for any purpose in determining the amount of compensation to be paid for the property.

In inverse condemnation suits, a successful plaintiff is entitled to reasonable attorneys' fees and reasonable expert witness fees. Snohoimish v. Joslin, 9 Wash. App. 495, 513 P.2d 293.

Under § 8.25.075, awards of attorneys' fees are authorized if the condemnor is held not to be able to acquire the property or the proceeding is abandoned.

West Virginia -- No provision for the payment of attorneys' fees.

Wisconsin -- Under § 32.28 litigation expenses (the sum of the costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees necessary to prepare for or participate in actual or anticipated proceedings before the condemnation commissioners, board of assessment or any court) shall be awarded to the condemnee if:

(a) The proceeding is abandoned by the condemnor;

(b) The court determines that the condemnor does not have the right to condemn part or all of the property described in the jurisdictional offer or there is no necessity for its taking;

(c) The judgment is for the plaintiff in an (inverse condemnation) action . . . ;

(d) The award of the condemnation commission . . . exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least $700 and at least 15% and neither party appeals the award to the circuit court;

(e) The jury verdict as approved by the court . . . exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least $700 and at least 15%;

(f) The condemnee appeals an award of the condemnation commission which exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least $700 and at least 15%, if the jury verdict as approved by the court . . .exceeds the award of the condemnation commission by at least $700 and at least 15%;

(g) The condemnor appeals the award of the condemnation commission, if the jury verdict as approved by the court . . . exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least $700 and at least 15%; [or]

(h) The condemnee appeals an award of the condemnation commission which does not exceed the jurisdictional offer or the highest written offer prior to the jurisdictional offer by 15%, if the jury verdict as approved by the court . . . exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least $700 and at least 15%. . . .

Wyoming -- Wy. Stat. § 1-26-512(a) requires payment of attorneys' fees in the event of a rescission of a resolution authorizing condemnation. Section 1-26-516 provides that the owner of land shall be granted litigation expenses in inverse condemnation cases.

FLORIDA DEPARTMENT OF \NSPORTATION
RIGHT OF WAY EXPENDITURES

FISCAL YEAR 96/97							
DISTRICT	LAND/IMPROVEMENTS/ SEVERANCE	BUSINESS DAMAGES	LANDOWNER ATTORNEY FEES	LANDOWNER APPRAISER FEES	LANDOWNER OTHER COSTS	TOTAL FEES AND COSTS	TOTAL
1	38,523,555.89	1,108,924.07	3,692,679.63	1,321,195.38	1,277,480.80	6,291,355.81	45,923,835.77
2	24,242,612.90	3,321,000.00	2,038,545.83	653,898.78	585,587.04	3,278,031.65	30,841,644.55
3	7,324,321.50	336,901.17	1,352,022.68	457,292.96	509,317.34	2,318,632.98	9,979,855.65
4	31,103,915.67	3,593,495.58	5,310,355.45	1,157,629.66	2,084,891.38	8,552,876.49	43,250,287.74
5	15,310,496.92	1,677,268.80	3,864,891.92	1,598,415.33	2,160,023.62	7,623,330.87	24,611,096.59
6	17,894,378.00	279,789.50	1,130,838.17	263,150.79	207,323.31	1,601,312.27	19,775,479.77
7	36,854,388.02	4,840,900.86	10,590,141.38	2,226,141.15	2,090,763.37	14,907,045.90	56,602,334.78
Turnpike	32,347,517.10	1,271,300.10	5,034,420.75	1,438,581.76	1,464,070.01	7,937,072.52	41,555,889.72
Statewide	203,601,186.00	16,429,580.08	33,013,895.81	9,116,305.81	10,379,456.87	52,509,658.49	272,540,424.57
	Parcels Acquired:	2,509		Negotiation Rate:	64%		

FLORIDA DEPARTMENT OF TRANSPORTATION
RIGHT OF WAY EXPENDITURES

FISCAL YEAR 97/98							
DISTRICT	LAND/IMPROVEMENTS/ SEVERANCE	BUSINESS DAMAGES	LANDOWNER ATTORNEY FEES	LANDOWNER APPRAISER FEES	LANDOWNER OTHER COSTS	TOTAL FEES AND COSTS	TOTAL
1	30,402,428.16	2,714,851.01	5,827,230.81	1,537,075.18	1,451,343.90	8,815,649.89	41,932,929.06
2	17,495,918.48	213,253.60	2,210,560.85	604,019.98	525,892.12	3,340,472.95	21,049,645.03
3	14,520,813.96	633,147.95	1,798,367.19	556,147.46	1,128,274.78	3,482,789.43	18,636,751.34
4	30,096,495.15	6,030,940.64	4,769,525.44	1,116,094.30	1,922,370.30	7,807,990.04	43,935,425.83
5	48,925,089.42	532,550.00	3,324,381.56	1,132,366.37	1,441,147.89	5,897,895.82	55,355,535.24
6	28,181,649.00	1,583,859.00	776,401.16	114,588.00	374,750.61	1,265,739.77	31,031,247.77
7	33,550,656.41	6,006,212.94	8,888,547.35	2,860,774.83	3,159,516.28	14,908,838.46	54,465,707.81
Turnpike	51,276,482.01	1,076,923.42	7,202,403.08	1,397,460.39	2,369,561.65	10,969,425.12	63,322,830.55
Statewide	254,449,532.59	18,791,738.56	34,797,417.44	9,318,526.51	12,372,857.53	56,488,801.48	329,730,072.63
	Parcels Acquired:	2,429		Negotiation Rate:	58%		

APPENDIX G

VIRGINIA RIGHT OF WAY ACQUISITION SUMMARY

LINE NAME	YEAR	VOLT. (KV)	TOTAL LINE MILEAGE	TOTAL NO. OF PROP. OWNERS PER LINE	TOTAL NO. OF PROP. OWNERS CONDEMNED PER LINE
Dan River-Fieldale Relocation	74-75	138	0.96	8	0
Pipers Gap-Pulaski	74-75	138	2.33	11	0
Cloverdale-Joshua Falls	76-77	765	56.65	301	11
Catawba-Cove Road	75-76	138	3.82	40	0
Copper Ridge Tap	76	138	0.06	1	0
Brush Tavern Tap	77-78	138	2.89	14	0
Gomingo-Joshua Falls	78	138	2.69	14	0
East Lynchburg-Joshua Falls	78	138	3.03	7	0
East Monument Loop	78	138	0.93	2	0
Skeggs Branch Tap	78	138	0.37	1	0
Jacksons Ferry-Pipers Gap	79	138	10.00	42	0
Jacksons Ferry-Pulaski-Wurno	79	138	14.03	69	1
Broadford-Richlands	79-80	138	14.45	53	0
Hales Branch-Richlands	81-82	138	14.18	71	0
Jim Branch-Switchback	78	138	16.81	5	0
Axton-Jacksons Ferry	82-83	765	73.47	413	31
Axton-Martinsville Tie Line	83	138	3.40	8	0
Axton-Danville #2	84-85	138	17.60	86	0
Claypool Hill Tap	85	138	0.06	2	0
Rustburg Tap	86	138	4.46	14	0
Dickens-Sexton	87	138	3.48	18	0
West Salem Loop	86	138	0.27	3	0
Bonsack Loop	89	138	0.33	2	0
Grassy Hill Loop & Tank Hill Tap	89	138	1.29	15	0
Cloverdale-Trinity	91	138	5.24	19	0
Meadowview Loop	91	138	3.12	17	5
Hales Branch-Looney Creek	92-93	138	9.68	38	4
Mount Union-Trinity	92-93	138	4.07	39	0
Atkins Loop	92	138	0.43	3	0
Austinville Loop	94	138	0.06	1	0
Boxwood-Riverville	93	138	2.54	15	0
Cloverdale-Mount Union	95-96	138	2.21	21	0
Cloverdale-Huntington Court	94	138	6.00	79	0
Mount Airy Loop	95	138	0.03	1	0
Huffman Loop	95	138	1.88	9	0
Penhook-Smith Mountain	97	138	6.55	4	2
Celanese-Peters Mountain	96	138	3.55	11	0
Oak Level Loop	96	138	0.18	1	0
Evington Tap	97	138	0.03	2	0
Eagle Springs Switching Station	96	138	0.10	1	0
Grassy Creek-Hales Branch	96	138	2.17	13	0
Huffman-Willis Gap	97-98	138	14.13	68	0
Hazel Hollow Loop	97	138	0.08	2	0

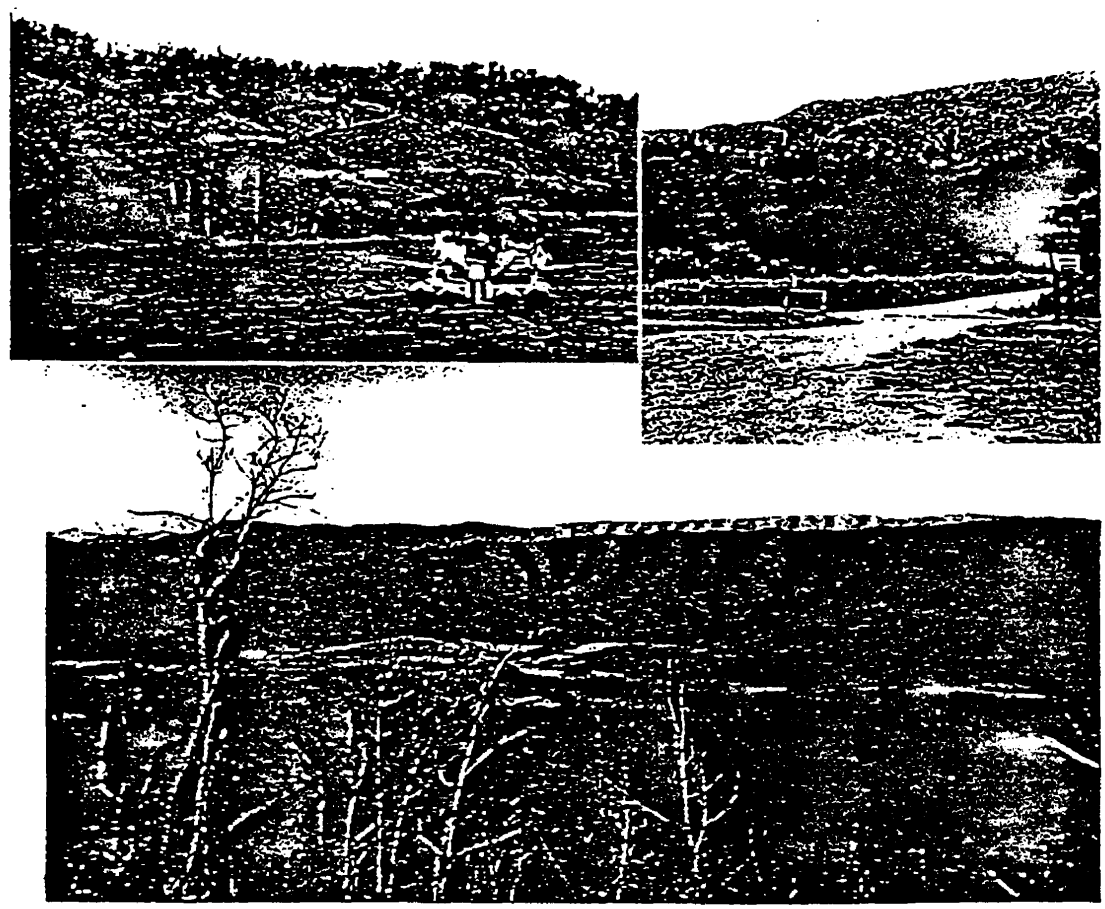
TOTAL LINE MILEAGE	309.60
TOTAL PROPERTY OWNERS PER LINE	1544
TOTAL PROPERTY OWNERS CONDEMNED	54
PERCENTAGE OF PROPERTY OWNERS CONDEMNED	3.50%

DRAFT ENVIRONMENTAL IMPACT STATEMENT

APCo 765 kV Transmission Line

VOLUME III

CHAPTER 4.0 ENVIRONMENTAL CONSEQUENCES
CHAPTER 5.0 LIST OF CONTRIBUTORS
CHAPTER 6.0 CONSULTATION AND COORDINATION
CHAPTER 7.0 GLOSSARY
CAHPTER 8.0 REFERENCES
CAHPTER 9.0 INDEX



Prepared by
U.S. Forest Service
George Washington & Jefferson National Forests

In cooperation with the:
National Park Service
and U.S. Army Corps of Engineers

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through 6, Botetourt County by all alternatives almost equally, and Roanoke County would be affected by 11 out of the 13 alternatives.

The portion of the transmission line which is located in counties with the highest (20 percent or greater) percent population under poverty status varies little by alternative. Alternative 5 has the greatest length (84 miles) and Alternatives 7 and 8 have the least (65 miles).

As mentioned above, in the absence of a precise route, the determination of exact impacts on minority/low-income populations is not possible. Analysis with county-level data is very general, and does not reveal all impacts. For instance Craig, Roanoke, and Botetourt counties generally have low percentages of their population below poverty level, and therefore in a corridor level comparison, it may be argued that those alternatives/segments that are located in these counties would generally have lesser impacts on low-income groups as these groups are present in these counties in lower numbers. However, since the transmission line routes have been developed to avoid high density areas and have been proposed for rural areas, the rural areas through which the line would pass could be the areas where low-income populations are concentrated in these counties. Despite this obvious drawback associated with county-level analysis, the analysis provided above is considered valid because it allows the reader to compare alternatives to see which alternative has a greater likelihood of affecting minority/low-income populations.

Federal actions for the proposed project would be limited to the location of the facilities on federal lands. Federal lands in the project area are not populated, therefore there would be little, if any, effects on minority/low income population from the project on federal lands.

4.11.2.5 Impacts on Property Values

The potential impacts of the proposed project on the value of real estate properties was identified as an issue during public scoping; in general, the concern was the potential decline in property values due to the proximity of the transmission line. There is no generally accepted methodology or standard analytical technique for identifying electrical transmission line property value impacts, nor is there consensus on whether such impacts occur. However, published research, specific property value case studies of existing transmission lines in Virginia, court cases dealing with property value effects of transmission lines, and other available literature were reviewed to assess this concern. All studies reviewed for this EIS are listed in the reference section. The findings from this review are summarized here.

The available literature summarizes two types of potential adverse economic effects on property from high voltage transmission lines: 1) a possible decrease in the value of the property; and 2) an increase in the time required to sell property located in the affected area causing an economic loss associated with the increased marketing time. Originally, these effects were considered to be associated only with visual reaction to lines and transmission towers. More recently, these effects

are also being associated with the public concerns of potential health effects caused by electric and magnetic fields (EMF) from powerlines.

Studies have been conducted since the 1950s on the effects of powerlines on property values, and a systematic body of research has developed on the topic since 1975 (Kroll and Priestley, 1992). Until the last decade, most studies had focused on visual effects and associated value loss. More recent studies have also begun to focus on EMF and its role in affecting property values. In general, these studies investigated the following questions:

- Is there a property value effect?
- If so, what is the magnitude of this effect?
- What are the characteristics of the transmission line that lead to an effect?
- Are some types of properties more vulnerable to property value effects than others?

The past studies have ranged widely from those focused on 65 kV lines to high voltage transmission lines. Kroll and Priestly note that existing studies provide little evidence that the level of impact is directly related to line voltage, but also state that the relationship between line characteristics such as voltage, height, etc. and the impact on property values has not been systematically researched (Kroll and Priestley, 1992). Property value studies have been conducted by financial institutions, real estate economists, and independent researchers, as well as by industry organizations such as the Edison Electric Institute and the Electric Power Research Institute (EPRI). Still other studies have been commissioned by various electric utility companies. These studies of property value impacts generally fall into three categories:

1. Studies using paired sales analysis or appraisal techniques involve comparing impact area properties with control area properties on the variable being studied (i.e., price differentials or average time involved in selling property). Studies completed since 1975 have covered many regions in the U.S. About half of the studies concluded that transmission lines do not affect property values, and that price differentials are small (5 percent or less) for residential properties. The criticism leveled against these studies is that their reliability is limited, often due to small sample size and lack of statistical analysis to verify results (Kinnard and Dickey, 1995; Kroll and Priestley, 1992).

2. Survey/opinion polling or attitudinal studies interview buyers and sellers to determine their likely behavior in given situations. The number of these studies is small and their results are inconsistent – some studies indicate that the respondents are not concerned about transmission lines; others conclude that the majority of those surveyed felt that the transmission lines would eventually (or had already) adversely affected property values. These studies are highly subjective and suggest what buyers would do only in certain situations. Actual buyer behavior has not been found to closely match the results of these studies. In fact, researchers note that whatever property value effects may eventually occur are considerably less than those suggested by the results from attitudinal studies (Kinnard and Dickey, 1995).

3. Market impact or statistical studies use multiple regression analysis, comparison of means, and other more rigorous statistical analyses. These studies use historical data on sales of properties in both impact and control areas, and examine the proportion of price differences that can be explained by a set of independent variables including location in an affected area and distance from powerlines. These studies also attempt to describe the change in effect with distance from the powerline. As with other techniques, the results of these studies have also varied from no effect to a significant loss of property value for single-family homes and agricultural lands (Kroll and Priestley, 1992; Kinnard and Dickey, 1995).

Overall (regardless of methodology or geographic area), some studies suggested little or no effect on property values while others reported large declines in the value of properties near powerlines (Kinnard and Dickey, 1995; Kroll and Priestley, 1992). Some studies found that, although the effect could vary from a 5 to 9 percent property value decline up to 200 feet from the edge of the ROW, visual screening could diminish the effect and that the effect could even disappear over time (Kinnard and Dickey, 1995). A 1979 study showed that median prices of homes increased with distance from the powerline and that beyond 200 feet, there was no discernible difference in the median selling price of homes (Colwell and Foley, 1979). Research has also indicated that the more informed a potential buyer is with respect to EMF, the less likely the buyer is to be deterred from buying property near powerlines (Kinnard and Dickey, 1995). In general, the following findings emerge from the literature:

- Transmission lines have a greater potential to reduce the value or sales price of urban and residential properties over other types of properties; rural and agricultural properties are relatively less affected, while many open space or resource management uses are not affected at all (e.g., timberlands, rangeland, wildlife preserves)

- The overall average property value effect for single-family residential properties is generally cited as being less than 10 percent, but in some cases has been 15 percent or more

- Effects are most likely to occur for properties crossed by, or immediately adjacent to, the line but some effects have been measured at longer distances

- Effects are generally greater for smaller properties than for larger parcels

- Effects are greatest immediately after construction but decrease over time

- Effects vary widely with area or regional and national locations, so findings from one area cannot readily be generalized to other areas

- Concern or public fear of EMF effects has been well documented, even though there is no consensus of opinion on actual health or safety effects created by EMF (refer to Section 4.16 for more discussion).

Many independent researchers believe that the question of economic value effects related to public concerns or fear of EMF will ultimately have to be resolved by additional studies in the future.

Studies of property value effects of existing powerlines in VA were conducted by the applicant in 1975 and 1992, specifically to determine changes in property values from the construction of a 765 kV powerline in Bedford, Smyth, and Wythe counties, VA. One study examined residential properties in four subdivisions and compared them with subdivisions in control areas using paired sales analysis. The study revealed no discernible difference in prices but a clear indication that it took longer to sell properties near the line versus those in the control area (Thompson, 1992). The second study focused on rural acreage parcels in Bedford County, VA, and examined average price per acre of land before and after the construction of the transmission line. This study concluded that the transmission line had resulted in little change in value to the remaining property, and generally showed no decrease in the value of land (Lipscomb, 1992). The third study, an attitudinal study of property owners with lands along a 765 kV line, also showed no perception of loss of property value except for one property (Thompson, 1975).

The possibility of actual personal injury and potential property value losses due to transmission line EMF effects and other factors have been litigated for several years without reaching consensus or generally accepted conclusions. Court opinions issued have fallen into three categories with respect to fear: 1) compensable, whether based on reasonable grounds or not; 2) compensable, only if based on reasonable grounds; and 3) not compensable, whether reasonable or not (Freeman, 1990). In earlier court cases involving EMF, the courts ruled that to receive damages, the plaintiff (generally, property owners) must prove that fear about cancer from EMF is genuine and reasonable, and that some vague and unfounded fear cannot form the basis for recovery of damages. The courts required property-selling claimants to prove that potential property buyers had reasonable grounds for apprehension, and that this apprehension affected the price the buyer would be willing to pay (Covaleski, 1994).

In the last few years, there have been cases in some states (notably New York) where the court ruled that the plaintiff could seek damages for a decrease in market value of the property caused merely by a fear that the powerlines may cause cancer even if such a fear was not medically or scientifically reasonable, as well as cases with completely opposite rulings (e.g., California). The argument taken in these lawsuits is that the fear itself, though unfounded, could depress property values (Criscuola v. New York Power Authority; Wilsey v. Kansas City Power and Light Co.; Ryan v. Kansas City Power and Light Co.; and Florida Power and Light Co. v. Jennings). The courts have noted that adverse health effects are not the issue in eminent domain proceedings, but rather full compensation to the land owner for property taken (McEvoy, 1994). At the same time, some courts also ruled that the personal fear of an individual was not admissible to prove fear in the marketplace, but that the plaintiff must provide evidence that the property near (or across from)

where powerlines were built has been negatively affected relative to properties without (or away from) powerlines. As of 1995, there are 12 states (including VA) and a 1959 decision by the 6th U.S. Court of Appeals that allow plaintiffs to seek damages for declines in property values based on fear of transmission lines. Four states – Alabama, Florida, Illinois, and West Virginia – require plaintiffs to prove that the public's fear is reasonable (Lenckus, 1993).

Although the specific studies of 765 kV lines in VA do not suggest the possibility of property value impacts, the available research and court rulings suggest that some unknown (and therefore, unquantifiable) effect on property values is possible from implementation of the proposed project. The exact magnitude of this potential impact cannot be predicted for several reasons. First, effects on specific properties can vary widely because of many other factors such as physical desirability, lot size and configuration, exact location of the line or tower relative to the remaining parcel, distance from the line, and overall market conditions in the area. Second, effects also vary with type of land use (e.g., residential, agricultural, commercial). Because the precise alignment for the proposed project has not yet been established, conclusions about potential property value effects would be speculative and premature (and thus, would conflict with CEQ guidelines about NEPA impact analysis). In general, significant property value effects are probably unlikely because most of the alternative corridors traverse rural acreage (which tends to be less affected in property value). Those alternatives having more segments in more densely settled residential areas have a higher potential to create property value impacts than alternatives having more segments in the sparsely populated rural areas. The southerly alternatives (Alternatives 11, 12, and 13) and the northerly alternatives (Alternatives 5, 6, 7, and 8) have a greater potential for adverse economic effects.

Neither the likelihood nor the magnitude of property value impacts can be predicted with certainty, but "prudent avoidance" through siting the project on lands with low property value sensitivity could mitigate potential impacts on property values. Prudent avoidance, a term coined in 1989 by the Congress' Office of Technology Assessment, was a concept developed to address the EMF issue and is defined as "striking of a reasonable balance between avoiding potential harm and its attendant costs and risks" (Freeman, 1990). Proponents of prudent avoidance argue that, given the uncertainty of medical evidence, expensive mitigation measures (such as burying the powerline) would be an excessive expenditure of rate payers' funds. These proponents recommend that, until medical and scientific evidence becomes available to resolve the EMF issue, other prudent measures to avoid impacts should be examined. Prudent avoidance could also be used to mitigate unknown property value effects. For new facilities (such as powerlines), prudent measures would include "avoidance siting" by distancing the facilities from residential and urban populations. This can be achieved in two ways: 1) acquiring more land so as to create a "safe corridor"; or 2) selecting a route that affects less densely settled areas. For the proposed project, the second option (avoidance via siting) is suggested as a possible first step to be considered by the State Corporation Commissions, and the first option (creation of a "safe corridor") as a second step, as needed.

NIEHS REPORT on

Health Effects from Exposure to Power-Line Frequency Electric and Magnetic Fields

Prepared in Response to the 1992 Energy Policy Act
(PL 102-486, Section 2118)

National Institute of Environmental Health Sciences
National Institutes of Health

Dr. Kenneth Olden, Director

Prepared by the
NIEHS EMF-RAPID Program Staff

NIH Publication No. 99-4493

Supported by the NIEHS/DOE

EXECUTIVE SUMMARY

Introduction

Electrical energy has been used to great advantage for over 100 years. Associated with the generation, transmission, and use of electrical energy is the production of weak electric and magnetic fields (EMF). In the United States, electricity is usually delivered as alternating current that oscillates at 60 cycles per second (Hertz, Hz) putting fields generated by this electrical energy in the extremely low frequency (ELF) range.

Prior to 1979 there was limited awareness of any potential adverse effects from the use of electricity aside from possible electrocution associated with direct contact or fire from faulty wiring. Interest in this area was catalyzed with the report of a possible association between childhood cancer mortality and proximity of homes to power distribution lines. Over the next dozen years, the U.S. Department of Energy (DOE) and others conducted numerous studies on the effects of ELF-EMF on biological systems that helped to clarify the risks and provide increased understanding. Despite much study in this area, considerable debate remained over what, if any, health effects could be attributed to ELF-EMF exposure.

In 1992, the U.S. Congress authorized the Electric and Magnetic Fields Research and Public Information Dissemination Program (EMF-RAPID Program) in the Energy Policy Act (PL 102-486, Section 2118). The Congress instructed the National Institute of Environmental Health Sciences (NIEHS), National Institutes of Health and the DOE to direct and manage a program of research and analysis aimed at providing scientific evidence to clarify the potential for health risks from exposure to ELF-EMF. The EMF-RAPID Program had three basic components: 1) a research program focusing on health effects research, 2) information compilation and public outreach and 3) a health assessment for evaluation of any potential hazards arising from exposure to ELF-EMF. The NIEHS was directed to oversee the health effects research and evaluation and the DOE was given the responsibility for overall administration of funding and engineering research aimed at characterizing and mitigating these fields. The Director of the NIEHS was mandated upon completion of the Program to provide a report outlining the

possible human health risks associated with exposure to ELF-EMF. This document responds to this requirement of the law.

This five-year effort was signed into law in October 1992 and provisions of this Act were extended for one year in 1997. The Program ended December 31, 1998. The EMF-RAPID Program was funded jointly by Federal and matching private funds and has been an extremely successful Federal/private partnership with substantial financial support from the utility industry. The NIEHS received $30.1 million from this program for research, public outreach, administration and the health assessment evaluation of ELF-EMF. In addition to EMF-RAPID Program funds from the DOE, the NIEHS contributed $14.5 million for support of extramural and intramural research including long-term toxicity studies conducted by the National Toxicology Program.

NIEHS Conclusion

The scientific evidence suggesting that ELF-EMF exposures pose any health risk is weak. The strongest evidence for health effects comes from associations observed in human populations with two forms of cancer: childhood leukemia and chronic lymphocytic leukemia in occupationally exposed adults. While the support from individual studies is weak, the epidemiological studies demonstrate, for some methods of measuring exposure, a fairly consistent pattern of a small, increased risk with increasing exposure that is somewhat weaker for chronic lymphocytic leukemia than for childhood leukemia. In contrast, the mechanistic studies and the animal toxicology literature fail to demonstrate any consistent pattern across studies although sporadic findings of biological effects (including increased cancers in animals) have been reported. No indication of increased leukemias in experimental animals has been observed.

The lack of connection between the human data and the experimental data (animal and mechanistic) severely complicates the interpretation of these results. The human data are in the "right" species, are tied to "real-life" exposures and show some consistency that is difficult to ignore. This assessment is tempered by the observation that given the weak magnitude of these increased risks, some other factor or common source of error could explain these findings. However, no consistent explanation other than exposure to ELF-EMF has been identified.

Epidemiological studies have serious limitations in their ability to demonstrate a cause and effect relationship whereas laboratory studies, by design, can clearly show that cause and effect are possible. Virtually all of the laboratory evidence in animals and humans and most of the mechanistic work done in cells fail to support a causal relationship between exposure to ELF-EMF at environmental levels and changes in biological function or disease status. The lack of consistent, positive findings in animal or mechanistic studies weakens the belief that this

association is actually due to ELF-EMF, but it cannot completely discount the epidemiological findings.

The NIEHS concludes that ELF-EMF exposure cannot be recognized as entirely safe because of weak scientific evidence that exposure may pose a leukemia hazard. In our opinion, this finding is insufficient to warrant aggressive regulatory concern. However, because virtually everyone in the United States uses electricity and therefore is routinely exposed to ELF-EMF, passive regulatory action is warranted such as a continued emphasis on educating both the public and the regulated community on means aimed at reducing exposures. The NIEHS does not believe that other cancers or non-cancer health outcomes provide sufficient evidence of a risk to currently warrant concern.

The interaction of humans with ELF-EMF is complicated and will undoubtedly continue to be an area of public concern. The EMF-RAPID Program successfully contributed to the scientific knowledge on ELF-EMF through its support of high quality, hypothesis-based research. While some questions were answered, others remain. Building upon the knowledge base developed under the EMF-RAPID Program, meritorious research on ELF-EMF through carefully designed, hypothesis-driven studies should continue for areas warranting fundamental study including leukemia. Recent research in two areas, neurodegenerative diseases and cardiac diseases associated with heart rate variability, have identified some interesting and novel findings for which further study is ongoing.

Background

Program Oversight and Management

The 1992 Energy Policy Act created two committees to provide guidance and direction to this program. The first, the Interagency Committee (IAC), was established by the President of the United States and composed of representatives from the NIEHS, the DOE and seven other Federal agencies with responsibilities related to ELF-EMF. This group receives the report from the NIEHS Director and must prepare its own report for Congress. The IAC had responsibility for developing a strategic research agenda for the EMF-RAPID Program, facilitating interagency coordination of Federal research activities and communication to the public and monitoring and evaluating the Program.

The second committee, the National EMF Advisory Committee (NEMFAC), consisted of representatives from public interest groups, organized labor, state governments and industry. This group was involved in all aspects of the EMF-RAPID Program providing advice and critical review to the DOE and the NIEHS on the design and implementation of the EMF-RAPID Program's activities.

ELF-EMF Health Effects Research

The EMF-RAPID Program's health effects research initiative relied upon accepted principles of hazard identification and risk assessment to establish priorities. All studies supported by the NIEHS and the DOE under this program were selected for their potential to provide solid, scientific data on whether ELF-EMF exposure represents a human health hazard, and if so, whether risks are increased under exposure conditions in the general population. Research efforts did not focus on epidemiological studies (i.e. those in the human population) because of time constraints and the number of ongoing, well-conducted studies. The NIEHS health effects research program focused on mechanistic, cellular and laboratory studies in the areas of neurophysiology, behavior, reproduction, development, cellular research, genetic research, cancer and melatonin. Mechanistic, cellular and laboratory studies are part of the overall criteria used to determine causality in interpreting epidemiological studies. In this situation, the most cost-effective and efficient use of the EMF-RAPID Program's research funds was clearly for trying to clarify existing associations identified from population studies. The DOE research initiatives focused on assessment of exposure and techniques of mitigation.

The EMF-RAPID Program through the combined efforts of the NIEHS and the DOE radically changed and markedly improved the quality of ELF-EMF research. This was accomplished by providing biological and engineering expertise to investigators and emphasizing hypothesis-driven, peer-reviewed research. Four regional facilities were also set-up where state-of-the-art magnetic field exposure systems were available for in-house and outside investigators to conduct mechanistic research. The EMF-RAPID Program through rigorous review and use of multi-disciplinary research teams greatly enhanced the understanding of the interaction of biological systems with ELF-EMF.

Information Dissemination and Public Outreach

The EMF-RAPID Program provided the public, regulated industry and scientists with useful, targeted information that addressed the issue of uncertainty regarding ELF-EMF health effects. Two booklets, a question and answer booklet on ELF-EMF and a layman's booklet addressing ELF-EMF in the workplace, were published. A telephone information line for ELF-EMF was available where callers could request copies of ELF-EMF documents and receive answers to standard questions from operators. The NIEHS also developed a web-site for the EMF-RAPID Program where all of the Program's documents are on-line and links are available to other useful sites on ELF-EMF. Efforts were made to include the public in EMF-RAPID Program activities through sponsorship of scholarships to meetings; holding open, scientific workshops; and setting aside a two-month period for public comment and review on ELF-EMF and the workshop reports. In addition, the NIEHS sponsored attendance of NEMFAC

members at relevant scientific meetings and at each of the public comment meetings.

Health Risk Assessment of ELF-EMF Exposure

In preparation of the NIEHS Director's Report, the NIEHS developed a process to evaluate the potential health hazards of ELF-EMF exposure that was designed to be open, transparent, objective, scholarly and timely under the mandate of the 1992 Energy Policy Act. The NIEHS used a three-tiered strategy for collection and evaluation of the scientific information on ELF-EMF that included: 1) three science review symposia for targeted ELF-EMF research areas, 2) a working group meeting and 3) a period of public review and comment. Each of the three symposia focused on a different, broad area of ELF-EMF research: mechanistic and cellular research (24-27 March 1997, Durham, NC), human population studies (12-14 January 1998, San Antonio, TX) and laboratory human and clinical work (6-9 April 1998, Phoenix, AZ). These meetings were aimed at including a broad spectrum of the research community and the public in the evaluation of ELF-EMF health hazards, identifying key research findings and providing opinion on the quality of this research. Discussion reports from small discussion groups held for specific topics were prepared for each meeting.

Following the symposia, a working group meeting (16-24 June 1998, Brooklyn Park, MN) was held where a scientific panel reviewed historical and novel evidence on ELF-EMF and determined the strength of the evidence for human health and biological effects. Stakeholders and the public attended this meeting and were given the opportunity to comment during the process. The Working Group conducted a formal, comprehensive review of the literature for research areas identified from the symposia as being important to the assessment of ELF-EMF-related biological or health effects. Separate draft documents covering areas of animal carcinogenicity, animal non-cancer findings, physiological effects, cellular effects, theories and human population studies (epidemiology studies) in children and adults for both occupational and residential ELF-EMF exposures were rewritten into a single book. The Working Group characterized the strength of the evidence for a causative link between ELF-EMF exposure and disease in each category of research using the criteria developed by the International Agency for Research on Cancer (IARC).

The IARC criteria fall into four basic categories: sufficient, limited, inadequate and evidence suggesting the lack of an effect. After critical review and discussion, members of the Working Group were asked to determine the categorization for each research area; the range of responses reflected the scientific uncertainty in each area. A majority of the Working Group members concluded that childhood leukemia and adult chronic lymphocytic leukemia from occupational exposure were areas of concern. For other cancers and for non-cancer health endpoints, the Working Group categorized the experimental data as

providing much weaker evidence or no support for effects from exposure to ELF-EMF.

Following the Working Group Meeting, the NIEHS established a formal review period for solicitation of comments on the symposia and Working Group reports. The NIEHS hosted four public meetings (14-15 September 1998, Tucson, AZ; 28 September, Washington, DC; 1 October 1998, San Francisco, CA; and 5 October 1998, Chicago, IL) where individuals and groups could voice their opinions; the meetings were recorded and transcripts prepared. In addition, the NIEHS received 178 written comments that were also reviewed in preparation of this report. The remarks that NIEHS received covered many areas related to ELF-EMF and provided insight about areas of concern on behalf of the public, researchers, regulatory agencies and industry.

APPENDIX J

EXHIBIT D

Reports of Acceptances, Refusals, AAC's and Awards from fiscal years July 1, 1995 to June 30, 1999

Fiscal Years	Acceptances*	Refusals**	Total	AAC's***	Commissioners Awards****
1998-1999	2,767	924	3,691	474	83
1997-1998	3,264	924	4,188	477	101
1996-1997	2,947	715	3,662	430	61
1995-1996	2,684	674	3,358	405	81
Totals	11,662	3237	14,899	1786	326

*Initial offer is accepted and closed by a voluntary conveyance (Deed)

**Initial offer is rejected and the decision to terminate negotiations and the filing of a certificate of take or certificate of deposit is recommended. The following are reasons to terminate negotiations:
1-Owner or attorney unequivocally states that no further contact is wanted.
2-Owner displays menacing or threatening conduct.
3-No progress on settlement after repeated personal contacts.
4-Owner becomes unavailable, or whereabouts unknown.

***Agreement reached after the filing of a certificate.

****Award numbers are representative of condemnations held and will not reflect exact parcel count as some condemnations include multiple parcels.

APPENDIX K

EXHIBIT A

October 21, 1999

Right of Way and Utilities Division

Appraisal Expenditures

Fiscal Year	Staff*	Fee**	Totals
1999	$ 1,654,461.71	$ 848,361.91	$ 2,502,823.62
1998	1,425,671.74	1,315,588.39	2,743,258.00
1997	1,190,312.93	1,242,434.93	2,432,747.86
1996	1,149,351.97	876,524.78	2,025,876.75
1995	1,570,544.81	1,299,369.63	2,869,914.44

*Salary costs incurred by VDOT staff in preparing appraisals connected with highway projects.

**Amounts paid to outside appraisal contractors to prepare appraisals for VDOT.

EXHIBIT B

October 21, 1999

Right of Way and Utilities Division

Outside Attorneys' Fees and Cost Advanced

Fiscal Year	Attorneys' Fees *	Cost Advanced **	Total
1999	1,964,255.59	483,555.56	2,447,811.15
1998	1,787,353.48	186,492.07	1,973,845.55
1997	1,391,658.99	272,073.31	1,663,732.30
1996	1,419,479.29	182,578.05	1,602,057.34
1995	1,693,443.64	237,043.40	1,930,487.04

*Hours involved in the actual closing of Right of Way acquisition transactions.

** "Out of Pocket" expenditures (recording fees, witness fees, commissioners fees, court reporter fees, telephone charges.)

Note: The Attorney General provides five (5) salaried attorneys to assist VDOT thoughout the Commonwealth. They assist in both closings and title review, as well as supervising preparation of legal documents. Their salaries are not included in the above.

APPENDIX M

Right of Way and Utilities Division EXHIBIT C

Right of Way/Utilities and Construction Expenditures

Fiscal Year	Right of Way *	Construction **	Total	See Note
1999	178,610,865	558,206,638	736,817,503	24.24%
1998	127,624,041	636,649,566	764,273,607	16.70%
1997	123,558,128	498,149,760	621,707,888	19.87%
1996	105,345,395	453,692,932	559,038,327	18.84%
1995	81,678,225	413,322,972	495,001,197	16.50%

*Land, all improvements thereon, and any and all damages

**Cost of new construction (no maintenance)

NOTE: This percentage indicates Right of Way Expenditures relationship to total expenditures.

APPENDIX N

Appendix N -- Suggested Changes to Eminent Domain Laws

Appraisers/ Appraisals

Statutes should require VDOT to use licensed appraisers, and require the appraisers to follow federal Uniform Standards. Stuart Tyler, Salem

Maintain the requirement under the Uniform Standards for Professional Appraisal Practice that allows only licensed appraisers to testify as to market value as expert witnesses. Other persons should not be allowed to testify as to their opinion of value. Allan Dorin, Manassas; Peter Eckert, Newport News

In a case where two or more licensed appraiser testify as to value, require the concluded values to be registered with the Real Estate Appraisal Board. If the values vary by more than 25 percent, require a review. Allen Dorin, Manassas

Instruct DPOR to enforce standards of professionalism for appraisers. Alex Grice, Newport News; Peter Eckert, Newport News

Condemnee should receive a copy of the condemnor's appraisal. Stuart Tyler, Salem; Lynn Bowmer, Salem; Andrea Kelso, Salem; Hollis Robertson, Newport News; Milton Johnston, Newport News. [N.B. -- Housing authorities are required to provide, with the prior offer, a certificate of a licensed appraiser stating his opinion of the property's fair market value, together with two comparables if available.]

Contracts by condemnors for appraisal services should be negotiated rather than let to the lowest bidder. Thomas Tye, Newport News

Appraisals should be ordered during the project design phase, rather than when it is so late that the appraisers have to rush. Thomas Tye, Newport News

Replace the current system of contracting out VDOT appraisers. Contracting for appraisals creates an incentive for low valuations, because the contractors will want to please the agency by coming in with low valuations. A suggested cure would have each side obtain its own appraiser, who would agree on a third appraiser, with the three appraisers being given the binding power to determine the value. William Mohen, Manassas

Require property acquisition managers for condemning authorities to accept the appraisal values arrived at by their "independent" appraisers. Hollis Robertson, Newport News

Condemnor should pay for the reasonable cost of an appraisal of all property to be acquired, including severance damages to the residue. Salem handout "Suggested changes"

Appraisals and offers are inconsistent, and seem to depend on the owner's identity. John Payne, Manassas; Jimmy Payne, Manassas; Ted Drake, Newport News; Paul Davidson, Newport News

Initial offers are too low; if more were offered, condemnors would save money by avoiding litigation. Stuart Martin, Manassas; Jay Sherrill, Newport News

Offer to Purchase

Initial offer should be for the full amount of the compensation determined by the appraiser, for all types of taking. Condemnors should not be allowed to make an offer for less than the appraised fair market value. Bill Duggins, Salem; Lynn Bowmer, Salem, Andrea Kelso, Salem [N.B. -- If the Uniform Act applies, the condemnor must appraise the property prior to commencing negotiations; the owner has the opportunity to accompany the appraiser; and the condemnor must make a prompt offer to buy the property

that is not less than the agency's approved appraisal of the fair market value of the property and any damages to the residue.]

Condemnor should include an itemized statement of consequential damages. Andrea Kelso, Salem [N.B. -- Under SB 641 (1998), offers to purchase must include a written explanation of the factual basis for the condemnor's offer.]

Drawings/ Plats

The plans that VDOT gives to condemnees when explaining the project are confusing; simpler drawings are needed. Stuart Tyler, Salem; John Drames, Newport News

Under § 33.1-89, landowners should be given clear plans with metes and bounds sketch, with building set-back lines if put in non-conforming status. When lenders are involved in the distributions of funds, they require a plat. VDOTs plans are not generally acceptable. The law should require plats acceptable to reasonable lenders. Benjamin Leigh, Manassas

Owners should receive information regarding set-backs and covenants from VDOT. Sherry Smith, Manassas

Rather than placing the burden on landowners to have a survey prepared, condemnors should prepare plats defining exactly what is to be taken. Thomas Tye, Newport News

VDOT Procedures

Several speakers criticized VDOT's "attitude." Stuart Martin, Manassas; Joanne Smith Johnson, Manassas; Sherry Smith, Manassas; Dorcas Akers, Newport News; John Drames, Newport News; Ward Winfield, Newport News; Willie Cooper, Newport News; Earl Game, Newport News; Justin Carter, Newport News

Adequate briefings to the owner regarding the effect of the project should be a jurisdictional requirement. Benjamin Leigh, Manassas

Landowners should be given more access to information. Sherry Smith, Manassas; Mark Weathersby, Newport News

Change the incentive structure so there is not a focus on saving money. Sherry Smith, Manassas

An impartial third party should do condemnations. Sherry Smith, Manassas

VDOT should not condemn land so close to houses that the remaining property violates set-back requirements. A. D. Allen, Newport News; Astrophel Tejada, Newport News

Mediation and Arbitration

Non-binding arbitration should be required before a case is set for trial. Toby Prince Brigham, Salem; Milton Johnston, Newport News; *see also* Allen Dorin's suggestion that arbitrators be used as an alternative to the commissioner system.

Mediation should be required. Sherry Smith, Manassas; Bob Barton, Manassas

Commissioner System

The joint subcommittee was advised to review the process for selecting commissioners in condemnation cases. John Beall, Richmond; Sandy Cherry, Richmond; Woody Hanson, Salem; Toby Prince Brigham, Salem; Allan Dorin, Manassas; Stewart Waymack, Manassas; Bob Barton, Manassas; James Webb Jones, Newport News; Alex Grice, Newport News; Patrick Gomez, Newport News; James Chapman, Newport News; Earl Game, Newport News; Brian Dundon, Newport News

Consider whether the law should continue to require commissioners (or jurors) to be owners of real property. John Beall, Richmond

Do not get rid of the commissioner system, but consider providing for an appeal. David Game, Newport News

The use of one (or three) approved arbitrators, in lieu of the commissioner or a jury system, should be considered. Allen Dorin, Manassas

Procedural Issues

In discovery, rule of court 4:1(b)(4)(D) provides that if the condemnor initiates discovery, it must pay the costs. If the landowner does it, is not reciprocal (each side pays its own expenses). Consider making it equal. John Beall, Richmond.

Require parties to exchange their appraisals before trial. Toby Prince Brigham, Salem

Use pre-trial conferences *in limine* to resolve issues, including those relating to testimony as to values. Alex Grice, Newport News

Owners of improvements built on leased land (such as billboard companies) should fully be involved in the condemnation process; the Supreme Court's decision in Lamar should be overturned. Keith Austin, Salem; John Stafford, Salem; Loretta Harrington, Manassas; Stephen Hughes, Manassas; Virginia Farm Bureau Federation letter, Newport News

Law should not allow condemning authorities to stop process or appeal the trial results if it doesn't like the findings of commissioners. Ken Parsons, Manassas

Once a condemnor enters into litigation with a property owner, both sides should be required to abide by the outcome, and condemnors should not be allowed to "pull the take" -- even though they have to pay the owner's costs. If they pull the take, they should not be able to re-file at a later date. Hollis Robertson, Newport News

Landowners should be allowed to testify as to the value of their property at trial. Jimmy Payne, Manassas

Condemnors should not be allowed to amend the description of the land they are seeking to condemn. Donna Midgette, Newport News

Payment Delays

Delays occur when VDOT makes a settlement. There are two delay points. First, VDOT needs to justify the settlement in writing. Second, VDOT prepares invoices and submits them to the Department of the Treasury. Giving VDOT the authority to write the checks might shorten the process. John Beall, Richmond.

The time for payments should be shortened. Benjamin Leigh, Manassas; Carol Vincent, Newport News

Funds should be available immediately when VDOT files a certificate. Sherry Smith, Manassas

Business Relocation Payments

The limit of $20,000 in business relocation assistance is inadequate. Sandy Cherry, Richmond; Stuart Tyler, Salem; Frank Tsutras, Manassas; Kathy Young, Manassas; Benjamin Leigh, Manassas; Tim and Pam Lawrence, Manassas; Abraham Shibe, Manassas; Stewart Waymack, Manassas; Bob Barton, Manassas; Mark Weathersby, Newport News; Harold Tompkins, Newport News. [N.B. -- Residences have been alleviated by the enactment of § 25-247.1; the federal regulations have allowed greater expenditures for last resort housing, which means whatever amount is necessary to place a person displaced by a public project that uses federal or state funds in a comparable, decent, safe, and sanitary replacement housing is available.]

Consider the results of the study underway pursuant to HJR 490 on the issue of business relocation payments. Stewart Waymack, Manassas

Application of the Uniform Relocation Assistance Act

Private companies are not covered, though utilities generally do not displace many people. If use only local moneys, the Act doesn't apply. Some confusion about the requirements is due to the fact that the procedures are different depending on who is doing the condemnation. John Beall, Richmond; Stewart Waymack, Manassas

Disruptions during construction

Access to business during construction may be impaired, but damages are not payable if there is no actual taking. Consider whether they should be compensated. Sandy Cherry, Richmond; Earl Game, Newport News

If a contractor exceeds a temporary construction easement, the property owner has to bring an action against the contractor. The condemnor should enforce the limits of the construction easement. Thomas Tye, Newport News

Elements of compensable damages

A. Business Losses

If losses are unavoidable because a business cannot be relocated to another site, the business losses should be compensated. Toby Prince Brigham, Salem

Businesses should be compensated for loss of goodwill, lost profits, and future earnings potential, and not just for the value of the land and "bricks and mortar" taken. Gideon Kanner, Manassas; Virginia Retail Merchants Association (by letter)

Business losses incurred by operators of outdoor advertising signs should be compensable. Keith Austin, Salem; David Bailey, Salem; Loretta Harrington, Manassas; Stephen Hughes, Manassas

Tenants operating businesses should be compensated for the lost business profits, and start-up costs for new business. Edgar Wilburn, Manassas

Review the fairness of the unity of lands doctrine, especially in commercial situations where damage to adjacent properties under same ownership is not considered. Benjamin Leigh, Manassas

B. Fear of Electro Magnetic Fields

The public's fear of transmission lines, whether or not rational or scientifically supported, should be considered as a factor in determining a property's fair market value. It needs to be reflected in viable market data, and not be speculative. The fact that it is based on perceptions is not relevant; perceptions set market values. Woody Hanson, Salem. Also: Deborah Little, Salem; Carl Zipper, Salem

C. Other Elements of Damages

Any factor giving rise to a decline in value, including visual blight, should be compensable. Toby Prince Brigham, Salem

Broaden what an owner can claim as damages; now, certain things are excluded. David Game, Newport News

Condemnor should consider damages to the appearance of the remaining property or (and?) damage to the view, in determining the amount to be paid in compensation. Salem handout "Suggested changes"

Burden of providing compensation should be on the condemnor. Diana Dougherty, Salem

All damages to the landowner should be considered, including noise, effect on drainfields, the fact that land has been in family for many generations, and "quality of life" issues. Bill Duggins, Salem; Astrophel Tejada, Newport News; Milton Johnston, Newport News

Compensation should cover more than just the land and buildings; it should include "dreams." John Barkley, Newport News

Property owners should be compensated for inconvenience. Tricia Stall, Newport News

Business owners should be compensated for loss of visibility and access. Edgar Wilburn, Manassas; Jeff Janosco, Salem

Compensation should be based on the most advantageous use of the land (development value). Lynn Bowmer, Salem

It is not fair than owner has to pay for insurance on rental property after VDOT has filed a quick take certificate. Diana Taylor, Salem

Consider whether VDOT guidelines should allow appraisers to take into account factors such as noise, loss of access due to the construction of a median, circuity of access due to re-routing a highway or closing an interchange, and other technical issues in determining damages to residue. Also consider whether it is fair to compensate owners who do not suffer a taking for these damages. Allan Dorin, Manassas

Require payment for value of trees, not simply the amount by which the trees affected the market value of the property on which they were located. Gideon Kanner, Manassas

Consider mortgages on properties. Delegate Thelma Drake, Newport News

Stop using fair market value as the benchmark for just compensation because it fails to compensate a landowner for incidental damages, such as relocation expenses, lost profits, and destruction of business goodwill. As an alternative to an in rem proceeding (intended to pay for the property), adopt a system that covers all personal losses sustained by the landowner. Brief of Marie Finch, submitted in Newport News.

Land should be appraised at its fair market assessment value and nothing less, and damages to any residue should include anything that would cause the fair market value to decline, including EMF, visual blight, loss of revenue due to decreased crop yields, and unharvestable or damaged commodities. Virginia Farm Bureau Federation letter, Newport News

Payment of litigation expenses

Government should pay landowner's attorneys fees and expert witness fees, at least where the landowner prevails: Woody Hanson, Salem; Toby Prince Brigham, Salem; Salem handout "Suggested changes;" Stuart Tyler, Salem; Diana Dougherty, Salem John Dodson, Salem; Nancy McCord, Salem; Jeff Janosco, Salem; Andrea Kelso, Salem; Alan Gleiner, Salem; Salem handout "Suggested changes"; Ken Parsons, Manassas; Sherry Smith, Manassas; Gideon Kanner, Manassas; Roy Darden, Newport News; Astrophel Tejada, Newport News; Willie Cooper, Newport News; David Game, Newport News; Carol Vincent, Newport News; Jessie Brooks, Newport News; Virginia Farm Bureau Federation letter, Newport News (re-visit HB 221 of 1998); Milton Johnston, Newport News

[N.B. -- Under current law, courts may assess ,as a cost, up to $100 for a survey; a comment was made that this amount is too small.]

Damage to Property

If land near the subject property is taken, which taking causes the subject property to suffer a loss (a decline in value), the condemnor should be forced to take an easement. It is analogous to the taking of a scenic easement. Toby Prince Brigham, Salem; William Dougherty, Salem; Jeff Janosco, Salem; Carl Zipper, Salem (require payment for devaluation of adjacent land in proximity of power lines)

Compensation for devaluation of non-residue properties (located adjacent or in close proximity to easements) should be considered where a property that is not touched experiences a documented loss of market value as a result of transmission line construction. Salem handout "Suggested changes"

Businesses that become inaccessible should be compensated for loss in traffic, despite fact that none of their property is taken. Josie Brusseau, Manassas

SCC Approval of Transmission Lines

The state should require electric utilities to negotiate to buy easements in the free market. John Dodson, Salem

Before exercising the power of eminent domain, the SCC should compel utilities to look at options of retrofitting or expanding capacity; a higher threshold is needed. Glen Besa, Salem

Requiring Acquisition of Residue

Owners should have the option of selling the entire parcel to the condemnor and purchase another property of equal value without suffering major inconvenience or loss. Diana Dougherty, Salem; Deborah Little, Salem; John Dodson, Salem; Jeff Janosco, Salem; Andrea Kelso, Salem

Consider how much of a parcel should be left before condemnor has to pay for all of the parcel (suggests 50 acres minimum). Al Feldzamen, Salem

Three options for residential landowners: (i) utilities should be required to purchase the entire parcel if any portion is taken, and provide a perimeter survey at no cost to the home/property owner; (ii) allow the owner to remain on the land, receiving just compensation for the easement taken, plus additional

compensation for damage to land adjoining or remaining; or (iii) remain on the land until the transmission line project is complete, evaluate its impact, and then decide whether to require the utility to buy the entire parcel. (Salem handout "Suggested changes")

Location of Electric Transmission Line Easements

200-foot-wide transmission line easements are too narrow. Diana Dougherty, Salem; Lynn Bowmer, Salem; William Dougherty, Salem (they should be 300 feet wide); Salem handout "Suggested changes"

Power line easements should not be allowed within 300 feet of a residence. Salem handout "Suggested changes" [N.B. -- Currently lines cannot be built within 60 feet of a residence, absent special circumstances]

Public Purpose

Limit the scope (uses) for which the power of eminent domain can be exercised. Delbert Jones, Salem; Harold Tompkins, Newport News

If property is condemned to benefit another private business, the condemnee should receive a "bonus." Gideon Kanner, Manassas

Burden of proof needs to be on the government to show the need for the taking. Tricia Stall, Newport News

Consider whether it is fair to condemned unblighted property of homeowners as part of a larger blight abatement project. Delegate Thelma Drake, Newport News

Housing Authorities should not be allowed to take people's houses in order to build more expensive neighborhoods. Bobbi Caffey, Newport News

Planning

Greater involvement by the public, including the disenfranchised, is needed early in the process. David Muhly, Salem

In planning highway interchanges, existing affected entities should be given special attention and consideration to resolve their problems in a fair and equitable manner. Frank Tsutras, Manassas; Dr. Tom Yarbrough, Manassas; Walter Cecil, Newport News

Adopt a planning system (like the MIS structure) to assist in corridor planning and design, to address issues up front. Gary Woody, Manassas

Delays and Condemnation Blight

To avoid "condemnation fright," prevent VDOT from threatening condemnation when it does not have the funds to acquire the property. Benjamin Leigh, Manassas

Limit the maximum number of months an authority can hold property under condemnation. Hollis Robertson, Newport News

Require the condemning authority to make an offer to buy property within five years after announcement of the project. Patrick Gomez, Newport News

Consider the effects of delays, such as the ten years of delay in East Ocean View, because tenants vacate properties during the delay period. Delegate Thelma Drake, Newport News; Harold Tompkins, Newport News

Advance acquisitions should be allowed for property owners who request it. Thomas Tye, Newport News

Condemnors should move quickly to acquire and pay for property after a project or route is announced; reduce delays. Stuart Tyler, Salem; Milton Johnston, Newport News; Harry Gard, Newport News; Willie Cooper, Newport News; Earl Game, Newport News

Consider giving priority to setting condemnation trials, and limits on how long until they are resolved. Toby Prince Brigham, Salem

Require VDOT to act in two years or take the property off the books. Al Feldzamen, Salem

Other recommendations

Institute a step before matters go to court, where an ombudsman can determine that something is unfair, as has been suggested to deal with FOIA compliance. Stewart Fleming, Newport News

Create a venue where parties can negotiate, and create a separate authority that would have sole responsibility to undertake the condemnation. Virginia Farm Bureau Federation letter, Newport News.

Rights of ways and easements that have not been developed in five years should be offered to the original owner or heirs at the original cost of the property. Virginia Farm Bureau Federation letter, Newport News

Create state tax relief on income derived from a taking. Virginia Farm Bureau Federation letter, Newport News

Condemnors should fully disclose how the easements will be used at the beginning of the process. Condemnors should not be able to use rights-of-way for additional purposes, without paying additional compensation. Language in easements is construed too broadly. Bill Duggins, Salem; Janete Cassell; Newport News

Proceed cautiously with any proposed changes

Bill Thomas, Salem; Dan Carson, Salem; Bob Barton, Manassas; Stewart Waymack, Manassas; Patrick Gomez, Newport News; George Martin, Newport News; Tim Oksman (by letter), Newport News; Paul Fraim (by letter), Newport News; Tim Kaine (by letter), Newport News

APPENDIX O

A. Commissioner System

1. Should the current system, under which the two sides in a condemnation case each select six members of a panel from which five commissioners are selected, be changed?

2. If so, should the current commissioner system be replaced with a system where commissioners are drawn from a jury pool? Should commissioners (or jurors) be required to be owners of real property in the locality?

3. As an alternative to the current system, should parties have the right to appeal commissioners' findings to a civil jury?

4. Should the use of a panel of arbitrators be used in lieu of the commissioner or a jury system?

B. Litigation Expenses

1. Should the condemnor ever be required to pay litigation expenses of the condemnee in a dispute over the amount of compensation?

2. If so, what elements of litigation expenses should be included? Attorneys? Appraisers? Engineers? Accountants in business condemnation cases? Other experts?

3. Should the same rules regarding payment of litigation expenses apply in proceedings brought by all condemnors, or should they vary depending on the identity of the condemnor?

4. Should all litigation expenses be treated the same way, or should the threshold for requiring their payment depend on their type? For example, should appraisal fees be paid in all cases, but attorney's fees be paid only if the condemnee prevails? Should payment of fees of non-attorneys depend on whether they testify as witnesses, and their products are received into evidence by the court?

5. Should litigation expenses be paid only if the condemnee prevails? If so, how would you determine who has "prevailed"? Options used in other states include (i) an award that exceeds the condemnor's offer; (ii) an award that exceeds the condemnor's offer by a certain percentage, such as 10, 15 or 20 percent; (iii) the prevailing party is the one whose testimony in court is closest to the award; and (iv) the award is closer to the valuation evidence provided by the condemnee than to the condemnor's offer.

6. Should payment of litigation expenses be paid by the condemnor "automatically" if the threshold for liability is reached, or should the trial court be given the discretion to award litigation expenses, either in situations where the threshold is reached or in situations where such payments are deemed to be appropriate?

7. How should the amount of liability for litigation expenses be determined? Should there be a dollar cap on litigation expenses in a case? For non-lawyers, should the number of experts be limited? For attorneys, should fees be capped at a specific dollar amount? Should they be set at a percentage of the "benefit" to the condemnee? Should they be set by the court based on such factors as the number of hours and hourly rate involved? Should the payment of fees to the attorney be limited to the amount awarded by the court, as with the Virginia Worker's Compensation Act? Should awards be based on contingency fee agreements between the condemnee and his attorney?

8. Should the condemnee be required to pay, or should the court be given the discretion to require the condemnee to pay, all or a portion of the condemnor's litigation expenses if the condemnor prevails?

9. Virginia currently allows courts to assess, as a cost, up to $100 for the expense of a survey by the condemnee. Should this amount be changed?

C. Uniform Relocation Assistance Act Payments

1. The Uniform Relocation Assistance Act applies to "state agencies," which includes "any person who has the authority to acquire property under state law and who carries out projects with federal or state financial assistance that cause people to be displaced." Should the provisions of the Uniform Act, which include relocation assistance payments and rules of conduct for property acquisition, apply to other types of condemnations?

2. Under § 25-239, a displaced small business may receive (i) actual reasonable expenses necessary to reestablish a displaced farm, nonprofit organization or small business at its new site, not to exceed $10,000, plus actual reasonable expenses in moving his business, actual direct losses of tangible personal property as a result of moving or discontinuing the business, and actual reasonable expenses in searching for a replacement business; or (ii) a fixed payment in an amount of up to $20,000. Are these dollar limits, which were established in 1972, adequate? If not, what should be the limits on payments?

3. As an alternatively to raising the amount of the payment caps, should the caps be removed and replaced with a provision, similar to what is allowed for "last resort housing" under § 25-247.1, that authorizes the payment of whatever amount is necessary to place the displaced business in a comparable establishment?

4. Should any action on the issue of business relocation payments be postponed until results of the study underway pursuant to HJR 490 are issued?

D. Business Losses

1. Should operators of businesses operating on condemned land that are able to relocate be compensated for business losses, such as lost future profits and business goodwill, during the period that they are being relocated?

2. Should operators of businesses operating on condemned land that are unable to relocate be compensated for business losses, such as lost future profits and business goodwill?

3. Should lost profits be payable with respect to a temporary taking of a business' property during construction of a project?

4. If business losses should be compensable, should limits (such as, five years in business at the location or establishing that the profitability of the business is tied to its condemned location) be placed on eligibility?

5. If business losses should be compensable, should they be payable as an element of Constitutionally-required just compensation or as a supplemental award required under the Uniform Relocation Assistance Act?

6. Should billboard locations, as opposed to billboards themselves, be compensated on the basis of the future income stream to the advertising firm, if a relocation site is not available?

E. Compensation of Tenants

1. Should the Supreme Court's decision in Lamar be overturned in order to require that owners of improvements built on leased land (such as billboard companies) be parties to the condemnation proceeding? Should condemnors make separate condemnation awards to the landlord and the tenant, rather than paying the landlord for the taking and/or damage to the property and requiring the landlord pay the tenant for its interest in the land from the landlord's award?

2. Currently, tenants are entitled to payment from the owner's condemnation award only to the extent of the value of their leasehold estate in the condemned land. Should displaced tenants operating businesses be compensated for loss of goodwill and/or business profits?

3. Tenants operating businesses on leased property are eligible to recover certain relocation expenses under the Uniform Relocation Assistance Act; should all business tenants be eligible for the same relocation assistance, without regard to whether the condemnation is subject to the Uniform Act?

F. Damage to Property

1. Under the unity of lands doctrine, damage to adjacent properties under same ownership is not considered unless the properties have physical unity and unities of ownership and use. Should the unity of lands doctrine be relaxed?

2. Should a parcel be deemed "damaged" as the result of a taking of adjacent or nearby property that reduces the fair market value of the subject parcel?

3. Should a parcel be deemed "damaged" if a project on adjacent or nearby property will generate noise or electro-magnetic fields that effects the parcel?

4. Should a condemnor be required to condemn a scenic easement on a parcel, thereby requiring payment to the owner of the parcel, if a project built on condemned adjacent or nearby property impairs the view from the parcel? Or impairs the view of the parcel?

5. Should businesses that become less accessible due to road changes be compensated for losses due to a drop in business traffic, though no part of their property is taken?

G. Measure of Compensation for a Taking of, or Damage to, Property

1. Should the measure of just compensation for a taking of property continue to be the fair market value of the property taken? Should the owner be compensated for any factor that causes to a decline in property's value, including such things as visual blight?

2. Should the measure of just compensation for damage to the residue of property continue to be the difference between the value of the parcel immediately before and immediately after the taking, offset by any increase in value attributable to the project for which the taking was made?

3. As an alternative to compensating the owner only for the fair market value of property taken or damaged, should eminent domain compensation have as its goal the compensation for the owner for the full extent of his personal losses, including such things as business losses, upon adequate proof of such losses? Should it include compensation for such things as the fact that land has been in family for many generations, for inconvenience, and for "quality of life" issues?

4. Should just compensation for takings of property be based on the value of the property if it were to be developed into its most profitable use, regardless of whether steps have been taken to so develop the property?

5. Should the public's fear of transmission lines, whether or not rational or scientifically supported, be considered as a factor in determining a property's fair market value?

6. Should condemnors be required to pay for the replacement value of trees, rather than the amount by which the trees affected the market value of the property on which they were located?

7. Should the balance of mortgages on the property effect the amount of just compensation due upon for the taking of the property?

8. Should a parcel's owner be compensated for the costs of insuring property after VDOT has filed a quick take certificate against the parcel?

9. Should VDOT guidelines allow appraisers to take into account factors such as noise, loss of access due to the construction of a median, circuity of access due to re-routing a highway or closing an interchange, and similar issues in determining damages to the residue of a condemned parcel? Should owners of property of which no part is taken be compensated for these types of losses?

H. Appraisers

1. Should VDOT be statutorily required to use licensed appraisers?

2. Should VDOT appraisers be statutorily required to follow the Uniform Standards of Professional Appraisal Practice?

3. Should persons who are not licensed appraisers be permitted to testify as to their analysis of property?

4. Should landowners should be allowed to testify as to the market value of their property at trial?

5. Should condemnors continue to be able to use either in-house appraisers or contract with independent appraisers?

6. Should anything be done to enforce standards of professionalism for appraisers?

7. Should condemnors' contracts for appraisal services continue to be awarded to the lowest bidder, as is currently done, or be awarded on a negotiated basis?

8. Should condemnors be required to pay for the reasonable cost of an appraisal conducted for the condemnee in all takings, regardless of whether the condemnation results in litigation?

9. Should a condemnor be prohibited from offering less compensation than the amount determined to be appropriate by a licensed appraiser retained by the condemnor?

10. Should the conclusions of licensed appraisers who testify as to value in condemnation cases be registered with the Real Estate Appraisal Board, and reviewed if the values vary by more than 25 percent?

11. Should the current system of contracting out VDOT appraisers be replaced with one that requires each side obtain its own appraiser, who would agree on a third appraiser, with the three appraisers being given the authority to determine the property's value?

I. Offer to Purchase/ Copy of Appraisal

1. If the Uniform Relocation Assistance Act applies, the condemnor must appraise the property prior to commencing negotiations; the owner has the opportunity to accompany the appraiser; and the condemnor must make a prompt offer to buy the property that is not less than the agency's approved appraisal of the fair market value of the property and any damages to the residue. Should these requirements be expanded to apply to all condemnations?

2. Housing and Redevelopment Authorities are required to give condemnees, with the offer to purchase, a certificate signed by a certified general real estate appraiser setting forth the appraiser's opinion of the fair market value, together with two comparable property sales, if available, of the property to be acquired. Should this requirement apply to all condemnations?

3. Should offers include a copies of appraisals conducted for the condemnor?

4. Currently, offers include a written explanation of the factual basis for the condemnor's offer. Should this explanation specifically include an itemized statement of damages to the residue, if any?

5. What, if anything, should anything be done to curtail the impression that the amount offered for property varies depending on the identity of the owner? Should the condemnor be required to disclose the amount offered, or finally paid, for other parcels acquired in connection with the same, or similar, projects?

J. Descriptions of property to be taken or damaged

1. Are the plans that VDOT gives to condemnees when explaining the project too confusing? If so, should the condemnor be required to prepare and give condemnees a copy of simpler drawings? A plat of survey showing the property to be taken and/or damaged?

2. If plats should be required, should they include building set-back lines if the taking puts the property in non-conforming status under covenants or local land use regulations?

3. Under § 33.1-89, when negotiating with a property owner with respect to payment for prospective damage to property not taken, VDOT is required to ensure that the property owner is properly informed as to the type and amount of foreseeable damage and/or enhancement. Should this requirement apply to condemnations by other condemnors? Should adequate briefings to the owner regarding the effect of the project be a jurisdictional requirement for the exercise of the power of eminent domain?

K. Procedural Issues

1. Should arbitration or mediation should be required as a step in the condemnation dispute process?

2. In discovery, rule of court 4:1(b)(4)(D) provides that if the condemnor initiates discovery, it must pay the costs; if the landowner does it, is not reciprocal (each side pays its own expenses). Should the requirement be reciprocal?

3. Should both parties be required to exchange their appraisals before trial?

4. Should procedures encourage the use of pre-trial conferences *in limine* to resolve issues relating to property valuation?

5. Should condemnors be allowed to "pull the take" if they do not agree with the findings of commissioners, even though they are required to pay the landowner's litigation expenses?

6. If a condemnor pulls a take, should it barred from re-filing a condemnation proceeding involving the same property at a later date?

7. Should condemnors be allowed to appeal if they do not agree with the findings of commissioners?

8. If a contractor exceeds a temporary construction easement, the property owner must bring an action against the contractor. Should the condemnor, rather than the property owner, be responsible for enforcing the limits of such an easement?

L. Payment Delays

1. In order to avoid delays due to the fact that payments are not authorized until a title check is completed, should VDOT be required to conduct a title search of the property before making an offer to purchase or filing a certificate of take?

2. What, if anything, should be done to expedite the process for issuing payments to VDOT condemnees?

3. Should funds should be available immediately when VDOT files a certificate of take?

M. Requiring Acquisition of Residue

1. Should landowners have the option of selling the entire parcel to the condemnor and receiving sufficient compensation to purchase another property of equal value?

2. Should the condemnor be required to acquire the entire parcel if the taking of a portion results in a residue parcel that is too small to have the same use of the entire parcel? Should an option to require the acquisition of the residue parcel be triggered by the size of the residue parcel (e.g., a number of acres or a percentage of the size of the entire parcel?

3. Should residential landowners be given the choice of (i) requiring the condemnor to purchase the entire parcel if any portion is taken, and provide a perimeter survey at no cost to the home/property owner; (ii) allowing the owner to remain on the land, receiving just compensation for the easement taken, plus additional compensation to adjoining or remaining land; or (iii) remaining on the land until the project is complete deciding whether to require the utility to buy the parcel at a later time?

N. Parameters on Takings of Property

1. Should VDOT be allowed to condemn land so close to residences that the remaining property violates set-back requirements? If such takings should be allowed, should the agency be required to move the residence, if possible?

2. Before allowing electrical transmission firms to exercise the power of eminent domain, should the SCC should adopt a higher threshold and compel them to examine options of retrofitting or expanding the capacity of existing lines?

3. Is the standard 200-foot width for transmission line easements adequate?

4. Currently, electric transmission lines cannot be built within 60 feet of a residence, absent special circumstances; is this distance sufficient?

O. Delays and Condemnation Blight

1. To avoid "condemnation fright," should VDOT be prevented from threatening condemnation when it does not have the funds to acquire the property?

2. Should there be a limit on the length of time a condemning authority can hold property acquired by condemnation before constructing the project, as now exists with VDOT projects? Should the period be shortened from the current twenty years under § 33.1-90 for highway projects?

3. Should the condemning authority be required to make an offer to buy property within a certain period of time (e.g., five years) after announcement of the project?

4. Should advance acquisitions (required within a certain period of time following the announcement of a project) be allowed for property owners who request it?

5. Should court proceedings involving condemnations be given scheduling priority?

P. Miscellaneous Issues

1. Should the Joint Subcommittee attempt to address the issue of whether a taking is in furtherance of a "public purpose?"

2. If a condemnee's property is condemned to benefit another private business, should the condemnee receive a "bonus" of additional compensation?

3. What, if anything, can be done to address criticisms of VDOT's "attitude?"

4. Should the Joint Subcommittee attempt to address the issue of whether the Department of Transportation's project planning process should be studied in order to reduce disputes involving exercising the power of eminent domain?

5. Should the process be changed to reduce the condemnor's incentive to save money by keeping down the size of awards? Would empowering an impartial third party do condemnations eliminate this incentive?

6. Should the condemnation process include a step before matters go to court, where an ombudsman can determine whether the parties are acting fairly?

7. Should a new, separate authority have sole responsibility to undertake condemnations?

8. Should the use of property acquired by condemnation be limited to the specific purposes identified by the condemnor at the time of the condemnation? If the condemned property is used for additional purposes, should the condemnee be entitled to additional compensation?

9. Should this joint subcommittee be continued for another year to further study any of these issues, or any related issues?

APPENDIX P

LAW OFFICES
RANDOLPH, BOYD, CHERRY AND VAUGHAN
14 EAST MAIN STREET
RICHMOND, VIRGINIA 23219
(804) 643-6611
FAX NO. (804) 783-2765

B. RANDOLPH BOYD
FRANCIS A. CHERRY, JR.
ERNEST C. VAUGHAN, JR.

BONNIE M. ASHLEY
SARAH M. SAUNDERS

H. ARMISTEAD BOYD (1912-1979)
BEVERLEY H. RANDOLPH, JR. (1908-1987)

CHARLES CITY OFFICE
P. O. BOX 85
CHARLES CITY, VIRGINIA 23030
(804) 829-9215

December 3, 1999

The Honorable Madison E. Marye
Senator - 39th District
P.O. Box 37
Shawsville, Virginia 24162-0037

Re: Eminent Domain Study Sub-Committee

Dear Senator Marye:

I have been following closely the meetings and deliberations of the eminent domain sub-committee, both because of my personal interest and, at the request of the Attorney General's Office and Department of Transportation, to serve as a resource to the extent that I could. My involvement with Virginia eminent domain law commenced in 1972 when I was an Assistant Attorney General assigned to represent what was then called the Highway Department. In 1976 I went into private practice and have devoted over 50% of my practice to eminent domain trial work since that time. While the focus of my practice has been representing condemnors, including the State, localities and public service companies, in the last five years or so I have been doing a good deal of work for landowners as well. I have been involved in condemnation cases for roads, schools, sewers, reservoirs, airports, gas pipelines, electric transmission lines and convention centers to name a few.

So far I have refrained from expressing my personal views. I have tried merely to be available to your excellent counsel, Frank Munyan, the Department of Transportation and the Attorney General's Office when issues relating to eminent domain trial practice have surfaced.

At this point I would beg your indulgence to express my own views on the issues being addressed by the panel. These opinions are not necessarily shared by the different clients I represent– indeed I am sure that some of my clients would disagree with them. I am expressing my own views and not those of the Attorney General's Office or VDOT. For what they are worth I would like to share them with you.

A. Change in Commissioner System

The panel has voted to recommend changing from the current commissioner system to a jury system. I understand that the proposal to abandon the current land ownership requirement died on a tie vote.

The current system of the parties nominating commissioners invites abuse and contributes to trial delay and needless expense since attorneys must spend considerable time selecting the commissioners they feel will be most receptive to their case. I concur that the land ownership requirement should be retained. That requirement has always been viewed as a protection for the landowner since all triers of fact would be true "peers" who could identify with the landowner's situation. The change recommended is a very good one and I strongly support it.

B. Litigation Expenses to the Landowner

The panel has voted to permit the Court, in its discretion, to award litigation expenses (appraisal, other expert witnesses and attorney's fees) where the award exceeds the condemnor's "highest" offer by more than 15%.

I would point out the following problems with regard to this measure:

1. What is the "Highest Offer"? Some clarification is needed regarding what is meant by "highest offer." Is it the highest offer prior to trial? Is it the highest testimony at trial? Must the offer be in writing?

2. Who Really "Wins" a Condemnation Case? This recommendation seems to presume that the condemnor is vanquished and the landowner vindicated whenever the award is 15% more than the condemnor's highest offer. That is simply not the case. Here is a fairly typical evidence spread: State presents two appraisal witnesses–one at $90,000 and the other at $100,000. Landowner presents one appraiser who testifies to $350,000. State offers $110,000 to settle. Award comes in at $127,000. The award is 15% higher than the State's highest offer, but much closer to the State's evidence. Under the panel's suggested change a court could award attorney's fees, appraisal fees and other expert witness fees. The State has already incurred its own attorney's fees and fees for two appraisers. In this case the commission believed the State's appraisers far more than it believed the landowner's, yet the State is penalized for putting on the better case. That is unfair, makes no sense and benefits mainly the attorney for the landowner and experts hired by that attorney.

3. Attorney's Contingency Fee. The standard contingency fee in condemnation cases for landowner's counsel is 1/3 of the excess over the offer. If you do nothing to limit the contingency fee you will just be padding the pocket of the landowner's attorney. For example, in our sample case above, the standard attorney's fee would be $5,333 (1/3 of the difference between the offer and the award). If the court then awards attorney's fees of $10,000 based on time expended, this will be on top of the contingency.

Presuming that the panel's purpose is to make the landowner "whole" by awarding reasonable attorney's fees rather than creating a windfall for the attorney, this problem should be addressed in any proposed legislation.

4. Will These "Litigation Expenses" Apply for all Landowners? During the hearings the panel has always been thinking of the landowner as the "little guy" and the condemnor as the "big guy." I have cases in my office now against DuPont, Exxon, Southland, Chevron, Trammel/Crow and many other well heeled landowners. It is not unusual for our office to handle a condemnation case in which the condemning authority is much smaller than the landowner. For instance, I now represent the Town of Ashland in several cases against major international oil companies. Will these oil companies be entitled to have their attorney's fees and appraisal costs paid for by the taxpayers of Ashland for a road condemnation when these companies benefit more than most other landowners from good roads? Why?

Perhaps the panel might consider limiting litigation expenses to small cases–total award under $10,000? To me this would make more sense.

5. What Will be the Condemnor's Duty to Advise the Landowner During Negotiations that He/She May Be Entitled to Litigation Expenses? Only the more sophisticated landowners (e.g. Exxon) will know about entitlement to expenses unless the condemnor must somehow advise all landowners. However, if the condemnor is required to advise the landowner, how and when must it be done and wouldn't it tend to reduce rather than increase voluntary settlements?

The duty, if any, to advise landowners of these potential expenses should be addressed in the legislation rather than left to litigation.

6. Federal System. I have never heard any one suggest that the Federal system for awarding costs, attorney's fees and litigation expenses under the Equal Access to Justice Act (EAJA) is anything but fair. This Act allows a court to award to a prevailing party fees and expenses unless the court finds that the position of the United States (the condemnor) was "substantially justified." A party in a condemnation case is said to have

prevailed if the award is at least halfway between the highest amount testified to on behalf of the government and the highest amount testified to by the landowner. There are caps on fees and costs.

This system would prevent windfall attorney's fees and litigation expenses in cases like the one described in Paragraph B(2) above.

7. Will Jurors be Instructed that Attorney's Fees and Litigation Expenses May Be Awarded? It is not uncommon to find after a condemnation award that the commissioners took into consideration the landowner's attorney's fees and costs in making their award. If the subcommittee recommends legislation which would result in routine granting of attorney's fees and litigation expenses in condemnation, shouldn't the legislation also provide that the commissioners be instructed as to this additional compensation?

C. Increase in Survey Reimbursement from $100 to $1,000

The $100 figure is archaic and no one could object to a reasonable increase. In practice the change may actually lower VDOT offers since it is now VDOT's practice to include it its original offer a reasonable cost per property pin which has to be moved. This can sometimes exceed $1000.

D. Uniform Act to Apply to all Condemnors.

This will not impact VDOT but will significantly impact public service corporations and localities condemning where no federal or state funds are involved.

E. Should Business Loss Profits be Allowed as Part of Just Compensation?

As I understand it, this issue is still on the docket for consideration. I would respectfully suggest that this is a Pandora's box which ought to remain closed. The following problems should be considered before recommending this drastic change in Virginia law:

1. The deliberations so far have indicated to me that there may be some confusion in the minds of subcommittee members between business relocation expenses covered by the Uniform Act and lost business profits which under current law are not compensable. Many citizens were concerned with business relocation expenses. Adjusting the old caps, which you have voted to do, should take care of those concerns.

(See Paragraph G below.)

2. Traditionally the condemnor pays for what it buys and uses– the land, or the reduced value of the remaining land (damages to the residue). To allow lost business profits would require the condemnor to pay for something it did not buy. If the capitalized lost profits amounted to 100% of the fair market value of the business, would the condemnor (who is often the taxpayer) be permitted to buy and operate the business?

3. You will run the real risk of double compensation. It will be difficult and oftentimes impossible to separate damage to the residue (capitalized lost rents) from damage to the business (capitalized lost profits).

4. You will open up the landowner to discovery on all of his past business records, including tax records. Surely the landowner will not be allowed to speculate about lost profits without producing past business records. This will then invite the government to scrutinize tax returns for irregularities. You will end up spending significant time and resources in these cases dealing with wholly collateral issues. Lawyers on both sides will benefit; citizens and condemning authorities will suffer.

5. Wal-Mart and Exxon will be just as entitled to lost business profits as the neighborhood barber and far better prepared to prove theirs.

6. New roads, sewers and water lines often increase business profits. Will the condemning authority be allowed to show this as an offset against the land and damage award? If not, why not?

7. Every case where there is a partial take of business property will now require a different kind of expert witness, a person qualified to value a business. Real estate appraisers are only licensed to appraise land. The increased litigation costs will be significant.

8. Legislation requiring payment of lost business profits may have the unintended effect of encouraging condemnors to place infrastructure projects closer to residential areas than to businesses.

9. The only way to pay for business losses will be to capitalize lost business profits. If the business was not profitable before the take, then there cannot be damage to the business– that business should not have been in operation in the first place. Many small businesses operate with very little profit and capitalizing that profit loss will result in a very low figure. Many times it will be faster and cheaper for VDOT to just

pay for the whole business rather than wrangle about its worth. For example, a barbershop business's capitalized profits may arrive at a value of $5,000 for the entire business (separate and apart from the land and equipment). If VDOT then pays the $5,000 shouldn't it own the business? Shouldn't the barber be precluded from opening up a new business in the same area to compete with the business he just "sold?" To me this concept is nonsense and should not be considered.

The condemnor should only pay for what it acquires and devotes to a public use– the land. It should then pay relocation expenses for the business which should be fair and reasonable and actually incurred. It should not pay "lost profits" for an enterprise it isn't acquiring.

10. Lost future profits are inherently speculative and traditionally that is why the courts have disallowed them as an element of damage. Everyone hopes his business will be profitable in the future, but no one knows. What if VDOT is compelled to pay capitalized lost profits for an internet business and the day after the take that business loses its only software patent for reasons having nothing to do with VDOT's acquisition? What business profits does McDonalds lose if VDOT acquires one of its 25,000 restaurants and pays for the land and building? Allowing lost business profits will invite rank speculation into condemnation proceedings.

F. Requiring Condemnors to do Title Searches Before Making an Offer.

An excellent idea. I hope it will work. It may be a bit draconian to apply this across the board– what if condemnor only acquires a temporary construction easement? Will title still be required? You might consider an exception for *de minimis* takings.

G. Removing the Caps on Relocation Expenses.

The caps are old and in need of adjustment, however, I do not see why they should be removed altogether. Under HJR 490 (1990) the Highway Department's prestigious Research Council in Charlottesville is undertaking a study of business relocation expenses. I understand that the Federal Highway Administration is actively participating. I would urge that your HJR 491 Study Subcommittee reconsider its decision not to wait for the HJR 490 report before acting on business relocation expense caps.

H. Eliminating the Requirement that Tenants Have Leases of Longer than Twelve Months as a Condition to Intervening in the Taking.

Care must be taken here in the crafting of the amendment to avoid altering the

"undivided fee rule." The value of the lease, if any, is subsumed in the value of the whole under current law. So long as this amendment merely changes the types of tenants entitled to participate and makes no substantive change in the valuation process, I see no problem.

CONCLUSION

I have been very impressed with the long, hard work of this subcommittee and its staff. You have addressed a complicated and tedious subject in a serious and comprehensive fashion. However, because of the nature of the public hearing process I believe you have tended to hear more from the minority of landowners who feel they were treated unfairly than the majority who reached amicable settlement. Also, although condemning authorities have certainly had the opportunity to express their views, for reasons unclear to me they have been rather quiet and consequently, through no fault of its own, the panel has heard far more criticism of the current system than is justified by the facts. The current eminent domain system is far from broken, but it can be improved.

Land can only be condemned for public use. Essential public projects like roads, sewers, reservoirs and schools cannot be built without the power of condemnation. In my twenty-seven years of experience in this area, these projects add value to the community and to adjoining landowners more often than they diminish value. Enhancement is the net result of the project, in my opinion, more often than is damage.

All would agree I think that there must be an objective standard for the award of compensation. Our Constitution sets that standard– "Just Compensation." That term has been defined by the courts to mean fair market value of the land taken and damages to the residue, if any.

To the extent that this subcommittee adheres to that standard and tries to improve procedure and insure fairness to all sides, it will have done its work well. To the extent that the panel departs altogether from the fair market value standard I do not believe the public will benefit.

Sincerely yours,

Francis A. Cherry, Jr.

FAC/ckt

PROPOSED LEGISLATIVE CHANGES -- Part 1 (from November 16, 1999)

A. Replacing the existing commissioner system with a jury system

§ 25-46.3. Definitions.

. . .

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

. . .

§ 25-46.9. Commencement of proceedings; notice; filing of answer and grounds of defense.

Proceedings for condemnation shall be initiated by filing the petition referred to in § 25-46.7 in the court, or in the clerk's office thereof, having jurisdiction under § 25-46.4. Upon the filing of such petition, the petitioner shall give the owners twenty-one days' notice of the filing of such petition and of its intention to apply to the court for the appointment of ~~commissioners~~ a jury to ascertain just compensation for the property to be taken or affected as a result of the taking and use by the petitioner of the estate, interest or rights to be so acquired. In such notice, the petitioner may also give notice that an answer and grounds of defense shall be filed setting forth any objection or defense to the taking or damaging of his property or to the jurisdiction of the court to hear the case and to proceed with the appointment of ~~commissioners~~ a jury for the determination of such just compensation.

~~Such~~ The notice may also include notice of the petitioner's application for the right of entry as provided in § 25-46.8, whenever such application is included in the petition.

~~Such~~ The notice, along with a copy of the petition, shall be served on the owners, and within twenty-one days of the service thereof any such owner who desires to assert any objection or defense to the taking or damaging of his property or to the jurisdiction of the court to hear the case and to proceed with the appointment of ~~commissioners~~ a jury shall file his answer and grounds of defense designating the property in which he claims to be interested, the grounds of any objection or defense to the taking or damaging of his property or to the jurisdiction of the court to hear the case and to proceed with the appointment of ~~commissioners~~ a jury for the determination of just compensation.

~~Should~~ The failure of any ~~such~~ owner ~~fail~~ to file an answer and grounds of defense as hereinabove provided~~, such failure~~ shall not preclude the owner from (i) appearing on the date set for the appointment of ~~commissioners~~ nor a jury, (ii) presenting evidence as to valuation and damage nor ~~from~~ (iii) sharing in the award of just compensation according to his interest therein or otherwise protecting his rights~~, but such~~ However, such failure shall preclude ~~such~~ the owner from any other defense by way of pleas in bar, abatement or otherwise~~. Provided, however~~ , except that for good cause shown the time for filing such answer and grounds of defense may be extended by the court.

A copy of the notice required to be served on the owners by this section also shall be served in the same manner upon any tenant entitled to participate in the proceeding pursuant to § 25-46.21:1, whose lease has been duly recorded or whose tenancy is actually known to the petitioner~~; but~~ . However, a tenant so notified may participate in the proceeding only as permitted by § 25-46.21:1.

§ 25-46.11. Form of notice by publication.

The form of the notice by publication, to which shall be attached the signature of the clerk, or the deputy clerk for and on behalf of the clerk, shall be substantially as follows:

Virginia: In the (here insert the name of the court)

Name of petitioner

v. ~~In Chancery~~ At law. . . . . .

Name of one or more defendants, et al.,

and (. . . . .) acres, more or less, of land in

(city or county) Virginia.

To Whom It May Concern:

Pursuant to an order entered on the . . . . . day of . . . . . , 19 . . . ., this notice is hereby given:

In this proceeding the petitioner seeks to acquire by condemnation . . . . . (here state the estate, interest, or right to be acquired) to certain pieces or parcels of land situated in . . . . . (county or city), Virginia, for the uses and purposes of the petitioner . . . . . (here state briefly the uses and purposes and nature of the works and improvements to be made), all of which are described more particularly in the petition and exhibits attached thereto on file in the office of the clerk of this court, to which reference is hereby made for a full and accurate description thereof; and for the appointment of ~~commissioners~~ a jury to ascertain just compensation to the owners of any estate or interest in the property to be taken or affected as a result of the taking and use thereof by the petitioner.

For such purposes, the petitioner will apply to the court, sitting at . . . . . ., Virginia, on the . . . . . day of . . . . . ., 19. . . ., at . . . . . o'clock . . . .m., or as soon thereafter as petitioner may be heard, for the appointment of ~~commissioners~~ a jury to ascertain just compensation as aforesaid.

And it appearing by affidavit filed according to law that the following owners are not residents of the Commonwealth of Virginia, or their names and addresses are not known and that diligence has been used by and on behalf of the petitioner to ascertain such names and addresses without effect: (here set out the names of such owners or classes of owners and addresses where known), it is Ordered that the aforesaid owners do appear within ten (10) days after due publication of this order in the clerk's office of the (here insert the name of the court) and do what is necessary to protect their interests; and it is further Ordered that if any of the above named owners desires to assert any objection or defense to the taking or damaging of his property or to the jurisdiction of the court to hear the case and to proceed with the appointment of ~~commissioners~~ a jury he shall file his answer and grounds of defense designating the property in which he claims to be interested, the grounds of any objection or defense to the taking or damaging of his property or to the jurisdiction of the court to hear the case and to proceed with the appointment of ~~commissioners~~ a jury for the determination of just compensation.

Should any such owner fail to file his answer and grounds of defense as hereinabove provided, such failure shall not preclude the owner from appearing on the date set for the appointment of ~~commissioners~~ a jury nor from presenting evidence as to valuation and damage nor from sharing in the award of just compensation according to his interest therein or otherwise protecting his rights, but such failure shall preclude such owner from any other defense by way of pleas in bar, abatement or otherwise.

An extract, Teste:

.....

Clerk

(Here state name and address of counsel for petitioner)

Such notice by publication may also include notice of the petitioner's application for the right of entry as provided in § 25-46.8, whenever such application is included in the petition.

§ 25-46.17. Determination of preliminary issues; fixing date of trial on issue of just compensation.

At the hearing upon the petition and application for the appointment of ~~commissioners~~ a jury made in accordance with § 25-46.9 if no answer and grounds of defense has been filed objecting to the jurisdiction of the court to hear the case and to proceed with the appointment of ~~commissioners~~ a jury, the court shall enter an order fixing a date for the trial of the issue of just compensation and stating that such issue shall be determined by a ~~commission~~ jury or by the court, as provided in § 25-46.19. If any answer and grounds of defense has been filed objecting to the jurisdiction of the court, the court shall determine such issues or other matters in controversy, excepting the issue of just compensation or matters relating to the ownership of any land or other property or the interests of any party in such land or other property~~, and if~~ . If the court determines all such issues or other matters involving the jurisdiction of the court in favor of the petitioner, the court shall enter an order fixing a date for the trial of the issue of just compensation and stating that such issue shall be determined by a ~~commission~~ jury or by the court, as provided in § 25-46.19.

An order of the court in favor of the petitioner on any of the foregoing preliminary issues or matters shall not be a final order for purposes of appeal but an order against the petitioner on such issues or matters shall be a final order for purposes of appeal, if the petitioner so elects. If the order against the petitioner does not dismiss the petition, the petitioner may elect to proceed with the case without waiving any of its objections and exceptions to the rulings of the court.

At such hearing the court may also determine whether the petitioner shall have the right of entry as provided in § 25-46.8.

§ 25-46.19. How issue of just compensation to be determined.

~~If the statute granting the power of eminent domain does not specifically provide that a specially constituted tribunal shall determine~~ The issue of just compensation~~, such issue~~ shall be determined by a ~~commission~~ jury selected in the manner hereinafter provided in § 25-46.20. By agreement of the petitioner and all the parties who are sui juris that have appeared or responded, or, if the defendant upon proper notice fails to appear or respond, then, upon motion of the petitioner, the issue of just compensation may be determined by the court.

§ 25-46.20. Appointment and oath of ~~commissioners~~ condemnation jurors; ~~commissioners~~ jury to fix value of property and damages; qualifications of jurors; strikes.

~~If the~~ A. The issue of just compensation ~~is to~~ shall be determined by a ~~commission, the parties to the eminent domain proceeding may agree upon five or nine disinterested freeholders to act as commissioners, or if the parties cannot agree upon the names of commissioners to be summoned, then each party shall present to the court a list containing the names of at least six freeholders from which lists the court shall select the names of nine persons and two alternates who shall at least one week prior to their service be summoned to serve as commissioners. However, no person shall serve as such commissioner for more than one full week within any three month period, unless agreed to by the parties, all of whom shall be residents of the county or city wherein the property or the greater portion of the property to be condemned is situated. If any party fails to submit a list containing six or more names as provided in this section, the judge may, in his discretion, submit such a list in such party's behalf. If a defendant has filed no answer to the petition, and the attorney for the petitioner certifies that he believes the defendant is unrepresented by counsel the judge may, in his discretion, and subject to the right of the petitioner to challenge for cause, subpoena five persons who shall serve as commissioners. Once nine qualified persons are selected, the petitioner and the owners shall each have two peremptory challenges and the remaining five, or the original five if only five are summoned, shall be appointed, any three or more of whom may act. Such commissioners shall fix 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 the taking and use thereof by the petitioner. Before executing their duties the commissioners~~ jurors ~~shall take an oath before some officer authorized by the laws of this Commonwealth to administer an oath, that they will faithfully and impartially ascertain what will be 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.~~ condemnation jury only if a party entitled to participate in the trial of the issue demands trial by jury. The court shall determine all other issues without a jury.

B. Condemnation jurors shall be selected as follows:

1. The jury commissioners established pursuant to Chapter 11 (§8.01-336 et seq.) of Title 8.01 shall select condemnation jurors. The jury commissioners shall select as condemnation jurors persons who are (i) residents of the county or city in which the property to be condemned, or the greater portion thereof, is situated and (ii) disinterested freeholders of property within the jurisdiction. No person shall be eligible as a condemnation juror when he, or any person for him, solicits or requests a member of the jury commission to place his name on a list of condemnation jurors. The provisions of §§ 8.01-345, 8.01-346, 8.01-347, 8.01-356, and 8.01-358 relating to procedures for preparing this list from which members will be chosen, penalties for failure to appear and voir dire examination shall apply to condemnation jurors mutatis mutandis.

2. In any case where the issue of just compensation is to be determined by a condemnation jury, the jury shall be comprised of five members, and the jurors shall be drawn from the list submitted by the jury commission. The clerk shall, in the presence of the judge, after thoroughly mixing the ballots in the box, openly draw nine names therefrom. At the same time, two additional names shall be drawn to act as alternate jurors in the event of the death, absence, or disability of any acting juror. As soon as practicable thereafter, the clerk shall serve notice on the jurors so drawn to appear in court on the date set for trial.

3. After each ballot containing a juror's name and has been drawn, it shall be placed in a secure envelope maintained for the purpose of holding drawn ballots. The envelope shall be kept in the ballot box. No drawn ballot shall be returned to the pool of undrawn ballots until the pool has been exhausted. However, the clerk shall immediately return to the pool of undrawn ballots the ballot of any juror who was drawn but was excused by the court from appearing or was not required to appear because of trial cancellation. When the pool is exhausted, all ballots shall be returned to the box and drawing shall begin again. Alternatively, the procedures for selection by mechanical or electronic techniques as provided in § 8.01-350.1 may be utilized.

4. It shall be the duty of the clerk to notify each juror whose name has been drawn of the date on which he is to appear to hear the case. The notice shall be in writing and shall be delivered at least seven days prior to the trial. The clerk shall also promptly notify in writing the jurors who have been struck by pretrial challenge that they need not appear.

5. The court shall have the discretionary power to excuse a juror's attendance on any given day or for any specific case upon request of the juror for good cause shown. If a juror is so excused seven or more days prior to trial, a replacement juror shall be drawn and notified under the procedures provided in this section. However, if a juror is so excused within six days prior to trial, an alternate juror will be designated to serve as juror.

C. On the day set for trial, jurors who appear shall be called in such a manner as the judge may direct to be sworn on their voir dire until a disinterested and impartial panel is obtained. In addition, a condemnation juror may be stricken for cause for reasons civil jurors are excused. If all nine jurors and two alternates appear and none are stricken for cause, each party shall be entitled to exercise two peremptory strikes. However, if, because of strikes for cause and unexpected failure to appear, fewer than nine but more than five jurors remain before the court, the number of peremptory strikes for each party shall be equally reduced, and the judge shall, if necessary, strike by lot an additional name in order to reduce the jury to five members. If fewer than seven jurors remain before the court prior to the exercise of peremptory strikes, the trial may proceed and be heard by less than five jurors provided the parties agree. However, no trial shall proceed with fewer than three jurors.

D. Before executing the duties of a condemnation juror, each juror drawn shall take an oath before an officer authorized by the laws of this Commonwealth to administer an oath that he will faithfully and impartially ascertain the value of the property to be taken and the damages, if any, which may accrue to the residue beyond the enhancement in value, if any, to such residue by reason of such taking and use by the petitioner.

E. The jurors selected to hear the case shall fix the value of the property to be taken and the damages, if any, which may accrue to the residue beyond any enhancement in value to such residue by reason of the taking and use thereof by the petitioner. The conclusion of the jurors need not be unanimous, and a majority of the jurors may act in the name of the jury.

§ 25-46.21. View by ~~commissioners~~ condemnation jurors; hearing of testimony; ~~commissioners'~~ jurors' report; exceptions to report and hearing thereon.

Upon the selection of the ~~commissioners~~ condemnation jurors, the court shall direct them, in the custody of the sheriff or sergeant or one of his deputies, to view the property described in the petition with the owner and the petitioner, or any representative of either party, and none other, unless otherwise directed by the court; and, upon motion of either party, the judge shall accompany the ~~commissioners~~ jurors upon such view. Such view shall not be considered by the ~~commission~~ jury or the court as the sole evidence in the case. Upon completion of the view, the court shall hear the testimony in open court on the issues joined. When the ~~commissioners~~ jurors shall have arrived at their conclusion they shall make their report in writing to the court, or to the judge thereof in vacation. The report may be confirmed or set aside forthwith by the court, or the judge, as the case may be, provided that when the report is so filed and before the court or judge passes thereon, either party shall have the right to file written exceptions to the report, which shall be filed not later than ten days after the rendering of the report by the commissioners. The court or the judge, as the case may be, shall have the same power over the ~~commissioners'~~ juries' reports as it now has over verdicts of juries in civil actions.

Upon hearing of exceptions to the ~~commissioners'~~ juries' report the court shall not recall and question the ~~commissioners~~ jurors as to the manner in which their report was determined unless there be an allegation in such written exceptions that fraud, collusion, corruption or improper conduct entered into the report. If such allegation is made the judge shall summon the ~~commissioners~~ jurors to appear and he alone shall question them concerning their actions. If the court be satisfied that fraud, collusion, corruption or improper conduct entered into the report of the ~~commissioners~~ jurors, the report shall be set aside and new ~~commissioners~~ jurors appointed to rehear the case.

If the court be satisfied that no such fraud, collusion, corruption or improper conduct entered into the report of the ~~commissioners~~ jurors, or no other cause exists which would justify setting aside or modifying a jury verdict in civil actions, the report shall be confirmed.

§ 25-46.21:1. Participation of certain tenants in condemnation proceedings.

Any tenant for a term expiring more than twelve months after the filing of the petition referred to in § 25-46.7 may participate in the proceedings described in § 25-46.21 to the same extent as his landlord or the owner, if, not less than ten days prior to the date for the trial of the issue of just compensation, such tenant shall file his petition for intervention, in the manner provided in § 25-46.16, including a verified copy of the lease under which he is in possession, and an affidavit by the tenant or his duly authorized agent or attorney, stating

(1) That he claims an interest in the award; and

(2) That he desires to offer admissible evidence concerning the value of the property being taken or damaged.

For the purposes of this section, the unexpired portion of the term of a tenant's lease shall include any renewals or extensions for which the tenant has an enforceable written option. The term "tenant" shall include the assignee of the original tenant, as well as any sublessee of the entire demised premises of the owner for the full unexpired term of the sublessor.

Nothing in this section shall be construed, however, as authorizing such tenant to offer any evidence in the proceedings described in § 25-46.21 concerning the value of his leasehold interest in the property involved therein or as authorizing the ~~commissioners~~ jurors to make any such determination in formulating their report.

§ 25-46.22. Compensation of ~~commissioners~~ jurors.

The ~~commissioners~~ condemnation jurors appointed shall, for every day or portion thereof they may be employed in the performance of their duties, receive an allowance in the amount of sixty dollars as compensation for their attendance, travel and other costs, regardless of the number of cases heard on any particular day, to be paid by the petitioner. The persons summoned who appear, but are not appointed to serve as ~~commissioners~~ jurors, shall be allowed thirty dollars for each day they are summoned to appear.

§ 25-46.24. Payment of compensation and damages into court; vesting of title.

Upon the return of the report of the ~~commissioners~~ jurors or the court, as the case may be, and the confirmation, alteration or modification thereof in the manner provided in this chapter, the sum so ascertained by the court as compensation and damages, if any, to the property owners may be paid into court, upon which title to the property and rights condemned shall vest in the petitioner to the extent prayed for in the petition, unless such title shall have already vested in the petitioner in a manner otherwise provided by law, and the petitioner or its agent shall have the right to enter and construct its works or improvements upon or through the property described in its petition.

§ 25-46.25. When petitioner may begin work during pendency of proceedings; no injunction to be awarded.

Upon the return of the report of the ~~commissioners~~ jurors or the court, as the case may be, and upon payment into court of the sum ascertained therein, the petitioner or its agents may enter and construct its works or improvements upon or through the property as described in its petition, notwithstanding the pendency of proceedings on any objections to such report in the trial court, or upon an appeal of the case, or the ordering of a new trial of the issue of just compensation or otherwise. And no order shall be made nor any injunction awarded by any court or judge to stay the petitioner in the prosecution of its work unless it is manifest that the petitioner or its agents are transcending their authority and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages.

§ 25-46.29. Appointment of other ~~commissioners~~ jurors when new trial ordered; costs upon new trial.

If the ~~commission~~ condemnation jury fails to report its award of just compensation within a reasonable time after the issue of just compensation is submitted to it, or the ~~commission~~ jury reports that it is unable to make such award, or the ~~commissioners'~~ jurors' report is set aside, or a final order upon its report has been set aside upon appeal and a new trial ordered, the court shall, without further notice, as often as seems to it proper, appoint other ~~commissioners~~ jurors, and the matter may be proceeded in as hereinbefore prescribed in this chapter.

If a new trial of the issue of just compensation is ordered, either in the trial court or upon appeal, upon an exception by an owner with respect to the insufficiency of the award of just compensation, and the subsequent report of the award of just compensation, which is confirmed, is for the same or a lesser total amount, the court shall tax all the costs of the new trial against the owner making such exception and shall order repayment to the petitioner of any sum paid to such owner out of the fund paid into court by the petitioner in excess of the total sum ascertained by the second report with interest thereon at the rate of eight percent annually from the date the original payment was made to such owner until the date such excess is repaid to the petitioner except that any interest accruing prior to July 1, 1970, shall be paid at the rate of five per centum; and interest accruing thereafter and prior to July 1, 1981, shall be paid at the rate of six percent; and if such owner fails to make such repayment within thirty days from the date of the entry of such order, the court shall enter judgment therefor against such owner.

B. Litigation Expenses

1. Payment of condemnee's litigation expenses

§ 25-46.32:1. Litigation expenses.

A. As used in this section, "litigation expenses" means the costs, disbursements, and expenses, including attorney's fees, appraisal fees, and fees for expert testimony, necessary to prepare for anticipated or participation in court proceedings incurred by the condemnee in connection with an action to determine the issue of just compensation for a taking or damaging of property under exercise of the power of eminent domain.

B. If the amount of just compensation, awarded to the condemnee by the judgment, exclusive of interest and costs, exceeds the amount specified in the highest written offer of settlement made by the condemnor by fifteen percent or more, the condemnee may apply for an order for the condemnor to pay the condemnee's reasonable litigation expenses actually incurred because of the court proceedings on the issue of just compensation, by serving on the condemnor and filing with the clerk of court a verified application therefor within fifteen days after the court's confirmation of the jury's decision. The application shall show cause why the condemnee is entitled to an award of litigation expenses pursuant to this section; state the amount sought; and include an itemized statement under oath from an attorney, appraiser, engineer or expert witness representing or appearing at trial on behalf of the condemnee stating the fee charged, the basis therefor, the actual time expended and all actual expenses for which the recovery is sought. If requested by any party, or upon its own motion, the court may hear the parties with respect to the matters raised by the application and determine the amount of litigation expenses to be awarded.

C. In any proceeding to determine the amount of litigation expenses to be awarded, the court shall consider, among such other factors as the court deems relevant, the benefit provided to the condemnee by any of the professional or expert witness for whom the litigation expenses were incurred. Litigation expenses may be awarded to such of the attorneys, appraisers, engineers or expert witnesses representing or appearing at trial on behalf of the condemnee, and in such amounts, if any, as the court deems in the best interests of justice. In making its determination of whether to make an award pursuant to this section, the court may consider (i) the extent that the condemnee, during the course of the proceeding, engaged in conduct which unduly and unreasonably protracted the final resolution of the action, (ii) whether the position of the condemnor was substantially justified, and (iii) special circumstances make an award of litigation expenses unjust. In no event shall the amount of the expenses awarded pursuant to this subsection exceed the amount awarded as just compensation.

D. Any litigation expenses awarded by the court pursuant to this subsection shall be paid within thirty days of the court's final order.

2. Expenses of condemnee's survey

§ 25-46.32. Costs.

Except as otherwise provided in this chapter, all costs of the proceeding in the trial court which are fixed by statute shall be taxed against the petitioner. The court may in its discretion tax as a cost a fee for a survey for the landowner, such fee not to exceed ~~$100~~ $1,000. All costs on appeal shall be assessed and assessable in the manner provided by law and the Rules of Court as in other civil cases.

C. Uniform Relocation Assistance Act

1. Make the Uniform Relocation Assistance Act applicable to all condemnations

§ 15.2-729. Relocation assistance programs.

The board ~~may~~ shall provide by local ordinance for the application of Chapter 6 (§ 25-235 et seq.) of Title 25 to displaced persons as defined in § 25-238 ~~or as more narrowly defined by the board~~, in cases of acquisition of real property for use in projects or programs in which only local funds are used.

§ 25-46.36. Cities ~~may~~ to pay relocation costs ~~in connection with federally assisted programs~~.

~~Notwithstanding the provisions of Chapter 6 (§ 25-235 et seq.) of this title,~~ The governing body of any city ~~may~~ shall authorize the payment of relocation costs in connection with ~~federally assisted programs~~ the exercise of the power of eminent domain as provided in Chapter 6 (§ 25-235 et seq.) of this title under such rules and regulations as ~~the program~~ such chapter may require.

§ 25-236. Application of chapter.

A. The provisions of any municipal charter notwithstanding, the provisions of this chapter shall be applicable to the acquisition of real property by any state agency as hereinafter defined ~~for use in projects or programs in which federal or state funds are used; provided, however, that for the purposes of this chapter, federal guarantees or insurance shall not be deemed to be federal funds~~.

B. This chapter shall not apply to acquisitions by a state agency, as hereinafter defined, (i) which are voluntarily initiated or negotiated by the seller under no threat of condemnation, (ii) where property is dedicated pursuant to the provisions of Chapter 22 (§ 15.2-2200 et seq.) of Title 15.2, or (iii) where property is voluntarily dedicated or donated for no consideration, unless compliance with the provisions of this chapter in such instances is a prerequisite to the receipt, and expenditure of federal funds on the projects for which such property is ~~acquired; provided, however, that~~

C. The provisions of this chapter relating to relocation assistance shall apply for the benefit of persons, other than the owner, who are actually and lawfully occupying the real property to be acquired and who have been occupants thereof for at least ninety days prior to the initiation of negotiations for acquisition.

§ 25-238. Definitions.

As used in this chapter the term:

"Business" means any lawful activity, excepting a farm operation, conducted primarily:

1. For the purchase, sale, lease and rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property;

2. For the sale of services to the public;

3. By a nonprofit organization; or

4. Solely for the purposes of § 25-239 A for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display or displays, whether or not such display or displays are located on the premises on which any of the above activities are conducted.

"Comparable replacement dwelling" means any dwelling that is decent, safe and sanitary; adequate in size to accommodate the occupants; within the financial means of the displaced person; functionally equivalent; in an area not subject to unreasonable adverse environmental conditions; and in a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities, facilities, services and the displaced person's place of employment.

"Displaced person" means any person who moves (i) from real property, or moves his personal property from real property, (a) as a direct result of a written notice of intent to acquire or the acquisition of such real property, in whole or in part, for any program or project undertaken by a state agency or (b) on which such person is a residential tenant, or conducts a small business, or a farm operation or a

business defined in this article as a direct result of rehabilitation, demolition, or such other displacing activity as the state agency may prescribe, under a program or project undertaken by the state agency in any case in which the state agency determines that such displacement is permanent; and (ii) solely for the purposes of §§ 25-239 A and B and 25-242, as a direct result of a written notice of intent to acquire or the acquisition of real property on which such person conducts a business or farm operation, for such program or project; or as a direct result of rehabilitation, demolition, or such other displacing activity as the state agency may prescribe, under a program or project undertaken by the state agency in any case in which the state agency determines that such displacement is permanent.

The term "displaced person" does not include (i) a person who has been determined, according to criteria established by the state agency to be either in unlawful occupancy of the displacement dwelling or to have occupied such dwelling for the purpose of obtaining assistance under this chapter; or (ii) in any case which the state agency acquires property for a program or project, any person, other than a person who was an occupant of the property at the time it was acquired, who occupies such property on a rental basis for a short term or a period subject to termination when the property is needed for the program or project.

"Farm operation" means any activity conducted solely or primarily for the production of one or more agricultural products or commodities, including timber, for sale or home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support.

"Mortgage" means such classes of liens as are commonly given to secure advances on, or the unpaid purchase price of, real property, together with the credit instruments, if any, secured thereby.

"Nonprofit organization" means an organization that is exempt from paying federal income taxes under § 501 of the Internal Revenue Code (26 U.S.C. § 501).

"Person" means any individual, partnership, corporation or association.

"State agency" means any (i) department, agency or instrumentality of the Commonwealth; ~~or any~~ (ii) public authority, municipal corporation, local governmental unit or political subdivision of the Commonwealth; ~~or any~~ (iii) department, agency or instrumentality of any public authority, municipal corporation, local government unit, political subdivision of the Commonwealth~~, or two or more of any of the aforementioned and~~ ; (iv) any person who has the authority to acquire property by eminent domain under state law ~~and who~~ ; or (v) any two or more of any of the aforementioned, which carries out projects ~~with federal or state financial assistance~~ that cause people to be displaced.

2. Replace caps on relocation expenses with a requirement for payment of all reasonably-incurred relocation expenses

§ 25-239. Payments for moving and relocation expenses.

A. Whenever the acquisition of real property for a program or project undertaken by a state agency will result in the displacement of any person, such agency shall make fair and reasonable relocation payments to displaced persons as required by this chapter for:

1. Actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;

2. Actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the state agency;

3. Actual reasonable expenses in searching for a replacement business or farm; and

4. Actual reasonable expenses ~~necessary to reestablish~~ necessarily incurred in reestablishing a displaced farm, nonprofit organization or small business at its new site, ~~but not to exceed $10,000~~ in accordance with criteria established by the state agency.

B. Any displaced person eligible for payments under subsection A of this section who is displaced from a dwelling and who elects to accept the payments authorized by this subsection in lieu of the payments authorized by subsection A of this section may receive a moving expense allowance, determined according to a schedule established by the state agency.

~~C. Any displaced person eligible for payments under subsection A of this section who is displaced from his place of business or farm operation and who is eligible under criteria established by the state agency may elect to accept the payment authorized by this subsection in lieu of the payment authorized by subsection A of this section. Such payment shall consist of a fixed payment in an amount to be determined according to criteria established by the state agency, except that such payment shall not be less than $1,000 nor more than $20,000. A person whose sole business at the displacement dwelling is the rental of such property to others shall not qualify for a payment under this subsection.~~

§ 25-240. Additional payments to enable displaced persons to acquire dwellings.

A. In addition to payments otherwise authorized by this chapter the state agency shall make an additional payment ~~not in excess of $22,500~~ to any displaced person who is displaced from a dwelling actually owned and occupied by such displaced person for not less than 180 days prior to the initiation of negotiations for the acquisition of the property. Such additional payment shall include the following elements:

1. The amount, if any, which when added to the acquisition cost of the dwelling acquired by the state agency, equals the reasonable cost of a comparable replacement dwelling.

2. The amount, if any, which will compensate such displaced person for any increased interest costs and other debt service costs which such person is required to pay for financing the acquisition of any such comparable replacement dwelling. Such amount for any increased interest or debt service costs shall be determined in accordance with the criteria established by the state agency. Such amount shall be paid only if the dwelling acquired by the state agency was encumbered by a bona fide mortgage which was a valid lien on such dwelling for not less than 180 days immediately prior to the initiation of negotiations for the acquisition of such dwelling.

3. Reasonable expenses incurred by such displaced person for evidence of title, recording fees, and other closing costs incident to the purchase of the replacement dwelling, but not including prepaid expenses.

B. The additional payment authorized by this section shall be made only to such a displaced person who purchases and occupies a replacement dwelling which is decent, safe, and sanitary not later than the end of the one-year period beginning on the date on which he receives final payment of all costs for the acquired dwelling, or the date on which the state agency obligation under § 25-247 is met, whichever is the later date, except that the state agency may extend such period for good cause. If such period is extended, the payment under this section shall be based on the cost of relocating the person to a comparable replacement dwelling within one year of such date.

§ 25-241. Additional payments to certain persons not eligible for payments under § 25-240.

A. In addition to amounts otherwise authorized by this chapter, a state agency shall make a payment to or for any displaced person displaced from any dwelling not eligible to receive a payment under § 25-240 which dwelling was actually and lawfully occupied by such displaced person for not less than ninety days immediately prior to (i) the initiation of negotiations for acquisition of such dwelling, or (ii) in any case in which displacement is not a direct result of acquisition, such other event as the agency shall prescribe. Such payment shall consist of the amount necessary to enable such displaced person to lease or rent, for a period not to exceed forty-two months, a reasonably comparable replacement dwelling, ~~but not to exceed $5,250~~ in accordance with criteria established by the state agency.

B. Any person eligible for a payment under subsection A of this section may elect to apply such payment to a down payment on, and other incidental expenses pursuant to, the purchase of a decent, safe, and sanitary replacement dwelling. Any such person may, at the discretion of the state agency, be eligible under this subsection for the maximum payment allowed under subsection A, except that in the case of a

displaced homeowner who has owned and occupied the displacement dwelling for at least ninety days but not more than 180 days immediately prior to the initiation of negotiations for the acquisition of such dwelling, such payment shall not exceed the payment such person would otherwise have received under § 25-240 had the person owned and occupied the displacement dwelling 180 days immediately prior to the initiation of such negotiations.

§ 25-247.1. Amounts of benefits under §§ 25-239, 25-240, and 25-241.

~~The monetary limits~~ In no event shall the amounts of benefits provided for in §§ 25-239, 25-240, and 25-241 ~~shall~~ be ~~adjusted to conform to future revisions of corresponding~~ less than the amounts of monetary benefits required to be provided under the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646).

D. Tenancy length as a condition to intervention

§ 25-46.21:1. Participation of certain tenants in condemnation proceedings.

Any tenant ~~for a term expiring more than twelve months after the filing of the petition referred to in § 25-46.7~~ may participate in the proceedings described in § 25-46.21 to the same extent as his landlord or the owner, if, not less than ten days prior to the date for the trial of the issue of just compensation, such tenant shall file his petition for intervention, in the manner provided in § 25-46.16, including a verified copy of the lease under which he is in possession, and an affidavit by the tenant or his duly authorized agent or attorney, stating

(1) That he claims an interest in the award; and

(2) That he desires to offer admissible evidence concerning the value of the property being taken or damaged.

For the purposes of this section, the unexpired portion of the term of a tenant's lease shall include any renewals or extensions for which the tenant has an enforceable written option. The term "tenant" shall include the assignee of the original tenant, as well as any sublessee of the entire demised premises of the owner for the full unexpired term of the sublessor.

Nothing in this section shall be construed, however, as authorizing such tenant to offer any evidence in the proceedings described in § 25-46.21 concerning the value of his leasehold interest in the property involved therein or as authorizing the commissioners to make any such determination in formulating their report.

E. Payment delays/ title searches

§ 25-46.5. Effort to purchase required; prerequisite to effort to purchase or filing certificate.

A. No proceedings shall be taken to condemn property until a bona fide but ineffectual effort has been made to acquire from the owner by purchase the property sought to be condemned, except where such consent cannot be obtained because of the incapacity of one or more of the owners or because one or more of such owners is unable to convey legal title to such property or is unknown or cannot with reasonable diligence be found within this Commonwealth.

B. Such bona fide effort shall include a written statement to the owner which explains the factual basis for the condemnor's offer.

C. Notwithstanding any provision of law to the contrary, a condemnor, prior to making an offer to acquire the property by purchase or filing a certificate of take or certificate of deposit pursuant to § 33.1-120 or § 33.1-121, shall conduct or cause to be conducted an examination of title to the property in order to ascertain the identity of the owner or owners of such property and to determine the nature and extent of such owners' interests in the property.

PROPOSED LEGISLATIVE CHANGES – Part 2 (from December 10, 1999)

A. Allowing tenants that own billboards or similar improvements on leased land to be compensated for the fair market value, determined by comparable sales or other valuation approaches, of their improvements.

§ 25-46.2:2. Condemnable interests of owners of improvements on real property.

A. The owner of any building, structure or other improvement, including but not limited to an outdoor advertising sign structure, that is located on real property in which such owner has a leasehold interest shall (i) be deemed to have a separate condemnable interest in such building, structure or other improvement and (ii) be entitled to just compensation for the taking of or damage to such building, structure or other improvement, as provided in this section. Unless the owner of such building, structure or other improvement agrees to the contrary, the proceeding for condemnation of such owner's property, including the value of his leasehold interest as tenant of the condemned real property, shall not be joined with a proceeding for condemnation of the real property on which such building, structure or other improvement is located. Except as set forth in this section, the provisions of this chapter shall govern the proceeding for condemnation of such owner's property.

B. For the purposes of this section, just compensation shall be paid for the taking from the owner of such building, structure or other improvement, all right, title and interest therein and the value of such owner's tenancy interest relating thereto. Evidence regarding the value of comparable improvements, including transfers of leases thereof, may be considered in determining the fair market value of the improvements so taken or damaged.

C. Notwithstanding anything contained in this section to the contrary, the owner of such building, structure or other improvement shall be not be entitled to payment for the fair market value thereof if such owner is permitted under applicable law to relocate the improvement to another location (i) on the same real property; (ii) on adjacent real property; or (iii) along the same street or highway within one mile the previous location. If the improvement is relocated, the owner thereof shall be entitled to relocation assistance as the operator of a business pursuant to Article 2 (§ 25-239 et seq.) of Chapter 6 of this title.

§ 25-46.21:1. Participation of certain tenants in condemnation proceedings.

Any tenant ~~for a term expiring more than twelve months after the filing of the petition referred to in § 25-46.7~~ may participate in the proceedings described in § 25-46.21 to the same extent as his landlord or the owner, if, not less than ten days prior to the date for the trial of the issue of just compensation, such tenant shall file his petition for intervention, in the manner provided in § 25-46.16, including a verified copy of the lease under which he is in possession, and an affidavit by the tenant or his duly authorized agent or attorney, stating

(1) That he claims an interest in the award; and

(2) That he desires to offer admissible evidence concerning the value of the property being taken or damaged.

For the purposes of this section, the ~~unexpired portion of the term of a tenant's lease shall include any renewals or extensions for which the tenant has an enforceable written option. The~~ term "tenant" shall include the assignee of the original tenant, as well as any sublessee of the entire demised premises of the owner for the full unexpired term of the sublessor.

~~Nothing in this section shall be construed, however, as authorizing such tenant to offer any evidence in the proceedings described in § 25-46.21 concerning the value of his leasehold interest in the property involved therein or as authorizing the commissioners to make any such determination in formulating their report.~~

B. Requiring VDOT to use licensed real estate appraisers in conducting its valuations for property acquisitions.

§ 33.1-89. Power to acquire lands, etc., by purchase, gift or eminent domain; conveyance to municipality after acquisition; property owners to be informed and briefed.

The Commonwealth Transportation Commissioner is hereby vested with the power to acquire by purchase, gift, or power of eminent domain such lands, structures, rights-of-way, franchises, easements and other interest in lands, including lands under water and riparian rights, of any person, association, partnership, corporation, or municipality or political subdivision, deemed to be necessary for the construction, reconstruction, alteration, maintenance and repair of the public highways of the Commonwealth and for these purposes and all other purposes incidental thereto may condemn property in fee simple and rights-of-way of such width and on such routes and grades and locations as by the Commissioner may be deemed requisite and suitable, including locations for permanent, temporary, continuous, periodical or future use, and rights or easements incidental thereto and lands, quarries, and locations, with rights of ingress and egress, containing gravel, clay, sand, stone, rock, timber and any other road materials deemed useful or necessary in carrying out the purposes aforesaid. For the purpose of this article "public highway" means highway, road and street; and when applicable, the term "public highway" also includes bridge, ferry, causeway, landing and wharf.

The Commissioner is authorized to exercise the above power within municipalities on projects which are constructed with state or federal participation, if requested by the municipality concerned. Whenever the Commissioner has acquired property pursuant to a request of the municipality, he shall convey the title so acquired to the municipality, except that rights-of-way or easements acquired for the relocation of a railroad, public utility company, public service corporation or company, another political subdivision, or cable television company in connection with said projects shall be conveyed to that entity in accordance with § 33.1-96. The authority for such conveyance shall apply to acquisitions made by the Commissioner pursuant to previous requests as well as any subsequent request.

Any offer by the Commissioner to a property owner with respect to payment of compensation for the prospective taking of property and damage to property not taken incident to the purposes of this section shall separately state (i) the property to be taken and the amount of compensation offered therefor and (ii) the nature of the prospective damage or damages and the amount of compensation offered for each such prospective damage. <u>The amount of the offer shall not be less than the amount of the approved appraisal of the fair market value of such property, in accordance with the provisions of § 25-248. Any such appraisal used by the Commissioner as the basis for an offer shall be prepared by a certified general real estate appraiser licensed in accordance with Chapter 20.1 (§ 54.1-2009 et seq.) of Title 54.1.</u>

In negotiating with a property owner with respect to payment for prospective damage to property not taken incident to the purposes of this section, the Commissioner shall ensure that such property owner or his authorized representative is properly informed as to the type and amount of foreseeable damage and/or enhancement. Adequate briefing will include: (i) the giving of plats and profiles of the project, showing cuts and fills, together with elevations and grades; (ii) explanation, in lay terms, of all proposed changes in profile, elevation and grade of the highway and entrances, including the elevations of proposed pavement and shoulders, both center and edges, with relation to the present pavement, and approximate grade of entrances to the property.

Any option or deed executed by the property owner shall contain a statement that the plans as they affect his property have been fully explained. Provided, however, that the requirements of this section with respect to information and briefing and the acknowledgment thereof in options and deeds shall in no way be construed to affect the validity of any conveyance or to create any right to compensation or to limit the Commissioner's authority to reasonably control the use of public highways so as to promote the public health, safety and welfare.

C. Requiring condemnors to pay for the reasonable cost of a licensed appraisal conducted for the condemnee in all takings, regardless of whether the condemnation results in litigation.

§ 25-249.1. Reimbursement of owner for cost of appraisal; providing copy of appraisal to state agency.

Any state agency acquiring real property in connection with any program or project shall reimburse the owner, to the extent the state agency deems fair and reasonable, for expenses the owner incurred in having the real property appraised, following the initiation of negotiations for acquisition of the real property pursuant to § 25-248, by an appraiser selected by the owner; provided that (i) reimbursement shall not be required if the appraisal is conducted by someone other than a certified general real estate appraiser licensed in accordance with Chapter 20.1 (§ 54.1-2009 et seq.) of Title 54, (ii) reimbursement shall be not be required if the owner failed to provide the state agency with a copy of the appraisal report as soon as practicable after the owner's receipt thereof, and (iii) the state agency shall not be required to reimburse the owner for the cost of more than one such appraisal.

D. Requiring condemnors to provide copies of appraisals of the property with their offer to purchase.

§ 25-46.5. Effort to purchase required.

A. No proceedings shall be taken to condemn property until a bona fide but ineffectual effort has been made to acquire from the owner by purchase the property sought to be condemned, except where such consent cannot be obtained because of the incapacity of one or more of the owners or because one or more of such owners is unable to convey legal title to such property or is unknown or cannot with reasonable diligence be found within this Commonwealth.

B. Such bona fide effort shall include a written statement to the owner which explains the factual basis for the condemnor's offer, and include a copy of the appraisal of the property prepared pursuant to § 25-46.248 upon which such offer is based.

§ 25-248. General rules for conduct of acquisition.

Whenever real property is acquired by a state agency, on or after April 10, 1972, in connection with any programs or projects, such acquisition shall be conducted, to the greatest extent practicable, in accordance with the following provisions:

(a) An agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(b) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property.

(c) Before the initiation of negotiations for real property, the state agency concerned shall establish an amount which it believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for the amount it established as just compensation, together with a copy of the agency's approved appraisal of the fair market value of such property upon which the agency has based the amount offered for the property. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

(d) No owner shall be required to surrender possession of real property before the agency concerned pays the agreed purchase price, or deposits with the state court in accordance with applicable law, for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

(e) The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling will be available), or to move his business or farm operation, without at least ninety days' written notice from the agency concerned, of the date by which such move is required.

(f) If the agency permits an owner or tenant to occupy the real property acquired on a rental basis for a short term for a period subject to termination by the state agency on a short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(g) In no event shall the agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.

(h) If any interest in real property is to be acquired by exercise of the power of eminent domain, the agency concerned shall institute formal condemnation proceedings. No agency shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(i) If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the agency concerned shall offer to acquire the entire property.

§ 36-27. Eminent domain.

An authority shall have the right to acquire by the exercise of the power of eminent domain any real property which may be necessary for the purposes of such authority under this chapter after the adoption by it of a resolution declaring that the acquisition of the real property described therein is necessary for such purposes. An authority may exercise the power of eminent domain in the manner provided in Chapter 1.1 (§ 25-46.1 et seq.) of Title 25. The commissioners before which condemnation proceedings are conducted may hear evidence as to the value of the property including but not limited to the owner's appraisal and the effect that any pending application for a zoning change, special use permit application or variance application may have on the value of the property. The court may also determine whether there has been unreasonable delay in the institution of the proceedings after public announcement by the condemnor of a project which necessitates acquisition by the condemnor of a designated land area consisting of or including the land sought to be condemned. If the court determines that such unreasonable delay has occurred, it shall instruct the commissioners in such proceedings to allow any damages proved to their satisfaction by the landowner or landowners to have been sustained to his or their land during and because of such delay, in addition to and separately from the fair market value thereof, but such damages shall not exceed the actual diminution if any in fair market value of the land in substantially the same physical condition over the period of the delay. This provision shall not apply to any such public announcement made prior to July 1, 1960.

Prior to the adoption of any redevelopment plan pursuant to § 36-49 or any conservation plan pursuant to § 36-49.1, an authority shall send by certified mail, postage prepaid, to at least one of the owners of every parcel of property to be acquired pursuant to such plan a notice advising such owner that (i) the property owned by such owner is proposed to be acquired and (ii) such owner will have the right to appear in any condemnation proceeding instituted to acquire the property and present any defense which such owner may have to the taking. Such notice shall not be the basis for eligibility for relocation benefits. At the time it makes its price offer, the authority shall also provide to the property owner a ~~certificate signed~~ copy of the appraisal of the fair market value of such property upon which the authority has based the amount offered for the property, prepared by a certified general real estate appraiser licensed in accordance with Chapter 20.1 (§ 54.1-2009 et seq.) of Title 54.1, which shall include a

certificate setting forth the appraiser's opinion of the fair market value, together with two comparable property sales, if available, of the property to be acquired.

In all such cases the proceedings shall be according to the provisions of Chapter 1.1 (§ 25-46.1 et seq.) of Title 25, so far as they can be applied to the same, the term "company" as used in such chapter, and any officers of a "company" referred to therein, to be construed as meaning the authority and the commissioners thereof, respectively. An authority may exercise the power of eminent domain in the manner provided by any other applicable statutory provisions for the exercise of the power of eminent domain. No real property belonging to the city, the county, the Commonwealth or any other political subdivision thereof may be acquired without its consent.

E. Prohibiting a condemnor from re-filing condemnation proceedings within eighteen months after it dismisses condemnation proceedings against the same owner over the same property for the same purpose.

§ 25-46.34. Dismissal of proceedings; dropping defendant.

(a) If no hearing has begun in the trial of the issue of just compensation for the taking or damaging of property or property interest and the petitioner has not already acquired the title or a lesser interest or estate in or taken possession of such property, the petitioner may upon motion obtain, as a matter of right, an order dismissing the proceeding as to such property, which order shall also provide except in a settlement by agreement of the parties that the petitioner shall pay such owner or owners their reasonable expenses which have been actually incurred by them in preparing for the trial on the issue of just compensation, in such amounts as the court deems just and reasonable.

(b) At any time after a hearing has begun in the trial of the issue of just compensation for the taking or damaging of any property or property interest, the petitioner not having already acquired the title or a lesser interest or estate in or taken possession of such property, or paid the amount of just compensation into court, and before the time for noting an appeal from any final order upon a report of just compensation, the petitioner may, upon motion, obtain as a matter of right an order dismissing the proceedings as to such property, which order shall also provide that the petitioner shall pay such owner or owners for the following expenses which have been actually incurred by them in such amounts as the court deems just and reasonable: attorney's fee, witness fees including reasonable expert witness fees, not exceeding three, and other reasonable expenses and compensation for time spent as a result of the condemnation proceedings. If any such expenses are not paid within thirty days of the entry of such order, judgment therefor shall be entered against the petitioner.

(c) In the event the petitioner fails to pay to the parties entitled thereto, or into court, the amount of the award of just compensation before the time for noting an appeal from any final order upon the report of just compensation, the owner or owners of the property to be taken or affected may, upon motion, obtain as a matter of right an order dismissing the proceeding as to such property, which order shall also provide that the petitioner shall pay such owner or owners his expenses as provided in subsection (b) of this section. If any such expenses are not paid within thirty days of the entry of such order, judgment therefor shall be entered against the petitioner.

(d) Before the vesting of title, or a lesser interest or estate in any tract or parcel of land in the manner prescribed in this chapter, the proceedings may be dismissed, in whole or in part, as to any such property upon the filing of a stipulation of dismissal by the parties affected thereby; and, if such parties so stipulate, the court may vacate any order that has been entered.

(e) Except as otherwise provided in a stipulation of dismissal or order of the court, ~~any dismissal is without prejudice~~ the petitioner shall not bring an action to acquire the property of any owner through exercise of the power of eminent domain within eighteen months following the date of an order dismissing a proceeding to acquire such property from the same owner for the same public purpose for which the initial action was instituted.

(f) The court may at any time drop a defendant unnecessarily or improperly joined.

F. Extending the distance from a dwelling that land can be acquired for a right-of-way for a 765 kV transmission line from 60 to 100 feet.

§ 56-49. Powers.

In addition to the powers conferred by Title 13.1, each public service corporation of this Commonwealth organized to conduct a public service business other than a railroad shall have the power:

(1) To cause to be made such examinations and surveys for its proposed line or location of its works as are necessary to the selection of the most advantageous location or route or for the improvement or straightening of its line or works, or changes of location or construction, or providing additional facilities, and for such purposes, by its officers and servants, to enter upon the lands or waters of any person but subject to responsibility for all damages that are done thereto, and subject to permission from, or notice to, the landowner as provided in § 25-232.1.

(2) To acquire by the exercise of the right of eminent domain any lands or estates or interests therein, sand, earth, gravel, water or other material, structures, rights-of-way, easements or other interests in lands, including lands under water and riparian rights, of any person, which are deemed necessary for the purposes of construction, reconstruction, alteration, straightening, relocation, operation, maintenance, improvement or repair of its lines, facilities or works, and for all its necessary business purposes incidental thereto, for its use in serving the public either directly or indirectly through another public service corporation, including permanent, temporary, continuous, periodical or future use, whenever the corporation cannot agree on the terms of purchase or settlement with any such person because of the incapacity of such person or because of the inability to agree on the compensation to be paid or other terms of settlement or purchase, or because any such person cannot with reasonable diligence be found or is unknown, or is a nonresident of the Commonwealth, or is unable to convey valid title to such property. Such proceeding shall be conducted in the manner provided by Chapter 1.1 (§ 25-46.1 et seq.) of Title 25 and shall be subject to the provisions of § 25-233. However, the corporation shall not take by condemnation proceedings a strip of land for a right-of-way within sixty feet of the dwelling house of any person except (i) when the court having jurisdiction of the condemnation proceeding finds, after notice of motion to be granted authority to do so to the owner of such dwelling house, given in the manner provided in §§ 25-46.9, 25-46.10 and 25-46.12, and a hearing thereon, that it would otherwise be impractical, without unreasonable expense, to construct the proposed works of the corporation at another location; (ii) in case of occupancy of the streets or alleys, public or private, of any county, city or town, in pursuance of permission obtained from the board of supervisors of such county or the corporate authorities of such city or town; or (iii) in case of occupancy of the highways of this Commonwealth or of any county, in pursuance of permission from the authorities having jurisdiction over such highways. In addition, a corporation shall not take by condemnation proceedings a strip of land for a right-of-way for the purposes of construction or operation of an overhead electrical transmission line of 765 kilovolts or more within one hundred feet of the dwelling house of any person, except when the court having jurisdiction of the condemnation proceeding finds, after notice of motion to be granted authority to do so to the owner of such dwelling house, given in the manner provided in §§ 25-46.9, 25-46.10 and 25-46.12, and a hearing thereon, that it would otherwise be impractical, without unreasonable expense, to construct the proposed overhead electrical transmission line at another location. A public service corporation which has not been (i) allotted territory for public utility service by the State Corporation Commission or (ii) issued a certificate to provide public utility service shall acquire lands or interests therein by eminent domain as provided in this subdivision for lines, facilities, works or purposes only after it has obtained any certificate of public convenience and necessity required for such lines, facilities, works or purposes under Chapter 10.1 (§ 56-265.1 et seq.) of Title 56.

And provided, further, that notwithstanding the foregoing nor any other provision of the law the right of eminent domain shall not be exercised for the purpose of acquiring any lands or estates or interests therein nor any other property for the construction, reconstruction, maintenance or operation of any pipeline for the transportation of coal.

G. Prohibiting the Commonwealth Transportation Board from acquiring any existing business within 300 feet of the exit point of the interstate system solely for the construction of controlled access.

§ 33.1-49. Power and authority of Commonwealth Transportation Board generally.

A. The Commonwealth Transportation Board may plan, designate, acquire, open, construct, reconstruct, improve, maintain, discontinue, abandon and regulate the use of the Interstate System in the same manner in which it is now or may be authorized to plan, designate, acquire, open, construct, reconstruct, improve, maintain, discontinue, abandon and regulate the use of the primary system of state highways. The Board may vacate, close or change the location of any street or public way in the manner in which it is now authorized by law to vacate, close or change the location of a highway in the primary system. The Board shall have any and all other authority and power relative to such Interstate System as is vested in it relative to highways in the primary system and shall include the right to acquire by purchase, eminent domain, grant or dedication title to lands or rights-of-way for such interstate highways whether within or without the limits of any city or town, and in addition thereto, shall have such other power, control and jurisdiction necessary to comply with the provisions of the Federal-Aid Highway Act of 1956 and all acts amendatory or supplementary thereto, all other provisions of law to the contrary notwithstanding.

B. Notwithstanding any provision of this article or Article 7 (§ 33.1-89 et seq.) of this chapter to the contrary, the Commonwealth Transportation Board shall not have authority to acquire, by exercise of the power of eminent domain, any portion of the property of an existing commercial establishment, or any interest therein, if a purpose of the proposed acquisition is to control or limit access to commercial establishments located within 300 feet of a segment of the Interstate System.

H. By resolution, continuing the study for another year.

Continuing the Joint Subcommittee studying the current means and adequacy of compensation to Virginia citizens whose properties are taken through the exercise of eminent domain.

WHEREAS, Senate Joint Resolution 271 (1999) and House Joint Resolution 491 (1999) established the Joint Subcommittee to study the current means and adequacy of compensation to Virginia citizens whose properties are taken through the exercise of eminent domain; and

WHEREAS, the Joint Subcommittee was directed to study, among other things, (i) the methods by which eminent domain is exercised and (ii) the means by which compensation is provided or obtained; and

WHEREAS, the Joint Subcommittee has in its first year examined information on a wide variety of issues pertaining to the Commonwealth's eminent domain laws; and

WHEREAS, due to the complexity of the issues and time constraints, the Joint Subcommittee has not been able to complete its study of these issues and possible solutions to address the concerns identified by citizens who testified at the three public hearings conducted by the Joint Subcommittee; and

WHEREAS, the members agree that the Joint Subcommittee should be continued for a second year; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Joint Subcommittee studying the current means and adequacy of compensation to Virginia citizens whose properties are taken through the exercise of eminent domain be continued. The Joint Subcommittee shall examine the procedures by which the power of eminent domain is exercised and the adequacy of compensation provided under current law.

The members duly appointed pursuant to Senate Joint Resolution 271 (1999) and House Joint Resolution 491 (1999) studying the current means and adequacy of compensation to Virginia citizens

whose properties are taken through the exercise of eminent domain shall continue to serve; however, any vacancies shall be filled as provided in the enabling resolution.

The Division of Legislative Services shall continue to provide staff support for the study. All other agencies of the Commonwealth shall provide assistance to the Joint Subcommittee, upon request.

The Joint Subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 2001 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

I. By resolution, directing the Senate Finance and House Appropriations committees to examine whether land acquisitions should be transferred from VDOT to the Department of General Services and paid for from the general fund.

WHEREAS, the joint subcommittee studying the current means and adequacy of compensation to Virginia citizens whose properties are taken through the exercise of eminent domain, established by Senate Joint Resolution 271 and House Joint Resolution 491 (1999), has received a great deal of testimony from citizens during the course of its work relating to the practices of the Virginia Department of Transportation in acquiring land for highway projects; and

WHEREAS, one of the complaints voiced by citizenry was that the Department of Transportation had a vested interest in paying as little as possible to landowners for the land it must acquire for highway projects; and

WHEREAS, it was suggested that making another agency responsible for acquiring land for highway projects would alleviate the perception that the Commonwealth is trying to pay less to some landowners than the amount that provides just compensation for the taking of or damage to their properties; and

WHEREAS, transferring the source of expenditures for land acquisition from the Transportation Trust Fund to the Commonwealth's general fund may have the benefit of allowing the allocation of additional revenue for highway construction expenditures; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Senate Committee on Finance and the House Committee on Appropriations be directed to examine the feasibility of transferring the responsibility for acquiring property for highway purposes from the Department of Transportation to the Department of General Services. The Committees shall also examine the potential benefits and drawbacks of providing that costs of land acquisition for highway purposes be paid for by general fund appropriations, rather than from revenues currently dedicated to highway construction purposes.

The Committees shall complete its work in time to submit its findings and recommendations to the Governor and the 2001 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

003335468

SENATE BILL NO. 453

Offered January 21, 2000

A BILL to amend and reenact §§ 25-46.3, 25-46.5, 25-46.9, 25-46.11, 25-46.17, 25-46.19 through 25-46.22, 25-46.24, 25-46.25, 25-46.29, 25-46.32, 25-46.248, 33.1-89, and 36-27 of the Code of Virginia, relating to procedures for exercising the power of eminent domain.

Patrons—Marye, Colgan and Norment; Delegates: Bryant and Shuler

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 25-46.3, 25-46.5, 25-46.9, 25-46.11, 25-46.17, 25-46.19 through 25-46.22, 25-46.24, 25-46.25, 25-46.29, 25-46.32, 25-46.248, 33.1-89, and 36-27 of the Code of Virginia are amended and reenacted as follows:

§ 25-46.3. Definitions.

As used in this chapter, unless otherwise clearly indicated herein or required by the context~~, the term~~:

~~(a)~~ "Court" means the court having jurisdiction and the judge or judges thereof in vacation.

~~(b)~~ "Date of valuation" means the time of the lawful taking by the petitioner, or the date of the filing of the petition, whichever occurs first.

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

~~(c)~~ "Land" means land, lands and real estate and all rights and appurtenances thereto, together with the buildings and other improvements thereon, and any right, title, interest, estate or claim in or to land, lands or real estate.

~~(d)~~ "Law" means any statute, general, special, private or local, of this Commonwealth, including, but not limited to, the Code of Virginia or any section thereof.

~~(e)~~ "Person" may extend and be applied to bodies politic and corporate as well as individuals.

~~(f)~~ "Petitioner" means any person or public or private entity possessing the power to exercise the right of eminent domain seeking to exercise such power under this chapter.

~~(g)~~ "Property" means real and personal property, and land, and any right, title, interest, estate or claim in or to such property.

~~(h)~~ "State" or "Commonwealth" means the Commonwealth of Virginia.

§ 25-46.5. Effort to purchase required; prerequisite to effort to purchase or filing certificate.

A. No proceedings shall be taken to condemn property until a bona fide but ineffectual effort has been made to acquire from the owner by purchase the property sought to be condemned, except where such consent cannot be obtained because of the incapacity of one or more of the owners or because one or more of such owners is unable to convey legal title to such property or is unknown or cannot with reasonable diligence be found within this Commonwealth.

B. Such bona fide effort shall include a written statement to the owner which explains the factual basis for the condemnor's offer, *and include a copy of the appraisal of the property prepared pursuant to § 25-248 upon which such offer is based.*

C. Notwithstanding any provision of law to the contrary, a condemnor, prior to making an offer to acquire a fee simple interest in property by purchase or filing a certificate of take or certificate of deposit pursuant to § 33.1-120 or § 33.1-121, shall conduct or cause to be conducted an examination of title to the property in order to ascertain the identity of the owner or owners of such property and to determine the nature and extent of such owners' interests in the property.

§ 25-46.9. Commencement of proceedings; notice; filing of answer and grounds of defense.

Proceedings for condemnation shall be initiated by filing the petition referred to in § 25-46.7 in the court, or in the clerk's office thereof, having jurisdiction under § 25-46.4. Upon the filing of such petition, the petitioner shall give the owners twenty-one days' notice of the filing of such petition and of its intention to apply to the court for the ~~appointment~~*empanelment* of ~~commissioners~~ *a jury* to ascertain just compensation for the property to be taken or affected as a result of the taking and use by the petitioner of the estate, interest or rights to be so acquired. In such notice, the petitioner may

also give notice that an answer and grounds of defense shall be filed setting forth any objection or defense to the taking or damaging of his property or to the jurisdiction of the court to hear the case and to proceed with the ~~appointment~~*empanelment* of ~~commissioners~~ *a jury* for the determination of such just compensation.

~~Such~~ *The* notice may also include notice of the petitioner's application for the right of entry as provided in § 25-46.8, whenever such application is included in the petition.

~~Such~~ *The* notice, along with a copy of the petition, shall be served on the owners, and within twenty-one days of the service thereof any such owner who desires to assert any objection or defense to the taking or damaging of his property or to the jurisdiction of the court to hear the case and to proceed with the ~~appointment~~*empanelment* of ~~commissioners~~ *a jury* shall file his answer and grounds of defense designating the property in which he claims to be interested, the grounds of any objection or defense to the taking or damaging of his property or to the jurisdiction of the court to hear the case and to proceed with the ~~appointment~~*empanelment* of ~~commissioners~~ *a jury* for the determination of just compensation.

~~Should~~ *The failure of* any ~~such~~ owner ~~fail~~ to file an answer and grounds of defense as hereinabove provided~~,~~ ~~such failure~~ shall not preclude the owner from *(i)* appearing on the date set for the ~~appointment~~*empanelment* of ~~commissioners~~ ~~nor from~~ *a jury, (ii)* presenting evidence as to valuation and damage, ~~nor from~~ *or (iii)* sharing in the award of just compensation according to his interest therein or otherwise protecting his rights~~,~~ ~~but such~~. *However, such* failure shall preclude ~~such~~ *the* owner from any other defense by way of pleas in bar, abatement or otherwise. ~~Provided, however~~, *except that* for good cause shown the time for filing such answer and grounds of defense may be extended by the court.

A copy of the notice required to be served on the owners by this section also shall be served in the same manner upon any tenant entitled to participate in the proceeding pursuant to § 25-46.21:1, whose lease has been duly recorded or whose tenancy is actually known to the petitioner~~;~~ ~~but~~ *However,* a tenant so notified may participate in the proceeding only as permitted by § 25-46.21:1.

§ 25-46.11. Form of notice by publication.

The form of the notice by publication, to which shall be attached the signature of the clerk, or the deputy clerk for and on behalf of the clerk, shall be substantially as follows:

Virginia: In the (here insert the name of the court)
Name of petitioner
v. ~~In Chancery~~*At Law* . . . . . .
Name of one or more defendants, et al.,
and (. . . . . .) acres, more or less, of land in
(city or county) Virginia.

To Whom It May Concern:

Pursuant to an order entered on the . . . . . day of . . . . . , 19 . . . . ., this notice is hereby given:

In this proceeding the petitioner seeks to acquire by condemnation . . . . . . (here state the estate, interest, or right to be acquired) to certain pieces or parcels of land situated in . . . . . (county or city), Virginia, for the uses and purposes of the petitioner . . . . . (here state briefly the uses and purposes and nature of the works and improvements to be made), all of which are described more particularly in the petition and exhibits attached thereto on file in the office of the clerk of this court, to which reference is hereby made for a full and accurate description thereof; and for the ~~appointment~~ *empanelment* of ~~commissioners~~ *a jury* to ascertain ust compensation to the owners of any estate or interest in the property to be taken or affected as a result of the taking and use thereof by the petitioner.

For such purposes, the petitioner will apply to the court, sitting at . . . . ., Virginia, on the . . . . . day of . . . . . , 19. . ., at . . . . . o'clock . . .m., or as soon thereafter as petitioner may be heard, for the ~~appointment~~ *empanelment* of ~~commissioners~~ *a jury* to ascertain just

compensation as aforesaid.
And it appearing by affidavit filed according to law that the following owners are not residents of the Commonwealth of Virginia, or their names and addresses are not known and that diligence has been used by and on behalf of the petitioner to ascertain such names and addresses without effect: (here set out the names of such owners or classes of owners and addresses where known), it is Ordered that the aforesaid owners do appear within ten (10) days after due publication of this order in the clerk's office of the (here insert the name of the court) and do what is necessary to protect their interests; and it is further Ordered that if any of the above named owners desires to assert any objection or defense to the taking or damaging of his property or to the jurisdiction of the court to hear the case and to proceed with the ~~appointment~~ *empanelment* of ~~commissioners~~ *a jury* he shall file his answer and grounds of defense designating the property in which he claims to be interested, the grounds of any objection or defense to the taking or damaging of his property or to the jurisdiction of the court to hear the case and to proceed with the ~~appointment~~ *empanelment* of ~~commissioners~~ *a jury* for the determination of just compensation.
Should any such owner fail to file his answer and grounds of defense as hereinabove provided, such failure shall not preclude the owner from appearing on the date set for the ~~appointment~~ *empanelment* of ~~commissioners~~ *a jury* nor from presenting evidence as to valuation and damage nor from sharing in the award of just compensation according to his interest therein or otherwise protecting his rights, but such failure shall preclude such owner from any other defense by way of pleas in bar, abatement or otherwise.
. An extract, Teste:
.....
Clerk
.(Here state name and address of counsel for petitioner)

Such notice by publication may also include notice of the petitioner's application for the right of entry as provided in § 25-46.8, whenever such application is included in the petition.

§ 25-46.17. Determination of preliminary issues; fixing date of trial on issue of just compensation.

At the hearing upon the petition and application for the ~~appointment~~*empanelment* of ~~commissioners~~ *a jury* made in accordance with § 25-46.9 if no answer and grounds of defense has been filed objecting to the jurisdiction of the court to hear the case and to proceed with the ~~appointment~~*empanelment* of ~~commissioners~~ *a jury*, the court shall enter an order fixing a date for the trial of the issue of just compensation and stating that such issue shall be determined by a ~~commission~~ *jury* or by the court, as provided in § 25-46.19. If any answer and grounds of defense has been filed objecting to the jurisdiction of the court, the court shall determine such issues or other matters in controversy, excepting the issue of just compensation or matters relating to the ownership of any land or other property or the interests of any party in such land or other property, and if the court determines all such issues or other matters involving the jurisdiction of the court in favor of the petitioner, the court shall enter an order fixing a date for the trial of the issue of just compensation and stating that such issue shall be determined by a ~~commission~~ *jury* or by the court, as provided in § 25-46.19.

An order of the court in favor of the petitioner on any of the foregoing preliminary issues or matters shall not be a final order for purposes of appeal but an order against the petitioner on such issues or matters shall be a final order for purposes of appeal, if the petitioner so elects. If the order against the petitioner does not dismiss the petition, the petitioner may elect to proceed with the case without waiving any of its objections and exceptions to the rulings of the court.

At such hearing the court may also determine whether the petitioner shall have the right of entry as provided in § 25-46.8.

§ 25-46.19. How issue of just compensation to be determined.

~~If the statute granting the power of eminent domain does not specifically provide that a specially~~

~~constituted tribunal shall determine the issue of just compensation, such~~ *The* issue shall be determined by a ~~commission~~ *jury* selected in the manner hereinafter provided in § 25-46.20. ~~By~~*However, by* agreement of the petitioner and all the parties who are sui juris that have appeared or responded, or, if the defendant upon proper notice fails to appear or respond, then, upon motion of the petitioner, the issue of just compensation may be determined by the court.

§ 25-46.20. Empanelment and oath of condemnation jurors; jury to fix value of property and damages; qualification of jurors; strikes.

~~If~~ *A. Unless* the issue of just compensation is to be determined by ~~a commission, the parties to the eminent domain proceeding may agree upon five or nine disinterested freeholders to act as commissioners, or if the parties cannot agree upon the names of commissioners to be summoned, then each party shall present to the court a list containing the names of at least six freeholders from which lists the court shall select the names of nine persons and two alternates who shall at least one week prior to their service be summoned to serve as commissioners. However, no person shall serve as such commissioner for more than one full week within any three-month period, unless agreed to by the parties, all of whom shall be residents of the county or city wherein the property or the greater portion of the property to be condemned is situated. If any party fails to submit a list containing six or more names as provided in this section, the judge may, in his discretion, submit such a list in such party's behalf. If a defendant has filed no answer to the petition, and the attorney for the petitioner certifies that he believes the defendant is unrepresented by counsel the judge may, in his discretion, and subject to the right of the petitioner to challenge for cause, subpoena five persons who shall serve as commissioners.Once nine qualified persons are selected, the petitioner and the owners shall each have two peremptory challenges and the remaining five, or the original five if only five are summoned, shall be appointed, any three or more of whom may act. Such commissioners shall fix 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 the taking and use thereof by the petitioner. Before executing their duties the commissioners shall take an oath before some officer authorized by the laws of this Commonwealth to administer an oath, that they will faithfully and impartially ascertain what will be 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.~~ *the court as provided in § 25-46.19, the issue of just compensation shall be determined by a condemnation jury. The court shall determine all other issues without a jury.*

B. Condemnation jurors shall be selected as follows:

1. The jury commissioners established pursuant to Chapter 11 (§ 8.01-336 et seq.) of Title 8.01 shall select condemnation jurors. The jury commissioners shall select as condemnation jurors persons who are residents of the county or city in which the property to be condemned, or the greater portion thereof, is situated. No person shall be eligible as a condemnation juror when he, or any person for him, solicits or requests a member of the jury commission to place his name on a list of condemnation jurors. A majority of the persons included on the list of condemnation jurors shall be freeholders of property within the jurisdiction. Except as otherwise provided in this section, the provisions of §§ 8.01-345, 8.01-346, 8.01-347, 8.01-356, and 8.01-358 relating to procedures for preparing this list from which members will be chosen, penalties for failure to appear and voir dire examination shall apply to condemnation jurors mutatis mutandis.

2. In any case where the issue of just compensation is to be determined by a condemnation jury, the jury shall be comprised of five members, and the jurors shall be drawn from the list submitted by the jury commission. The clerk shall, in the presence of the judge, after thoroughly mixing the ballots in the box, openly draw nine names therefrom. At the same time, two additional names shall be drawn to act as alternate jurors in the event of the death, absence, or disability of any acting juror. However, a majority of the nine names drawn as acting jurors, and at least one of the two names drawn for alternate jurors, shall be freeholders of property within the jurisdiction. As soon as practicable thereafter, the clerk shall serve notice on the jurors so drawn to appear in court on the date set for trial.

3. After each ballot containing a juror's name has been drawn, it shall be placed in a secure envelope maintained for the purpose of holding drawn ballots. The envelope shall be kept in the ballot box. No drawn ballot shall be returned to the pool of undrawn ballots until the pool has been

exhausted, except as may be required to ensure that the required number of names drawn are freeholders of property within the jurisdiction. However, the clerk shall immediately return to the pool of undrawn ballots the ballot of any juror who was drawn but was excused by the court from appearing or was not required to appear because of trial cancellation. When the pool is exhausted, all ballots shall be returned to the box and drawing shall begin again. Alternatively, the procedures for selection by mechanical or electronic techniques as provided in § 8.01-350.1 may be utilized.

4. It shall be the duty of the clerk to notify each juror whose name has been drawn of the date on which he is to appear to hear the case. The notice shall be in writing and shall be delivered at least seven days prior to the trial. The clerk shall also promptly notify in writing the jurors who have been struck by pretrial challenge that they need not appear.

5. The court shall have the discretionary power to excuse a juror's attendance on any given day or for any specific case upon request of the juror for good cause shown. If a juror is so excused seven or more days prior to trial, a replacement juror shall be drawn and notified under the procedures provided in this section. However, if a juror is so excused within six days prior to trial, an alternate juror will be designated to serve as juror.

C. On the day set for trial, jurors who appear shall be called in such a manner as the judge may direct to be sworn on their voir dire until a disinterested and impartial panel is obtained. In addition, a condemnation juror may be stricken for cause for reasons civil jurors are excused. If all nine jurors and two alternates appear and none are stricken for cause, each party shall be entitled to exercise two peremptory strikes. However, if, because of strikes for cause and unexpected failure to appear, fewer than nine but more than five jurors remain before the court, the number of peremptory strikes for each party shall be equally reduced, and the judge shall, if necessary, strike by lot an additional name in order to reduce the jury to five members; however, the judge shall not strike a freeholder if the striking of such name would result in freeholders constituting less than a majority of the members of the jury. If fewer than seven jurors remain before the court prior to the exercise of peremptory strikes, the trial may proceed and be heard by less than five jurors provided the parties agree. However, no trial shall proceed with fewer than three jurors.

D. Before executing the duties of a condemnation juror, each juror drawn shall take an oath before an officer authorized by the laws of this Commonwealth to administer an oath that he will faithfully and impartially ascertain the value of the property to be taken and the damages, if any, which may accrue to the residue beyond the enhancement in value, if any, to such residue by reason of such taking and use by the petitioner.

E. The jurors selected to hear the case shall fix the value of the property to be taken and the damages, if any, which may accrue to the residue beyond any enhancement in value to such residue by reason of the taking and use thereof by the petitioner. The conclusion of the jurors need not be unanimous, and a majority of the jurors may act in the name of the jury.

§ 25-46.21. View by condemnation jurors; hearing of testimony; jury's report; exceptions to report and hearing thereon.

Upon the ~~selection~~*empanelment* of the ~~commissioners~~*jury*, the court shall direct ~~them~~ *the jurors*, in the custody of the sheriff or sergeant or one of his deputies, to view the property described in the petition with the owner and the petitioner, or any representative of either party, and none other, unless otherwise directed by the court; and, upon motion of either party, the judge shall accompany the ~~commissioners~~ *jurors* upon such view. Such view shall not be considered by the ~~commission~~*jury* or the court as the sole evidence in the case. Upon completion of the view, the court shall hear the testimony in open court on the issues joined. When the ~~commissioners~~*jury* shall have arrived at ~~their~~*its* conclusion ~~they~~*it* shall make ~~their~~*its* report in writing to the court, or to the judge thereof in vacation. The report may be confirmed or set aside forthwith by the court, or the judge, as the case may be, provided that when the report is so filed and before the court or judge passes thereon, either party shall have the right to file written exceptions to the report, which shall be filed not later than ten days after the rendering of the report by the ~~commissioners~~*jury*. The court or the judge, as the case may be, shall have the same power over the ~~commissioners'~~ *jury's* reports as it now has over verdicts of juries in civil actions.

Upon hearing of exceptions to the ~~commissioners'~~*jury's* report the court shall not recall and question the ~~commissioners~~*jurors* as to the manner in which their report was determined unless there

be an allegation in such written exceptions that fraud, collusion, corruption or improper conduct entered into the report. If such allegation is made the judge shall summon the ~~commissioners~~*jurors* to appear and he alone shall question them concerning their actions. If the court be satisfied that fraud, collusion, corruption or improper conduct entered into the report of the ~~commissioners~~ *jury*, the report shall be set aside and new ~~commissioners appointed~~ *jurors empanelled* to rehear the case.

If the court be satisfied that no such fraud, collusion, corruption or improper conduct entered into the report of the ~~commissioners~~*jury*, or no other cause exists which would justify setting aside or modifying a jury verdict in civil actions, the report shall be confirmed.

§ 25-46.21:1. Participation of certain tenants in condemnation proceedings.

Any tenant ~~for a term expiring more than twelve months after the filing of the petition referred to in § 25-46.7~~*under a lease with a term of twelve months or longer* may participate in the proceedings described in § 25-46.21 to the same extent as his landlord or the owner, if, not less than ten days prior to the date for the trial of the issue of just compensation, such tenant shall file his petition for intervention, in the manner provided in § 25-46.16, including a verified copy of the lease under which he is in possession, and an affidavit by the tenant or his duly authorized agent or attorney, stating

(1) That he claims an interest in the award; and

(2) That he desires to offer admissible evidence concerning the value of the property being taken or damaged.

For the purposes of this section, the ~~unexpired portion of the~~ term of a tenant's lease shall include any renewals or extensions for which the tenant has an enforceable written option. The term "tenant" shall include the assignee of the original tenant, as well as any sublessee of the entire demised premises of the owner for the full unexpired term of the sublessor.

Nothing in this section shall be construed, however, as authorizing such tenant to offer any evidence in the proceedings described in § 25-46.21 concerning the value of his leasehold interest in the property involved therein or as authorizing the ~~commissioners~~ *jury* to make any such determination in formulating their report.

§ 25-46.22. Compensation of jurors.

The ~~commissioners appointed~~ *jurors empanelled* shall, for every day or portion thereof they may be employed in the performance of their duties, receive an allowance in the amount of sixty dollars as compensation for their attendance, travel and other costs, regardless of the number of cases heard on any particular day, to be paid by the petitioner. The persons summoned who appear, but are not ~~appointed~~ *empanelled* to serve as ~~commissioners~~ *jurors*, shall be allowed thirty dollars for each day they are summoned to appear.

§ 25-46.24. Payment of compensation and damages into court; vesting of title.

Upon the return of the report of the ~~commissioners~~*jury* or the court, as the case may be, and the confirmation, alteration or modification thereof in the manner provided in this chapter, the sum so ascertained by the court as compensation and damages, if any, to the property owners may be paid into court, upon which title to the property and rights condemned shall vest in the petitioner to the extent prayed for in the petition, unless such title shall have already vested in the petitioner in a manner otherwise provided by law, and the petitioner or its agent shall have the right to enter and construct its works or improvements upon or through the property described in its petition.

§ 25-46.25. When petitioner may begin work during pendency of proceedings; no injunction to be awarded.

Upon the return of the report of the ~~commissioners~~*jury* or the court, as the case may be, and upon payment into court of the sum ascertained therein, the petitioner or its agents may enter and construct its works or improvements upon or through the property as described in its petition, notwithstanding the pendency of proceedings on any objections to such report in the trial court, or upon an appeal of the case, or the ordering of a new trial of the issue of just compensation or otherwise. And no order shall be made nor any injunction awarded by any court or judge to stay the petitioner in the prosecution of its work unless it is manifest that the petitioner or its agents are transcending their authority and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages.

§ 25-46.29. Empanelment of other jurors when new trial ordered; costs upon new trial.

If the ~~commission~~ *jury* fails to report its award of just compensation within a reasonable time after

the issue of just compensation is submitted to it, or the ~~commission~~ *jury* reports that it is unable to make such award, or the ~~commissioners'~~ *jury's* report is set aside, or a final order upon its report has been set aside upon appeal and a new trial ordered, the court shall, without further notice, as often as seems to it proper, ~~appoint~~ *empanel* other ~~commissioners~~*jurors*, and the matter may be proceeded in as hereinbefore prescribed in this chapter.

If a new trial of the issue of just compensation is ordered, either in the trial court or upon appeal, upon an exception by an owner with respect to the insufficiency of the award of just compensation, and the subsequent report of the award of just compensation, which is confirmed, is for the same or a lesser total amount, the court shall tax all the costs of the new trial against the owner making such exception and shall order repayment to the petitioner of any sum paid to such owner out of the fund paid into court by the petitioner in excess of the total sum ascertained by the second report with interest thereon at the rate of eight percent annually from the date the original payment was made to such owner until the date such excess is repaid to the petitioner except that any interest accruing prior to July 1, 1970, shall be paid at the rate of five ~~per centum~~ *percent*; and interest accruing thereafter and prior to July 1, 1981, shall be paid at the rate of six percent; and if such owner fails to make such repayment within thirty days from the date of the entry of such order, the court shall enter judgment therefor against such owner.

§ 25-46.32. Costs.

Except as otherwise provided in this chapter, all costs of the proceeding in the trial court which are fixed by statute shall be taxed against the petitioner. The court may in its discretion tax as a cost a fee for a survey for the landowner, such fee not to exceed ~~$100~~ *$1,000*. All costs on appeal shall be assessed and assessable in the manner provided by law and the Rules of Court as in other civil cases.

§ 25-248. General rules for conduct of acquisition.

Whenever real property is acquired by a state agency, on or after April 10, 1972, in connection with any programs or projects, such acquisition shall be conducted, to the greatest extent practicable, in accordance with the following provisions:

(a) An agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(b) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property.

(c) Before the initiation of negotiations for real property, the state agency concerned shall establish an amount which it believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for the amount it established as just compensation, *together with a copy of the agency's approved appraisal of the fair market value of such property upon which the agency has based the amount offered for the property*. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

(d) No owner shall be required to surrender possession of real property before the agency concerned pays the agreed purchase price, or deposits with the state court in accordance with applicable law, for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

(e) The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling will be available), or to move his business or farm operation, without at least ninety days' written notice from the agency concerned, of the date by which such move is required.

(f) If the agency permits an owner or tenant to occupy the real property acquired on a rental basis for a short term for a period subject to termination by the state agency on a short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(g) In no event shall the agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.

(h) If any interest in real property is to be acquired by exercise of the power of eminent domain, the agency concerned shall institute formal condemnation proceedings. No agency shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(i) If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the agency concerned shall offer to acquire the entire property.

§ 33.1-89. Power to acquire lands, etc., by purchase, gift or eminent domain; conveyance to municipality after acquisition; property owners to be informed and briefed.

The Commonwealth Transportation Commissioner is hereby vested with the power to acquire by purchase, gift, or power of eminent domain such lands, structures, rights-of-way, franchises, easements and other interest in lands, including lands under water and riparian rights, of any person, association, partnership, corporation, or municipality or political subdivision, deemed to be necessary for the construction, reconstruction, alteration, maintenance and repair of the public highways of the Commonwealth and for these purposes and all other purposes incidental thereto may condemn property in fee simple and rights-of-way of such width and on such routes and grades and locations as by the Commissioner may be deemed requisite and suitable, including locations for permanent, temporary, continuous, periodical or future use, and rights or easements incidental thereto and lands, quarries, and locations, with rights of ingress and egress, containing gravel, clay, sand, stone, rock, timber and any other road materials deemed useful or necessary in carrying out the purposes aforesaid. For the purpose of this article "public highway" means highway, road and street; and when applicable, the term "public highway" also includes bridge, ferry, causeway, landing and wharf.

The Commissioner is authorized to exercise the above power within municipalities on projects which are constructed with state or federal participation, if requested by the municipality concerned. Whenever the Commissioner has acquired property pursuant to a request of the municipality, he shall convey the title so acquired to the municipality, except that rights-of-way or easements acquired for the relocation of a railroad, public utility company, public service corporation or company, another political subdivision, or cable television company in connection with said projects shall be conveyed to that entity in accordance with § 33.1-96. The authority for such conveyance shall apply to acquisitions made by the Commissioner pursuant to previous requests as well as any subsequent request.

Any offer by the Commissioner to a property owner with respect to payment of compensation for the prospective taking of property and damage to property not taken incident to the purposes of this section shall separately state (i) the property to be taken and the amount of compensation offered therefor and (ii) the nature of the prospective damage or damages and the amount of compensation offered for each such prospective damage. *The amount of the offer shall not be less than the amount of the approved appraisal of the fair market value of such property, in accordance with the provisions of § 25-248. Any such appraisal used by the Commissioner as the basis for an offer shall be prepared by a certified general real estate appraiser licensed in accordance with Chapter 20.1 (§ 54.1-2009 et seq.) of Title 54.1.*

The Commissioner shall also provide to a property owner a copy of any report of status of title prepared in connection with such acquisition, if prepared pursuant to subsection C of § 25-46.5.

In negotiating with a property owner with respect to payment for prospective damage to property not taken incident to the purposes of this section, the Commissioner shall ensure that such property owner or his authorized representative is properly informed as to the type and amount of foreseeable damage and/or enhancement. Adequate briefing will include: (i) the giving of plats and profiles of the project, showing cuts and fills, together with elevations and grades; (ii) explanation, in lay terms, of all proposed changes in profile, elevation and grade of the highway and entrances, including the elevations of proposed pavement and shoulders, both center and edges, with relation to the present

pavement, and approximate grade of entrances to the property.

Any option or deed executed by the property owner shall contain a statement that the plans as they affect his property have been fully explained. Provided, however, that the requirements of this section with respect to information and briefing and the acknowledgment thereof in options and deeds shall in no way be construed to affect the validity of any conveyance or to create any right to compensation or to limit the Commissioner's authority to reasonably control the use of public highways so as to promote the public health, safety and welfare.

§ 36-27. Eminent domain.

An authority shall have the right to acquire by the exercise of the power of eminent domain any real property which may be necessary for the purposes of such authority under this chapter after the adoption by it of a resolution declaring that the acquisition of the real property described therein is necessary for such purposes. An authority may exercise the power of eminent domain in the manner provided in Chapter 1.1 (§ 25-46.1 et seq.) of Title 25. The commissioners before which condemnation proceedings are conducted may hear evidence as to the value of the property including but not limited to the owner's appraisal and the effect that any pending application for a zoning change, special use permit application or variance application may have on the value of the property. The court may also determine whether there has been unreasonable delay in the institution of the proceedings after public announcement by the condemnor of a project which necessitates acquisition by the condemnor of a designated land area consisting of or including the land sought to be condemned. If the court determines that such unreasonable delay has occurred, it shall instruct the commissioners in such proceedings to allow any damages proved to their satisfaction by the landowner or landowners to have been sustained to his or their land during and because of such delay, in addition to and separately from the fair market value thereof, but such damages shall not exceed the actual diminution if any in fair market value of the land in substantially the same physical condition over the period of the delay. This provision shall not apply to any such public announcement made prior to July 1, 1960.

Prior to the adoption of any redevelopment plan pursuant to § 36-49 or any conservation plan pursuant to § 36-49.1, an authority shall send by certified mail, postage prepaid, to at least one of the owners of every parcel of property to be acquired pursuant to such plan a notice advising such owner that (i) the property owned by such owner is proposed to be acquired and (ii) such owner will have the right to appear in any condemnation proceeding instituted to acquire the property and present any defense which such owner may have to the taking. Such notice shall not be the basis for eligibility for relocation benefits. At the time it makes its price offer, the authority shall also provide to the property owner a ~~certificate signed~~ *copy of the appraisal of the fair market value of such property upon which the authority has based the amount offered for the property, prepared* by a certified general real estate appraiser licensed in accordance with Chapter 20.1 (§ 54.1-2009 et seq.) of Title 54.1, *which shall include a certificate* setting forth the appraiser's opinion of the fair market value, together with two comparable property sales, if available, of the property to be acquired.

In all such cases the proceedings shall be according to the provisions of Chapter 1.1 (§ 25-46.1 et seq.) of Title 25, so far as they can be applied to the same, the term "company" as used in such chapter, and any officers of a "company" referred to therein, to be construed as meaning the authority and the commissioners thereof, respectively. An authority may exercise the power of eminent domain in the manner provided by any other applicable statutory provisions for the exercise of the power of eminent domain. No real property belonging to the city, the county, the Commonwealth or any other political subdivision thereof may be acquired without its consent.

REPRINT

003334468

SENATE BILL NO. 63

Offered January 12, 2000

A BILL to amend and reenact §§ 15.2-729, 25-46.36, 25-236, 25-238, and 25-239 of the Code of Virginia, relating to the Uniform Relocation Assistance Act.

Patrons—Marye, Colgan and Norment; Delegates: Bryant, Griffith, Ingram, Moran and Shuler

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 15.2-729, 25-46.36, 25-236, 25-238, and 25-239 of the Code of Virginia are amended and reenacted as follows:

§ 15.2-729. Relocation assistance programs.

The board ~~may~~ *shall* provide by local ordinance for the application of Chapter 6 (§ 25-235 et seq.) of Title 25 to displaced persons as defined in § 25-238 ~~or as more narrowly defined by the board~~, in cases of acquisition of real property for use in projects or programs in which only local funds are used.

§ 25-46.36. Cities to pay relocation costs.

~~Notwithstanding the provisions of Chapter 6 (§ 25-235 et seq.) of this title, the~~ *The* governing body of any city ~~may~~ *shall* authorize the payment of relocation costs in connection with ~~federally assisted programs~~ *the exercise of the power of eminent domain as provided in Chapter 6 (§ 25-235 et seq.) of this title* under such rules and regulations as ~~the program~~ *such chapter* may require.

§ 25-236. Application of chapter.

A. The provisions of any municipal charter notwithstanding, the provisions of this chapter shall be applicable to the acquisition of real property by any state agency as hereinafter defined ~~for use in projects or programs in which federal or state funds are used; provided, however, that for the purposes of this chapter, federal guarantees or insurance shall not be deemed to be federal funds~~.

B. This chapter shall not apply to acquisitions by a state agency, as hereinafter defined, *(i)* which are voluntarily initiated or negotiated by the seller under no threat of condemnation, *(ii)* where property is dedicated pursuant to the provisions of Chapter 22 (§ 15.2-2200 et seq.) of Title 15.2, or *(iii)* where property is voluntarily dedicated or donated for no consideration unless compliance with the provisions of this chapter in such instances is a prerequisite to the receipt, and expenditure of federal funds on the projects for which such property is acquired~~; provided, however, that the~~.

C. The provisions of this chapter relating to relocation assistance shall apply for the benefit of persons, other than the owner, who are actually and lawfully occupying the real property to be acquired and who have been occupants thereof for at least ninety days prior to the initiation of negotiations for acquisition.

§ 25-238. Definitions.

As used in this chapter the term:

"Business" means any lawful activity, excepting a farm operation, conducted primarily:

1. For the purchase, sale, lease and rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property;

2. For the sale of services to the public;

3. By a nonprofit organization; or

4. Solely for the purposes of § 25-239 A for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display or displays, whether or not such display or displays are located on the premises on which any of the above activities are conducted.

"Comparable replacement dwelling" means any dwelling that is decent, safe and sanitary; adequate in size to accommodate the occupants; within the financial means of the displaced person; functionally equivalent; in an area not subject to unreasonable adverse environmental conditions; and in a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities, facilities, services and the displaced person's place of employment.

"Displaced person" means any person who moves (i) from real property, or moves his personal

property from real property, (a) as a direct result of a written notice of intent to acquire or the acquisition of such real property, in whole or in part, for any program or project undertaken by a state agency or (b) on which such person is a residential tenant, or conducts a small business, or a farm operation or a business defined in this article as a direct result of rehabilitation, demolition, or such other displacing activity as the state agency may prescribe, under a program or project undertaken by the state agency in any case in which the state agency determines that such displacement is permanent; and (ii) solely for the purposes of §§ 25-239 A and B and 25-242, as a direct result of a written notice of intent to acquire or the acquisition of real property on which such person conducts a business or farm operation, for such program or project; or as a direct result of rehabilitation, demolition, or such other displacing activity as the state agency may prescribe, under a program or project undertaken by the state agency in any case in which the state agency determines that such displacement is permanent.

The term "displaced person" does not include (i) a person who has been determined, according to criteria established by the state agency to be either in unlawful occupancy of the displacement dwelling or to have occupied such dwelling for the purpose of obtaining assistance under this chapter; or (ii) in any case which the state agency acquires property for a program or project, any person, other than a person who was an occupant of the property at the time it was acquired, who occupies such property on a rental basis for a short term or a period subject to termination when the property is needed for the program or project.

"Farm operation" means any activity conducted solely or primarily for the production of one or more agricultural products or commodities, including timber, for sale or home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support.

"Mortgage" means such classes of liens as are commonly given to secure advances on, or the unpaid purchase price of, real property, together with the credit instruments, if any, secured thereby.

"Nonprofit organization" means an organization that is exempt from paying federal income taxes under § 501 of the Internal Revenue Code (26 U.S.C. § 501).

"Person" means any individual, partnership, corporation or association.

"State agency" means any *(i)* department, agency or instrumentality of the Commonwealth; ~~or any~~ *(ii)* public authority, municipal corporation, local governmental unit or political subdivision of the Commonwealth~~;~~ or any department, agency or instrumentality ~~of any public authority, municipal corporation, local government unit, political subdivision of the Commonwealth, or two or more of any of the aforementioned and~~*thereof; (iii)* ~~any~~ person who has the authority to acquire property by eminent domain under state law ~~and who~~*; or (iv) two or more of the aforementioned, which* carries out projects ~~with federal or state financial assistance~~ that cause people to be displaced.

§ 25-239. Payments for moving and relocation expenses.

A. Whenever the acquisition of real property for a program or project undertaken by a state agency will result in the displacement of any person, such agency shall make fair and reasonable relocation payments to displaced persons as required by this chapter for:

1. Actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;

2. Actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the state agency;

3. Actual reasonable expenses in searching for a replacement business or farm; and

4. Actual reasonable expenses ~~necessary to reestablish~~ *necessarily incurred in reestablishing* a displaced farm, nonprofit organization or small business at its new site, ~~but not to exceed $10,000~~ in accordance with criteria established by the state agency.

B. Any displaced person eligible for payments under subsection A of this section who is displaced from a dwelling and who elects to accept the payments authorized by this subsection in lieu of the payments authorized by subsection A of this section may receive a moving expense allowance, determined according to a schedule established by the state agency.

C. Any displaced person eligible for payments under subsection A of this section who is displaced from his place of business or farm operation and who is eligible under criteria established by the state

agency may elect to accept the payment authorized by this subsection in lieu of the payment authorized by subsection A of this section. Such payment shall consist of a fixed payment in an amount to be determined according to criteria established by the state agency, except that such payment shall not be less than $1,000 nor more than ~~$20,000~~ *$50,000.* A person whose sole business at the displacement dwelling is the rental of such property to others shall not qualify for a payment under this subsection.

Official Use By Clerks

Passed By The Senate		**Passed By The House of Delegates**	
without amendment	☐	without amendment	☐
with amendment	☐	with amendment	☐
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Date: _____ Date: _____

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Clerk of the Senate Clerk of the House of Delegates

2000 SESSION

003332468

SENATE BILL NO. 110

Offered January 12, 2000

A BILL to amend and reenact § 33.1-49 of the Code of Virginia, relating to the powers of the Commonwealth Transportation Board; acquisitions to control or limit access to certain establishments.

Patrons—Marye, Colgan and Norment; Delegates: Blevins, Bryant, Ingram, Moran and Shuler

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 33.1-49 of the Code of Virginia is amended and reenacted as follows:

§ 33.1-49. Power and authority of Commonwealth Transportation Board generally.

A. The Commonwealth Transportation Board may plan, designate, acquire, open, construct, reconstruct, improve, maintain, discontinue, abandon and regulate the use of the Interstate System in the same manner in which it is now or may be authorized to plan, designate, acquire, open, construct, reconstruct, improve, maintain, discontinue, abandon and regulate the use of the primary system of state highways. The Board may vacate, close or change the location of any street or public way in the manner in which it is now authorized by law to vacate, close or change the location of a highway in the primary system. The Board shall have any and all other authority and power relative to such Interstate System as is vested in it relative to highways in the primary system and shall include the right to acquire by purchase, eminent domain, grant or dedication title to lands or rights-of-way for such interstate highways whether within or without the limits of any city or town, and in addition thereto, shall have such other power, control and jurisdiction necessary to comply with the provisions of the Federal-Aid Highway Act of 1956 and all acts amendatory or supplementary thereto, all other provisions of law to the contrary notwithstanding.

B. Notwithstanding any provision of this article or Article 7 (§ 33.1-89 et seq.) of this chapter to the contrary, the Commonwealth Transportation Board shall not have authority to acquire, by exercise of the power of eminent domain, any portion of the property of an existing commercial establishment, or any interest therein, if a purpose of the proposed acquisition is to control or limit access to commercial establishments located within 300 feet of a segment of the Interstate System.

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Official Use By Clerks			
Passed By The Senate		**Passed By The House of Delegates**	
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Clerk of the Senate		Clerk of the House of Delegates	

003333736

HOUSE BILL NO. 1145

Offered January 24, 2000

A BILL to amend and reenact § 36-49 of the Code of Virginia, relating to powers of housing authorities; limitations.

Patrons—Drake, Bryant, Byron, Devolites, Griffith, Ingram, McClure and Shuler; Senators: Colgan, Marye, Norment, Rerras, Schrock and Watkins

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Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That § 36-49 of the Code of Virginia is amended and reenacted as follows:

§ 36-49. Undertakings constituting redevelopment projects; limitations.

A. Any authority now or hereafter established, in addition to other powers granted by this or any law, is specifically empowered to carry out any work or undertaking (hereafter called a "redevelopment project"):

1. To acquire blighted or deteriorated areas, which are hereby defined as areas (including slum areas) with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement of design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals or welfare of the community;

2. To acquire other real property for the purpose of removing, preventing, or reducing blight, blighting factors or the cause of blight;

3. To acquire real property where the condition of the title, the diverse ownership of the real property to be assembled, the street or lot layouts, or other conditions prevent a proper development of the property and where the acquisition of the area by the authority is necessary to carry out a redevelopment plan;

4. To permit the preservation, repair, or restoration of buildings of historic interest; and to clear any areas acquired and install, construct, or reconstruct streets, utilities, and site improvements essential to the preparation of sites for uses in accordance with the redevelopment plan;

5. To provide for the conservation of portions of the project area and the rehabilitation to project standards as stated in the redevelopment plan of buildings within the project area, where such rehabilitation is deemed by the authority to be feasible and consistent with project objectives;

6. To make land so acquired available to private enterprise or public agencies (including sale, leasing, or retention by the authority itself) in accordance with the redevelopment plan;

7. To assist the reconstruction of project areas by making loans or grants of funds received from any public or private source, for the purpose of facilitating the construction, reconstruction, rehabilitation or sale of housing or other improvements constructed or to be constructed on land situated within the boundaries of a redevelopment project;

8. To acquire, construct or rehabilitate residential housing developments for occupancy by persons of low, moderate and middle income to be owned, operated, managed, leased, conveyed, mortgaged, encumbered or assigned by an authority. Income limits for such persons shall be determined for each redevelopment project by an authority by resolution adopted by a majority of its appointed commissioners, shall be adjusted for household size and may be revised as an authority deems appropriate. In connection with a residential housing development, an authority shall have all rights, powers and privileges granted by subdivision 4 of § 36-19, and shall establish rental rates in accordance with § 36-21. This subdivision shall apply only to (i) a redevelopment and housing authority created by joint resolution adopted by a city council of a city on September 27, 1940, and a board of aldermen of a city on October 1, 1940, and approved by the mayor of a city on October 3, 1940, and (ii) a redevelopment and housing authority created by a November 2, 1965, referendum, the initial commissioners of which were appointed by a February 23, 1966, board of supervisors resolution; and

9. To accomplish any combination of the foregoing to carry out a redevelopment plan.

B. Real property identified by a housing authority for redevelopment in accordance with this

article shall be acquired by the housing authority within thirty-six months after announcement of the redevelopment plan. In addition, if a housing authority decides against acquiring real property identified for redevelopment, it shall reimburse the owner of such property his reasonable expenses related to the proposed acquisition of his property, upon request.

Official Use By Clerks

Passed By The House of Delegates		**Passed By The Senate**	
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Date: _____ Date: _____

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Clerk of the House of Delegates Clerk of the Senate

003298468

SENATE JOINT RESOLUTION NO. 37

Offered January 12, 2000

Continuing the Joint Subcommittee studying the current means and adequacy of compensation to Virginia citizens whose properties are taken through the exercise of eminent domain.

Patrons—Watkins, Colgan, Marye and Norment; Delegates: Bryant, Griffith, Ingram, Moran and Shuler

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Referred to Committee on Rules

WHEREAS, Senate Joint Resolution 271 (1999) and House Joint Resolution 491 (1999) established the Joint Subcommittee to study the current means and adequacy of compensation to Virginia citizens whose properties are taken through the exercise of eminent domain; and

WHEREAS, the Joint Subcommittee was directed to study, among other things, (i) the methods by which eminent domain is exercised and (ii) the means by which compensation is provided or obtained; and

WHEREAS, the Joint Subcommittee has in its first year examined information on a wide variety of issues pertaining to the Commonwealth's eminent domain laws; and

WHEREAS, due to the complexity of the issues and time constraints, the Joint Subcommittee has not been able to complete its study of these issues and possible solutions to address the concerns identified by citizens who testified at the three public hearings conducted by the Joint Subcommittee; and

WHEREAS, the members agree that the Joint Subcommittee should be continued for a second year; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Joint Subcommittee studying the current means and adequacy of compensation to Virginia citizens whose properties are taken through the exercise of eminent domain be continued. The Joint Subcommittee shall examine the procedures by which the power of eminent domain is exercised and the adequacy of compensation provided under current law.

The members duly appointed pursuant to Senate Joint Resolution 271 (1999) and House Joint Resolution 491 (1999) studying the current means and adequacy of compensation to Virginia citizens whose properties are taken through the exercise of eminent domain shall continue to serve; however, the number of citizen members shall be increased from three to four, with the additional citizen member to be appointed by the Speaker of the House. Any vacancies shall be filled as provided in the enabling resolution.

The Division of Legislative Services shall continue to provide staff support for the study. All other agencies of the Commonwealth shall provide assistance to the Joint Subcommittee, upon request.

The Joint Subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 2001 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

The direct costs of this study shall not exceed $7,600.

Implementation of this resolution is subject to subsequent approval and certification by the Joint Rules Committee. The Committee may withhold expenditures or delay the period for the conduct of the study.

003331468

SENATE JOINT RESOLUTION NO. 38

Offered January 12, 2000

Directing the Senate Committee on Finance and the House Committee on Appropriations to examine the feasibility of transferring the responsibility for acquiring property for highway purposes from the Department of Transportation to the Department of General Services.

Patrons—Watkins, Colgan, Marye and Norment; Delegates: Bryant, Griffith, Ingram, Moran and Shuler

Referred to Committee on Rules

WHEREAS, the joint subcommittee studying the current means and adequacy of compensation to Virginia citizens whose properties are taken through the exercise of eminent domain, established by Senate Joint Resolution 271 and House Joint Resolution 491 (1999), has received a great deal of testimony from citizens during the course of its work relating to the practices of the Virginia Department of Transportation in acquiring land for highway projects; and

WHEREAS, one of the complaints voiced by citizenry was that the Department of Transportation had a vested interest in paying as little as possible to landowners for the land it must acquire for highway projects; and

WHEREAS, it was suggested that making another agency responsible for acquiring land for highway projects would alleviate the perception that the Commonwealth is trying to pay less to some landowners than the amount that provides just compensation for the taking of or damage to their properties; and

WHEREAS, transferring the source of expenditures for land acquisition from the Transportation Trust Fund to the Commonwealth's general fund may have the benefit of allowing the allocation of additional revenue for highway construction expenditures; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Senate Committee on Finance and the House Committee on Appropriations be directed to examine the feasibility of transferring the responsibility for acquiring property for highway purposes from the Department of Transportation to the Department of General Services. The Committees shall also examine the potential benefits and drawbacks of providing that costs of land acquisition for highway purposes be paid for by general fund appropriations, rather than from revenues currently dedicated to highway construction purposes.

The Committees shall complete their work in time to submit their findings and recommendations to the Governor and the 2001 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Official Use By Clerks			
Agreed to By The Senate		**Agreed to By The House of Delegates**	
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Clerk of the Senate		Clerk of the House of Delegates	