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 OF APPELLEE

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# TABLE OF CONTENTS

**Page**

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE CASE ..... 1

FACTS ..... 3

ARGUMENT ..... 7

Standard of Review ..... 7

1. Evidence of Damage to the Remainder was Admissible as the Damage Waiver in the Reservation was not Applicable ..... 8

2. City's Motion to Reconsider Sought to Impose Unconstitutional Conditions and was Based on Speculation ..... 10

3. Evidence of Loss of Visibility Damage was Admissible Because Land and Rights Taken Were Appurtenant to and Indispensable Parts of the Project ..... 16

4. Loss of Direct Access to Dominion Boulevard was Compensable and was not a Condition to the Subdivision Variance ..... 23

5. The Court Properly Excluded Proffered Evidence ..... 25

CONCLUSION ..... 26

CERTIFICATE OF SERVICE ..... 29

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

*8960 Square Feet v. State of Alaska*,
806 P.2d 843 (Alaska 1991) ..... 22

*Appalachian Power Co. v. Anderson*,
187 S.E.2d 148 (Va. 1972) ..... 19, 20

*Board of County Supervisors v. Sie-Gray Developer, Inc.*,
334 S.E.2d 542 (Va. 1985) ..... 25

*Commonwealth Transp. Comm'r v. Glass*,
613 S.E.2d 411 (2005)..... 20, 21

*Commonwealth Transp. Comm'r of Virginia v. Linkhorn Bay Condo Ass'n*,
79 Va. Cir. 379 (Va. Beach Oct. 7, 2009)..... 12

*Craufurd's Adm'r v. Smith's Ex'r*,
23 S.E. 235 (Va. 1895) ..... 13

*Gills v. Gills*,
101 S.E. 900 (Va. 1920) ..... 14

*Hawthorne v. VanMarter*,
692 S.E.2d 226 (Va. 2010) ..... 13, 14, 15

*Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*,
717 S.E.2d 134 (Va. 2011) ..... 8

*Lee v. Spoden*,
776 S.E.2d 798 (Va. 2015) ..... 7-8

*Lynch v. Commonwealth Transp. Comm'r*,
442 S.E.2d 388 (Va. 1994) ..... 19-20

*Malarkey v. Ballard*,
120 S.E. 245 (Va. 1923) ..... 14

*Palmer v. Commonwealth*,
Nos. 1949-07-2 and 0072-08-2,
2009 Va. App. LEXIS 337 (Va. Ct. App. July 28, 2009)..... 14

*People v. Ricciardi*,
144 P.2d 799 (Cal. 1943)..... 19

*Prospect Dev. Co. v. Bershader*,
515 S.E.2d 291 (Va. 1999) ..... 17

*Pruner v. State Highway Comm'r*,
4 S.E.2d 393 (Va. 1939) ..... 21

*Russakoff v. Scruggs*,
400 S.E.2d 529 (Va. 1991) ..... 17

*Shelton v. Commonwealth*,
No. 3134-06-1, 2008 Va. App. LEXIS 28
(Va. Ct. App. Jan. 15, 2008) ..... 14, 15

*State by Comm'r of Transp. v. Weiswasser*,
693 A.2d 864 (N.J. 1997)..... 18

*State by Humphrey v. Strom*,
493 N.W.2d 554 (Minn. 1992)..... 19

*State Highway & Transp. Comm'r of Va. v. Linsly*,
290 S.E.2d 834 (Va. 1982) ..... 23

*State Highway Comm'r v. Easley*,
207 S.E.2d 870 (Va. 1974) ..... 23

*State, ex rel. Dep't of Highways v. Manning*,
322 So. 2d 362 (La. Ct. App. 1975) ..... 19

*Town of Galax v. Waugh*,
129 S.E. 504 (Va. 1925) ..... 20, 21, 22

*Utah Dep't of Transp. v. Admiral Beverage*,
275 P.3d 208 (Utah 2011)..... 16, 17, 18

*Withers v. Hestend*,
46 Va. (5 Gratt.) 456 (1849).....9

**CONSTITUTIONAL PROVISION**

VA. CONST. art. 1, § 11 .....17

**STATUTES**

Va. Code § 1-219.1.....9, 23

Va. Code § 25.1-230A(1).....16

Va. Code § 25.1-417(A)(3).....12

**RULE**

Va. Sup. Ct. R. 2:403.....8

**OTHER AUTHORITY**

City of Chesapeake Zoning Ordinance § 20-402(C).....24

Tracy A. Batemen, *Annotation, Eminent Domain: compensability of loss of visibility of owner's property*, 7 A.L.R.5th 113 (1992) .....19

## STATEMENT OF THE CASE

The City of Chesapeake ("City") appeals the decision of the Circuit Court of the City of Chesapeake awarding just compensation to Respondent Dominion SecurityPlus Self Storage, LLC ("Dominion" or "Landowner") in the amount of $44,140.00 for the property and rights taken, and $2,156,789.18 for damage to the residue. City appeals the award of damages to the residue.

Acting pursuant to City Council Resolution, in March 2012 City filed a certificate of take of land in fee and rights belonging to Dominion for the Dominion Boulevard Improvement Project (the "Project") to build a highrise bridge and freeway, finally designed in 2011. (App. 12.) The Petition to condemn the property was for the Project, "which project involves a portion of the Respondent's land." (App. 3.) In its Answer, Dominion asserted a claim for damage to the residue resulting from loss of direct access to Dominion Boulevard and loss of visibility by the public.

City filed a motion in limine to exclude any evidence of residue damages, relying on a reservation (the "Reservation") for later purchase by City in a subdivision plat (the "Plat") recorded in 2001. The Reservation contains a waiver of a claim for damages to the residue if City purchases the land in the area reserved. The trial court granted the motion in part,

finding that the Reservation was a binding contract, observing that because the details of the Project were not known when Dominion purchased the property, damages were not foreseeable, except that the residue would be smaller without the reserved area. Further, because City took more land than the area reserved, Landowner could offer evidence of damages, except it could not claim damage that the remainder was smaller after the purchase. (App. 150-56.)

City filed a second motion in limine to exclude evidence of damage from loss of visibility, asserting that, because none of the Project is built on the fee taken, there can be no damage for loss of visibility because Dominion had lost no property right. The court denied the motion, holding that loss of visibility was from the Project as a whole, for which Dominion's land was an indispensable part. (App. 255.) City then filed a motion to reconsider its first motion in limine, claiming pre-trial discovery had revealed new and significant evidence which would affect the court's first ruling, i.e., that Dominion had some knowledge of the details of the Project before the purchase. That motion was also denied. (App. 577, 635.) City filed a third motion in limine, restating much of the same argument as in its motion to reconsider, seeking to exclude evidence of damage due to the loss of direct access to Dominion Boulevard. The court reserved ruling on

that motion. At the close of all of the evidence the court denied City's third motion in limine.

After a four day bench trial, the court awarded Dominion just compensation for the land and rights taken as well as damages to the residue. City's exceptions to that decision were overruled and judgment was entered. This appeal followed.

## FACTS

Nathan and Margaret Eure (Eure) owned a six acre tract of land in Chesapeake fronting on Dominion Boulevard which they subdivided by deed into two parcels of 4.5 and 1.5 acres. (App. 685.) Dominion Boulevard is a two-lane road in the western one-half of a 200 foot right-of-way, running north and south in southern Chesapeake. It crosses the Southern Branch of the Elizabeth River by way of a drawbridge at grade, known as the Steel Bridge, which opens on average 12 times a day to accommodate river traffic. It is in the eastern one-half of the right-of-way that the new bridge and highway are being built.

The 4.5 acre parcel had direct access to Dominion Boulevard and excellent visibility from passing vehicles. In 2001 Dominion entered into an agreement with Eure to purchase the parcel subject to site plan approval.

Dominion's engineer, Kellam & Gerwitz (Kellam), submitted a site plan to Public Works for approval of a seven building, 422 unit self-storage facility with a driveway over City's 100 foot right-of-way connecting to Dominion Boulevard. The site plan was rejected for several reasons, noting that subdivision by deed was no longer allowed, and a subdivision plat would have to be recorded which would have to include a 50 foot reservation with City's right to purchase. The requirement of a plat required Eure to apply to the Planning Commission to approve the subdivision of the tract into two parcels. Once applied for, Eure learned that because the frontage on Dominion Boulevard of the 4.5 acre parcel did not meet the minimum requirement, a variance would have to be granted. The variance was granted with a confusing letter to Eure's attorney stating that at some time in the future the Steel Bridge would be replaced and access to the parcel would be from a road other than Dominion Boulevard. (App. 48.) Eure hired Kellam to prepare the subdivision Plat with the Reservation which was approved by the Directors of Public Works and Planning and recorded in December 2001. Thereafter, the site plan was approved by Public Works in January 2002 with no reference to either loss of access or connection to service road. (App. 714.) Landowner purchased the property in February 2002 and constructed the buildings.

The Reservation is standard in all subdivision plats. (App. 776.) The language is Appendix Seven of the City's Public Facilities Manual (PFM) and is required by Public Works before site plan approval. (App. 773.) It appears in Note 7 in the Plat and reads as follows:

> The owner and/or their heirs, assigns, lessee, grantees or successors in interest agrees to reserve for future **purchase** by the city the area hereby designated on the plat and shall convey same to the City by deed containing general warranty and English covenants to title. The purchase value of said area is to be based on the fair market value as of the date the city exercises its right to **purchase** the area designated as reserved with no compensation for any improvements placed within the area. The owners agree that it shall not make or have any claims for damage to the said improvements *or* **damages to the residue for the owner's property by reason of the said purchase**. (emphasis added)

There is no mention of a new bridge or a loss of direct access to Dominion Boulevard in the Plat or the Reservation or the site plan, nor was a later connection to an access road a condition to site plan approval.

Around 2000, City began planning for the replacement of the Steel Bridge. As late as 2004, the options ranged from a drawbridge at grade to a high rise bridge. (App. 378.) It was not until 2008 that a decision was made to build a 95 foot high rise bridge. (App. 668.) In 2009 the Commonwealth Transportation Board declared Dominion Boulevard a limited access highway. In April 2011 Chesapeake City Council passed a resolution authorizing the filing of a petition to condemn land for the

Dominion Boulevard Improvement Project. The petition acknowledges that the Project required a portion of Dominion's land or it could not be built. The land and rights taken include Dominion's easement for the driveway across City's 100 foot right-of-way connecting to Dominion Boulevard.[1] City required Dominion to post a bond for the driveway and required a left-turn lane, built at Dominion's expense, for southbound traffic to turn into the property. (App. 663, 664.) At trial, Kevin Lundgren, City's project manager for the Project, testified that the bridge was finally designed in 2011. The purpose of the Project was to open southern Chesapeake to development and to replace the Steel Bridge with a 95 foot high rise bridge. (T-I at 34, App. 645.) He also testified that the new elevated highway will be 30 or more feet above the remainder of the property. (App. 661.) Mr. Lundgren confirmed that Dominion's approved driveway was built on Dominion's easement across City's right-of-way and that, as a result of the Project, all access from Dominion Boulevard to Dominion's property would be extinguished. (App. 656.) He testified that the Project includes a new access road to the property, built on the fee taken, from Cedar Road to the south, and dead ends one-quarter mile to the north. The access road is a cul de sac and does not connect to Dominion Boulevard. It is not a

[1] *See* Development Plan, Ex. J to City's Mot. to Reconsider.

thoroughfare. To gain access to the property, southbound vehicles on Dominion Boulevard will have to drive past the property, exit Dominion Boulevard and turn at the intersection with Cedar Road, drive on Cedar Road and make a left turn again at the access road, with no provision for through traffic. (App. 657.) This is a driving distance of more than one mile. Mr. Lundgren confirmed that had the Project not included the access road, City's only choice was to declare the entire parcel a total take. *Id*. He acknowledged that the property taken was necessary in order to accommodate the entire Project. (App. 657, 659.) In that same regard, he confirmed that the City Council's decision to proceed by eminent domain was to accommodate the entire Project. (*Id*.) City could not do the Project without taking all of the land and rights. (*Id*.) Mr. Lundgren conceded that the Project negatively impacts both access to and visibility of the property. (App. 660, 662.)

## ARGUMENT

### Standard of Review

In its Petition for Appeal City correctly stated the Standard of Review was for an abuse of discretion. Assignments 1, 2, 3 and 4 in Appellant's Brief all seek reversal of the trial court's refusal to exclude evidence which is reviewed for an abuse of discretion. *Lee v. Spoden*, 776 S.E.2d 798,

806 (Va. 2015); *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 717 S.E.2d 134 (Va. 2011); Va. Sup. Ct. R. 2:403. City acknowledges that abuse of discretion applies to Assignments 2 and 4, which seek the same relief as Assignments 1 and 3. Dominion agrees that the Standard of Review for Assignments 2, 4 and 5 is for an abuse of discretion.

**1. <u>Evidence of Damage to the Remainder was Admissible as the Damage Waiver in the Reservation was not Applicable</u>.**

City assigns error to the court's decision to permit evidence of residue damage, asserting that it is contrary to the damage waiver in the Reservation. City says the court correctly found the Reservation to be a binding contract because it was incorporated in the deed when Dominion purchased the property from Eure, but erred when it rewrote the contract saying the only foreseeable damage was the existence of the residue without the reserved area after the purchase. City's reliance on that argument is not well founded as that was not the basis for the court's ruling. The court relied on the fact that City took more area than permitted by the Reservation and, because that area was not within the contemplation of the parties at the time, it is not governed by the agreement. (App. 150.) The Court reached the right result and, in part for the right reason. Because City took area outside the Reservation, the better reason would have been that the Reservation was not applicable at all because City did not act

pursuant to its terms. *Withers v. Hestend*, 46 Va. (5 Gratt.) 456 (1849) (A court will not require performance beyond the exact terms of the agreement.). The court correctly struggled with the meaning of the phrase "damage to the residue …. by reason of said purchase." This was not a purchase, it was a taking. There was no attempt to purchase the reserved portion. Even the offer letter was pursuant to the statutory requirements for a taking in eminent domain, not the terms of the Reservation. (App. 52.) City had no choice but to act pursuant to Virginia Code § 1-219.1 because it needed more area than the 50 feet reserved. As City had no choice but to take more area, the trial court had no choice but to allow landowner to present evidence of residue damage. The loss of direct access to Dominion Boulevard was not "as a result of such purchase," nor was the height of the bridge which City concedes is causing loss of visibility. The Reservation is not a contract, but is a condition in the chain of title which City is proposing to rewrite by equating "purchase" to "taking." If City had intended that meaning, it needed to add to the Reservation the phrase "or taking" after "purchase," not to suggest that it is legal, as conceded a City witness. (T. II at 258.) It did not do so and it cannot be done in this Appeal.

According to James Tate, City's Director of Planning and Permits (formerly Public Works), City has revised Appendix 7 in the PFM (Note 7 in the Plat) whenever it felt the need to preclude a developer from claiming damage to the remainder after the reserved area was purchased and the road widened. (App. 788.) It was not an aid in the development of property, it was only a means to save City money. (App. 785.) Tate acknowledged the high rise bridge was not a part of the discussion when the Planning Commission granted the variance, nor mentioned in the letter to Eure's attorney. Further, he agreed that the bridge affects visibility of the remainder, and visibility is important to the value of the property. (App. 790, 791.) He wondered if adding "taking" along with "purchase" would be legal.

**2. <u>City's Motion to Reconsider Sought to Impose Unconstitutional Conditions and was Based on Speculation</u>.**

In its second assignment of error, City says the court made a clear error in judgment when it denied City's Motion for Reconsideration of the court's November 16, 2012 ruling, and for not granting a hearing on its motion. There is no merit to this assignment. City claimed that "new" "significant" evidence showed that Dominion's damages from the take of the reserved property was foreseeable. In support of the motion, City says Dominion and/or its engineer, Kellam, knew, before the Plat was recorded

and Dominion bought the property, that direct access to Dominion Boulevard would be closed, that access to the property would be from a service road, and that the bridge would be 95-feet high. As evidence of Dominion's "knowledge" City attached a memo from Public Works engineer Milinazzo to Kellam dated March 27, 2000 (more than one year before Dominion hired Kellam), and records from the Planning Commission hearing approving the subdivision, which City says conditioned the grant of the variance for frontage by requiring connection to a service road and closing the existing entrance to Dominion Boulevard. There was no evidence the decision of the Commission was conveyed to Dominion, nor that it was a matter of public record. These facts were not "new" or "significantly changed." Dominion's purported knowledge of the sketchy details of the future road at the time of the Plat does not rise to the level of "foreseeable," even if that were relevant. Nor does it change the fact that City took more property than the reserved area. Further, whether taken individually or collectively, City is seeking to add terms to the Reservation. The Commission's approval of the variance runs with the land, but whether the language in the unrecorded letter to Eure's attorney constitutes a condition to development is immaterial. The court ruled, absent a condition

in the chain of title, it could not limit Dominion's rights to seek just compensation for damages to the residue. (App. 577.)

City cannot use the Landowner's information about the Project, prior to an actual take, to preclude the Landowner's evidence of damages. Such knowledge is irrelevant and inadmissible under Virginia Code § 25.1-417(A)(3):

> 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, . . . shall be disregarded in determining the compensation for the property.

In *Commonwealth Transportation Commissioner of Virginia v. Linkhorn Bay Condo Ass'n*, 79 Va. Cir. 379 (Va. Beach Oct. 7, 2009) the court relied on Virginia Code § 25.1-417(A)(3), and granted the landowner's motion in limine to exclude any testimony or discovery of landowner's knowledge of the take as it related to valuation of the residue property, holding that "[u]ntil a certificate of take is actually filed, it is too speculative or remote to include the landowner's prior knowledge of the likelihood of a take into the calculation of the present market value." *Id.* at 380.

In keeping with the principle that compensation to a landowner should be based on valuation at the time of the take, the court did not abuse its discretion to deny City's Motion for Reconsideration. This Court has

articulated that there are only two instances where a trial court can exercise its discretion to reconsider its prior ruling. The first instance is when there is a material error of law in the trial court's ruling. The second instance requires the movant, as a threshold matter, to establish that it will offer "newly discovered" or "after-discovered" evidence. *See Hawthorne v. VanMarter*, 692 S.E.2d 226, 234 (Va. 2010). In its motion, City claims it discovered the "significant new facts" after the first hearing, but before the trial, that Dominion voluntarily accepted the conditions placed upon its subdivision variance, that those conditions were the loss of direct access to Dominion Boulevard and substitution of an access road, and that Dominion's engineer was forwarded documentation from City that the future bridge would be 95 feet high and direct access would be eliminated. Therefore, City's request for reconsideration of the court's prior ruling is based upon alleged "newly discovered" or "after-discovered" evidence. Before deciding whether to exercise its discretion to reconsider an earlier ruling based upon additional evidence, a trial court first "ought to be satisfied that the evidence relied on" truly is newly discovered. *Craufurd's Adm'r v. Smith's Ex'r*, 23 S.E. 235, 236 (Va. 1895). Because City cannot pass the threshold test, this Court cannot exercise its discretion to consider the additional evidence. The standard for determining whether evidence

qualifies as newly discovered evidence is that it must be evidence that the party could not by the use of due or reasonable diligence have discovered **or used** before the decree complained of was rendered. *Hawthorne*, 692 S.E.2d at 234. The burden of proof to establish that the evidence is newly discovered is on the party requesting reconsideration. *Shelton v. Commonwealth*, No. 3134-06-1, 2008 Va. App. LEXIS 28, at *8-9 (Va. Ct. App. Jan. 15, 2008). Furthermore, in order to proceed with an attempt to meet that burden, the requesting party must first submit affidavits detailing: 1) what its efforts were to obtain the evidence prior to the court's ruling, and 2) showing why it was prevented from obtaining the evidence prior to the hearing. *Palmer v. Commonwealth*, Nos. 1949-07-2 and 0072-08-2, 2009 Va. App. LEXIS 337, at *9-10 (Va. Ct. App. July 28, 2009). As demonstrated by the above cases, a trial court should deny a motion for reconsideration based on additional evidence whenever one of six independent situations exists:

1. The evidence was actually known to the party prior to the hearing or trial. *See*, *e.g.*, *Malarkey v. Ballard*, 120 S.E. 245, 247 (Va. 1923) (movant knew witness had knowledge prior to the hearing and failed to disclose any effort to locate the witness prior to the hearing); *Gills v. Gills*, 101 S.E. 900, 905 (Va. 1920) (items known to have existed prior to judgment were not

newly discovered). All documents proffered were City documents, including documents showing Deputy City Attorney was a participant.

2. Failure to present testimony of witnesses known to the party. *Hawthorne*, 692 S.E.2d at 234. City knew that Kellam was Dominion's site plan engineer.

3. Failure to investigate available documents and interview available witnesses prior to the hearing. *Shelton*, 2008 Va. App. LEXIS 28, at *10 (finding party failed to use reasonable diligence in not reviewing documents or interviewing witnesses prior to hearing). City offered no evidence of an investigation.

4. The requesting party does not show sufficient reason for its failure to present the evidence prior to entry of the order.

5. The party stipulated to the facts.

6. Failure at the prior hearing to refute, object to or challenge the facts offered by the other party, or to offer any contrary evidence or facts.

Finally, any error in denying a hearing for the motion to reconsider was cured at trial when City proffered all of the evidence it would have offered at such a hearing. Interestingly, Kellam testified that in his meetings with Public Works engineers during site plan approval process, they stated that they were unsure about the future of the Project because

there was no funding for it. Kellam testified he conveyed that information to Dominion's principal. (App. 719.) This testimony alone was sufficient to find the "new" evidence speculative.

### 3. Evidence of Loss of Visibility Damage was Admissible Because Land and Rights Taken Were Appurtenant to and Indispensable Parts of the Project.

Conceding that the bridge caused loss of visibility to Dominion's remaining property, in its assignment of error City argues that no part of the bridge was built on the land taken, as it was built within City's right-of-way. That is an incorrect statement of fact. Equally incorrect is for City to say that Dominion has no appurtenant right in City's right-of-way. Ignoring Dominion's easement over the right-of-way, City says the trial court erred in applying the "project rule," which was the basis for the Utah Supreme Court's holding in *Utah Department of Transportation v. Admiral Beverage*, 275 P.3d 208 (Utah 2011), finding loss of visibility compensable when no part of the project was built on land taken. City has cited cases going the other way, and also relies on Virginia Code § 25.1-230A(1) to support its argument.

At the outset it must be recognized that in January 2002, by approving the site plan, City granted Dominion an easement for its driveway across the eastern 100 feet of City's right-of-way where the bridge

and new road are being built. City required and Dominion posted a performance bond for that right. Therefore, it is incorrect for City to claim that Dominion has no appurtenant right in City's right-of-way, or that no part of the project is built on the Dominion's property. By its action, City extinguished Dominion's easement of access across City's right-of-way, giving Dominion the right to claim that the cause of its loss of visibility is built on rights taken from it. An easement appurtenant, often referred to as a pure easement, has both a dominant and servient estate and is capable of being transferred and inherited. *Prospect Dev. Co. v. Bershader*, 515 S.E.2d 291 (Va. 1999). Easements are appurtenant to, and run with, the dominant tract if they benefit the owner in his use and enjoyment of that tract. *Russakoff v. Scruggs*, 400 S.E.2d 529, 531 (1991).

But that is the practical argument. The better argument, and the argument which comports most consistently with the Virginia Constitution and the holdings of this Court, is found in the *Admiral Beverage* decision, where the Court ruled that the property owner should be able to recover the reduction of fair market value by relying on "common sense notions of property value." *Admiral Beverage*, 275 P.3d 208, 220. The *sine qua non* of Article 1, Section 11 of the Virginia Constitution is to award just compensation when property is taken or damaged for public purpose. In

cases where this Court has decided the issue of just compensation, it has recognized that damages relate to fair market value of property. Visibility is a characteristic valued in the market place. Visibility directly correlates with a property's value. Take away visibility and there is a loss of fair market value of the property. To be limited by the fine line of whether or not the cause of the loss of visibility is from construction on property of others is to ignore the associated loss of fair market value. And this is especially true when, as here, it is undisputed that "the Project involves a portion of Respondent's land", and that the fee and rights taken are indispensable parts of the Project. In *Admiral Beverage*, the Utah Supreme Court held that severance damages includes:

> damages caused by an improvement that is built on property other than that which was condemned if the use of the condemned property is essential to the completion of the project as a whole. And this rule applies whether or not the improvement is built upon land abutting the state-owned property. This is because the state's condemnation of land is the 'but for cause' of the damage; if the state had not condemned the land, the State would not have been able to complete the project.
>
> *Admiral Beverage*, 275 P.3d 208, 216 (internal citations omitted).

*See also State by Comm'r of Transp. v. Weiswasser*, 693 A.2d 864, 876 (N.J. 1997) (just compensation requires compensation for the diminution of value of the remainder property that is specifically attributable

to visibility lost as a direct result of the removal of other portions of the property through a partial-taking condemnation); *State by Humphrey v. Strom*, 493 N.W.2d 554, 561 (Minn. 1992) (evidence of loss of visibility of the public traveling on a redesigned highway is admissible as a factor in determining diminution in market value of the remaining property); *People v. Ricciardi*, 144 P.2d 799, 806 (Cal. 1943) ("The weight of authority seems to be in favor of the proposition that an abutting owner of property on a public highway has an easement of reasonable view of his property from the highway"); *State, ex rel. Dep't of Highways v. Manning*, 322 So. 2d 362, 364 (La. Ct. App. 1975) (landowner entitled to damages resulting from loss of outdoor advertising space because the state was taking the only land from which his sign would be visible from both directions of highway); *see generally* Tracy A. Batemen, *Annotation, Eminent Domain: compensability of loss of visibility of owner's property*, 7 A.L.R.5th 113 (1992).

In a Virginia eminent domain proceeding, "[t]he test of damages to the residue of the land not taken is the difference in value before and immediately after the taking." *Appalachian Power Co. v. Anderson*, 187 S.E.2d 148, 152 (Va. 1972). This Court has stated that in determining damages, consideration should be given to "every circumstance, present or future, that affects the residue's value at the time of the take." *Lynch v.*

*Commonwealth Transp. Comm'r*, 442 S.E.2d 388, 390 (Va. 1994). "It is 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, that is to be considered." *Appalachian Power*, 187 S.E.2d at 152. In *Town of Galax v. Waugh*, 129 S.E. 504, 509 (1925), the Court stated that all factors which affect the market value are to be considered: "[t]he creation of noise and dust, the invasion of privacy, the deprivation of light and means of access, the burden of additional fencing and like matters are to be included, not by being added together item by item, but to the extent that, taken as a whole, they detract from the market value of the property."

Virginia courts have determined that all factors affecting the property should be considered, excluding remote or speculative damages. It is necessary to demonstrate the actual detrimental effect to the property caused by the loss of visibility. Moreover, the case law disallowing recovery for remote and speculative damages is usually focused on the inability to predict how the future expenditure might have affected the property. For example, in *Commonwealth Transp. Comm'r v. Glass*, 613 S.E.2d 411 (2005), the Court stated that plans to build a new business on the property taken were too remote to be considered. Based on the exact

language in the test for damages – the difference of fair market value – the loss of visibility must be considered in condemnation cases in the same way it would be in market transactions. *Id.* at 419. In the instant case, with a highway bridge blocking the view of a property, the property would be significantly diminished in value. A buyer would pay a significant amount higher for a retail space if prospective shoppers could not only see the property, but access it directly. It should not matter whether a property owner has a right to visibility, rather that the owner is provided a full and perfect equivalent for the property taken and place in as good a position pecuniarily as if the Project had not occurred. *Pruner v. State Highway Comm'r*, 173 Va. 307, 311, 4 S.E.2d 393 (1939). Courts have had a broad allowance for all considerations, and there is a distinction between the right and the fair market value.

This Court has arguably already decided that visibility from an abutting highway is a property right for which the property owner must be compensated if damaged. In *Town of Galax*, 129 S.E.2d at 511, property owners claimed damages when an abutting street was raised. No property was taken to raise the grade, but abutting owners had to modify their buildings to accommodate the new grade. The new paved road replaced a dirt road which proved to be a benefit to the abutting owners. The Court

weighed the tradeoff between the damage to the residue and the enhancement by the new road:

> The improved street was a constant invitation to the public to pass along that way, which was a benefit peculiar to the owners of property along that street, and not enjoyed by the owners of property along other streets of the town.

*Id*.

This language illustrates that the "invitation to the public to pass along that way" was a benefit sufficient to offset against damage caused to the residue by the change in grade. *Id*. If, in determining just compensation, a court must consider the peculiar benefit visibility to passing traffic on a highway grants to an abutting landowner, then so too must it consider the loss of such visibility as an element of damages.

City's argument is not aided by reliance on *8960 Square Feet v. State of Alaska*, 806 P.2d 843 (Alaska 1991) ("*Dimond D*") and later cases. In *Dimond D*, the court recognized loss of visibility as damage when the loss results "from changes [made] on the property taken." *Id.* at 846. The case not only endorses visibility as a property right but confirms that Dominion is entitled to claim visibility damages because the "changes," i.e., the construction of the bridge and new road, were made on Dominion's driveway. Similarly, City's "bundle of rights" argument is also unfounded as the visibility cases it cites illustrate that visibility is a property right.

City's police power argument is also not availing. There is no dispute that City may reasonably regulate the flow of traffic, but if it does so unreasonably it must answer in damages. City acknowledged that replacing the bridge was to further development in Chesapeake. Standing alone, that is not a purpose for exercising police power or the power of eminent domain under Virginia Code § 1-219.1. But even if it were it could not do it in a way, as here, where it completely extinguished all direct access to Dominion Boulevard. Even in *State Highway Commissioner v. Easley*, 207 S.E.2d 870 (Va. 1974), cited by City, the Court recognized that in building curbs along the owners property it still had to leave access for customers to enter and leave the property. *Id.* at 875.

**4. <u>Loss of Direct Access to Dominion Boulevard was Compensable and was not a Condition to the Subdivision Variance</u>.**

It was correct for the court to permit evidence of residue damage resulting from the extinguishment of all access to Dominion Boulevard. *See State Highway & Transp. Comm'r of Va. v. Linsly*, 290 S.E.2d 834 (Va. 1982). City's arguments are largely a repeat of its Assignment of Error 2 regarding action of the Commission in granting a variance as a part of approval of the subdivision of Eure's property. In granting the variance from the frontage limitation, the Commission did not impose a condition that, in the future, the owner would have to close its access to Dominion

Boulevard. The Commission had no such authority. At most it was information to Eure that, if, in the future, the new bridge resulted in loss of direct access to Dominion Boulevard, access to the property would be from a service road. Neither the minutes of the Commission meeting nor its letter to Eure's attorney were matters of public record, serving as notice to a buyer that the action of the Commission imposed a condition on the land. The language in the Plat is clear, that a buyer takes subject to conditions of record. Significantly, the frontage requirement from which Eure sought a variance is found in City's *subdivision* ordinance, not the zoning ordinance. Nonetheless, City argues that the Commission imposed a condition on the variance that access to Dominion Boulevard would be closed in the future. City's reliance on the cases cited is misplaced as all of the cases cited are zoning cases, not subdivision cases, where the zoning official was given clear authority to condition variances from zoning ordinances. Zoning ordinances by definition impose conditions which run with the land. Correspondingly, a variance to such a condition would also run with the land. In Chesapeake, the authority to condition variances to the zoning ordinance is explicit.[2] Not so the subdivision ordinance.

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[2] *See* section 20-402(C) of City's zoning ordinance where the board of zoning appeals may impose conditions as part of a variance to zoning restrictions.

City's reference to *Board of County Supervisors v. Sie-Gray Developer, Inc.*, 334 S.E.2d 542 (Va. 1985) is inapposite. There the subdivision plat had already been recorded and the issue of proffers for public road improvement became a condition to site plan approval. The developer made the proffer and posted a performance bond to assure compliance. When it defaulted, County sued on the bond. Sie-Gray's defense that imposing the condition of public road improvement on site plan approval was unconstitutional, was denied because of *Sie-Gray's* express agreement and later actions. Not only do those facts not fit the instant case, but *Sie-Gray* was not a condemnation case where the Virginia Constitution and legal precedent provide different protections.

**5. <u>The Court Properly Excluded Proffered Evidence</u>.**

Assignment of Error Five is little more than a repeat of the argument that, because Dominion may have had some knowledge of the height of the bridge and the loss of access to Dominion Boulevard, it was error for the court to limit the damage waiver in the Reservation. Even if Dominion had actual knowledge of details, that would not bar its right to present damage evidence for all of the reasons previously stated, not least of which is that assumption of the risk is not a defense in eminent domain. Kellam's testimony did not help City's position. His discussion with Dominion's

principal was necessarily vague on details of the Project. There was no funding for the Project; only a study was being funded; there were no plans. (App. 719.) Any reliance by Landowner on Kellam's knowledge would have been speculation as was confirmed by the fact that City was so uncertain about the Project that every City department involved in overseeing the development of the site approved the site plan and the construction, including the modifications to Dominion Boulevard to accommodate a left-turn lane for access and the easement for the driveway. Surely, City would not have been so cavalier if plans had been as firm as City contends. That the court sustained the motion to strike the evidence of knowledge of the Project was not error.

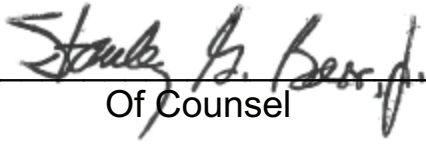
## CONCLUSION

In the final analysis, this appeal is a challenge to the trial court's decisions on the admissibility of certain evidence relating to the market value of property, which is reviewed as an abuse of discretion. This is a condemnation action, not a suit to interpret terms or conditions of a contract to purchase real estate as City urges. The Reservation is not a binding contract and the waiver of damage clause is unenforceable. If the Reservation were a contact, City could not have acted pursuant to its terms because it needed more area than reserved. Since a purchase was not

possible, suing in condemnation was City's only means of acquiring the area, freeing Dominion to seek just compensation for damages to the residue. It is not important that the court found the Reservation a binding contract. What is important is that the court found that because City took more land and rights than permitted by the Reservation, except for the size of the remainder, the damage restriction did not apply. Armed with that decision, the court needed only to determine if case law permitted damage evidence for loss of direct access and visibility.

The court's decisions to admit evidence on those claims was supported by City's recognition in the petition in condemnation that the Project involved Dominion's land, that its witnesses confirmed that the access road was an indispensable part of the Project and that the bridge and highway are built on Dominion's driveway connecting to Dominion Boulevard. The decisions to admit evidence were not an abuse of discretion and the judgment should be affirmed.

**DOMINION SECURITYPLUS SELF STORAGE, LLC**

By: 
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## CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November, 2015, in compliance with Rule 5:26(h), one electronic copy of the foregoing Brief of Appellee was filed, via VACES, and ten bound copes were hand-filed with the Clerk of the Supreme Court of Virginia. On this same day, one electronic copy of the same was served, via email, to the following:

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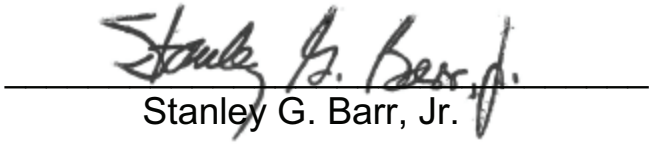

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