In The

Supreme Court of Virginia

RECORD NO. 180178

RICHARD H. DWYER,

Appellant,

v.

TOWN OF CULPEPER,

Appellee.

BRIEF OF APPELLEE

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INTRODUCTION

At the end of a five-day trial, the jury unanimously awarded Richard H. Dwyer $762,240 for the Town of Culpeper's partial taking from three parcels to construct a new road. Although Dwyer thinks he deserves more, he received a fair trial and the award was 486% greater than the amount the Town urged the jury to award. Suggesting that Dwyer prevailed on the unity-of-use issue, the jury's award even was 63% greater than the Town's initial estimate of just compensation, which the jury knew the Town had based on an appraisal that—unlike the Town's theory of valuation at trial but just like Dwyer's—valued the three take parcels together with five other parcels from which nothing was taken and concluded that the highest and best use of all eight parcels was to develop a large apartment complex.

The Court should decline Dwyer's invitation to throw out the jury's award and can uphold it for three independent reasons. First, the Court does not have jurisdiction because Dwyer did not timely appeal from the September 11, 2017 order confirming the jury's award, which was a final order and immediately appealable pursuant to Va. Code § 25.1-239. Second, even if the appeal was timely, the trial court did not commit any of Dwyer's four assigned errors; several even suffer procedural problems that limit the Court's review and all four should be reviewed only for abuse of discretion. Finally, even if the trial court had committed any of Dwyer's four assigned errors, they would be harmless on this record.

COUNTER-STATEMENT OF THE CASE AND FACTS

I. Summary Of Material Proceedings

On July 17, 2013, the Town recorded a certificate of deposit in the amount of $466,467 to acquire 5.391 acres of land, a permanent utility easement encumbering 0.26 acres, another permanent utility easement encumbering 0.096 acres, and a temporary construction easement encumbering 0.663 acres. (A. at 2, 13-14, 31-32, 497.) Although Dwyer owns eight contiguous parcels, which totaled approximately 25.65 acres before the take, only parts of three parcels were taken.[1] (Br. at 1-2.)

The jury viewed all eight parcels and heard testimony from a number of witnesses during the five-day trial in July 2017. The trial court allowed the jury to decide the two main issues that the parties disputed: (1) whether there was a "unity of use" among all eight parcels when the take occurred; and (2) whether the "highest and best use" of all eight parcels was to develop a large apartment complex. The jury unanimously awarded $762,240 to Dwyer, including $500,240 for the take and $260,000 for damage to the residue. (A. at 506-07.)

The trial court entered an order on September 11, 2017 confirming the jury's award and overruling Dwyer's post-trial exceptions, vesting the Town with indefeasible title to the land and easements that were taken, and requiring the Town

[1] The three parcels totaled almost 23 acres before the take. (A. at 494, 497.)

to deposit additional funds to pay the award and interest.[2] (A. at 532-37.) When that order was entered, two issues still remained to be decided concerning how the additional deposit would be distributed: (1) the Town had filed a motion seeking a refund of $8,910.16 from Dwyer, which the Town contended was erroneously paid in 2014 based on a miscalculation of interest when Dwyer drew down the Town's original $466,467 deposit; and (2) Dwyer had not yet worked out whether he or his lender would receive the additional deposit. (A. at 535-36.) Accordingly, "pursuant to Va. Code § 25.1-240 and § 25.1-241"—which authorize the second stage of a condemnation proceeding to decide competing claims to the award—the September 11 order expressly retained the trial court's jurisdiction "solely for the purpose" of deciding these two issues. (A. at 535.)

After the two remaining issue later were resolved by agreement, the trial court entered an order on November 7, 2017 to distribute the additional deposit, with most of it going to Dwyer's lender and a small portion refunded to the Town. (A. at 538-42.) Because the case was then in the second stage, the parties requested that the November 7 order be entered "pursuant to Va. Code § 25.1-240." (A. at 538.) The November 7 order did not modify or alter the previously confirmed award.

Dwyer filed a notice of appeal on November 27, 2017, claiming to appeal

[2] The Town deposited the full amount that was required on September 14, 2017. (A. at 538.)

from the November 7 order even though he does not challenge how the additional deposit was distributed.[3] He then filed a petition for appeal on February 2, 2018. The Town moved to dismiss the appeal, contending it was untimely because the September 11 order was a final order and immediately appealable pursuant to Va. Code § 25.1-239. In its order granting the petition for appeal, the Court instructed the parties to address the Town's motion in their briefing.[4]

II. The Unity-Of-Use Dispute

The first issue on which the parties disagreed at trial was whether unity of use existed among all eight parcels when the take occurred in 2013. That was important because Dwyer wanted the jury to value all eight parcels as a single, unified parcel and he accordingly had to rely on the unity-of-lands doctrine.[5]

The facts concerning the unity-of-use issue mostly were undisputed and, unless specifically noted, the jury heard all the evidence discussed in this section. Seven of the parcels were (and remain) improved with single-family homes that

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[3] The November 7 order was not "entered … in favor of the Town" as Dwyer claims. (Br. at 1.)

[4] The Town's argument in support of its motion to dismiss begins below at page 20. The remaining sections of the Town's counter-statement are important only if Dwyer's appeal is timely.

[5] Dwyer claims the Town "injected the unity-of-use issue at trial." (Br. at 12.) However, the reason unity of use was an issue in this case was because Dwyer chose to pursue a theory of valuation that valued all eight parcels together.

Dwyer rents out and the eighth was (and remains) vacant land. (A. at 202-07, 238, 252-54, 494.) Nothing required Dwyer to continue to own all eight parcels or prevented him from selling them separately as individual parcels. (A. at 238-39; *see also* July 11, 2017 Tr. at 278-79 ("Q. And was there any legal or regulatory approval that was binding these properties to be used together? A. No, there was not.").)

Dwyer also never obtained site plan *approval* to change any of the existing uses of the eight parcels. (A. at 73, 168.) Although site plan approval is required before starting construction (A. at 168), Dwyer claims he was "on the brink of construct[ing]" a large apartment complex on all eight parcels when the take occurred in 2013. (Br. at 7.) But Dwyer clearly had not yet begun construction and he never presented any evidence that he had entered into any construction contracts or even was close to beginning construction when the take occurred.

Even though he never obtained site plan approval, Dwyer had submitted two site plan *applications* seeking permission to construct a complex with 344 efficiency and one-bedroom apartments before the take occurred.[6] Dwyer submitted his first application in 2008, but withdrew it without responding to the Town's comments

[6] An "efficiency" apartment does not have a separate kitchen or a separate bedroom. (A. at 213-14.)

when the Great Recession began later the same year.[7] (A. at 147-48, 429-59.) Dwyer then learned in 2012 that the Town planned to take part of three parcels. (A. at 240, 252-53.) Even though he knew the review process could take "approximately two years," Dwyer submitted his second application on March 20, 2013, less than four months before the take.[8] (A. at 152, 240-41, 460-90.)

Both of Dwyer's applications had problems. For example, the 2008 application proposed a new road for the proposed complex's main entrance that would connect to Old Rixeyville Road and had to cross through floodplain, but Dwyer never obtained a floodplain study, which the Town needed before it could complete its review of the 2008 application.[9] (A. at 169-70, 241, 246-51.) Hoping to avoid having to cross the floodplain, Dwyer then had a neighbor join the 2013

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[7] The Town did approve a "fairly simple" sewer plan for a "trunk line" that Dwyer submitted with his 2008 site plan application, but Dwyer never posted a bond to construct the sewer line, and the sewer plan did not authorize Dwyer to construct any apartments nor guarantee approval of his site plan application. (A. at 235, 379; *see also* July 13, 2017 Tr. at 294-95.)

[8] Although he never finished addressing the Town's comments, Dwyer requested the Town's Planning Commission to vote to approve or deny the 2013 application. After voting to deny it, Dwyer never appealed the Planning Commission's decision. (A. at 123-24, 142-44, 172, 242.) The denial thus became a "thing decided" and could no longer be challenged. *See, e.g.*, *Gwinn v. Alward*, 235 Va. 616, 621 (1988).

[9] Half of Dwyer's property was floodplain and other parts were steeply sloped, rising 60 feet from the property's lowest to highest points. (A. at 39-41, 181, 196, 492, 493.)

application as a co-applicant and now showed the proposed main entrance crossing the neighbor's property to connect to Sperryville Pike (Route 522). (A. at 150-52, 171, 241.) This meant the 2013 application was not even limited to the eight parcels he wanted the jury to value. Dwyer's own expert also admitted that only a one-way road was possible at the location shown on the 2013 application, which he thought was not appropriate for an apartment complex's main entrance and was "too much trouble" to construct; instead, he preferred a two-way main entrance crossing the floodplain and connecting to Old Rixeyville Road.[10] (A. at 133-140, 428, 467.)

Dwyer also claims he did several things "over the years" to "preserve[] his ability to develop" the eight parcels.[11] (Br. at 2.) However, Dwyer only vacated two lot lines to consolidate a few of his parcels in May 2013, after he knew the take was imminent, and he never attempted to consolidate any of the other parcels because "they had homes on them with addresses."[12] (A. at 237, 243.) Moreover, while Dwyer had six unused sewer and water taps, he never spent the millions of dollars

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[10] Dwyer can now connect the residue to the Town's new road, Colonel Jamison Boulevard, without needing to cross the floodplain. (A. at 67-68. 498.)

[11] Dwyer did not present evidence at trial that the leases of the seven existing single-family homes were only "month-to-month." (Br. at 2.)

[12] The eight parcels originally were configured as ten. For simplicity, the Town will always refer to Dwyer's property as being eight parcels in this brief.

that would be needed to purchase enough taps to connect a 344-unit apartment complex to public water and sewer.[13]

The Town moved to strike Dwyer's unity-of-use claim after both parties rested their cases. The Town argued that unity of use could not exist as a matter of law because it was undisputed that Dwyer was actually using the eight parcels for separate uses and he never obtained site plan approval to change the existing uses. (A. at 306-18, 327-33.) Dwyer opposed the Town's motion, arguing that "the evidence concerning the actual unification of these parcels … was overwhelming" and that the jury should decide if unity of use existed.[14] (A. at 318-27.) The trial court denied the Town's motion. (A. at 333-34.)

The trial court instructed the jury about unity of use as follows:

> You have heard evidence that Richard Dwyer owns eight (8) contiguous parcels and that the Town has taken parts of only three (3) of those parcels. Among the issues you will need to decide in this case is what property is to be considered.
>
> In making that decision, you may award compensation for damages, if any, to any parcel or parcels from which there was no taking only if you first find that, on July 17, 2013, there was an actual, permanent, and present joint use made of the three (3) "take parcels" and the other "non-take parcels." An intention to jointly develop a

[13] The Town charges $16,500 to connect each individual apartment to public water and sewer. (A. at 78-80.) The total cost to purchase taps to connect 344 apartments to public water and sewer is $5,676,000.

[14] Dwyer never argued that unity of use existed as a matter of law.

> group of parcels in the future is not sufficient by itself to establish an actual, permanent, and present joint use of the parcels.
>
> If you find that there was no actual, permanent, and present joint use being made of the three (3) "take parcels" and the other "non-take parcels," your award of just compensation must be limited to only the three (3) take parcels.
>
> Richard Dwyer has the burden of proving by the greater weight of the evidence that there was an actual, permanent, and present joint use being made on July 17, 2013 between the "take parcels" and the "non-take parcels."

(A. at 368-69, 500.) The trial judge refused Dwyer's alternative instruction about unity of use, which would have instructed the jury only as follows:

> You should determine what constitutes Richard Dwyer's entire property before the taking. To do so, you should consider that multiple parcels, which border each other and are owned by the same person, may be considered as the entire property if, as of July 17, 2013, there was such a connection or relation of adaptation, convenience and actual and permanent use, as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it was used.

(A. at 531; *see also* A. at 337-53.)

During closing argument, Dwyer agreed that "to be unified, it is not only the intention of [Dwyer] to unify [the eight parcels] but [he] ha[s] to have done something." (A. at 376.) Dwyer then argued to the jury that he was making an actual, permanent, and present joint use of all eight parcels because he had submitted his two unapproved site plan applications before the take occurred. (A. at 376-79.)

III. The Highest-And-Best-Use Dispute

The second issue on which the parties disagreed at trial was whether—even if all eight parcels could be valued together—the highest and best use of all eight parcels was for development of a large apartment complex. While they may sound alike, "unity of use" and "highest and best use" are different concepts, which is important to remember because even if the jury *agreed* with Dwyer's position about unity of use, the amount of the award would be less than he wanted if the jury *disagreed* with his position about the highest and best use of all eight parcels.

Both parties' appraisers testified that a property's highest and best use must be legally permissible, physically possible, financially feasible, and maximally productive. (A. at 178-81; *see also* July 11, 2017 Tr. at 288 ("the uses that I consider are what are physically possible, what are legally permitted, financially feasible and maximally productive").) The trial court also instructed the jury that a property's highest and best use was not necessarily its existing use, although "imaginative or speculative uses" could not be considered. (A. at 370, 501-02.)

The parties agreed that, subject to obtaining site plan approval and complying with other regulatory requirements such as floodplain restrictions, it was legally permissible to construct apartments on the eight parcels because they were all zoned in districts that allowed by-right multifamily development up to a certain density

without requiring further legislative approval.[15] The parties also agreed that it was physically possible to construct apartments on the eight parcels, although they disagreed about the specific number of units; the Town's engineering witness, Jack Rinker, thought 156 one- and two-bedroom units were possible before the take (A. at 66, 83-84, 495), while Dwyer's engineering witness, Lee Baines, thought 344 efficiency and one-bedroom units were possible. (A. at 147-48, 157, 213.)

The biggest area of disagreement was whether it was financially feasible to develop all eight parcels as a large apartment complex. The Town called Rinker and several other experts to testify about site constraints a developer would face if he tried to develop the property and the extraordinary costs needed to address them, including (1) the need to construct a road and water and sewer lines through the floodplain, which required permits and would be expensive even if the permits were issued; (2) the significant earthwork required by the challenging topography; and (3) the $16,500 per-unit tap fee, which was substantially more than other localities charged to connect to public water and sewer. (A. at 51-66, 78-80.) The Town also called other experts who opined that there was not enough demand to justify the expense of developing a new apartment complex in the Town. (A. at 263-98.)

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[15] The eight parcels are mostly in the R-2 zoning district, where the maximum density is 10 two-bedroom apartments, 12 one-bedroom apartments, or 15 "efficiency" apartments per acre. (A. at 145-46.) While density credit is allowed, no apartments can be built in the floodplain. (A. at 181.)

The Town's appraiser, Walter Robinson, testified that he considered whether the highest and best use of the three take parcels was to assemble them with the five other parcels for development of an apartment complex. However, after working with a team of experts, Robinson concluded that developing all eight parcels as an apartment complex was not financially feasible because "[i]t doesn't make sense to build something and lose money while you are at it."[16] (A. at 51-66, 77-93.) After considering other options for all eight parcels, which also were not financially feasible, Robinson concluded that the highest and best use of the three take parcels was for development of four single-family lots (one parcel could be divided into a fourth buildable lot without triggering the cost to connect to public water and sewer). (A. at 93-101, 496.) Robinson then appraised only the three take parcels and determined Dwyer should receive $130,022 for the take. (A. at 103-06, 499.)

Dwyer called his own appraiser, Heywood Cantrell, who appraised all eight parcels together and testified that Dwyer should receive $3,347,706.[17] (A. at 198-201.) Cantrell believed that, before the take, the highest and best use of all eight

[16] Robinson testified that, after adjusting for their superior locations, his multifamily land sales suggested a land value for Dwyer's eight parcels "in the neighborhood of $14,800" per apartment. But a developer then would need to spend $21,200 per apartment to overcome site constraints. (A. at 91-92.)

[17] Dwyer thought Cantrell's estimate of just compensation was too low and testified that he should receive $4.5 million. (A. at 238.)

parcels was to develop an apartment complex with 256 market-rate units. (A. at 178-88, 216.) To try to support that opinion, he testified that he considered (1) vacancy rates for existing apartment complexes in the Town and (2) the as-built density of ten apartment complexes throughout Virginia.[18] (A. at 182-86, 211-12.) However, Cantrell admitted that a developer "cannot determine financial feasibility based only upon those two things" and would study the issue in more detail before agreeing to purchase all eight parcels. (A. at 211-12, 225.) Cantrell also acknowledged that a developer would "probably build 125 units [to] see how successful that was" before committing to build more units. (A. at 223-24.)

IV. The Unsuccessful 2010 Listing

The trial court did not allow Dwyer to use an unsuccessful 2010 listing of the eight parcels[19] when cross-examining one of the Town's rebuttal witnesses, Richard Marchitelli, who is an appraiser with Cushman & Wakefield, a "global real estate company" with "about 45,000 people in 70 countries." (A. at 263-64.) The listing agents worked for Thalhimer, which was an "alliance partner" of Cushman & Wakefield at the time of the listing. (A. at 300, 526-27.) However, Marchitelli was

[18] Cantrell had to look outside the Town for recently built apartment complexes "since nothing has been built in Culpeper in the last 10 years." (A. at 182.)

[19] The listing also included another small parcel that Dwyer owns but that he did not ask the jury to value.

never involved with the listing. (A. at 301.)

Marchitelli testified on direct examination that, in his opinion, Cantrell's highest and best use conclusion was "materially flawed" and "not supported" because there was no evidence of "excess" or "unaccommodated" demand for apartments in the Town to justify building a large apartment complex. (A. at 268, 289-90, 297-98.) To support his opinion, Marchitelli looked "as far back as 2005" and did not find any completed multifamily land sales in the Town. (A. at 268-71.) Marchitelli also explained that there were 1,149 existing apartment units in the Town—579 were market-rate units, the others were income-restricted housing—and that a new apartment complex with 256 market-rate units like Cantrell proposed "would be a very extremely significant introduction of new inventory into the market place." (A. at 279-80, 297.) Finally, Marchitelli noted that, while the Town had approved site plan applications for 320 apartment units since 2002, none had been approved since 2007, only 22 of the approved units were constructed, and even those 22 units were part of a larger project that never was completed. (A. at 271-79.)

Marchitelli never testified about the listing in direct examination and he did not rely on it to support his opinion about the lack of market demand.[20] In fact, the only information Marchitelli knew about the listing came from a telephone call he

[20] Marchitelli's entire direct examination is at pages 263-98 of the appendix.

had with one of the listing agents in 2015 after being retained as an expert in this case. (A. at 526-29.) As a precaution, since it did not know if Dwyer would try to use the listing in his case, the Town disclosed in its rebuttal expert designation that Marchitelli might testify about what he had learned about the listing from his telephone call.[21] (A. at 303-04, 508-12.) However, Dwyer never mentioned the listing in his case, he never called the listing agents, and none of his experts relied on it. Thus, there ended up being nothing for the Town to rebut about the listing.

When the Town objected to Dwyer using the listing to cross-examine Marchitelli, Dwyer did not claim the listing was relevant to show unity of use, and he also disclaimed any intention to mention the listing price unless Marchitelli "were to somehow volunteer that." (A. at 302-03.) Dwyer instead argued that the listing was relevant to show market demand in 2013, but he never proffered that the listing received any interest while it was active. He also argued that he should be allowed to use the listing because it had been mentioned in the Town's rebuttal expert designation and because the listing agents had been associated with Cushman & Wakefield. (*Id.*) After hearing argument, the trial court ruled that the listing was not relevant and was unfairly prejudicial. (A. at 299-305.)

[21] The Town's rebuttal expert designation only said that "Marchitelli is anticipated to discuss the listing of the Dwyer property for sale by Cushman & Wakefield." (A. at 508.)

V. The Unconsummated Offers Made Before The Great Recession

Dwyer received two offers from potential purchasers before the Great Recession in 2008. One of the offers, which was made in 2005, was for "approximately 43 acres" and thus was not limited to the eight parcels Dwyer wanted the jury to value.[22] (A. at 388-427.) The potential purchaser then terminated the offer in 2005 after a short feasibility study period. (A. at 387.) The other offer, which was made in 2007, was a non-binding "commitment letter" that Dwyer never signed. (A. at 384-86.) It also was not limited to the eight parcels Dwyer wanted the jury to value, including one other parcel and also requiring Dwyer to obtain an access easement over a neighboring property. (*Id.*) It also included a contingency for a feasibility study period and another contingency if the Virginia Housing and Development Authority did not agree to provide tax credits. (*Id.*)

The trial court excluded the two unconsummated offers in a pretrial ruling. Dwyer agreed he could not use the offers as evidence of the property's value in 2013, but he argued that they were evidence of market demand and "support" for Dwyer's own opinion of value. (A. at 22-27.) The trial court disagreed, ruling that the offers were hearsay and too remote in time to be relevant to the 2013 date of valuation. (A. at 28-29.) At trial Dwyer moved the trial court to reconsider, arguing that the

[22] Some of the additional parcels were jointly owned by Dwyer and his wife, which would have created another problem under the unity-of-lands doctrine.

offers were relevant to show unity of use in 2013. (A. at 115-32.) The trial court again disagreed, ruling that the offers were not admissible to show unity of use in 2013 because they had been terminated before the Great Recession. (A. at 131-32.)

VI. The Town's Initial Estimate of Just Compensation

Pursuant to *Ramsey v. Commissioner of Highways*, 289 Va. 490 (2015), the trial court allowed Dwyer to tell the jury that, before recording the certificate of deposit, the Town had told him that its initial estimate of just compensation was $466,467 and that it thought all eight parcels were "suitable for apartment development." (A. at 236-37.) The Town then called its first appraiser, Robert Gentry, in its rebuttal case to respond to this evidence.[23] Gentry explained to the jury that, although he had appraised all eight parcels together, each parcel was being used separately when he inspected the property in November 2012. (A. at 252-54.) Gentry also noted that, while he thought the highest and best use of all eight parcels was for development of an apartment complex with a maximum of 256 units, his opinion was based on the maximum density for two-bedroom apartments and was contingent on the ability to construct a new road through the floodplain. (A. at 255-56, 260.) Gentry also acknowledged that, unlike Robinson, he did not have a team of experts to assist him when he prepared his appraisal. (A. at 255.) And, when

[23] While Robinson was the Town's appraiser at trial, Gentry performed the appraisal on which the Town relied to make its initial estimate.

asked what he had done to determine if development of a large apartment complex was financially feasible, Gentry candidly admitted, "[n]ot a lot." (A. at 256-57.)

Wanting to highlight the similarity between Gentry's appraisal and his own theory of valuation, Dwyer at several points in the trial emphasized to the jury that the Town was required by law to make an initial estimate of just compensation and to base that estimate on an appraisal. (A. at 72, 379; *see also* July 10, 2017 Tr. at 32 (telling the jury in opening statement that "[t]he law says that before your property can be taken, it has to be appraised, and the appraisal has to be presented to you").) At the Town's request, the trial court instructed the jury as follows:

> Before exercising the power of eminent domain, the Town is required to obtain an appraisal to estimate the amount that it believes to be just compensation. However, the Town's initial estimate of just compensation is not binding on the Town in this case.
>
> You may give the Town's initial estimate of just compensation and the appraisal on which that estimate was based whatever weight, if any, that you determine to be appropriate based on your consideration with all the evidence you have heard and find to be persuasive and also based on your consideration of the instructions of law that you have been given.

(A. at 373, 505.) The trial court believed this instruction was appropriate because of Dwyer's comments to the jury that the Town's initial estimate and Gentry's appraisal were legally required. (A at 361.)

VII. The Jury's Award

As previously noted, the jury's award was $762,400. During the charge conference the Town asked the trial court to add a special interrogatory to the jury's report form so the jury could state whether or not it found unity of use. (A. at 362-67.) However, Dwyer successfully objected to the Town's request and the trial court did not ask the jury to state its finding. (A. at 367.) The jury's award was 486% greater than the amount the Town urged the jury to award based on Robinson's appraisal. It was also 63% greater than the Town's initial estimate of just compensation, which—just like Dwyer's theory of valuation and Cantrell's appraisal—was based on Gentry's appraisal of all eight parcels and his conclusion that their highest and best use was to develop a large apartment complex.

ASSIGNMENT OF CROSS-ERROR[24]

The trial court erred by denying the Town's motion to strike because unity of use cannot exist as a matter of law since Dwyer was actually using the eight parcels for independent uses at the time of the take and never obtained site plan approval to change the actual use. (Preserved: A. at 306-35, 537.)

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[24] The Town does not ask for a new trial, but its assignment of cross-error provides another reason the Court should reject Dwyer's arguments about unity of use. Although the Town assigned cross-error as a precaution, an appellee is not required to assign cross-error to invoke the right-for-the-wrong-reason doctrine as an alternative basis to affirm the trial court. *See Alexandria Redevelopment & Hous. Auth. v. Walker*, 290 Va. 150, 156 (2015).

ARGUMENT

I. The Court Should Dismiss This Appeal Because It Is Untimely

"No appeal shall be allowed unless" a notice of appeal is filed "within 30 days after entry of final judgment or other appealable order or decree," Rule 5:9(a), and a petition for appeal must be filed "not more than 90 days after entry of the order appealed from," Rule 5:17(a)(1). The Court should make short work of this appeal if these jurisdictional deadlines began to run from the September 11 order.

The General Assembly has declared that the order confirming the jury's award of just compensation "shall be final" and immediately appealable. Va. Code § 25.1-239; *see also* Va. Code § 25.1-314 (referring to the order that confirms award and vests indefeasible title as a "final order"). Here, only the September 11 order confirmed the jury's award and vested indefeasible title in the Town. (A. at 532-37.) The November 7 order did *not* modify or alter the jury's award or the Town's title, but only authorized the distribution of the Town's additional deposit to pay the award. (A. at 538-41.)

The statutory finality of the order confirming the jury's award is an important component of the General Assembly's statutory scheme. Unlike an ordinary civil case, which is governed by common law principles of finality, a condemnation proceeding is a two-stage statutory proceeding in which just compensation is determined in the first stage and any dispute about who receives the award is

determined in the second stage. *See Williams v. Fairfax County Redevelopment & Housing Auth.*, 227 Va. 309, 313-15 (1984).[25] Nothing in the statutory scheme suggests that the finality of the order confirming the award (which brings the first stage to a close) is postponed when the second stage is necessary. *See* Va. Code § 25.1-241(B) (authorizing appeal from order resolving second-stage issues without postponing statutory finality of order confirming award). Other parts of the statutory scheme also show that a trial court retains at least some jurisdiction when an appeal is taken from the order confirming the award. *See* Va. Code § 25.1-243(A) (providing procedure for landowner to withdraw payment of award while appeal is pending from order confirming award). The statutory finality of the order confirming the award also is functionally important to other parts of the statutory scheme. *See* Va. Code § 25.1-249 (trial court can dismiss condemnation proceeding if award is not paid before time expires to appeal from order confirming award).

Dwyer concedes the September 11 order would "otherwise [be] final" because of Va. Code § 25.1-239. (Br. at 5.) However, he claims its finality was "postponed" because the trial court expressly retained jurisdiction to decide the two issues affecting the distribution of the additional deposit to pay the award.

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[25] In *Williams*, which concerned whether a trial court could dismiss a condemnation proceeding without the consent of the landowner's lender after the award was confirmed, the Court assumed without deciding that the order confirming the award was a final order. *See* 227 Va. at 315.

Dwyer's "postponement" theory ignores important language used in the September 11 order to retain the trial court's jurisdiction:

> ORDERED, ADJUDGED, and DECREED that, *pursuant to Va. Code § 25.1-240 and § 25.1-241*, the Court shall retain jurisdiction in this case *solely for the purpose of* (1) deciding the Town's Interest Credit Motion, if necessary, and (2) deciding any disputes between competing claimants, if any, to the Town's deposit of $295,773 and interest and then distributing these funds to the appropriate person[.]

(A. at 535 (emphasis added).) The emphasized language makes clear that the trial court did not retain jurisdiction to modify the jury's award or even generally. Instead, the trial court did so "solely for the purpose" of deciding two unresolved issues "pursuant to Va. Code § 25.1-240 and § 25.1-241," which are the statutes that govern the second stage of a condemnation proceeding.[26]

Dwyer's "postponement" theory also mistakenly relies on common law principles of finality rather than looking to the General Assembly's statutory scheme for condemnation proceedings. In other contexts, the Court has made clear that legal principles do not automatically apply in a condemnation proceeding just because they apply in other civil actions.[27] While Dwyer tries to rely on cases like *Super*

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[26] The condemnor can be a party in the second stage of a condemnation proceeding pursuant to Va. Code § 25.1-241. *See 3232 Page Ave. Condo. Unit Owners Ass'n v. City of Va. Beach*, 284 Va. 639, 66 (2012).

[27] *See Trout v. Commonwealth Transp. Comm'r of Va.*, 241 Va. 69, 72-74 (1991) (Va. Code § 8.01-380 does not apply); *Hamer v. Sch. Board of City of Chesapeake*, 240 Va. 66, 72-74 (1990) (burden of proof principles and order of opening and closing arguments are different); *Williamson v. Hopewell*

Fresh Food Mkts. of Va., Inc. v. Ruffin, 263 Va. 555 (2002), and *Johnson v. Woodard*, 281 Va. 403 (2011), none involved a condemnation proceeding or addressed Va. Code § 25.1-239.

Differences between a condemnation proceeding and other civil cases again prove important. In both *Ruffin* and *Johnson*, the trial court expressly retained jurisdiction to attempt to prevent Rule 1:1 from depriving it of jurisdiction to resolve a pending motion—a motion to reconsider in *Ruffin* and a motion for sanctions in *Johnson*. However, nothing suggests that Rule 1:1 ever requires the second stage of a condemnation proceeding to be completed within 21 days after the order confirming the award is entered. *See* Va. Code § 25.1-241(A) and (B) (requiring trial court to enter order "setting a time for hearing the case and determining the rights and claims of all persons entitled to the fund," and authorizing trial court to appoint commissioner in chancery); *see also Williams*, 227 Va. at 315 (holding that trial court had jurisdiction to dismiss condemnation proceeding even assuming it failed to comply with Rule 1:1 after order confirming award was entered); *cf. Safrin v. Travaini Pumps USA, Inc.*, 269 Va. 412, 419 n. 2 (2005) (recognizing that the statutory procedure for setting aside a confessed judgment "provides a limited,

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Redevelopment & Hous. Auth., 203 Va. 653, 656 (1962) (procedure for commencing case is different).

specific exception to the operation of Rule 1:1").[28]

Ultimately, if the Court accepted it, Dwyer's "postponement" theory in a condemnation proceeding would essentially rewrite Va. Code § 25.1-239 and other parts of the statutory scheme by postponing the finality of the order confirming the award whenever the second stage is needed to decide how to distribute it. After all, a trial court must always retain jurisdiction—whether expressly or implicitly—to conduct the second stage. Whether or not Va. Code § 25.1-239's statutory finality is the best policy, the Court should let the General Assembly decide whether any change is warranted because "the legislature, not the judiciary, is the sole author of public policy." *Tvardek v. Powhatan Vill. Homeowners Ass'n, Inc.*, 291 Va. 269, 279-80 (2016) (citation and internal quotation marks omitted).

Finally, although Dwyer never attempts to rely on this fact, the Town acknowledges that it prepared the initial draft of the September 11 order and that,

[28] Although he does not make the point in his opening brief, Dwyer once claimed that *Johnson* "addresses fully" the Town's focus on the deliberately bifurcated nature of a condemnation proceeding. (Response to Motion to Dismiss at 3.) In *Johnson*, the Court held that the trial court's retention of jurisdiction to consider a sanctions motion—which Dwyer views as a collateral matter analogous to a condemnation proceeding's second stage—postponed the finality of an order nonsuiting a petition to remove elected officials brought pursuant to Va. Code § 24.2-235. However, unlike the procedure for removal actions, Va. Code § 25.1-239 expressly makes the order confirming the award a final order that is immediately appealable.

after filing its motion to recover the 2014 interest overpayment, the Town removed from its initial draft order language that expressly stated that the order was final and immediately appealable pursuant to Va. Code § 25.1-239.[29] The Town took this language out because the Town was uncertain whether, notwithstanding Va. Code § 25.1-239, the order confirming the jury's award would be final and appealable with the Town's own motion to recover the 2014 interest overpayment pending. However, Dwyer rightly does *not* claim that the September 11 order needed to expressly reference Va. Code § 25.1-239 to be final and appealable; that the Town ever agreed that the appellate deadlines in Rule 5:9 and 5:17 would not begin running from the September 11 order (which are jurisdictional rules that cannot be changed by private agreement in any event); or that, by itself, the pendency of the Town's motion prevented the September 11 order from being final and appealable.[30]

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[29] The language that the Town took out of its initial draft order read as follows: "ORDERED, ADJUDGED, and DECREED that, pursuant to Va. Code § 25.1-239, this Order shall be final and any party aggrieved thereby may apply for an appeal to the Supreme Court of Virginia…." Notably, in addition to originally containing that language, the Town's initial draft order also expressly retained the trial court's jurisdiction to decide any claim Dwyer's lender might make to receive the Town's additional deposit. Thus, if Dwyer's "postponement" theory were correct, the Town's initial draft order was contradictory—in one paragraph expressly saying it was final and in another silently making it interlocutory.

[30] Dwyer would not have been prejudiced by filing a notice of appeal within 30 days of the September 11 order even if it was not a final order. *See* Rule 5:9(a) (permitting notice of appeal to be filed before final order is entered).

II. The Trial Court Did Not Err By Refusing Dwyer's Alternative Instruction About Unity Of Use

A. The Standard Of Review Is Abuse Of Discretion Because Dwyer Did Not Assign Error To The Trial Court's Unity-Of-Use Instruction

"When granted instructions fully and fairly cover a principle of law, a trial court does not abuse its discretion in refusing another instruction relating to the same legal principle." *Stockton v. Commonwealth*, 227 Va. 124, 145 (1984). "[T]he abuse of discretion standard requires a reviewing court to show enough deference to a primary decisionmaker's judgment that the court does not reverse merely because it would have come to a different result in the first instance." *Martin v. Lahti*, 295 Va. 77, 87-88 (2018) (citation and quotation marks omitted).

When the question is raised properly, the Court reviews *de novo* whether a jury instruction correctly states the law. *See, e.g.*, *Lawlor v. Commonwealth*, 285 Va. 187, 228 (2013). However, Dwyer does not assign error to the unity-of-use instruction the trial court gave to the jury. Instead, he assigns error only to the trial court's *refusal* of his alternative instruction. (Br. at 2.) An assignment of error should carefully "point out the targeted error" because it "set[s] analytical boundaries for the arguments on appeal." *Forest Lakes Cmty. Ass'n v. United Land Corp. of Am.*, 293 Va. 113, 122-123 (2017); *see also, e.g.*, *Haynes-Garrett v. Dunn*, ___ Va. ___, ___ (Oct. 4, 2018) (wording of assignment prevented Court from reaching an issue). Dwyer's first assignment of error is meaningfully different than

if he had assigned error by saying "the trial court erroneously instructed the jury about the unity-of-use requirement."[31] Because Dwyer did not assign error to the unity-of-use instruction that the trial court gave the jury, it should be the law of the case. *See* Rule 5:17(c); *see also, e.g.*, *Maine v. Adams*, 277 Va. 230, 242 (2009).

B. Even If Dwyer Had Assigned Error To It, The Trial Court's Unity-Of-Use Instruction Is Correct

Even if Dwyer had assigned error to the trial court's unity-of-use instruction, the trial court correctly stated the law by explaining to the jury that, before it could value all eight parcels together, Dwyer was required to show that he was making "an actual, permanent, and present joint use" of all eight parcels when the take occurred. (A. at 368, 500.)

The general rule in Virginia is that "[w]hen a portion of a tract of land is taken by eminent domain, the owner is entitled to recover for the damage to the remainder of the parcel taken, but not for damage to separate independent tracts." *Commonwealth Transp. Com'r of Virginia v. Glass*, 270 Va. 138, 147–48 (2005) (citing *Bogese, Inc., v. State Highway Comm'r*, 250 Va. 226, 228-29 (1995)).

[31] Appellants should assign error specifically to the instructions that were given when challenging them on appeal. *See, e.g.*, *Handberg v. Goldberg*, Record No. 170964 (assignment of error reads, "The trial court erred by providing incorrect instructions of the law to the jury on defamation …"); *Online Resources Corp. v. Lawlor*, Record No. 120208 (assignment of error reads, "The trial court erred by instructing the jury to construe any ambiguity in the contract against the drafter").

However, "[a]n exception to that general rule, the unity-of-lands doctrine, allows an owner to recover for damage to other tracts of land which are not part of the actual taking when three factors are present: unity of use, physical unity, and unity of ownership."[32] *Id.* at 148. Like most exceptions to general rules, the unity-of-lands doctrine is strictly construed. *See Bogese*, 250 Va. at 231 (doctrine did not apply because parcels were not owned by the exact same owners).

The Court explained in *Virginia Electric and Power Co. v. Hylton*, 292 Va. 92 (2016), and in *Glass* that "[t]o demonstrate unity of use, a party must demonstrate 'an actual, permanent and present joint use of all the parcels as of the date of take' and 'not a use that might occur at some future date.'" *Hylton*, 292 Va. at 109 (quoting *Glass*, 250 Va. at 149-50). In *Hylton*, the Court held that the condemnor's motion *in limine* in that case correctly was denied because "on the date of the take, Hylton was receiving royalties [from the lessee of] an *existing* underground mine on his property which partially extended under the parcel subject to the take." 292 Va. at 110 (emphasis added). Even Dwyer himself agrees that "unity of use requires 'actual

[32] While only the unity-of-use requirement is at issue in this appeal, the landowner bears the burden of proving that the unity-of-lands doctrine is applicable. *See id.* at 149.

joint use … present at the date of take.'"[33] (Br. at 7 (quoting *Glass*, 272 Va. at 150) (ellipses in original).)

C. Dwyer's Alternative Instruction Is Confusing

Despite agreeing it is required, Dwyer never wanted the jury to be told he had to be making an "actual, permanent, and present joint use" of all eight parcels in order to establish unity of use. He wanted the jury to be instructed only as follows:

> You should determine what constitutes Richard Dwyer's entire property before the taking. To do so, you should consider that multiple parcels, which border each other and are owned by the same person, may be considered as the entire property if, as of July 17, 2013, *there was such a connection or relation of adaptation, convenience and actual and permanent use, as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it was used*.

(A. at 531 (emphasis added).) Although the emphasized language in Dwyer's alternative instruction is found in *Hylton* and *Glass*, the Court has cautioned that language from an opinion may not be appropriate for use as a jury instruction. *See*,

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[33] Dwyer does not argue on appeal that the trial court erred by instructing the jury that "[a]n intention to jointly develop a group of parcels in the future is not sufficient by itself to establish an actual, permanent, and present joint use of the parcels." (A. at 368, 500.) That part of the trial court's instruction correctly follows *Hylton*'s and *Glass*'s recognition that unity of use cannot be based on "a use that might occur at some future date." *Hylton*, 292 Va. at 109 (quoting *Glass*, 250 Va. at 149-50). Dwyer was able to argue to the jury that he actually was developing the eight parcels when the take occurred and thus had more than just an intention to do so in the future. (A. at 376-79.)

e.g., *Virginia Elec. & Power Co. v. Dungee*, 258 Va. 235, 251 (1999). Moreover, even if it is a correct statement of law, the trial court did not abuse its discretion by refusing Dwyer's alternative instruction because the unity-of-use instruction it gave the jury also correctly stated the law.[34] *See Stockton*, 227 Va. at 145.

One problem with Dwyer's alternative instruction was that, even in its best light, it was a longer and less understandable way of saying that an actual, permanent, and present joint use is necessary to show unity of use. Notably, the Court in *Glass* said it "is apparent from" the emphasized language Dwyer wanted to use in his alternative instruction "that the actual joint use must be a present use at the date of the take, not a use that might occur at some future date." 270 Va. at 150. To reinforce this point, the Court even used italics to emphasize the word "is" in the language Dwyer wanted to use. *See Glass*, 270 Va. at 149. Even if the jury might have understood this point from Dwyer's alternative instruction, which is debatable, the trial court did not abuse it discretion by using clearer and more succinct language to tell the jury the same thing.

An even more troubling problem was that Dwyer's alternative instruction could have misled the jury to conflate the concepts of unity of use and highest and

[34] Dwyer claims on appeal that the trial court "refused to instruct the jury on by-right development plans." (Br. at 9.) Any argument in that regard is barred by Rule 5:25 because Dwyer never asked the trial court to do so.

best use. Unlike unity of use, which focuses on the property's existing use at the time of a taking, the highest and best use of property can be something other than its existing use. *See United States v. 1.604 Acres of Land*, 844 F. Supp. 2d 668, 679 (E.D. Va. 2011). By using language like "adaptation," and "the most advantageous and profitable manner," Dwyer's alternative instruction about unity of use sounded like the instructions the trial court gave the jury about highest and best use. (A. at 370, 501-02.) The jury unquestionably would have erred if it found in Dwyer's favor on the unity-of-use issue simply because it thought the highest and best use of all eight parcels was to develop a large apartment complex in the future.

These were not its only problems. Dwyer's alternative instruction failed to explain why the jury needed to "determine what constitutes Richard Dwyer's *entire property* before the taking," which itself is prejudicial because in ordinary conversation a person might readily say that all eight parcels are part of Dwyer's "entire property." (A. at 531 (emphasis added).) It also failed to instruct the jury that it could only value all eight parcels together if unity of use existed. And, although Dwyer later agreed it should, it initially did not mention that he had the burden to prove unity of use. (A. at 342-43.)

Finally, there is no merit to Dwyer's contention that, after denying the Town's motion to strike, the trial court reversed itself, *sub silentio*, and took the unity-of-use issue away from the jury by refusing Dwyer's alternative instruction. (Br. at 8.)

Dwyer was permitted to try to convince the jury that he was making an actual, permanent, and present joint use of all eight parcels because he had submitted his two site plan applications before the take occurred. (A. at 376-79.)

D. The Court Also Can Reject Dwyer's Unity-Of-Use Arguments Because That Issue Should Not Have Gone To The Jury

The trial court should have granted the Town's motion to strike, which provides the Court with another reason to reject Dwyer's arguments about unity of use because that issue should not have gone to the jury.[35]

The unity-of-lands doctrine is not a guarantee that, whenever land is taken before it has been developed, the landowner is entitled to realize the reward of development without facing any of its risk. *See Glass*, 270 Va. at 152 (citing favorably to the dissenting opinion in *City of San Diego v. Neumann*, 863 P.2d 725 (Cal. 1993)). A landowner must show an actual, permanent, and present joint use of multiple parcels to invoke the unity-of-lands doctrine. *See Hylton*, 292 Va. at 109 (quoting *Glass*, 250 Va. at 149-50). Here, the undisputed facts showed that: (1) when the take occurred in 2013, and also four years later when the jury conducted its view, Dwyer was using seven of the parcels as separate rental homes and the eighth parcel was vacant land; (2) Dwyer never obtained site plan approval to

[35] The Court reviews *de novo* the denial of the Town's motion to strike and, when considering that issue, views the evidence in the light most favorable to Dwyer. *See Saks Fifth Ave. Inc. v. James, Ltd.*, 272 Va. 177, 188 (2006).

construct an apartment complex on the eight parcels; and (3) although he submitted two site plan applications, Dwyer withdrew his 2008 application when the Great Recession began and submitted his 2013 application only after he knew the take was imminent. By arguing (erroneously) that the trial court's unity-of-use instruction "effectively took this issue away from the jury" (Br. at 8), Dwyer essentially concedes that he was not making an actual, permanent, and present joint use of all eight parcels when the take occurred.

Dwyer tries to distinguish his case from *Glass* by claiming that "this appeal presents the opposite end of the development-planning spectrum." (Br. at 7.) However, even viewing the evidence in the light most favorable to him, Dwyer proceeded only slightly farther than the landowner did in *Glass*. *See Glass*, 270 Va. at 144 (landowner had hired a surveyor to assist in preparing a "site development plan" but stopped work when take occurred). Dwyer also notes that the Court did not reject the landowner's claim in *Glass* "out of hand" but instead "evaluated it on the merits before finding Glass's evidence wanting." (Br. at 7-8.) But that does not mean *Glass* is a "roadmap" to successfully show unity of use. (A. at 321.) Dwyer's interpretation of *Glass* ignores the Court's actual holding, which was only that the evidence in that case was legally insufficient to show unity of use. The route the Court took to reach *Glass*'s holding may reflect only a preference to decide a case on narrow grounds presented by specific facts. *See, e.g.*, *Kalergis v. Comm'r of*

Highways, 294 Va. 260, 262 (2017); *McGhee v. Commonwealth*, 280 Va. 620, 626 (2010). Dwyer's expansive reading of *Glass* ignores the warning that, when deciding a case, the Court "seldom completely investigate[s]" how the reasoning in that case might apply to "all other cases." *Vasquez v. Commonwealth*, 291 Va. 232, 242 (2016) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821)).

Citing *Town of Occoquan v. Elm Street Development, Inc.*, Record No. 110075, slip op. at 4 (April 6, 2012), Dwyer also tries to argue that the fact that he never obtained site plan approval is irrelevant because apartments are permitted "by right" and site plan approval is ministerial. (Br. at 7.) However, *Town of Occoquan* was not a condemnation case and did not involve the unity-of-lands doctrine. The by-right nature of apartments and the ministerial nature of site plan approval are insufficient to show that Dwyer was making an actual, permanent, and present joint use of all eight parcels when the take occurred.

As it argued below, the Town believes vested rights law provides a helpful analogy to identify how far along in the "development-planning" process a landowner must get for uncompleted development plans to satisfy the unity-of-use requirement.[36] (A. at 313-18.) The General Assembly adopted Va. Code § 15.2-

[36] The Town never claimed that Dwyer had to completely finish construction before the take to establish unity of use. For example, the Town agreed unity of use may exist if a landowner obtained site plan approval and was in the middle of construction when the take occurred. (A. at 313.)

2307 to answer a similar question: How far along in the "development-planning" process must a landowner get for uncompleted development plans to be immune from future legislative zoning change?

The concept of vested rights is grounded in the constitutional right to just compensation when property is taken for public use. *See* Grayson P. Hanes and J. Randall Minchew, "On Vested Rights to Land Use and Development," 46 Wash. & Lee L. Rev. 373, 385-86 (1989); Comment, "Virginia's Vested Property Rights Rule: Legal and Economic Considerations," 2 Geo. Mason L. Rev. 77, 83 (1994). There is no reason the rule to determine if unity of use exists should differ from the rule to determine if a vested right exists. In both contexts, the government does something—either by exercising the power of eminent domain or the police power—that may interfere with a landowner's uncompleted plans. The power of eminent domain results in a direct taking and, without the immunity that vested rights law provides, the police power would result in a regulatory taking, with each triggering a constitutional right to just compensation.

Until he has a vested right, a landowner has "no property right in anticipated uses of [his] land." *Board of Zoning Appeals v. Caselin Sys.*, 256 Va. 206, 210 (1998). A landowner cannot obtain a vested right merely by submitting a site plan application. For example, in *Town of Stephens City v. Russell*, 241 Va. 160 (1991), the Court rejected a landowner's claim that he had a vested right to construct a 33-

unit apartment complex because he had filed several unapproved site plan applications before a legislative zoning change reduced the number of apartments he could build. *Id.* at 161-62. Dwyer never obtained "a significant affirmative governmental act … allowing development of a specific project," Va. Code § 15.2-2307(A), and thus, just like the landowner in *Russell*, he does not have a vested right to develop a large apartment complex on all eight parcels. Likewise, Dwyer should not have been allowed to try to establish unity of use among all eight parcels by relying on two unapproved site plan applications.

III. The Trial Court Did Not Err By Not Allowing Dwyer To Use The Unsuccessful 2010 Listing To Cross-Examine Marchitelli

A. The Standard of Review Is Abuse Of Discretion

The parties agree the standard of review is abuse of discretion. (Br. at 10.)

B. Dwyer Did Not Preserve His Argument That The Listing Is Admissible To Show Unity Of Use

Dwyer agrees the unsuccessful 2010 listing is inadmissible hearsay if offered for the truth of any assertions about the "quality" or "value" of the property. (Br. at 11.) Trying to avoid that problem, Dwyer contends on appeal that "[t]he primary purpose of this evidence at trial … was to show simply that the property had indeed been listed for a unitary sale." (*Id.*) But Rule 5:25 bars Dwyer's claim that the listing is "positive evidence of unity of use." (*Id.* at 10.) Dwyer never claimed at trial that he wanted to use the listing to show unity of use; he only claimed it was

relevant to show that the highest and best use of the eight parcels was for multifamily development.[37] (A. at 302-03.)

Even if it were not barred by Rule 5:25, the Court still should reject Dwyer's unity-of-use argument. Neither *Glass* nor *Hylton* suggest that a listing (let alone an inactive one) is evidence of unity of use. If Dwyer truly believed this argument, he surely would have tried to use the listing in his own case. Another problem is that, if Dwyer had tried to use the listing during cross-examination to show unity of use, he would have impermissibly exceeded the scope of direct examination because Marchitelli never testified about unity of use. *See* Rule 2:611(b)(i).

C. The Listing Is Not Admissible Evidence Of Market Demand

The trial court did not abuse its discretion by rejecting Dwyer's argument that the listing was admissible evidence of demand for multifamily housing. (A. at 302-03.) A litigant "does not have an absolute right to cross-examine a witness about evidence that is not relevant." *Velocity Express Mid-Atlantic v. Hugen*, 266 Va. 188, 205 (2003). A listing is only an agreement between the owner and the listing agent to try to sell property. *See C. Porter Vaughan, Inc. v. DiLorenzo*, 279 Va. 449, 457 (2010). The mere fact of a listing is not evidence of market demand, and Dwyer

[37] While Dwyer briefly contended in his post-trial exceptions that the listing was relevant to show unity of use, that came too late. *See, e.g.*, *Lawlor*, 285 Va. at 222 (argument waived if made too late in trial process); *Preferred Sys. Solutions, Inc. v. GP Consulting, LLC*, 284 Va. 382, 395 (2012) (same).

never proffered any interest in the listing while it was active. The listing also cannot be used as evidence of whatever opinions, if any, the non-testifying listing agents might have. *See, e.g.*, *Gelber v. Glock*, 293 Va. 497, 514 (2017) (tax assessment records cannot be used as evidence of value without assessor being called as expert witness). Even Dwyer agrees on that point. (*See* Br. at 11.)

D. Marchitelli Did Not Rely On The Listing To Support His Opinions

A litigant generally may cross-examine an expert about the specific facts he "relies" upon to support the specific opinions he testifies about in direct examination. Va. Code § 8.01-401.1. However, Marchitelli never testified about the listing at trial, he never relied on it to support the opinions he offered at trial, and Dwyer never tried to lay a foundation to show otherwise. The Town's rebuttal expert designation also never claimed that Marchitelli relied upon the listing to support his opinions. (A. at 508-12.) The only potential scenario where the Town might have had Marchitelli try to testify as a rebuttal witness about what he learned about the listing from his telephone call with one of the listing agents was if the trial court had allowed Dwyer to use the listing in his case (despite hearsay and relevance objections the Town would have made). But Dwyer never tried to use the listing in his case and the Town ultimately had no need to present any rebuttal evidence about it.

E. Dwyer No Longer Claims He Can Use The Listing Just Because The Listing Agents Were Associated With Cushman & Wakefield

Dwyer no longer makes an argument he made in his petition for appeal—that he should be allowed to use the listing to impeach Marchitelli just because the listing agents had been affiliated with Cushman & Wakefield. The Court should treat that argument as waived. *See Palmer v. Atlantic Coast Pipeline, LLC*, 293 Va. 573, 580 (2017); *see also* Rule 5:27(d).

Dwyer's impeachment argument also is wrong even if it were not waived. Even though Marchitelli and the listing agents happened to be affiliated with the same large company, the listing is not a prior inconsistent statement *by Marchitelli*. *See* Rule 2:613. Just as an expert cannot bolster his own opinions by using another person's hearsay opinions, *see, e.g.*, *Todd v. Williams*, 242 Va. 178, 180-82 (1991), a party also cannot impeach an expert's opinions on cross-examination by using another person's hearsay opinions, *see, e.g.*, *Ochoa-Valenzuela v. Ford Motor Co., Inc.*, 2017 WL 1130314 at * 1 (9th Cir. Mar. 27, 2017); *Pernix Ireland Pain Dac v. Alvogen Malta Operations Ltd.*, 316 F. Supp. 3d 816, 826-28 (D. Del. 2018). The listing also did not "squarely contradict" Marchitelli's testimony about the lack of market demand. *Compare Jones v. Ford Motor Co.*, 263 Va. 237, 258 (2002) (plaintiff was allowed to use deposition testimony from fact witnesses to impeach

expert witness because factual testimony "squarely contradict[ed]" expert's opinion about how accident occurred).[38]

The proper way for Dwyer to try to present evidence about whatever opinions, if any, the listing agents might have about market demand or about his property would have been for Dwyer to designate them as experts and call them in his case. Maybe Dwyer never tried to do that because he knew their opinions would not help him. Whatever the reason, the trial court did not abuse its discretion by rejecting the shortcut he attempted when cross-examining Marchitelli.

IV. The Trial Court Did Not Err By Excluding The Two Unconsummated Offers From Before The Great Recession

A. The Standard Of Review Is Abuse Of Discretion

The parties agree the standard of review is abuse of discretion. (Br. at 12.)

B. The Trial Court Did Not Abuse Its Discretion By Excluding The Offers

Dwyer does not challenge the trial court's pretrial ruling that the two unconsummated offers from before the Great Recession are hearsay and too remote in time to be evidence of market conditions in 2013. (A. at 21-29.) The trial court also did not abuse its discretion by ruling that the offers were "too remote and irrelevant" to show that Dwyer was making an actual, permanent, and present joint

[38] Even if the listing could have been used to impeach Marchitelli, the Town would have been entitled to an instruction telling the jury that the listing could not be considered as substantive evidence. *See Jones*, 263 Va. at 258.

use of all eight parcels in 2013. (A. at 131.) Both offers expired well before 2013, they included parcels other than the eight parcels Dwyer wanted the jury to value, and they included contingencies so the potential purchasers could determine if development was financially feasible before committing to purchase the property. Thus, just like in *Glass*, Dwyer never had any "firm offers, much less a contract, lease, or other binding document" when the take occurred.[39] *Glass*, 270 Va. at 151.

V. The Trial Court Did Not Comment On The Town's Initial Estimate of Just Compensation And Gentry's Appraisal

A. The Standard Of Review Is Abuse Of Discretion

Whether an instruction should be given is generally reviewed for abuse of discretion. *See Cooper v. Commonwealth*, 277 Va. 377, 381, (2009).

B. The Trial Court's Instruction Was A Correct Statement Of Law

Dwyer does not contend that the trial court's instruction incorrectly stated the law. In fact, he never even mentions its first two sentences.

The instruction's first sentence—which Dwyer had already emphasized to the jury (A. at 72, 379; *see also* July 10, 2017 Tr. at 32)—told the jury that the Town was required by law to make an initial estimate of just compensation based on an appraisal. (A. at 373, 505.) That is a correct statement of law. *See* Va. Code § 25.1-

[39] Moreover, *Glass* only addressed the sufficiency of evidence and does not hold that unconsummated offers are admissible to show unity of use. "The admissibility of evidence and the sufficiency of evidence are distinct issues." *Banks v. Mario Indus.*, 274 Va. 438, 455 (2007).

204(E)(1) and § 25.1-417(3). The instruction's second sentence told the jury that the initial estimate and Gentry's appraisal were not binding on the Town. (A. at 373, 505.) That also is a correct statement of law, *see Ramsey*, 289 Va. at 498, and the trial court did not abuse its discretion by making sure the jury knew the law fully, not just the part Dwyer had emphasized. (A. at 361.)

Dwyer only challenges the instruction's third sentence. That sentence told the jury only that it could give this evidence whatever weight it thought appropriate based on its consideration of all the evidence and the other instructions it had been given. (A. at 373, 505.) Again, that is a correct statement of law.[40]

C. The Trial Court Did Not Comment On The Evidence

If the trial court had any opinions about the evidence, it never expressed them to the jury in this instruction or at any other point in the trial. The trial court also never told the jury how to weigh the evidence. A trial court does not improperly comment on the evidence just by giving an instruction that concerns a specific piece of evidence. *See Adams v. Ristine*, 138 Va. 273, 306 (1924) (rejecting argument that a proposed jury instruction about specific evidence expressed a negative opinion

[40] Dwyer did not object to the trial court instructing the jury that "[y]ou are the judges of the facts, the credibility of the witnesses, and the weight of the evidence," that "[y]ou may not arbitrarily disregard believable testimony of a witness," and that "you should consider, but are not bound by, the opinion testimony that has been presented." (A. at 372-73; July 14, 2017 Tr. at 72.)

about that evidence). Dwyer's cited cases are easily distinguished. For example, in *Spence v. Miller*, 197 Va. 477 (1955), the judge stated while in the jury's presence that he did not think a witness was giving "straightforward" answers, *id.* at 481-82, and in *Quercia v. United States*, 289 U.S. 466 (1933), the judge instructed the jury that the defendant's mannerisms are "almost always an indication of lying" and that he thought almost everything the defendant said "was a lie," *id.* at 468.

VI. Dwyer's Assigned Errors Would Be Harmless On This Record

Although the Court should reject Dwyer's four assigned errors for the reasons previously discussed, the Court also can affirm the trial court because any of them would be harmless on this record. "The harmless-error concept is no mere prudential, judge-made doctrine of appellate review," but is a legislative limitation on judicial authority that "grows out of the imperative demands of common sense." *Commonwealth v. White*, 293 Va. 411, 419-20 (2017) (quotation marks and citations omitted); *see also* Va. Code § 8.01-678.

"[I]t is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless." *White*, 293 Va. at 420 (quotation marks and citation omitted). The Town acknowledges that an error is generally presumed to be prejudicial unless the record clearly shows it could not have affected the trial's outcome. *See, e.g.*, *Monahan v. Obici Medical Mgmt. Services, Inc.*, 271 Va. 621, 635 (2006). Reflecting that presumption, when an issue has been erroneously

submitted to the jury rather than decided as a matter of law, an appellant is not required to show that the jury's verdict was actually based on the erroneously submitted issue. *See id.* at 637; *Clohessy v. Weiler*, 250 Va. 249, 254 (1995). However, the Court also has stated that, "[w]here the evidence is conflicting" in a condemnation proceeding, the jury's award "will not be disturbed except upon clear proof that it is based on erroneous principles." *Glass*, 270 Va. at 154. Moreover, unlike *Monahan* and *Clohessy*, which involved issues that should not have been submitted to the jury at all, Dwyer does not contend that the trial court should have found unity of use to exist as a matter of law. Finally, even when error is presumed to be harmful, that does not make harmless error analysis unnecessary or meaningless. *See, e.g.*, *Commonwealth v. Proffitt*, 292 Va. 626, 642 (2016) (Court "consider[s] the potential effect of the excluded evidence in light of all the evidence that was presented to the jury"); *Online Resources Corp. v. Lawlor*, 285 Va. 40, 57 (2013) (any error in jury instruction was harmless); *Riverside Hosp., Inc. v. Johnson*, 272 Va. 518, 537 (2006) (same).

A. The Unity-Of-Use Issue

Although Dwyer successfully objected to the Town's request that the jury be given a special interrogatory to state its unity-of-use finding, the amount of the jury's award provides compelling evidence that the jury *found in Dwyer's favor* on the unity-of-use issue, especially since it was 63% greater than the Town's initial

estimate of just compensation based on Gentry's appraisal of all eight parcels.[41] The jury certainly could have returned its award of $762,400, including $500,240 for the take and $260,000 for damage to the residue, by (1) finding *in Dwyer's favor* on the unity-of-use issue and (2) finding that the highest and best use of the eight parcels was to develop a smaller apartment complex than Dwyer or Cantrell envisioned. Consider the following calculations on the next several pages, which are based on evidence the jury heard and use a formula in a model jury instruction given without objection. (A. at 371-72, 503.)

Step 1: Determine "Before-Take" FMV Of All Eight Parcels (25.65 acres)

156 apartments[42] x $14,650/unit[43] = $2,285,400 ÷ 25.65 ac.= $89,100/ac.

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[41] While an appellant does not need to request a special verdict form to preserve an objection, *see Ponirakis v. Choi*, 262 Va. 119, 126 n. 3 (2001), the Court does not appear to have decided if an appellant can assume the jury ruled against him after objecting to a request for a special interrogatory.

[42] This is the number of apartments the Town agreed was physically possible before the take. (A. at 66, 83-84, 495.) Cantrell also agreed that a developer would do more to study whether his proposed 256-unit complex was financially feasible and may start by building less apartments. (A. at 223-25.)

[43] This "per apartment" land value essentially mirrors Gentry's highest value of $14,644 per unit, which Dwyer elicited in cross-examination. (A. at 258.) It also is close to the $14,605 per unit land value the jury saw on a demonstrative exhibit (A. 516) for a multifamily land sale in Charlottesville, which Cantrell thought was the most similar to Dwyer's property of six sales he considered. (A. at 189-190, 196-97; *see also* A. at 513-19 (each demonstrative exhibit was shown to the jury during Cantrell's direct examination).) Robinson also testified that his multifamily

Step 2: Determine Compensation For Land And Easements Taken

(a) Fee Take	$89,100	x	5.391 ac.		=	$480,338
(b) Elec./Tel. Easement	$89,100	x	0.26 ac.	x 25%[44]	=	$5,792
(c) Gas Easement	$89,100	x	0.096 ac.	x 25%	=	$2,138
(d) Temporary Easement	$89,100	x	0.663 ac.	x 20%[45]	=	$11,815
						$500,083

Step 3: Determine "After-Take" FMV Of Residue

104 apartments[46] x $14,650/unit = $1,523,600

Step 4: Determine Damage To Residue Caused By Partial Taking

(a) Before-take FMV of 25.65 acres		$2,285,400
(b) Compensation for Partial Taking	-	$500,083
(c) Residue – "Before-Take" FMV		$1,785,317
(d) Residue – "After-Take" FMV	-	$1,523,600
(e) Damage to Residue		**$261,717**

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land sales suggested a land value range "between $11,000 and $14,800 per unit" before he considered extraordinary development costs. (A. at 91.)

[44] Robinson used 25% of fee value when valuing both permanent easements. (A. at 103-04.)

[45] Robinson and Cantrell used a 10% annual return over a two-year duration to value the temporary easement. (A. at 104-05; *see also* July 12, 2017 Tr. at 297.)

[46] Relying on Baines, Cantrell testified that "you are going to lose 33 percent of your density" because of the taking. (A. at 160, 200.) An "after-take" yield of 104 apartments also corresponds to Cantrell's opinion that the residue can still yield 104,419 square feet of building area after the take, which equals approximately 100 apartments based on Cantrell's average apartment size of 1,050 square feet. (A. at 188, 200.) Baines also agreed at least 104 apartments could be built on the residue after the take. (*See* July 12, 2017 Tr. at 230 (Baines thought 152 efficiency and one-bedroom units could be built).) Rinker also agreed at least 90 apartments were possible after the take. (A. at 68, 498.)

Step 5: Determine Total Compensation

Taking		$500,083 (actual award $500,240)
Damage to Residue	+	$261,717 (actual award $262,000)
		$761,800 (actual award $762,240)[47]

B. The Unsuccessful 2010 Listing

Any error in excluding the listing would be harmless because Dwyer did not proffer that the listing generated any interest while it was active. *See Commonwealth Transp. Comm'r v. Target Corp.*, 274 Va. 341, 348 (2007) (a proffer permits Court to decide if exclusion of evidence is erroneous and also prejudicial).

C. The Town's Initial Estimate and Gentry's Appraisal

Any error in the instruction about the Town's initial estimate and Gentry's appraisal would be harmless because the jury's award was 63% greater than the Town's initial estimate that was based on Gentry's appraisal of all eight parcels.

CONCLUSION

The Court should either dismiss this appeal or affirm the trial court.

[47] The small discrepancy compared to the actual amount of the award easily can result from rounding or other insignificant differences.

Respectfully submitted,

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CERTIFICATE

I hereby certify that on this 29th day of November, 2018, pursuant to Rule 5:26, three paper copies of the Brief of Appellee have been hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the brief in Portable Document Format (PDF) has been filed using VACES. On this same day, a copy of the brief was served via email on the following:

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