In The

Supreme Court of Virginia

RECORD NO. 150328

CITY OF CHESAPEAKE, VIRGINIA, a municipal corporation,

Appellant,

v.

DOMINION SECURITYPLUS SELF STORAGE, L.L.C.,

Appellee.

BRIEF AMICUS CURIAE OF THE VIRGINIA PROPERTY RIGHTS COALITION IN SUPPORT OF APPELLEE

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INTEREST OF *AMICUS CURIAE*

The Virginia Property Rights Coalition ("VPRC"), by counsel, respectfully submits this Brief *Amicus Curiae* in support of Respondent-Appellee Dominion Securityplus Self Storage, LLC ("Dominion") on the third assignment of error of the Petitioner-Appellant City of Chesapeake, Virginia ("City"), which addresses the trial court's refusal to exclude evidence relating to the loss in market value to Dominion's property caused by the City's taking and damaging of its property rights for the Dominion Boulevard Improvement Project ("Project").

The VPRC is a coalition of citizens who have organized to advocate for the fair treatment of property owners facing infringements upon their fundamental right to own private property. The Virginia Property Rights Coalition regularly advocates at the General Assembly and throughout the Commonwealth of Virginia for legislative reforms on behalf of property owners. Its members are property owners across Virginia who are concerned with ensuring that owners are fully

and fairly compensated when their fundamental right of private property is taken or damaged by government for public use.

Given the VPRC's history in advocating for the fair treatment of property owners facing the use of the power of eminent domain, it is uniquely situated to comment on the variance in treatment received by landowners across the Commonwealth of Virginia whose property is subject to condemnation. The VPRC has previously filed brief *amicus curiae* in cases before this Court that implicate the fundamental rights of private property owners.

STATEMENT OF THE CASE

The VPRC adopts the Statement of the Case submitted by Dominion in its Brief.

STATEMENT OF FACTS

The VPRC adopts the Statement of Facts submitted by Dominion in its Brief.

ARGUMENT

I. The Constitution Requires Payment of Just Compensation when Property is Taken for a Public Use and when it is Damaged for a Public Use

Article I, Section 11 of the Virginia Constitution prohibits private property from being "taken or damaged for public uses, without just compensation."[1] The phrase, "or damaged," was added to the Virginia Constitution in 1902 and this Court's earliest decisions interpreting this amendment recognize that the new words did "not require [that] the damage . . . be caused by a trespass, or an actual physical invasion of the owner's real estate, but, if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover." Tidewater Ry. Co. v. Shartzer, 107 Va. 562, 59 S.E. 407, 409-10 (1907) (citation omitted and emphasis added). This Court continued, "We regard that case as conclusive of this question." Id. Thus, since 1902, this Court has linked the

[1] On January 1, 2013, after the City initiated the condemnation of Dominion's property, Article I, Section 11 of the Virginia Constitution was amended, but the change is not material to this case.

public use project and operation of the public improvements constructed with the damages resulting therefrom, even where there was not a physical invasion or taking.

All parties and *amici* agree that Article I, Section 11 of the Constitution of Virginia requires that just compensation be paid whenever private property is *taken* for public use and whenever it is *damaged* for public use. See also Heldt v. Elizabeth River Tunnel Dist., 196 Va. 477, 514 (1954). There is also no dispute that the City's acquisition of a portion of Dominion's property was necessary in order for it to complete the construction of the Dominion Boulevard Improvement Project ("Project"). J.A. at 3, 4. Accordingly, by initiating the condemnation action against Dominion, the City agreed that it was obligated to pay just compensation both for the taking and for the damaging of Dominion's property.

II. To Constitute a Taking or Damaging, a Governmental Action Must Adversely Affect a Landowner's Ability to Exercise a Property Right

The parties and *amici* also agree that a constitutional taking or damaging occurs whenever a governmental action adversely

affects a private landowner's ability to exercise a right connected to his or her property. As this Court has consistently held, "[t]o take or damage property in the constitutional sense does not require that the sovereign actually invade or disturb the property. Taking or damaging property in the constitutional sense means that the governmental action adversely affects the landowner's ability to exercise a right connected to the property." Richmeade, L.P. v. City of Richmond, 267 Va. 598, 603 (2004) (internal citations omitted).

Thus, even if it did not actually invade or disturb Dominion's property, the City was constitutionally obligated to pay just compensation if its actions adversely affected Dominion's ability to exercise any right connected to its property. In this regard, Article I, Section 11 has never been interpreted—as the City and *amicus* Local Government Attorneys of Virginia, Inc. ("LGA") urge—to preclude a private landowner from recovering just compensation where there was no physical invasion of its property. In fact, the City's argument directly contradicts the "or damaged" clause in the Virginia Constitution, rendering decisions

like Shartzer and Hannah v. City of Roanoke, 148 Va. 554 (1927), null and void.

III. The City Took and Damaged Dominion's Property Rights—Including the Right to Exclude—for a Public Use

The City admits in its Petition for Condemnation that it had to acquire a portion of Dominion's property to complete its public use project. J.A. at 3. (stating "the land sought to be condemned is necessary for … the uses and purposes of the City of Chesapeake for road improvements on Dominion Boulevard.") The Project involved not only the widening of Dominion Boulevard, but also the replacement of an existing drawbridge over the Southern Branch of the Elizabeth River with a 95-foot-tall fixed span bridge. J.A. at 4.

The trial court found that, to build its public use project, the City took and damaged Dominion's rights in its property. Because Dominion could not prevent the City from constructing the Project on its property, its property rights—including the right to exclude—were adversely affected by the City's actions. The trial court properly considered the City's adverse affect on

Dominion's right to exclude in determining the just compensation owed by the City.

A. The Right to Exclude is the Most Essential Element of Property Ownership

The Supreme Court of the United States has repeatedly observed that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). Professor Thomas W. Merrill, a leading property law scholar, has argued "that the right to exclude others is more than just 'one of the most essential' constituents of property—it is the *sine qua non*." Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730 (1998).

The right to exclude others undergirds almost all conceptions of property, and it has lasting implications in the field of takings law, particularly when considering the constitutional requirement of just compensation. This Court has consistently held that a constitutional taking or damaging occurs when a governmental action adversely affects the ability of a landowner to exercise a right connected to his or her property. Therefore, the trial court

properly considered the City's construction and operation of its public use Project, in determining that they constituted a taking and damaging of Dominion's property rights for which just compensation is owed.

In so holding, the trial court correctly applied the rule adopted by the Utah Supreme Court in Utah Dept. of Transp. v. Admiral Beverage Corp., 275 P.3d 208, 220 (Utah 2011). The underlying rationale of Admiral Beverage is that when a condemning authority takes a landowner's right to exclude, it must fully compensate that landowner for the loss in market value caused by the taking. And where, as here, the City has taken and damaged Dominion's right to exclude, it must also pay just compensation for the loss in market value, including for the loss of visibility, caused by the City's taking and damaging of Dominion's property rights. It is immaterial whether the trial court concluded that the City *took* or *damaged* Dominion's right to exclude, because the Constitution requires the City to pay just compensation for both taking *and* damaging.

B. Market-Based Valuation Has Always Been the Touchstone for the Determination of Just Compensation

Article I, Section 11 of the Virginia Constitution requires the payment of just compensation, which is the sum of 1) the value of the property taken and 2) the decrease in value to Dominion's remaining property. Appalachian Elec. Power Co. v. Gorman, 191 Va. 344, 353 (1950). Together, just "[c]ompensation must be a full and perfect equivalent for the property." Ramsey v. Commissioner of Highways, 770 S.E.2d 487, 490 (2015) (internal quotation omitted). See also Pruner v. State Highway Com'r, 173 Va. 307, 311 (1939).

Explaining what considerations and evidence are relevant to the second component of just compensation, this Court has routinely held:

> The true test of damages to the residue of the land not taken is the difference in value before and immediately after the taking, and in ascertaining such damages there may be considered every circumstance, present or future, which affects its then value.

Gorman, 191 Va. at 353.

In another recent eminent domain case, this Court reaffirmed the principle that "'[a]ll relevant evidence is admissible . . . .'" Ramsey, 770 S.E.2d at 490 (quoting Va. R. Evid. 2:402(a)). Perhaps most succinctly this Court has said, "Everything which affects the market value is to be taken into consideration." Town of Galax v. Waugh, 143 Va. 213, 229 (1925).

Noting that when the Court adopts the standards of the marketplace in making valuations in eminent domain cases, "there is no reason why it should close its eyes to how the market place arrives at and applies [such] standards," the United States Court of Appeals for the Fourth Circuit observed that "It is difficult to perceive why testimony, which experience has taught is generally found to be safely relied upon by men in their important business affairs outside, should be rejected inside the courthouse." Cade v. United States, 213 F.2d 138, 140-41 (4th Cir. 1954) (internal quotation omitted). The market value standard simply permits a landowner to offer the same evidence in court which would be considered by any private entity when

buying or selling property outside the courtroom. The trial court properly applied the market value standard.

C. The Constitution Does Not Allow the City to be Treated Better than a Private Landowner

It is the City's taking and damaging of Dominion's bundle of rights, including the right to exclude—the most essential aspect of its property rights—that require the payment of just compensation. The City's brief and the brief *amicus curiae* of LGA, which argue that visibility is not a compensable property right, are misguided, as this Court need not decide whether the right to visibility is a property right which may be taken or damaged. See Commonwealth Transp. Com'r v. Target Corp., 274 Va. 341, 353-54 (2007). Because the City's actions have taken and damaged Dominion's right to exclude—i.e., its right to act as the gatekeeper of its own property—Dominion is entitled to just compensation, including for the impact of such actions on the market value of its remaining property, just as it would require full market payment from a market buyer not wielding the power of eminent domain.

Suppose that, instead of the City, the land adjacent to Dominion's property was owned by a private corporation, which wanted to construct a billboard blocking all of Dominion's visibility from a public street. If that private neighbor could not complete its billboard project without encroaching on a portion of Dominion's property—even for a few feet of an underground footing—then Dominion could exercise its right to exclude and simply tell its neighbor "no."

Alternatively, Dominion could agree to sell the necessary rights for an underground footing, and would require that the neighbor pay not only for the impact of the small bit of billboard footing, but also for the overall impact of the billboard project as a whole on the value of Dominion's property. This type of market transaction illustrates the essence of considering "everything which affects the market value." Waugh, 143 Va. at 229.

It is the right to exclude that provides the basis for Dominion to receive the full amount of compensation for the loss in value caused by the billboard, even if the only element of the billboard that is to be built on Dominion's property is an

underground footing. In the private marketplace of informed buyers and sellers, if a portion of Dominion's property is necessary for the adjoining landowner's billboard project, the adjoining landowner has to fully and fairly compensate Dominion for all of the loss in value, or an agreement for entry will not be reached.

Replacing the hypothetical private corporation with the City, a municipal corporation, and the billboard with the Project does not and should not change the legal or valuation calculus. The only difference is that Dominion had no ability to tell the City "no."

Accordingly, when the City exercised its power of eminent domain to acquire the part of Dominion's property necessary for the Project, Dominion's right to exclude was taken and damaged, and the City was constitutionally required to pay just compensation.

The City cannot and should not be treated more favorably than a private landowner simply because it is a municipal corporation and not a private corporation. Yet the City repeatedly

asks this Court to disregard the market value standard and instead preclude private landowners from offering evidence, let alone recovering compensation for the full amount of their losses when governments take and damage their property rights. The City argues that fact-finders should be prevented from considering "everything which affects the market value" of the remaining property. Id.

D. Virginia Code § 25.1-230 Cannot Contradict the Virginia Constitution

The Code governing eminent domain requires that "the body determining just compensation shall 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 . . . ." Va. Code § 25.1-230(A)(1) (emphasis added). The City asks the Court to ignore the words "by reason of" and "use by the petitioner," but these words directly reference the "public use" for which the property is being taken. These words are not an instruction to isolate Dominion's remaining land from the rest of the universe; rather they are a directive to consider the entire

public use for which the taking of Dominion's property is necessary.

Under our constitutional system, this Court may not elevate a statute above the Constitution, as the City and LGA urge. Such a result is "repugnant to the bedrock principles of constitutional government." Com. v. Owens-Corning Fiberglas Corp., 238 Va. 595, 600 (1989).

Under the City's interpretation, this Court's decision in Shartzer is erroneous, because it interprets the Constitution to require payment of compensation for damages caused by the construction and operation of improvements even where there is no taking of land. The City asks this Court to hold that the phrase "or damaged" in Article I, Section 11 is entirely superfluous, and to overturn more than a century of precedent holding that just compensation must be paid even when there is no physical invasion or taking.

E. The City Interprets Virginia Code § 25.1-230 to Preclude it and Other Condemnors from Presenting Evidence of Enhancement

The City argues that Code § 25.1-230 only permits compensation for damages to Dominion's remaining property caused by the improvements actually built on property taken from Dominion, not by the Project as a whole. Taken to its logical conclusion, this interpretation produces an untenable result. The words "by reason of" and "use by the petitioner" in Code § 25.1-230 modify "enhancement" *as well as* "damages." Accordingly, as urged by the City, if Code § 25.1-230 prohibits consideration of the Project in determining damages, it must also prohibit consideration of the Project—or any public use project—in determining enhancement.

For example, a condemnor taking private property for a road project may argue that the enhancement in value to the owner's remaining land offsets any damages to the remainder caused by the taking. But to make such an argument, the entire road project must be considered, because a small patch of new asphalt added to the owner's property adds little value unless it is

connected to the rest of the road project built on the property of others. Yet under the City's argument, evidence of enhancement caused by off-site improvements, such as the remainder of the road project, must be excluded. Such a ruling would prevent the fact-finder from considering "everything which affects the market value." Waugh, 143 Va. at 229.

This Court should reject the City's argument and affirm the plain meaning of Code § 25.1-230.

IV. When Private Property is Taken and Damaged for Public Use, the Costs Must be Shared Equally by the Public

LGA—with the City's consent—asks the Court to rule that requiring governments to actually pay just compensation when it takes and damages private property will cost too much. Just after the 1902 Constitutional amendment, this Court considered and rejected precisely this argument, reiterating that our constitutional rights are not subservient to budgetary concerns.[2]

[2] Substituting another right in the bill of rights illustrates the dangerous inversion of our constitutional scheme the City and LGA propose by prioritizing budgetary concerns above the right to freely practice one's religion, the right to assemble or free speech.

> The Constitution guarantees compensation for property damaged or injured for public use. The right to compensation is coextensive with the damage or injury, both in space and in amount. . . . It is said this might give the right to make an immense number of claims. Suppose it did. Suppose there were 1,000 claims of £1,000 each. If they are well founded, £>>1,000,000 of property is destroyed, and why is not that part of the cost of the improvement; and, if taken into account as such, why should not the loser of it receive it?'

Shartzer, 107 Va. 562, 59 S.E. 407 at 411 (internal quotations omitted).[3]

The Constitution protects the fundamental right of private property by requiring that a taking or damaging be only for a public use and only upon payment of just compensation. These two principles work together to protect owners who are compelled by government to yield their property rights to a public use. To deny an owner compensation for the damage to its remaining property from the public use for which its property is being

[3] In contrast, applying the rule which the City and *amicus* LGA urge upon the Court would "result in an increase in unnecessarily complex, drawn-out litigation involving valuation of partially condemned property." Admiral Beverage, 275 P.3d 208 at 220. It would also increase the cost of public projects by prohibiting damages from being offset by enhancement. See Section III(E), supra.

expropriated is to deny that landowner the full measure of the constitutional protection it must receive.

CONCLUSION

The City took and damaged Dominion's property, including its right to exclude, and it must pay just compensation for what it took and damaged. Because "[t]he true test of damages to the residue of the land not taken is the difference in value before and immediately after the taking, and in ascertaining such damages there may be considered every circumstance, present or future, which affects its then value," the trial court correctly permitted Dominion to offer market-based evidence of the damages to the residue of its property not taken by the City, which flowed from the public use Project.

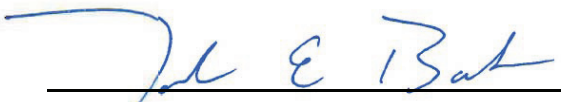
Instead, the City asks this Court to hold that a statute can restrict the constitutional requirement of just compensation by prohibiting the trier of fact from considering every circumstance that actually affects the market value of the property. The City urges this Court to replace the long held market value standard—which relies upon an informed buyer and seller—with a standard

that requires fact-finders to act as ignorant buyers and sellers. Such a system would ensure that property owners can never recover the full amount of just compensation for the taking *and damaging* of their property rights for public use and will bear a disproportionate share of the costs of all public projects. The Court should affirm the trial court's ruling as to Assignment No. 3 and maintain this Court's long-standing precedent.

Respectfully submitted,

VIRGINIA PROPERTY RIGHTS COALITION

By Counsel



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CERTIFICATE

Pursuant to Rules 5:26 and 5:30 of the Supreme Court of Virginia, I hereby certify the following:

1. That on November 20, 2015, a true copy of the foregoing Brief Amicus Curiae of the Virginia Property Rights Coalition in Support of Appellee were filed electronically, via VACES, and 10 true copies of the same was hand-filed with the Clerk of this Court. A true copy of the same was served, via electronic mail to counsel for the Appellant, Kelly D. Sheeran, CITY OF CHESAPEAKE, VIRGINIA, 4306 Cedar Road, Chesapeake, Virginia 23322; Telephone: (757) 382-6882; Facsimile: (757) 382-8749; ksheeran@cityofchesapeake.net, via electronic mail to counsel for the Appellee, Stanley G. Barr, Jr., KAUFMAN & CANOLES, P.C., Post Office Box 3037, Norfolk, Virginia 23514; Telephone: (757) 624-3000, Facsimile: (757) 624-3169, sgbarr@kaufcan.com, and via electronic mail to counsel for Amicus Curiae, Sheri Hitler, ELLIOT LAWSON & MINOR, P.C., 110 Piedmont Avenue, Suite 300, Bristol, Virginia 24201; Telephone:

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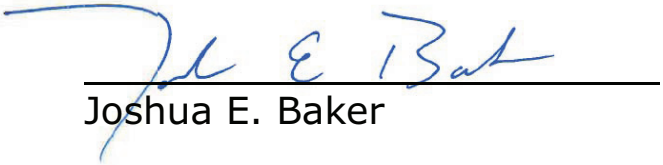
2. That this brief does not exceed 50 pages or 8,750 words in length.



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