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IN THE

Supreme Court of Virginia

RECORD NO. 150328

CITY OF CHESAPEAKE,

Appellant,

v.

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

Appellee.

**BRIEF AMICUS CURIAE OF THE
LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC.
IN SUPPORT OF APPELLANT**

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INTEREST OF THE *AMICUS CURIAE*

The Local Government Attorneys of Virginia, Inc. ("LGA"), by counsel, respectfully submits this Brief *Amicus Curiae* in support of Petitioner-Appellant City of Chesapeake, Virginia ("Chesapeake") on its third Assignment of Error, addressing the trial court's decision to permit Respondent-Appellee Dominion SecurityPlus Self Storage, LLC ("Dominion") to present evidence of damage to the residue of its property due to loss of visibility from Dominion Boulevard, a public roadway.

The LGA is a nonprofit professional corporation created to promote the continuing legal education of local government attorneys, furnish information to local government attorneys and their offices that will enable them to better perform their functions, offer a forum through which LGA members may meet and exchange ideas of import to Virginia local government attorneys, and initiate, support, or oppose legislation and litigation that, in the judgment of the LGA, is significant to Virginia's local governments. The LGA was founded in 1975, and its 797 public and private attorney members represent 78 counties, 36 cities, and 57 towns of the Commonwealth, as well as a variety of authorities and other special units of local government. The LGA regularly is asked by the Virginia General Assembly and agencies of the Commonwealth to offer legal advice on

matters of state policy and to recommend knowledgeable attorneys to serve on legislative study committees and commissions.

As an organization of attorneys who are charged with the responsibility of protecting the legal interests of Virginia's local governments, the LGA is well qualified to recognize matters of general importance impacting local government law that may be presented to this Court. The LGA, therefore, is well situated to provide assistance to the Court with respect to local government issues that may impact not only the present litigants but all Virginia local governments and their citizens. The LGA has previously filed briefs *amicus curiae* in cases before this Court that implicate issues of special importance to Virginia's local governments.

The LGA requested consent from both parties to file this brief, but Dominion withheld consent. Accordingly, the LGA submits a motion with this brief requesting leave of court to participate as *amicus curiae* pursuant to Rule 5:30 of the Supreme Court of Virginia.

STATEMENT OF THE *AMICUS CURIAE*

This case presents an issue of broad precedential value to state and local governments and other governmental authorities throughout the Commonwealth possessing the power of eminent domain. The outcome of this case will directly impact the measure of damages recoverable in a condemnation proceeding, and an adverse decision could significantly increase the cost of condemnation at the expense of all Virginians.

The trial court permitted the landowner, Dominion, to present evidence of damage to the residue of its property due to loss of visibility from Dominion Boulevard, a public roadway. This Court has not decided whether a landowner may recover for loss of visibility in a condemnation proceeding. If, as the LGA urges, a landowner has no property right to visibility of its property, the trial court erred in permitting Dominion to introduce evidence of lost visibility damages during the trial on just compensation.

This case, if affirmed, would create a new property right or category of damages for which Virginia state and local governments must compensate landowners in condemnation proceedings. Recognizing such a right would negatively impact public improvement projects that protect and promote the health, safety, and welfare of the public. The increased

cost of critical transportation infrastructure projects would further tax the public purse while delaying needed upgrades of congested roadways. The case could also affect private property rights generally by permitting new grounds for private nuisance or other claims between private owners.

STATEMENT OF THE CASE

The LGA adopts the Statement of the Case submitted by Chesapeake in its Opening Brief.

STATEMENT OF FACTS

The LGA adopts the Statement of Facts submitted by Chesapeake in its Opening Brief.

STANDARD OF REVIEW

Chesapeake's third Assignment of Error presents the purely legal question of whether a landowner is entitled to compensation for damages from a property's loss of visibility in a condemnation proceeding in Virginia. Therefore, this Court should apply the de novo standard of review in deciding this issue of law. *See Bd. of Zoning Appeals of Fairfax Cnty. v. Bd. of Sup'rs of Fairfax Cnty.*, 276 Va. 550, 552, 666 S.E.2d 315, 316 (2008); *see also Smith v. McLaughlin*, ___ Va. ___, ___, 769 S.E.2d 7, 19 (2015) ("The types of injuries for which damages are recoverable . . . is a question of law reviewed de novo.").

ARGUMENT

I. The trial court erred in permitting the landowner to present evidence of damages to its property from loss of visibility.

Chesapeake is engaged in a project to improve safety and address traffic congestion on Dominion Boulevard by replacing an aging drawbridge over the Elizabeth River with a 95-foot-high fixed span bridge. Dominion's property is located near a section of roadway that must be elevated to accommodate the taller bridge. The elevated roadway is being constructed entirely on property already owned by Chesapeake and is outside the boundaries of the property taken from Dominion. *See* Tr. Vol. II, pp. 344–45. Dominion claims that the elevated roadway will eliminate its property's visibility from Dominion Boulevard. *See* Tr. Vol. IV, p. 575. In essence, it seeks compensation for the loss of free advertising of its self-storage business to the traveling public due to its location near a major roadway.[1]

This Court has not directly addressed whether a property's loss of visibility is a compensable damage in a condemnation proceeding, so this case presents an issue of first impression. *See Commonwealth Transp.*

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[1] Chesapeake recorded a Certificate of Take on March 22, 2012 for a partial taking of Dominion's property. On January 1, 2013, the Constitution of Virginia was amended to permit compensation for "lost profits" and "lost access," and the General Assembly amended the Code of Virginia to implement those changes. *See* Va. Const. art. I, § 11 (2015); Va. Code Ann. § 25.1-100 (2015); *id.* § 25.1-230.1 (2015); 2012 Va. Acts ch. 684; *id.* ch. 699. This case predates the constitutional and statutory amendments.

Com'r v. Target Corp., 274 Va. 341, 353–54, 650 S.E.2d 92, 99 (2007) ("[W]e do not decide whether a landowner, whose real property is the subject of a condemnation proceeding, may recover damages for loss of visibility to the residue of the real property. This issue remains undecided in this Commonwealth.").

For the reasons stated below, the Court should find that visibility is not a property right. Because a landowner possesses no property right to visibility, no compensation is due for loss of visibility in a partial taking case, and a trial court should not permit a landowner to present evidence of damages from lost visibility in a trial on just compensation.

In the alternative, when a partial taking occurs, a landowner may only recover for damages that flow from the government's use of the specific property taken from that landowner. A landowner is not entitled to recover damages accruing from the public project generally or from public improvements constructed outside the property taken. A trial court should not permit a landowner to present evidence of damages, including lost visibility, that do not result directly from the partial taking.

A. Visibility is not a compensable property right in a condemnation proceeding.

The concept of "just compensation" is intended to compensate landowners for property rights, but it is not an insurance policy to provide

indemnification to landowners for any negative impacts of nearby public projects. Virginia landowners have a constitutional right to just compensation when the government takes or damages private property for public use. *See* Va. Const. art. I, § 11 (2015). However, landowners must show damage to some property right, not merely to property value.

Property ownership is the "bundle of rights" that the landowner acquires when it takes title to the property. *See City of Virginia Beach v. Bell*, 255 Va. 395, 400, 498 S.E.2d 414, 417 (1998). "Virginia law holds partial diminution in the value of property compensable only if it results from dislocation of a specific right contained in the property owner's bundle of property rights." *Bd. of Sup'rs of Prince William Cnty. v. Omni Homes, Inc.*, 253 Va. 59, 72, 481 S.E.2d 460, 467 (1997). A landowner seeking compensation for damage must allege that the government action "limits the landowner's ability to exercise his property rights. . . . The mere fact that the measurement of that compensation may be based on a decline in the value of the subject property does not make the action one for injury to property." *Richmeade, L.P. v. City of Richmond*, 267 Va. 598, 603, 594 S.E.2d 606, 609 (2004).

To be compensable in a partial taking, visibility must be a specific right found in the landowner's bundle of rights. Visibility refers to the right

for the landowner's property to be visible from the property of another—in this case, the visibility of Dominion's property from Dominion Boulevard, a public roadway. Thus, rather than a right to use the subject property, visibility is the assertion of a right to restrict another landowner's use of its property, removing a stick from a neighbor's bundle of property rights.

A landowner who claims a right of visibility is asserting an easement, or a "right[] to demand that the owner of the servient tract refrain from certain uses of his own land." *Bunn v. Offutt*, 216 Va. 681, 684, 222 S.E.2d 522, 525 (1976). Specifically, visibility is a negative easement, "consist[ing] solely of a veto power" over a neighbor's exercise of its property rights. *Prospect Dev. Co. v. Bershader*, 258 Va. 75, 89, 515 S.E.2d 291, 299 (1999). At common law, negative easements "were those created to protect the flow of air, light, and artificial streams of water, and to ensure the subjacent and lateral support of buildings or land." *United States v. Blackman*, 270 Va. 68, 77, 613 S.E.2d 442, 446 (2005).

Visibility is not a property right that inheres to Dominion solely by ownership of its property, and Dominion does not claim to hold a negative easement of visibility burdening Chesapeake's property. Thus, the asserted right of visibility is not within Dominion's bundle of property rights. Even if the loss of visibility of Dominion's property from the elevated

roadway diminishes the value of the residue of Dominion's property, this loss is not compensable in a condemnation proceeding because it does not result from the dislocation of any property right that Dominion possesses.

B. Visibility should be treated the same as view, which is not a compensable property right in Virginia.

This Court previously declined to recognize a property right that protects the view *from* private property. *See Byler v. Virginia Elec. & Power Co.*, 284 Va. 501, 509, 731 S.E.2d 916, 921 (2012). In an inverse condemnation proceeding, landowners claimed that their properties were damaged without compensation when a public utility built a 230 kilovolt electric transmission line nearby. *Id.* at 504, 731 S.E.2d at 918. Though none of their land was taken for the project, they claimed that their properties became "less valuable, marketable and desirable" due to the power line's proximity. *Id.* at 504, 731 S.E.2d at 918. Noting that the Constitution of Virginia does not "authorize a remedy for every diminution in the value of property that is caused by a public improvement," the Court found that the landowners failed to allege interference with any specific property right, and they were entitled to no compensation for any decrease in property value due to impairment of view. *Id.* at 509, 731 S.E.2d at 921.

For the same reasons that "view from the property" is not a property right in Virginia, the Court should decline to recognize "visibility of the

property" as a property right. Accordingly, because Dominion possesses no property right to visibility, the trial court erred in permitting Dominion to present evidence of damage to the residue of its property due to loss of visibility. Any loss of visibility suffered by Dominion is a purely economic injury that is not compensable in a condemnation proceeding.

C. Recognizing visibility as a property right would negatively impact public improvement projects in Virginia.

As a policy matter, recognition of a property right of visibility would have wide-ranging implications. In the condemnation context, the cost of public projects could increase dramatically. The universe of landowners entitled to compensation would expand significantly to include those merely located near public improvement projects, even projects where no new private property is taken. The public, as the primary funding source and beneficiary of public projects, would ultimately suffer from the increased complexity and expense and decreased efficiency of the government's exercise of its power of eminent domain. Private litigation would also be affected by recognition of this property right, giving landowners a new and powerful tool against their neighbors in private nuisance and other property-based actions.

D. The Constitution of Virginia does not define just compensation to include damages for lost visibility.

The Constitution of Virginia sets out the compensation that is due to a landowner when private property is taken or damaged for a public use, defining just compensation to include "the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking." Va. Const. art. I, § 11 (2015). Lost visibility is not found in this list of compensable items. The General Assembly has not defined lost visibility in section 25.1-100 of the Code of Virginia, as it has done for "lost profits" and "lost access", and sections 25.1-230 and 25.1-230.1 do not provide for computation of lost visibility damages, as they do for lost profits, lost access, and other damages. *See* Va. Code Ann. § 25.1-100 (2015); *id.* § 25.1-230(2015); *id.* § 25.1-230.1 (2015). Under Virginia law, lost visibility is not a category of damages that is compensable in a condemnation action.

The General Assembly has considered and rejected bills that would award damages for loss of view or visibility. *See, e.g.*, H.B. 3115, Va. Gen. Assemb., 2007 Reg. Sess. (attempting to require fact finders to consider damages to "viewshed" of property taken). This Court should decline to create a new category of condemnation damages that is not contemplated in the Constitution of Virginia or the Code of Virginia.

E. No compensation is due for damages arising from public improvements constructed outside the property taken.

In a partial taking, the damages to the residue of the property must "flow directly from the taking" of the landowner's property. *City of Virginia Beach v. Oakes*, 263 Va. 510, 517, 561 S.E.2d 726, 729 (2002); *State Highway & Transp. Com'r of Virginia v. Lanier Farm, Inc.*, 233 Va. 506, 510, 357 S.E.2d 531, 533 (1987); *Tidewater Ry. Co. v. Cowan*, 106 Va. 817, 56 S.E. 819, 820 (1907) ("[I]n assessing damages to the residue of the tract where a part of the land is taken in condemnation proceedings, it is proper for the commissioners to consider and allow any damages to the residue flowing directly from the taking of a part of the land . . . .").

The landowner is not entitled to compensation for damages that flow from the public project generally, but only for those damages that flow from the taking of the landowner's property specifically. The proper inquiry for the trial court is whether the landowner's damages were caused by construction of a public improvement *on* the property taken from the landowner. When the complained-of public improvements are constructed on property not taken from the landowner, no compensation is due because the damages are not a direct result of the taking. Rather, a landowner's damages from project work outside the property taken are a

non-compensable "diminution in the value of property that is caused by a public improvement," *Byler*, 284 Va. at 509, 731 S.E.2d at 921.

The General Assembly has codified this limitation in section 25.1-230 of the Code of Virginia, which provides that the landowner is entitled to compensation for damages to the residue of the property "by reason of such taking and use by the petitioner." Va. Code Ann. § 25.1-230(A)(1), (2) (2015). By using this language, the General Assembly purposely chose to limit any damage award to only those damages arising from the taking itself, rather than permitting a landowner to be compensated for all economic losses resulting from a public project.

In this case, Chesapeake is constructing the elevated roadway on property it already owns and not on the property taken from Dominion. *See* Tr. Vol. II, pp. 344–45. Dominion does not allege that the loss of visibility flows from construction of any improvement on the property taken from it. Thus, the visibility damages flow from the public improvements being constructed outside the property taken and not from the partial taking of Dominion's property. Because the change in visibility is not "by reason of" Chesapeake's taking and use of Dominion's property as required by section 25.1-230 of the Code of Virginia, the alleged damages are indirect economic losses that are not compensable in this proceeding.

F. Virginia should join the other states that have declined to compensate landowners for loss of visibility.

A variety of states have addressed the issue of visibility as a property right or as a compensable category of condemnation damages. The general consensus is that loss of visibility is not compensable when it is caused by construction of a highway or other public improvement on property not taken from the landowner. *See, e.g.*, *8,960 Square Feet, More or Less v. Dep't of Transp. & Pub. Facilities*, 806 P.2d 843, 848 (Alaska 1991) (finding that "the best position is that loss of visibility is compensable in an eminent domain proceeding where the diminished visibility results from changes on the property taken from the landowner, but not where it occurs due to changes on the property of another"); *Regency Outdoor Adver., Inc. v. City of Los Angeles*, 139 P.3d 119, 125 (Cal. 2006) (noting that "the virtually unanimous rule provides that there is no freestanding right to be seen, and that the government need not pay compensation for any lessened visibility"); *Troiano v. Colorado Dep't of Highways*, 463 P.2d 448, 456 (Colo. 1969); *Dep't of Transp. v. Weggies Banana Boat*, 576 So. 2d 722, 724 (Fla. Dist. Ct. App. 1990); *Moreton Rolleston, Jr. Living Trust v. Dep't of Transp.*, 531 S.E.2d 719, 722 (Ga. Ct. App. 2000); *Idaho Transp. Bd. v. HI Boise, LLC*, 282 P.3d 595, 603–04 (Idaho 2012); *Malone v. Com.*, 389 N.E.2d 975, 979 (Mass. 1979); *Grossman Investments v. State by*

Humphrey, 571 N.W.2d 47, 51–52 (Minn. Ct. App. 1997); *State ex rel. Missouri Highway & Transp. Comm'n v. Dooley*, 738 S.W.2d 457, 469 (Mo. Ct. App. 1987); *State by Com'r of Transp. v. Stulman*, 345 A.2d 329, 336 (N.J. Sup. Ct. App. Div. 1975); *State ex rel. State Highway Comm'n v. Lavasek*, 1963-NMSC-020, 73 N.M. 33, 38, 385 P.2d 361, 364; *Bopp v. State*, 227 N.E.2d 37, 39 (N.Y. 1967); *Filler v. City of Minot*, 281 N.W.2d 237, 244 (N.D. 1979); *Jantz v. Dep't of Transp., Div. of Highways*, 217 N.W.2d 266, 269 (Wis. 1974).

Some courts also decline to compensate landowners for lost visibility of the residue caused by improvements constructed on the property taken. *See, e.g.*, *Dep't of Transp. of State v. Marilyn Hickey Ministries*, 159 P.3d 111, 116 (Colo. 2007) (reasoning that a landowner "cannot recover for the loss of motorists' visibility because it never had a right to continued traffic passing its property"). However, the factual situation of visibility interference by construction on the property taken is not present in the case before the Court. The elevated roadway that impairs visibility of Dominion's property is located entirely on property already belonging to Chesapeake and not on any property taken from Dominion, *see* Tr. Vol. II, pp. 344–45, and this Court should join the other states that have declined to compensate landowners for lost visibility on those facts.

CONCLUSION

The Court should decline to recognize visibility as a property right or as a compensable category of condemnation damages. Because the trial court erred in permitting Dominion to present evidence of damage to the residue of its property due to loss of visibility from a public roadway, the Court should vacate the condemnation award and remand the case for a new trial on the issue of just compensation.

Respectfully submitted,

LOCAL GOVERNMENT
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CERTIFICATE

The undersigned counsel hereby certifies that the foregoing Brief *Amicus Curiae* complies with Rules 5:26 and 5:30 of the Supreme Court of Virginia and that on October 28, 2015, ten printed copies of this brief were hand-delivered to the Clerk of this Court and one PDF copy of this brief was filed with the Clerk of this Court and emailed to the counsel of record in this case:

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