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 APPELLANT

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SCV: Submitted on 10-28-2015 15:33:07 EDT for filing on 10-28-2015

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STATEMENT OF THE CASE

This is an appeal from a judgment of the Chesapeake Circuit Court (trial court) awarding just compensation for property that the City acquired for the Dominion Boulevard Road Project. The trial court awarded $44,141.00 for the land taken and $2,156,789.18 for damages to the residue property as a result of the loss of direct access and loss of visibility of the residue. Early in the litigation, City filed a motion in limine to preclude Dominion or its experts from testifying as to any damages to the residue by reason of the right of way reservation contract that contained a waiver of damages clause. The City argued that Dominion's owner/developer voluntarily agreed to the right of way reservation contract when its engineer placed the reservation on the subdivision plat as a condition for site plan approval. City further argued that the waiver of damages clause prohibited Dominion from claiming any damages to the residue as a result of the purchase of the reserved area for the road project. A. 26-35, 44-46. Although the trial court granted the City's motion in limine, it did so with the restriction that Dominion was only precluded from claiming damages based on the reduced size of the residue by virtue of the reservation. A. 150-157. In other words, Dominion could present evidence of damages to the residue for any reason other than the residue's

reduced size. The trial court's rationale being that the parties did not know at the time of the reservation what the future road plans would entail or what damages from the project were foreseeable.

City attempted to have the trial court reconsider its ruling on the right of way reservation when it discovered significant new facts after the hearing and before trial that were material to the reservation issue. Specifically, City discovered that Dominion voluntarily accepted the conditions placed upon its subdivision variance. Those conditions were the loss of direct access to Dominion Boulevard and substitution of an access road. A. 261-267, 280-288, 290-291, 293-298, 301-351, 352-353. In addition, the City learned from Dominion's engineer that he was forwarded documentation from the City that the future bridge would be ninety five feet high and direct access would be eliminated. A. 286-288. The trial court improperly denied the motion to reconsider.

Following the trial court's ruling on the reservation, City filed a motion in limine to preclude the introduction into evidence of damages for loss of the public's visibility of the residue when such loss did not result from the taking of Dominion's land or the use of the take. City argued that Article 1, Section 11 of the Virginia Constitution and Virginia Code Section 25.1-230 clearly required that damages must flow directly from the take or the use of

the take. A. 158-170. In response, Dominion implored the Court to adopt the "Project Rule" from the Utah Supreme Court decision in *Utah Department of Transportation v. Admiral Beverage Corporation, et al*., 275 P.3d 2018 (2011). City took the position that although, the Virginia Supreme Court has not ruled on the compensability for loss of visibility, the majority rule relied upon by the Alaska Supreme Court comports with Virginia Code Section 25.1-230 and Article 1, Section 11 of the Virginia Constitution. In *8,960 Square Feet More or Less v. State of Alaska Dep't of Transportation*, 806 P.2d 843 (1991) known as the Dimond D case, the Court ruled that there must be a nexus or causal connection between the taking and the loss of visibility to be compensable. In overruling the City's motion in limine, the trial court said it was more likely that as between the Alaska Rule and the Utah Rule, our Virginia Supreme Court would adopt the Utah or Project Rule. A. 246-250, 254-255.

Prior to the commencement of the trial on just compensation, the City moved in limine for the court to exclude evidence of loss of direct access to the residue as such loss was a legal condition placed on the subdivision variance and as such ran with the land. A. 578-581. The trial court deferred ruling on the motion until the end of the trial, at which time, it denied the motion on the basis that while conditions placed on a variance

run with the land, in this instance, such a condition was not legal as it deprived the Landowner of its constitutional right to just compensation. A.1007-1014.

During the just compensation trial, the City proffered testimony of its expert appraiser who found no damages to the residue by reason of the recorded subdivision plat containing the right of way reservation with the waiver of damages clause. A. 451-456. Both City's and Dominion's experts agreed that nothing in the take created the loss of visibility. Rather, the loss of visibility was caused by the construction of the elevated bridge and new road within the City's land. A. 651-654, 828-830, 946. Dominion's engineer testified that he informed Dominion of the City's communication regarding the requirement for a right of way reservation, the future height of the bridge and the conditional subdivision variance that required the elimination of direct access when the Project began. He further testified that Dominion proceeded to develop its storage facility because it did not think City would ever get the funding for the road project. A. 704-718.

At the conclusion of Dominion's case, Dominion moved to strike all of the testimony that the City offered, including the testimony of its engineer, Kellam, who testified that he informed the Dominion's owner of the right of way reservation, the future height of the bridge and the subdivision

variance conditions of future closure of direct access to Dominion Boulevard. The Court granted Dominion's motion finding that the testimony offered by the City including that of Dominion's engineer was speculative as to the issue of Dominion's knowledge. The Court overruled the City's exceptions to the Report of Court and entered the Order Confirming the Report of Court. This Court awarded the City an appeal on September 21, 2015.

ASSIGNMENTS OF ERROR

1. The Trial court committed reversible error when it admitted into evidence testimony by Dominion's experts on damages to the residue resulting from the acquisition of the fee take and interests within a 50 foot Right of Way Reservation as the Reservation was an enforceable contract with language that specifically precluded Dominion from claiming damages to the residue by reason of the City's purchase of the area contained in the reservation, including, but not limited to the fee acquisition which was wholly within the reserved area. [Preserved at A.156-157, 900-904, 1028-1030, 1034-1037.]

2. The Trial court erroneously refused to grant the City a hearing on City's Motion for Reconsideration of the Court's ruling on the City's Motion in Limine to prohibit and/or strike any evidence of damages to the residue. After the hearing on the Motion in Limine and before trial, City provided the Court relevant and material information that significantly changed the facts of the case. [Preserved at A. 635-636, 1015-1016,1028-1030, 1031-1033, 1034-1037.]

3. The Trial court erroneously allowed Dominion to offer evidence of loss of visibility in support of its claim of damage to the residue arising from the project as a whole. Such evidence should have been prohibited as any loss of visibility was not caused by the taking but by public project improvements on the City's land in the exercise of its police power to

control the flow of traffic on its highway. [Preserved at A. 250, 903-904, 1015-1016, 1031-1033, 1034-1037.]

4. The Trial court erroneously refused to exclude damages of evidence for loss of direct access when such loss of direct access was a legal condition placed upon a subdivision variance approved by the City of Chesapeake's Planning Commission and accepted by Dominion's predecessor in title as well as Dominion as a condition on the property prior to site plan approval. [Preserved at A.1017-1018, 1031-1033, 1034-1037.]

5. The Trial court erroneously ruled that Dominion's prior knowledge and voluntary acceptance of the future elevated bridge and loss of direct access prior to purchase and development was speculative, likewise, it was error to strike the trial testimony of Dominion's engineer, Robert Kellam, P.E., whose testimony was not speculative but relevant and material to the issues before the court. [Preserved at A.956, 1031-1033, 1034-1037.]

FACTS

In 2001, Dominion began negotiations with Nathan and Margaret Eure, ("Eures") for the purchase of the subject parcel. Dominion endeavored to develop a storage facility. To that end, Dominion hired Robert Kellam, principal of the engineering firm Kellam & Gerwitz Engineering, Inc. ("Kellam") to prepare a development site plan and a subdivision plat as required by the Chesapeake City Code and administered by the City's Planning and Public Works departments. During the site plan approval process, Kellam was notified by letter dated October 24, 2001, from the City that, prior to site plan approval, a legal subdivision plat needed to be approved and recorded; a subdivision variance due to

lack of sufficient road frontage was required, and that a Right of Way Reservation of 50 feet must be shown on the subdivision plat and a right of way reservation was required. Dominion's owner, Thomas Fiscus, was copied on the letter. A. 40-41, 962-963.

As the sale of the parcel was contingent on site plan approval, the Eures were the applicants for the subdivision variance and hired Kellam's firm to prepare the plat. The Planning Commission granted the subdivision variance on condition that the parcel's existing entrance to Dominion Boulevard would be closed in the future and an access road would be provided after the completion of the future road project. A. 727-731, 969-974. Kellam communicated with Dominion's owner concerning the future closure of its entrance on Dominion Boulevard. Dominion did not object to the conditions and proceeded with purchase and development. A. 715-716. Kellam then prepared the subdivision plat with the required 50 foot right of way reservation as set forth at "Note 7." A. 964-965. The parcel was conveyed by deed to Dominion on January 7, 2002, "subject to all of the terms, conditions, rights, obligations, restrictions, easements, and reservations set forth in duly record (sic) deeds, plats, declarations and other instruments constituting constructive notice in the chain of title to the property conveyed which have not expired or otherwise become

ineffective." A. 966. On January 17, 2012, the City offered to purchase, for fair market value, the land within the 50' right of way reservation for future road improvements. In addition, the City offered to purchase an interest in land outside of the reservation for the purpose of acquiring a portion of a permanent utility easement, waterline easement and temporary construction easement that was located both within and outside of the reserved area. Dominion rejected the City's offer and on March 22, 2012, the City filed its Certificate of Take acquiring 4,943 square feet of fee, all of which was located in the reservation area; 354 square feet for a waterline easement, 3,180 square feet for a permanent utility easement, and 1,898 square feet for a temporary construction easement. It in its Petition for Condemnation, the City requested the Court to ascertain just compensation as provided by Virginia Code Section 25.1-230, but limited to the reservation agreement on the recorded subdivision plat. A. 6-7.

In response, Dominion filed its Answer claiming that the Reservation was an unlawful exaction of property and beyond the authority of the City. A. 21. The City filed its first Motion in Limine to exclude testimony on damages to the residue by virtue of the reservation agreement, specifically Note 7 which contained a waiver by the Landowner of all damages to any improvements within the reserved area and all damages to the residue by

virtue of the City's purchase of the reserved area for future road improvements. A. 28-29. The Court ruled that while the reservation was a valid contract between the parties, the Landowner was only precluded from claiming damages to the residue by virtue of the fact that the acquisition created a smaller residue. A. 155-156. At trial, and over the objection of the City, the Court allowed Dominion's witnesses to testify as to damages to the residue resulting from the purchase of the entire fee simple area and portions of the easements within the reservation area. A. 551.

City filed a second Motion in Limine to exclude testimony of any damages to the residue that resulted from a loss of the public's visibility of Dominion's residue land. The City based its motion on the fact that none of the land and/or interests acquired from Dominion, nor the use of such land or interests, created any loss of visibility. Any loss of visibility was caused by the construction of improvements on the City's right of way. Thus, there was no nexus between the taking and the loss of visibility. The Trial court ruled that Dominion could claim damages for loss of visibility

> "…as any claim of loss of visibility arises from the project as a whole and Respondent's residue is being impacted by the project. Therefore, the Court will permit Respondent to offer evidence of loss of visibility to support its claim of damage to the residue arising from the project as a whole." A. 254-256.

After the hearing on Petitioner's Motion in Limine as to the reservation and before trial, City obtained information that significantly changed the facts of the case. Based on these new facts, City filed a Motion for Reconsideration and a Motion for the Court to Grant a Hearing on City's Motion for Reconsideration on July 3, 2014. Together, these motions asked for the Court to reconsider its Letter Opinion of November 16, 2012 and its Order of May 28, 2013. The City's Motion for Reconsideration was predicated on the fact that, following the Court's ruling on the City's Motion in Limine, the City obtained testimonial and documentary evidence through pre-trial discovery that confirmed Dominion and/or Dominion's agent were not only aware but accepted prior to Dominion's purchase of the subject parcel on January 7, 2002, that the parcel would lose all direct access to Dominion Boulevard, that Dominion would be required to connect its entrance to a future access road, and that the future steel bridge would be 95 feet in height. A. 257-260, 261-356, 394-418, 429-434.

City's third Motion in Limine was filed to exclude evidence on damages resulting from the loss of direct access to Dominion Boulevard based upon the Planning Commission's grant of the variance that allowed this parcel to depart from the frontage requirements of the City's

Subdivision Ordinance on the specific condition that access to Dominion Boulevard would close in the future and be replaced with an alternative point of access. The Court deferred hearing the Motion in Limine until after the trial. In a post-trial proceeding, the City argued that awarding damages for loss of direct access when such loss was a condition running with the land would be contrary to the decision of the Chesapeake Planning Commission. Moreover, the condition was voluntarily accepted by Dominion. A. 1011-1015. On October 22, 2014, after hearing argument on the City's Motion in Limine, the Court ruled that although the conditions ran with the land, the conditions had to be generated by the proposed development of the property. The Court further ruled that when the conditions were placed on the land the "complete future development" was unknown and to enforce those conditions would "circumvent and prohibit a Landowner's constitutional rights to seek just compensation in an eminent domain proceeding" and "for that reason is not valid". A. 1017-1018.

At trial following a view of the subject property, City called the Dominion Boulevard Project Manager, Kevin Lundgren, P.E. to testify as to the acquisition and the use of the acquisition areas by the City. Lundgren testified without objection that the fee simple right of way acquisition consisting of 4,943 square feet was totally within the right of way

reservation and was acquired for the purpose of constructing an at grade substitute access also known as Access Road C or Sampson Creek Road. A. 646-652, 959-961. Mr. Lundgren further testified that no right of way or easement interests were acquired for the construction of the elevated bridge or the widening and elevation of Dominion Boulevard. Without objection, he testified that no interests in land were acquired from Dominion that created any change in grade or elevation that would obstruct the travelling public's visibility of Dominion. In Mr. Lundgren's experience as a traffic engineer, the fixed span bridge and all of the new improvements for the south and northbound lanes were for the purpose of controlling the flow of traffic and promoting traffic safety. A. 652-654.

Dominion's voluntary acceptance of the Right of Way Reservation and conditional variance prior to its purchase of the subject parcel was established by City's site plan reviewer, Pat Milinazzo. A. 678-690. Dominion's engineer, Kellam testified that at the time the subdivision variance was granted and the Right of Way Reservation recorded, Dominion accepted that direct access to Dominion Boulevard would be closed in the future and substitute access provided. On cross-examination, Kellam testified that "[we] knew it was going to be elevated. We knew it was going to be a structure to allow sailing, private sailing vessels

underneath without there having to be a drawbridge." A. 719. Kellam's testimony as to Dominion's knowledge was struck by the Court at the close of the City's case in chief. The Court deemed the testimony regarding Dominion's knowledge too speculative and stated that it would consider only the chain of title and recorded plats to establish Dominion's knowledge. The Court noted the City's exception to the ruling. A. 954-956.

City called traffic safety engineer, Chris Kiefer, P.E. to testify on the acquisition areas and the uses being made of the acquisition areas as well as his opinion on the access to and from Dominion before and after the take. Mr. Kiefer testified that the fee acquisition located inside the reservation area was acquired for the construction of the new service road which provides new ingress and egress from Dominion. Mr. Kiefer explained that all of the road improvements that are elevated in the vicinity of the subject property are not occurring within the area of the take but are all within the land and right of way that the City owns. He further testified that the new access road that will serve the subject after the take is at grade and is the same elevation as Dominion's current driveway resulting in no loss of visibility from the new access road. A. 828-830.

Mr. Kiefer testified that all of the works and improvements that are occurring on City right of way for the newly elevated Dominion Boulevard

and high rise bridge are for the purpose of controlling the flow of traffic by additional lanes allowing for an increase in average speed from 45 mph to 55 mph. A. 831-832.

City's appraiser, Allen Armstrong prepared two appraisals for the Dominion partial acquisition. In the first appraisal, Armstrong only valued the areas acquired by the Certificate of Take. Because the Court ruled that Dominion did not waive its right to claim damages to the residue under the reservation, City proffered Armstrong's testimony based upon his first appraisal. Armstrong testified that he did not consider whether the take negatively impacted the fair market value of the remaining land based upon the recorded plat in the chain of title that included the right of way reservation signed by the title owners with a note waiving damages to the residue by reason of the purchase of the reserved area. Mr. Armstrong's first appraisal concluded just compensation in the amount of $39,310.00 for the take and no damages to the remaining land as a result of the take. A. 841-847.

Following its proffer, City continued with Armstrong who testified that he prepared a second appraisal updating it to the date of take. Armstrong testified that he prepared a narrative report to analyze the before value of the property, the value of the take and the value of the remaining property,

including any damages resulting from the take. Mr. Armstrong testified that his appraisal analysis was predicated on two legal instructions given to him by the City. A. 849. The first instructed Mr. Armstrong to assume that the right of way reservation precluded Dominion from claiming damages to the residue as a result of the purchase of the reserved land. The second instruction provided him with the definition of the measure of just compensation found in Virginia Code Section 25.1-230:

> "Measure of Just Compensation.
> That the measure of just compensation is the value of the land acquired and any damages to the residue as a result of the taking and use by the condemning authority."
> A. 849-850.

Mr. Armstrong valued the land and all interests acquired at $39,310.00. A. 851. Using the income approach, he determined the before value to be $4,614,194.00. As to the value of the property in the after situation, Mr. Armstrong considered damages to the residue as a result of the areas acquired that were located **outside of the reserved area only** (emphasis added). He testified that he found no impact on the fair market value of the remaining property due to the change in access because the after access, in his opinion, was reasonable for the highest and best use of Dominion as a self-storage facility. When asked if he considered whether any damages flow from the utility and waterline easements **outside of the**

reservation (emphasis added) he responded in the negative. A. 863-865. On cross-examination, he explained that he did not attribute damages to the residue for the loss of visibility because any such loss did not result from the taking, nor did he consider the loss of visibility that occurred as a result of the Project. A. 881-882.

Upon resting its case in chief and prior to Dominion's commencement of its case, City renewed its exceptions to the Trial court's pre- and post-trial rulings on the right of way reservation, specifically, allowing any evidence as to damages to the residue in contradiction of the language in the reservation. City also renewed its exception to the Court's ruling allowing evidence of damages for loss of visibility that resulted from the Project as opposed to the taking. The Trial court noted the City's renewed objections to the introduction of such evidence and exceptions to its rulings. The Trial court also noted that the City's exceptions and objections to Dominion introducing expert testimony as to damages were continuing so as to avoid disruption and prolonging the trial. A. 900-908.

Dominion called Craig Allen, a commercial real estate broker to testify as to the before and after characteristics of the Dominion site. Mr. Allen testified that in the before the subject enjoyed the "best access and visibility. In the after scenario, it was his testimony that access would be

cumbersome and difficult and that visibility was going to zero. A. 915-916. On cross examination, Mr. Allen testified that a developer would consider the risk of a change in future access and future loss of visibility when making a determination on whether to invest in property like the subject. A. 926.

Dominion's valuation expert, Heyward Cantrell, MAI, testified that he damaged the residue because the newly elevated Dominion Boulevard created a loss of visibility of the site from the elevated roadway. Cantrell further testified that he damaged the residue because it was losing direct access to Dominion Boulevard and the access road was detrimental to the value of the residue. A. 946. Cantrell denied reviewing the title report including the right of way reservation agreement and damaged the residue for the loss of direct access to Dominion Boulevard even though the fee take for the closure of its entrance to Dominion and construction of the service road was wholly within the 50 foot reserved area. Cantrell stated that when valuing the residue he looked at what the effect the public improvements would have on the remainder. A. 946. Mr. Cantrell estimated the value of the total acquisition at $41,141.00 and damages at $3,348,848.00 due to the public improvements being constructed on the City's land causing loss of visibility and to the change in access which

clearly resulted from the purchase and use of the reservation area as indicated on the plat. A. 949, 959, 966.

At the close of Dominion's case in chief, it moved to strike all of the testimony the City offered (inclusive of Kellam's) regarding the knowledge that Dominion's owner had about the future bridge and loss of direct access as being irrelevant. A. 954-955. The City objected, arguing that Dominion's knowledge was relevant because it established what a willing buyer would offer for the subject knowing that in the future a 95 foot bridge would be constructed in front of the parcel and that the parcel would lose direct access to Dominion Boulevard when the road was improved. The Court sustained Dominion's motion to strike stating that what the owner knew about the future project was speculative and that it is the chain of title and "whatever Note 7 meant, that's what a purchaser would be on notice for." City noted its exception to the Trial court's ruling. A. 954-956.

In post-trial proceedings, the Court overruled City's Motion in Limine to keep out evidence of damages by reason of the closure of direct access as a condition placed on the variance. The Court ruled that while the Planning Commission's condition on the variance ran with the land, the condition was invalid because it circumvented the Landowner's right to just compensation in an eminent domain proceeding. City noted its exception

to the Court's ruling. A. 1017-1018. Following the overruling of City's Exceptions to the Report of Court, the Order Confirming Report of Court was entered.

ARGUMENT

Standard of Review

Assignment 1, involving the trial court's interpretation and construction of the language of the right of way reservation contract inclusive of the waiver of damages clause, is reviewed de novo.[1] *Eure v. Norfolk Shipbuilding and Drydock Corporation, Inc.*, 263 Va. 624 (2002), 561 S.E.2d 663, 667 (2002). Assignment 2, relating to the trial court's refusal to reconsider its ruling on City's motion in limine is reviewed for abuse of discretion. *Collins v. Collins*, 2013 Va. App. LEXIS 26, at 4 (2013). Assignment 3 deals with the admissibility of loss of visibility evidence and as such, presents a pure question of law requiring the interpretation of Article 1, Section 11 of the Virginia Constitution and Virginia statutory authority and is reviewable *de novo*.[2] *The Falls Church v. Protestant Episcopal Church*, 285 Va. 651, 666, 740 S.E.2d 530, 538 (2013), *cert. denied*, 134 S. Ct. 1513 (2014); *Gallagher v. Commonwealth*,

[1] The City's Petition for Appeal incorrectly identified the proper Standard of Review for Assignment of error No. 1.
[2] The City's Petition for Appeal incorrectly identified the proper Standard of Review for Assignment of error No. 3.

284 Va. 444, 449, 732 S.E.2d 22, 24 (2012); *Renkey v. Cnty. Bd.*, 272 Va. 369, 373, 634 S.E.2d 352, 355 (2006). Assignment 4 involves the trial court's refusal to consider significant and relevant factors that should have resulted in the exclusion of evidence; such rulings are reviewed for abuse of discretion. *Landrum v. Chippenham & Johnston-Willis Hop., Inc.*, 282 Va. 346, 717 S.E.2d 134 (2011). Assignment 5 deals with the trial court's decision to strike expert witness testimony as being speculative, and is reviewed for abuse of discretion. *Blue Ridge Service of Va. v. Saxon Shoes*, 271 Va. 206 (2006), 624 S.E.2d 55 (2006).

Discussion

1. **The right of way reservation was an unambiguous enforceable contract with clear language that specifically precluded Dominion from claiming damages to the residue by reason of the City's purchase of the area contained in the reservation. (Assignment 1)**

The Court committed reversible error in failing to enforce the Right of Way Reservation and by allowing evidence of damages to the residue at the trial of just compensation. Dominion and the City entered into a binding contract when Dominion volunteered to place a right of way reservation for future road improvements on its recorded plat in return for site plan approval. That contract explicitly stated in Note 7 that the Landowner waived any claim of damages to the improvements or the residue by

reason of the purchase of the reserved area by the City. The reservation was not ambiguous. Nor was the language in the waiver clause ambiguous or in need of interpretation by the trial court. The Trial court's ruling that the only foreseeable damage at the time of the reservation was "the existence of the residue without the reserved area" was a re-writing of the agreement and an insertion of a term that qualified the plain meaning of the words "damages to the residue." The residue clearly means the remaining property after the purchase of the reserved area. For the Trial court to limit the waiver clause to only damages to the residue by reason of "a reduction in the total size of the remainder" is not only nonsensical, but it is clearly a re-writing of an enforceable agreement. Courts are not authorized to rewrite contracts. *Graphic Arts Mutual Ins. v. Wharthen Co.*, 240 Va. 457, 460, 397 S.E.2d 876, 878 (1990); *Magann Corp. v. Electrical Works*, 203 Va. 259, 264, 123 S.E.2d 377, 381 (1962). Courts must conclude that parties intend what their written contracts plainly declare. *Magann Corp.*, 203 Va. 259, 264, 123 S.E.2d at 381. Courts may not insert, for the benefit of either party, terms not set out in their contract. *Lansdowne Dev. Co. v. Xerox Realty*, 257 Va. 392, 400, 514 S.E.2d 157, 161 (1999). The right of way reservation agreement clearly stated that the reserved area was for future road improvements and that the Landowner would not make or claim

damages to its residue by reason of the purchase of the reserved area. The City purchased the reserved area in fee for the construction of a new access road. Dominion's claim of damages to the residue is a clear breach of the agreement, particularly its claim for damages for loss of direct access and change in access, as that change occurred as a result of the fee taking, which is entirely within the reserved area.

When Dominion purchased the property it took with notice of the right of way reservation agreement as the deed stated that the conveyance to Dominion

> "is made subject to all of the terms, conditions, rights, obligations, restrictions, easements, and reservations set forth in duly record (sic) deeds, plats, declarations and other instruments constituting constructive notice in the chain of title to the property conveyed which have not expired or otherwise become ineffective."

The trial court recognized that Dominion and the City entered into a contract when the deed was recorded as it stated that the conveyance was subject to any prior reservations. Thus, the reservation placed on the plat not only became an enforceable contract between Dominion and the City, it established the legal bundle of rights conveyed to Dominion. City takes the position that the bundle of rights conveyed to Dominion did not include the right to claim damages to the residue land when the City purchased the fee take and easements within the reservation. The insertion by the trial court

of a ‘foreseeability standard; ignores well settled law. Here, Dominion voluntarily contracted away its right to claim damages to the residue regardless of what was or was not foreseeable. They wanted site plan approval and were willing to give the City what it asked for.

2. The trial court erroneously and arbitrarily denied the City’s motion for reconsideration of its ruling on the right of way reservation when the City presented relevant and material information that significantly changed the facts of the case and was germane to the court’s rationale for its ruling. (Assignment 2)

The Trial court abused its discretion when it denied City’s motion to grant a hearing on its motion for reconsideration of the Court’s ruling on the reservation agreement, specifically, the limitation that the Court placed on the waiver of damages clause. The evidence offered by the City in its motion for reconsideration and at the hearing on its motion was relevant and material to the issues before the Court.

The Court’s Letter Opinion of November 16, 2012, found that because the parties had no knowledge of “what or how the new road would be constructed” the “only foreseeable damage was the existence of the residue without the reserved area.” The Planning Commission’s marked agenda, the minutes of the proceeding and a letter dated November 29, 2001 from the Planning Commission’s recording secretary to the owner’s attorney advising that the variance was granted with conditions were

provided to the Court in City's Motion for Reconsideration. These documents made clear that the City required and the owner voluntarily accepted, at the time of the reservation and application for subdivision variance, that the new road would require Dominion's direct access to be closed and a new access road provided. Thus, the evidence provided was more than sufficient to grant a hearing to reconsider the Court's prior ruling. The motion with its supporting exhibits showed the Court that the facts as the Court understood them at the time of its ruling had significantly changed. See *United States of America v. Smithfield Foods, Inc.*, 969 F. Supp. 975 (1997) and *Glenn v. Inland Container Corp.*, 1992 WL 521517 at 1. Moreover, the exhibits contradicted the reasons for the Court's ruling on the reservation agreement, that being, that the only foreseeable damage was the existence of the residue without the reserved area. The exhibits illustrated that there was, at the time of the reservation agreement and subdivision variance, not just foreseeable damage but actual knowledge of Kellam and Dominion that Dominion's direct access to Dominion Boulevard would cease to exist and that a new access road would be provided. A. 513-527, 530-531. Manifest injustice to the City resulted when the Trial court refused to grant the motion to reconsider as the City provided the

Court with conclusive evidence as to what damages were actually known at the time of the reservation.

3. The trial court erred when it allowed Dominion to offer evidence of loss of visibility as any such loss was caused by the project's improvements on City's land and not by the take or use of the take. (Assignment 3)

Neither the Code of Virginia nor Article 1, Section 11 of the Virginia Constitution has designated the loss of the public's visibility of private property as a compensable item of damage when such loss is caused by improvements on the public right of way. The measure of just compensation is defined in Virginia Code Section 25.1-230(A)(1) as "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…" Although the date of take in this case preceded the recent amendment to Article 1, Section 11 of the Virginia Constitution that Amendment calls for just compensation to "be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking." The controlling law before and after the Amendment requires a nexus between the taking and the damage for there to be compensation. The Virginia Supreme Court has never recognized loss of visibility as a compensable item of damage in a partial takings case. See

Commonwealth Trans. Comm'r v. Target Corp., 274 Va. 341, 650 S.E.2d 92 (2007). Nevertheless, if loss of visibility is to be compensable, it should flow directly from the taking. *City of Virginia Beach v. Oakes*, 263 Va. 510, 517, 561 S.E.2d 726, 729 (2002); *State Highway Commissioner v. Lanier Farm, Inc*., 233 Va. 506, 509-510, 357 S.E.2d 531, 533 (1987); *State Highway Commissioner v. Crockett*, 203 Va. 796, 801, 127 S.E.2d 354, 358 (1962); and *Tidewater Railway Co. v. Cowan*, 106 Va. 817, 821, 56 S.E. 819 (1907). City could find no authority in Virginia that supports a finding of damage to a residue resulting from a Project or the public use of right of way. Any loss of the public's visibility from the improvement of Dominion Boulevard results from the construction of a new bridge and the elevation of that new section of road, all of which is occurring within the City's right of way. Nothing is being constructed in the area of take that impacts the visibility of Dominion, and the use of the take did not create any loss of visibility. Damages must flow from the taking and use of the land taken as stated in Virginia Code Section 25.1-230(A)(1). In addition, Virginia Model Jury Instruction No. 46.030 specifically instructs the jury that they "must decide….the damage, if any, to the owner's remaining property as a result of the taking beyond the enhancement if any, which results from the taking." No mention of damages resulting from the condemning authority's

"project" is included either in Article 1, Section 11 of the Virginia Constitution, Section 25.1-230 or VMJI No. 46.030. The entire basis for Dominion's damage claim for loss of visibility by the travelling public relates to the impact from the construction of the project upon the land owned by the City and not from the take or the use of the take. During oral argument on City's Motion in Limine to keep out evidence of loss of visibility, Dominion advanced the argument that the Trial court should follow the 'Project Rule' from the Utah Supreme Court's decision in *Admiral Beverage supra.* The rule requires that there must be an actual physical taking, though it is not necessary that the obstruction of visibility be constructed on the land acquired, so long as the land acquired is essential to the project. If that requirement is met, then the issue of whether a loss in market value resulted from the loss of visibility is addressed. In contrast to the Project Rule, the majority rule from the Alaska Supreme Court case *8,960 Square Feet v. State of Alaska*, 806 P.2d 843 (1991) ("Dimond D") holds that loss of visibility is compensable where the obstruction results from land taken for the condemnor's project. In *Dimond D*, the project at issue involved widening Dimond Boulevard from two lanes to six lanes and providing an overpass across Dimond Boulevard for the Alaska railroad. The court concluded that the loss of visibility was compensable where the loss results

from changes make on the land taken for the road widening, but found that the loss of visibility caused by the construction of the overpass within existing right of way was not compensable. *Id*. at 846.

The majority of courts that have confronted this precise issue have agreed that the critical factor in determining if loss of visibility is a compensable element of damages in a partial taking case, is whether the loss arises from changes occurring in the property taken. *State v. Strom*, 493 N.W.2d 554, 561 (Minnesota, 1992) ("We consider this rule most compatible with the compensation provision of our state constitution. Therefore, although the owner of property abutting a public highway may have no compensable property right to the continuous and sustained flow of traffic past its property, where, as here, the property taken by the state from the abutting owner was used to raise the south frontage road to 21 feet and obstruct visibility to the remaining property, evidence of that loss of visibility may be taken into account when determining fair market value of the remaining property."); *State of Idaho v. HI BOISE, LLC*, 282 P.3d 595, 603-604 (2012) ("While a few courts have approved severance damages for lost visibility, almost all refuse to do so when none of the alleged obstructions are actually constructed on the owner's condemned property…Here it is undisputed that none of the improvements alleged to

obstruct visibility of the HI Boise property are located on its severed strip of land or on its allegedly condemned Vista driveway." *State of New Jersey v. Marlton Plaza Associates, L.P.*, 44 A.3d 626, 638 (2012) ("A party seeking severance damages pursuant to a partial condemnation may only recover for losses in value directly attributable to the taking itself. In *State Comm'r of Transp. v. Weiswasser*, 693 A.2d 864, 876 (1997) the Court determined that the property owner could only recover severance damages for loss of visibility if the loss rose directly from changes that occurred on the property taken. Following this reasoning, defendants were only entitled to severance damages that rose directly from the property actually taken."); *Dubois v. State of New York*, 54 A.D.2d 782, 783 (1976) ("Consequential damages are plainly limited to those which arise by reason of the use to which the State puts the property taken and do not encompass those which result from the taking of a neighbors' land.").

Based on such holdings and the fact that the rationale in these holdings comport with the just compensation language in Article 1, Section 11 of the Virginia Constitution and 25.1-230, both of which require that damages flow from the take and the use of the take, it was error for the Court to invoke the Project Rule in determining loss of visibility to be a compensable item of damage herein.

Moreover, Dominion has no appurtenant right in the City's right of way. "Property is damaged for Virginia constitutional purposes when an appurtenant right connected with the property is directly and specially affected by a public use and that use inflicts a direct and special injury on the property which diminishes its value." *Bd. of Sup'rs of Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 72, 481 S.E.2d 460, 467 (1997) (citing *City of Lynchburg v. Peters*, 156 Va. 40, 49, 157 S.E. 769, 772 (1931)). "Virginia law holds that 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." *Omni Homes*, 253 Va. at 72, 481 S.E.2d at 467 citing *Lambert v. City of Norfolk*, 108 Va. 259, 268, 61 S.E. 776, 778-79 (1908). (See *Byler v. Virginia Electric and Power Company*, 731 S.E. 2d 916 (2012)).

Virginia law has always recognized the police power of a City to regulate the flow of traffic for the public good. The works and improvements on the City's right of way are for the purpose of regulating the flow of traffic. In *Comm'r v. Easley*, 215 Va. 197, 203 (1974), the Court held that an "owner of property abutting a public road has no right to compensation when the state, in the exercise of its police powers, reasonably regulated the flow of traffic on the highway." *Id*. at 203. The

construction of a fixed span bridge, elevating and widening the roadway are all functions by the City to regulate traffic, its direction and flow. Moreover, all of this is being accomplished within the City's right of way and to compensate Dominion for the loss of visibility by the travelling public is to deny well settled law protecting the City's right to regulate the flow of traffic pursuant to its police powers. The trial court committed reversible error in ignoring the well settled law of this Commonwealth, that being, damages must flow from the taking and use of the taking, not from the project as a whole.

4. The trial court erred by refusing to exclude evidence of loss of direct access when such loss was a legal condition placed on the subdivision variance and voluntarily accepted by Dominion. (Assignment 4)

The Court abused its discretion in failing to exclude damage testimony by Dominion's witnesses for the loss of direct access to Dominion Boulevard when such loss was a condition placed upon Dominion's subdivision variance by the City's Planning Commission and voluntarily accepted by Dominion.

The Court found that although such a condition ran with the land, the condition was invalid because to enforce it would circumvent Dominion's constitutional right to seek compensation in an eminent domain proceeding. The Trial court ignored the fact that there was abundant testimony that both

Dominion and its predecessor in title voluntarily accepted the conditional variance in return for plat approval. This Court's holding in *Board of County Supervisors v. Sie-Gray Developers, Inc.*, 230 Va. 24 (1985) supports City's contention that the voluntary acceptance of the conditions placed on the subdivision variance for plat approval created an enforceable contract against Dominion prohibiting it from claiming damages for the very condition it agreed to accept in order to proceed with purchase and development. Like the developer in *Sie-Gray*, Dominion made no attempt to challenge the Planning Commission's authority to impose a condition on its future access, submitted documentation that it complied with the City's request to obtain a variance and proceeded to develop its facility. Like the right of way reservation, the conditions placed on the subdivision variance should have been strictly enforced by the Trial court. It was error for the Court to allow evidence of damages for the loss of direct access as it was not only contrary to the conditions voluntarily accepted by Dominion but it was also contrary to the authority and decision of the Chesapeake Planning Commission and City Council granted by Virginia Code Section 15.2-2210 to "promote orderly development" of the City. A variance runs with the land and its benefit is available to the applicant's successors in title. Variances are granted with respect to a particular piece of property, not with respect

to a particular landowner. It is a legal status granted to a certain parcel of realty without regard to ownership. (*Garibaldi v. Zoning Bd. of Appeals of Norwald*, 163 Conn. 235, 303 A.2d 743, 745 (1972); *National Black Child Development Institute, Inc. v. District of Columbia Bd. of Zoning Adj.*, 483 A.2d 687, 691-92 (D.C. App. 1984); *Halifax Area Council on Alcoholism v. City of Daytona Beach*, 385 So. 2d 184 (1980); *Huntington v. Zoning Bd. of Appeals*, 428 N.E.2d 826 (1981); *State v. Konopka*, 200 N.E.2d 695 (1963); *Vlahos Realty Co. v. Little Boar's Head Dist.*, 146 A.2d 257 (1958); *Goldberg v. Milwaukee Bd. of Zoning Appeals*, 340 N.W.2d 558 (1983); *Nuckles v. Allen*, 156 S.E.2d 633 (1967); *Mechem v. City of Sante Fe*, 634 P.2d. 690 (1981); *St. Onge v. Donovan*, 522 N.E.2d 1019 (1988); *Neiburger v. Lewis*, 57 N.Y.S.2d 542 (1945); *Mastrati v. Strauss*, 67 A.2d 29 (1949). For that reason the Court's finding that the condition was invalid as against the personal interests of Dominion runs afoul of well settled law, including this Court's decision in *Sie-Gray*.

5. The trial court erroneously struck the testimony of Dominion's engineer as such testimony was relevant and material to the issues before the Court. (Assignment 5)

The Trial court abused its discretion in striking the testimony of Dominion's engineer, Kellam as his testimony was relevant evidence regarding Dominion's actual knowledge of and voluntary acceptance of the

future elevated bridge and the closure of direct access to Dominion Boulevard.

"An abuse of discretion for the exclusion of evidence by a trial court can occur when a relevant factor that should have been given significant weight was not considered." *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011). The uncontradicted testimony of Kellam was that prior to the purchase of the parcel by Dominion, he was the engineer who consulted with Dominion's owner and discussed the right of way reservation, the height of the bridge and the conditions placed on the variance. Evidence, if it is relevant and promotes the search for the truth should come in. That is the policy of this Commonwealth. Dominion's actual knowledge of the future improvements as well as the condition of relocating its access was relevant to the issue of whether Dominion voluntarily waived its right to claim damages to the residue by reason of the City's acquisition. Engineers act as agents of their employers because they have technical skills and experience to engage in activities which, often times, the principal does not possess. Virginia law recognizes that in an agency relationship, knowledge of the agent is imputed to its principal, especially when, as here, the agent was acting within the scope of his authority. *State Bank of Pamplin v. J. L. Payne and*

W.K. Payne, 156 Va. 837, 843 (1931). Kellam's testimony was also relevant to the issue of what a willing buyer is willing to pay for the subject after the project and should have been considered by the trial court in its decision as to the extent of any damages to the residue. Kellam's testimony was relevant and sufficient for the Court to conclude that from the beginning of the site plan process to the end Dominion made informed decisions to proceed with development of its facility that would someday be impacted by the future road widening project.

CONCLUSION

This eminent domain appeal raises issues of first impression against the backdrop of a unique set of facts, chief among which are the voluntary actions of the landowner/developer ("Dominion") that should have resulted in a forfeiture of any claim of damages for the loss of direct access and visibility of its residual property.

The rulings of the trial court to which the City takes exception are contrary to long standing principles of contract, land use and real property law in the Commonwealth and should be reversed. The trial court's evidentiary and substantive rulings essentially rewrite the City's duly recorded right of way reservation. The Court's addition of terms, restriction of terms and substituting its interpretation of the unambiguous wording for

those of the parties is contrary to the law of contracts in Virginia. To allow the ruling on the right of way reservation to stand would eviscerate the ability of landowners and localities to effectively achieve a compatible balance between commercial development and transportation needs. Similarly, affirming the trial court's erroneous ruling allowing Dominion to claim damages in contravention of a condition required by a lawful variance granted by the City's Planning Commission would nullify the long-recognized authority of localities and the Commonwealth to place reasonable conditions on the subdivision and development of property. The trial court's improper ruling extending damages for loss of visibility to off-site improvements adjacent to the taken property is contrary to the well-established law of the Commonwealth and would effect a massive judicial expansion of eminent domain damages beyond those authorized by the state legislature and Constitution. For these reasons, Appellant, City of Chesapeake, respectfully requests that this honorable Court reverse the trial court's judgment and remand the case for a new trial.

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CERTIFICATE OF SERVICE

Pursuant to Rules 5:26(h) and 5:32(a)(3)(ii) of the Rules of the Supreme Court of Virginia, I hereby certify that on this 28th day of October, 2015, an electronic version of the foregoing Brief of Appellant and Appendix have been e-filed, via VACES, and 10 paper copies of the foregoing Brief of Appellant and 3 paper copies of the Appendix, have been hand-filed with the Clerk of the Supreme Court of Virginia. An electronic copy of the Brief of Appellant has been served, via e-mail, and an electronic copy of the Brief of Appellant and Appendix on CD-Rom have been served, via UPS Ground Transportation, upon:

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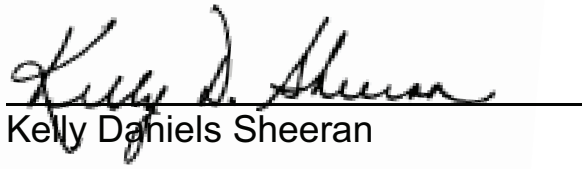

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