In the

Supreme Court of Virginia

At Richmond

Record No. 180691

HELMICK FAMILY FARM, LLC,

Appellant,

– v. –

COMMISSIONER OF HIGHWAYS,

Appellee.

OPENING BRIEF OF APPELLANT

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SCV: Submitted on 11-26-2018 16:04:48 EST for filing on 11-26-2018

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The trial court erred by excluding all evidence of the reasonable probability of rezoning the property taken from Helmick Family Farm, LLC by VDOT. The evidence excluded did not involve speculative uses and imagined profits, but instead had a direct impact on the value of the property. This Court should, consistently with its own eminent domain jurisprudence and that of every other state that has confronted this issue, hold that evidence of the reasonable probability of a rezoning of a property is admissible in an eminent domain proceeding.

The trial court further erred by approving two of VDOT's jury instructions and by prohibiting the landowner's representative from explaining the bases for his opinion of the value of the property taken. As a result, this Court should reverse the trial court's decision and remand the case for a new trial.

Statement of the Case

I. Material Proceedings Below.

The Commissioner of Highways ("VDOT") condemned land owned by Helmick Family Farm, LLC ("Helmick") on August 20, 2014, by filing a Certificate of Take, later amended, among the land records of Culpeper County, with defeasible title vesting in the Commonwealth for the following interests: fee simple in 2.155 acres; a slope and drainage easement of 0.198 acres; a temporary construction easement for cut and/or fill slopes of 0.318 acres; and a utility

easement of 0.078 acres. JA[1] 26-31. VDOT filed a petition in condemnation on January 20, 2015. JA 1. It describes the purpose of the highway project: "the improvement of a Section of Route 29, State Primary System, a Limited Access Highway, and more specifically to replace the existing at-grade intersection of Routes 29 and 666 with a diamond interchange to improve safety and capacity." JA 5.

Prior to trial, VDOT filed a motion in limine to exclude the testimony of 1) Helmick's expert appraiser Charles T. Dennis, 2) Helmick's expert in land use, zoning, and land planning, Charles F. Carter, and 3) Helmick's representative Melvin Helmick. JA 37-199. On December 20, 2016, the court held a hearing on this motion and on a motion in limine filed by Helmick. Following that hearing, the circuit court sustained VDOT's motion in part. It ruled that i) "the testimony of owner's appraiser Charles T. Dennis and any evidence regarding his subject appraisal set forth in pages 37 and 44 thereof are excluded from trial," ii) "all testimony and evidence regarding hypothetical rezoning of the subject property is excluded from trial," iii) "Melvin Helmick may testify as to the value of the subject property, but evidence at trial shall be limited to the value of the property, in the condition it is in on the date of the taking, and not the value after or regarding

[1] JA refers to the Joint Appendix filed in this appeal. The Order authorizing the amendment of the Certificate of Take to reduce the size of the Rappahannock Electric Cooperative easement is found at JA 204.

hypothetical rezoning," and iv) Helmick's motion in limine is moot. JA 420-422.

VDOT objected to Helmick's witnesses and most of its exhibits, largely based on VDOT's claim that the opinions and supporting evidence were speculative because they related to a "hypothetical rezoning" of the property. JA 423-428. A trial began on January 4, 2017, and at the conclusion of Helmick's opening statement, VDOT moved for a mistrial on the grounds that Helmick improperly suggested to the commissioners that a rezoning of the property was possible. JA 465. The trial court stated that "it's a very thin line that you're required to walk when considering the factors that the Commissioners can consider and planting a very large seed regarding the rezoning issue and the property being rezoned commercial and the Court funds that you crossed the line. So we're granting the motion." JA 473. The Order granting VDOT's motion for a mistrial was entered on January 24, 2017. JA 494-95.

Thereafter, a hearing was held on April 19, 2017, on VDOT's objections to Helmick's witnesses and exhibits. During that hearing, Helmick provided a detailed proffer of the anticipated testimony of its witnesses. JA 554-589. Helmick's proffer included the following: the anticipated testimony of Helmick's expert real estate appraiser, Charles T. Dennis ("Dennis"), as embodied in his appraisal report which is found at JA 645-739 (the "Dennis Appraisal"); the anticipated testimony, as embodied in a report (the "Carter Report"), found at JA

39-111, prepared by the Helmick's expert in land use, zoning, and land planning, Charles F. Carter, AICP[2] ("Carter"), the former Planning Director for Culpeper County; and the anticipated testimony of Helmick's representative, Melvin Helmick, as embodied in Helmick's Interrogatory responses, found at JA 740-825. In addition, Helmick discussed each of the exhibits that were objected to by VDOT, JA 576-589, including those ultimately excluded by the trial court and addressed in the assignments of error—23, 27, 29-41, 44-48.[3]

After the hearing on April 17, 2017, the court ruled that "[w]hile the Helmick property is identified on the County's Future Land Use Map as being rezoned[4] to Light Industrial or Commercial, this is not an assurance of community

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[2] AICP stands for the American Institute of Certified Planners, which provides certification for professional planners; Mr. Carter holds this certification.

[3] Helmick's final exhibit list is found at JA 837-38, and the relevant exhibits are: Exhibit 23, Future Land Use Plan Map (B) depicting the area of the Helmick property planned Commercial; Exhibit 27, Letter from Paul Howard Jr. to Helmick Family Farm, LLC regarding inclusion in the water and sewer service district; Exhibits 29-36, summaries and deeds for Dennis's comparable sales; Exhibit 37, a map of Dennis's comparable sales; Exhibit 38, Dennis's adjustment grid for his comparable sales; Exhibit 39, Dennis's valuation summary; Exhibit 40, Dennis's just compensation summary; Exhibit 41, a map depicting Dennis's comparable sales and those of VDOT's appraiser; Exhibits 44 through 47, deeds for sales relied on by Melvin Helmick for his value of the property taken; Exhibit 48, Culpeper County's Light Industry zoning district section.

[4] Helmick respectfully submits that the trial court either misspoke or misunderstood what the County's Future Land Use Map of its Comprehensive Plan depicted because at the time of the taking, the portion of the Helmick property taken was identified as "Commercial," but no legislative act altering the County's Zoning Map designation for the property had occurred. However, it is Helmick's

acceptance or a commitment to development by the County. As previously stated, as in the case of [*City of Virginia Beach v. Oakes,* 263 Va. 510 (2002)], this hypothetical rezoning is too speculative and remote to be considered." JA 829. The court entered an order on September 6, 2017, carrying out this ruling. JA 832-835.

The result of this ruling was that at trial, Helmick's appraiser could not testify, Helmick's expert in land planning and zoning could not testify that it was reasonably probable that the property would be rezoned to Culpeper's Light Industrial zoning designation consistently with the Comprehensive Plan, and Helmick's representative could not provide justification for his opinion of value, such as citing sales of properties that he believed were comparable. The court sustained VDOT's objections to Helmick's exhibits 23, 29-41, all relating to the proffered testimony of Helmick's expert appraiser. It also sustained objections to Helmick's exhibits 27 and 42-48, which supported the excluded opinions as well as provided a bases for Helmick's value for the property.

At the trial, condemnation commissioners returned an award of $22,592.00. Helmick filed exceptions. JA 1276-1281. The court overruled the exceptions and entered final judgment on February 27, 2018, confirming the commissioners' report. JA 1282-1287. Helmick appeals.

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position that it was reasonably probable at the time of the taking that a change of the zoning from Agricultural to a commercial designation would occur if an application was submitted.

II. Facts.

Helmick's property comprises over 168 acres in Culpeper County. JA 929. It has approximately 2,000 feet of frontage on Poor Farm Road, which abuts Route 29/15, and slightly over 50 feet of frontage on Greens Corner Road (State Route 666). JA 891. The property is in the southeast quadrant of the intersection of Route 29/15 and State Route 666, and is visible from both of these roads. JA 890.

At the time of the taking, Culpeper County's Land Use Map, contained within the County's Comprehensive Plan,[5] designated the property VDOT took from Helmick as Commercial. JA 1270.[6] The property taken is also within the Urban Services Boundary. JA 1007, 1253. The property had the right to 16 sewer taps at the time of the taking; it obtained that right in return for Helmick dedicating 20 acres of land to the County for use as a sewage treatment plant. JA 1216. A public water connection was close the property as well. JA 981.

The Carter Report acknowledges that the zoning designation of the Helmick property as of the date of the taking was Agricultural. JA 40. It also notes that the zoning designations of properties adjacent to the Helmick property taken include

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[5] Each locality in Virginia is required to adopt a comprehensive plan which shall show, among other items, "the locality's long-range recommendations for the general development of the territory covered by the plan." Va. Code § 15.2-2223(C).

[6] Helmick's Appraiser, Dennis, estimated that the area planned Commercial totaled 31.5 acres. JA 681.

Light Industrial and Commercial Services. JA 40. Soon after the taking, on November 5, 2014, the Board of Supervisors voted to include the entire property within the Town Environs Adopted Water and Sewer Services Area, confirming that it could be served by public water and sewer. JA 84-86.

The Carter Report included a list of recent rezoning applications in Culpeper County where agriculturally zoned land was proposed to become commercial and industrial; Carter would have testified that the Board of Supervisors had approved almost every application submitted between 2006 and 2015. JA 110-111. Based on all the facts related to the property and his experience, Carter concluded that "it is reasonably probable that, at the time of VDOT Take, the subject property would be rezoned from A-1 (Agricultural) to LI (Light Industry) if application was made by the landowner[]." JA 42.

Helmick's real estate appraiser, Dennis, maintains an MAI designation from the Appraisal Institute. The Dennis Appraisal describes the property's characteristics such as its proximity to one of the County's high schools, and discusses the Commercial designation of the property within the County's Comprehensive Plan. It summarizes Dennis's conversations with the County's planning staff, the commercial uses located on surrounding properties, the Helmick property's proximity to the signalized intersection of Route 29/15 and Route 666, its proximity to water and sewer services, and Carter's findings. JA 666-675.

Ultimately, Dennis concluded that "the highest and best use of the land would be to rezone the 31.5 acres planned for commercial to LI or another commercial zoning district, and hold the remaining 136.9457 acres for investment purposes." JA 681. Notably, he did not value the Helmick property *as if it already had been rezoned*; he merely concluded that a willing buyer would pay more for the property because of its *potential* to be rezoned.

To arrive at his opinion of value, he used the comparable sales approach, relying on four sales in relatively close proximity to the Helmick property. JA 682. Although his sales were either zoned Commercial Services, Heavy Industrial, or Light Industrial, Dennis made a qualitative adjustment and in doing so, he recognized that the zoning designation of the Helmick property was an *inferior* characteristic as compared to each sale because the property "will need to be rezoned prior to being used for commercial purposes [and] … having to get a rezoning done can be time consuming." JA 683-689.

The range of sales prices per acre for the properties Dennis used to compare to the Helmick property was $65,000 to $176,906. Dennis determined that, when considering other characteristics such as access to utilities, road access and location, all the sales but one were inferior to the Helmick property. Ultimately Dennis concluded that the Helmick property taken was worth $130,000 per acre. JA 690. He opined that, based on this land value and the impact of the easements

acquired, Helmick was entitled to $321,000 in just compensation. JA 695.[7]

At trial, Melvin Helmick, who has over 60 years' experience owning and developing property in various Virginia jurisdictions, including Culpeper County, testified for his company and gave his opinion that the land taken was worth $6 per square foot, or $261,360 per acre. JA 1065. Based on the court's earlier rulings, he was not able to refer to any land sales that he relied on to arrive at this value.[8] He instead testified that he was not aware of any sales of properties in Culpeper County that are planned commercial but zoned agricultural. JA 1066. Mr. Helmick testified that his company was entitled to $640,000 in just compensation. JA 1068.

Like Mr. Dennis, VDOT's own expert appraiser, Walter Robinson ("Robinson"), believed that there was a reasonable probability of rezoning the Helmick property. He simply believed that prior to the taking it was not economically feasible to rezone the property because in his opinion, Culpeper County would require the owner to dedicate the very right-of-way that VDOT sought in this case in order for the rezoning to be approved – something the County could not require under Virginia law. See Va. Code § 15.2-2208.1. Specifically, his

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[7] An earlier version of Dennis's appraisal concluded just compensation of $348,000, but after VDOT amended the Certificate of Take to reduce the size of a utility easement, Dennis updated his appraisal and his opinion of the value of the taking was reduced.

[8] Those land sales are included in Helmick's proffered testimony. JA 741; 744-825.

appraisal report stated, in discussing the highest and best use of the property prior to the taking, that

> [a]ny rezoning of the subject property based on the recent historical record in the county would require dedication of road right-of-way with possible ancillary easements and further construction of a portion of the current highway project or a significant contribution of funds for construction. After careful consideration of all available information, a request for rezoning to commercial/rural does not appear to be economically feasible with these requirements under current market conditions.

JA 228. However, because of the trial court's rulings prohibiting testimony regarding the reasonable probability of rezoning the property, Robinson did not testify about his views on the potential to rezone the property prior to the taking.

At trial, Robinson acknowledged that *none* of the comparable sales he used to value the property, which were all zoned Agricultural, were designated as Commercial on the County's Land Use Map of its Comprehensive Plan. JA 1002. Also, *none* of his sales were within the County's Urban Services Area. JA 1004.[9] Using these sales, he concluded that the Helmick property was worth $6,300 per acre, and that the compensation owed was $22,464. JA 927.

In direct testimony, Robinson also discussed the remaining area of the property after the taking, and concluded there were no damages to the remainder. JA 968-970. Counsel for Helmick referred the trial court to Robinson's report

[9] Robinson initially testified that Helmick's property is not within the Urban Services Area, but later acknowledged it is. JA 1007.

which stated that "after the acquisition, the highest and best use of the property changes in part. The northerly portion of the residue as shown on the comprehensive plan as shown on the comprehensive plan to be commercial[.]" JA 995. But Robinson was not permitted to talk about this change in the property's highest and best use. He did, however, testify that he found a higher value for the property after the taking of $21,780/acre, nearly 3.5 times his pre-taking value. JA 997. Robinson acknowledged that proximity to Culpeper County's Eastern View High School would have a bearing on the value of the property after the taking, in particular "[t]o the ultimate highest and best use which would require rezoning which I'm not here to talk about." JA 1001.

Assignments of Error

1. The circuit court erred by excluding testimony and evidence regarding the reasonable probability that the property would be rezoned. [*Preserved*: JA 389-402; JA 554-589; JA 610-616; Helmick's Exception 5, JA 1278-79.]

2. The circuit court erred in giving Instruction 7. This instruction prohibited the condemnation commissioners from considering the reasonable probability of rezoning of the property to a different designation and stated that such a rezoning is speculative and remote. [*Preserved,* JA 1103-04; Helmick's Exception 1, JA 1276-77.]

3. The circuit court erroneously excluded evidence relating to the highest and best use of the property, including the reasonable probability that, as of the date of take, it would be rezoned. In doing so, the court erroneously barred testimony from Helmick's experts, Charles Dennis and Charles Carter, including the grounds for their respective opinions, and erroneously excluded Exhibits 23, 27, 29-41, and 48. [*Preserved*: JA 39-111; JA 389-402; JA 416-419; JA 554-565, 568-572, 580-587, 589, 610-616; JA 645-739; JA 836-839; JA 1106-07; Helmick's Exception 5, JA 1278-79.]

4. The circuit court erred by prohibiting Helmick's representative from testifying about the bases for his opinion of the value of the property taken, and by excluding exhibits 27 and 44 through 47. [*Preserved*: JA 402-04; JA 416-419; JA 519-20; 573-75; 582; 587-89; JA 740-825; JA 836-839; Helmick's Exception 5, JA 1278-79.]

5. The circuit court erred by giving Instruction 8 because it was an incomplete and prejudicial recitation of a portion of the County's Comprehensive Plan, and amounted to comment on the evidence. [*Preserved*: JA 1095-1099; Helmick's Exception 2, JA 1277.]

Authorities and Argument

I. Summary of Argument.

As a result of the trial court's rulings, Helmick was unable to present any basis for its position that it was entitled to more compensation than VDOT's appraiser believed was owed. VDOT's appraiser was able to testify to a depressed land value of $6,300/acre based on sales of properties bearing no similarity to the Helmick property other than the zoning designation.

Helmick's witnesses could not testify about the reasonable probability of the rezoning before the taking, or how that probability influenced the property's value. This gave the condemnation commissioners the false impression that VDOT's value was supported by an appraisal, while Helmick's was not. The commissioners' award was the result of the trial court only permitting them to hear VDOT's position of the value of the Helmick property.

This Court should expressly rule that evidence of the reasonable probability

of rezoning is admissible, and that a valuation based on that evidence is permitted. In addition, the Court should find that a landowner must be permitted to explain the bases of his opinion of the value of his own property, including using sales of properties he believes are comparable. The Court should further find that it was error to quote from only a small portion of the County's Comprehensive Plan, which misled the commissioners, when the entire chapter relevant to the case was admitted into evidence.

It is important for this Court to ensure that a landowner faces a level playing field at trial to ensure just compensation is paid when land is taken through the power of eminent domain.

II. Evidence of the reasonable probability of a rezoning materially affected the property's value, and should have been admitted.

A. Standard of Review.

This Court recently described the standard of review on this issue:

> The admissibility of evidence is within the discretion of the trial court and this Court will not reject the decision of the trial court unless we find an abuse of discretion. But when the trial court's decision is influenced by a mistake of law, it is an abuse of discretion.

Comm'r of Highways v. Karverly, Inc., 295 Va. 380, 388, n.7 (2018) (internal quotations and citations omitted).

B. Under existing Virginia law, evidence regarding the reasonable probability of the rezoning of a property is admissible when it affects the value of a property.

The circuit court was influenced by the mistaken view that as a matter of law, evidence of the reasonable probability of a rezoning and other related evidence is inadmissible in a condemnation proceeding because, in the circuit court's words, such evidence "regarding hypothetical rezoning shall be excluded as being too speculative and remote." JA 832. However, this Court has stated that

> [i]t is the duty of commissioners who are charged with determining the value of land which is being taken by eminent domain *to consider all uses to which it may be reasonably adapted and to award compensation upon the basis of its most advantageous and valuable use, having regard to the existing business demands of the community or such as may be reasonably expected in the immediate future. The uses to be considered must be so reasonably probable* as to have an effect on the present market value of the land. Purely imaginative or speculative value should not be considered. Compensation must be a full and perfect equivalent for the property.

Pruner v. State Highway Comm'r, 173 Va. 307, 310-311 (1939) (citations omitted; emphasis supplied).

In *Pruner*, the Court considered whether condemnation commissioners should "have considered the land from the standpoint of subdivision purposes as well as farm uses." *Id*. at 310. The Court answered this question in the affirmative,

for many of the same reasons that Helmick submits that it is reasonably probable that its property would be rezoned:

> Pruner's tract is located on the south of old highway No. 19, lying partly within the town of Lebanon but the largest portion lying outside of the town. Many residences have been built on the north side of the old highway which runs the entire length of the tract. The new highway cuts through Pruner's land rendering it less valuable for building lots as well as for agricultural purposes. The location and surroundings *likely rendered the land available for subdivision and its prospective value as such should have been considered by the commissioners in fixing their award*.

Id. at 310 (emphasis supplied). The Court further held, "in the appraisal of the land in question its adaptability for subdivision uses should have been considered as an element in estimating market value, — its use should not have been confined to that of agriculture alone." *Id*. at 311.

Pruner is not an outlier. In *Appalachian Electric Power Co. v. Gorman*, 191 Va. 344 (1950), the Court affirmed the admission of unrecorded subdivision plats to help illustrate the impact of a taking on the use of the residue of the property, noting that "[e]verything which affects the market value is to be taken into consideration." *Id.* at 354.

In *Lynch v. Commonwealth Transportation Comm'r*. 247 Va. 388 (1994), the property involved was zoned R-1 (Residential), but a zoning application was pending at the time of the taking to I-5 (General Industrial). The Court ruled that

several exhibits depicting Lynch's land devoted to an office/industrial park use, and changes to the plan of development necessitated by the taking, should have been admitted into evidence. *Id.* at 393.

Although this Court has not used the term "reasonable probability of rezoning" in a reported decision, it has recognized that a property's existing zoning may not reflect its current highest and best use. It did so in *Lynch*, involving land zoned residential at the time of the taking, when it said that

> Lynch's land was adaptable and suitable for development as an office/industrial park and that such may be the highest and best use of the land. This plan for the property, therefore, was not speculative, but, based upon study and planning, represented a real and present potential use in light of existing conditions and circumstances.

Id.

Additionally, *Com. Transp. Com'r. v. DuVal*, 238 Va. 679 (1989) has strikingly similar facts to this case. There, the property was zoned for single-family residential use on the date of the taking, but the properties surrounding it were used "for commercial and industrial purposes." *Id.* at 681. VDOT's appraiser testified that before the taking, "absent the impact of the project, the highest and best use of the property would have been for single-family residential purposes; however, because of the project, its highest and best use changed to light industrial development." *Id.* at 682. The landowner disagreed, urging that "the project did not

influence this change in highest and best use of the property. He contended that development of the area near [the property] had changed the prospects for rezoning, as well as the highest and best use of his property to light industrial, without regard to the project." *Id.*

The Court in *DuVal* considered whether the trial court properly instructed the condemnation commissioners regarding how to determine the reason for the change in the highest and best use. If one inserts the language approved by the Court into the instruction given at trial, it reads as follows:

> If you find that the subject property's highest and best use had changed by May 25, 1985, from single family residential development to light industrial development due in whole or in part to the road improvement project which condemned the 11.983 acres, then you cannot consider the subject property's highest and best use as being light industrial development.

Id. at 686. The Court further ruled that "[a]ppropriate language should explain that if the change in the property's highest and best use came about for reasons unrelated to the project, as DuVal testified, the property owner is entitled to the benefit of the property's consequent increase in value." *Id.*

Here, Robinson, VDOT's appraiser, believed the construction of the project changed the highest and best use of the property and would have made a rezoning economically feasible. On the other hand, Helmick's land planner and appraiser believed that the rezoning of the property was reasonably probable without regard

to the VDOT project. At a minimum, pursuant to the holding in *DuVal*, the trial court should have permitted the presentation of this competing evidence, as opposed to giving Instruction 7 and prohibiting any evidence related to the reasonable probability of rezoning the property.

Consistent with these cases, Virginia Model Jury Instruction 46.060, used in eminent domain proceedings and entitled "Fair Market Value: Use of Property," states the following:

> In determining fair market value, *you should consider all of the uses which might reasonably have been made of the property in light of existing conditions and circumstances*. In this respect, you should consider all of the natural advantages and disadvantages of the property as well as the characteristics and needs of the surrounding community which existed at the time of the taking *or which probably would exist in the near future*.
>
> The uses to which the property is adaptable must be so *reasonably probable* as to have an effect on its fair market value. You may not consider imaginative or speculative uses.

(Emphasis supplied). This instruction was given as Instruction 5, but its impact and meaning was improperly narrowed by Instruction 7.

The Court's recent holding in *Va. Elec. & Power Co. v. Hylton*, 292 Va. 92 (2016), involving the impact of mineral reserves on the value of property, further support's Helmick's position. A locality's comprehensive plan designation of commercial, along with other factors that lead to the reasonable probability of

rezoning, are akin to physical attributes like mineral reserves. In *Hylton*, the Court reaffirmed that "[w]here mineral deposits exist in condemned property, the measure of compensation is, as in other eminent domain cases, the fair market value of the property, and the presence of mineral deposits is an element of value to be considered." 292 Va. 92, 106-07 (2016) (citing *Henrico County v. Wilkerson*, 226 Va. 84, 88 (1983)). Here, the Court should permit the trier of fact to hear evidence of the reasonable probability of rezoning, which is undoubtedly "an element of value to be considered." *Id.*

C. Rather than follow the holdings in *Pruner, Gorman, Lynch,* and *DuVal*, the trial court misapplied this Court's holding in *City of Va. Beach v. Oakes*, 263 Va. 510 (2002).

In *Oakes*, the landowner's evidence of damages was based "in part upon future rents of a 'hypothetical building.'" *Id.* at 515. The Court noted that the "building could not have been constructed unless and until the City approved zoning changes to the property." *Id*. at 517. But the Court also noted that "[a]dditionally, prior to construction of this hypothetical building, the City would have been required to approve a sewage treatment system and a site plan." *Id*. For the Court, damages based on rents that did not exist, for a building that did not exist, and that required multiple approvals prior to it being lawfully constructed, rendered the landowner's damages too speculative to be considered.

Unlike the landowner in *Oakes*, Helmick did not seek to introduce valuation evidence relying on buildings or uses that did not exist at the time of the taking. Critically, Helmick did not seek to value the property as if a rezoning had occurred. Instead, Helmick's appraiser would have testified that a willing buyer would have paid more for the Helmick property because of its rezoning *potential* than it would for agriculturally zoned property without such potential; however, such a buyer would not value the property as if it had already been rezoned. This evidence is permissible under the holdings of *Pruner, Gorman, Lynch,* and *DuVal*, as well as the language of Model Jury Instruction 46.060, and it was error for the trial court to exclude this evidence.

D. Appraisal standards require consideration of the reasonable probability of rezoning.

The Uniform Standards of Professional Appraisal Practice (USPAP) provide in Standards Rule 1-3 that

> When necessary for credible assignment results in developing a market value opinion, an appraiser must:
>
> (a) Identify and analyze the effect on use and value of existing land use regulations, *reasonably probable modifications of such land use regulations*, economic supply and demand, the physical adaptability of the real estate, and market area trends[.]

Emphasis supplied.

The regulations applicable to appraisers licensed in Virginia provides that

"[i]n developing a real property appraisal, all licensees shall comply with the provisions of the Uniform Standards of Professional Appraisal Practice (USPAP) as defined in this chapter or in the prior edition in effect at the time of the reports' preparation." 18 VAC 130-20-180(D). Consequently, Virginia law requires that appraisers consider "the effect on use and value of … reasonably probably modifications of [] land use regulations," USPAP, Standards Rule 1-3, and there is no reason why appraisers must disregard the reasonable probability of rezoning a property in eminent domain proceedings.

In fact, VDOT's Right of Way Manual of Instructions provides that

> [t]he existing use and zoning must be given consideration *as well as the possibility of obtaining a zoning change to a more intensive use*. However, even if a zoning change to a more intensive use is likely, any potential use under the zoning change must be financially feasible. If no effective demand exists for a use, even though it is allowed by zoning, the appraiser may not conclude that it is the highest and best use for a property.

RIGHT OF WAY MANUAL OF INSTRUCTIONS, § 4.3.17 (3rd ed. 2016) (emphasis supplied). [10]

As discussed in the Statement of Facts, VDOT's appraiser Robinson

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[10] VDOT's Manual further provides that "VDOT emphasizes and requires that the appraiser comply with [USPAP] in effect on the date of the appraisal report." RIGHT OF WAY MANUAL OF INSTRUCTIONS, § 4.2.3 (3rd ed. 2016). Robinson's appraisal report was dated August 22, 2016. JA 212. The Right of Way Manual of Instructions is available at:

http://www.virginiadot.org/business/resources/Right_of_way/RW-Manual.pdf

determined that a rezoning of the Helmick property prior to the taking was possible, but not financially feasible because he believed Helmick would have to either build or contribute money for the VDOT project. But for the impropriety of basing his opinion on an unconstitutional exaction (see Va. Code § 15.2-2208.1), Robinson was following VDOT's own instructions for its appraisers.

Again, the trial court should have permitted a presentation of the competing appraisal evidence, with Helmick's appraiser believing there was sufficient demand for commercial properties to support a rezoning, JA 681, so that the commissioners could ultimately could decide whether a rezoning of the property was reasonably probable, and whether it influenced the value of the property taken.

E. Courts across the country have ruled that evidence of a reasonable probability of a rezoning is admissible.

Counsel for Helmick is not aware of any state that has adopted a *per se* prohibition on evidence about the reasonable probability of rezoning. Instead, "[i]t is generally held that the value of the property is to be considered as of the taking date, but it has also been said that the value should contain a factor for the likelihood of a zoning change. This concept has been called the doctrine of reasonable probability of rezoning." 4 NICHOLS ON EMINENT DOMAIN § 13.04.[11]

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[11] The states that have addressed this issue and concluded that evidence of the reasonable probability of a rezoning is admissible in a condemnation case include: Colorado, *Stark v. Poudre School Dist. R-1*, 560 P.2d 77, 79 (Colo. 1977); Connecticut, *Transportation Plaza Assocs. v. Powers*, 525 A.2d 68, 75 (Conn.

When deciding whether an expert can opine that a rezoning of a property is reasonably probable, as opposed to just testifying regarding facts that might lead the jury or judge adopt this conclusion, most states have permitted an expert to give an opinion on the reasonable probability of rezoning.[12] None of these cases required that a rezoning application be pending at the time of the taking for the fact finder to hear opinion testimony on the reasonable probability of rezoning.

When first confronted with the issue, North Carolina's Supreme Court ruled that testimony about the reasonable probability of rezoning is admissible. *Barnes v. North Carolina State Highway Com.,* 109 S.E.2d 219 (N.C. 1959). It adopted

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1987); Delaware, *Bd. of Ed. v. 13 Acres of Land*, 131 A.2d 180 (Del. Sup. Ct. 1957); Hawaii, *State by Attorney Gen. v. Pioneer Mill Co*., 637 P.2d 1131, 1138 (Haw. 1981); Idaho, *Ada County Highway Dist. v. Magwire*, 662 P.2d 237, 239 (Idaho 1983), Illinois, *Oak Brook Park Dist. v. Oak Brook Dev. Co.*, 524 N.E.2d 213, 219 (Ill. App. 2nd Dist. 1988), *appeal denied*, 530 N.E.2d 250 (1988); Missouri, *State ex rel. Missouri Highway and Transp. Comm'n v. Sturmfels Farm Ltd. Partnership*, 795 S.W.2d 581, 585 (Mo. Ct. App. 1990); Nevada, *City of Las Vegas v. Bustos*, 75 P.3d 351, 352–353 (Nev. 2003); New Jersey, *Borough of Saddle River v. 66 E. Allendale, LLC*, 77 A.3d 1161 (N.J. 2013); North Carolina, *Barnes v. North Carolina State Highway Com*., 109 S.E.2d 219 (N.C. 1959); Rhode Island, *Palazzi v. State*, 319 A.2d 658 (R.I. 1974); Washington, *State v. Motor Freight Terminals*, 357 P.2d 861 (Wash. 1960).

[12] *See Barnes v. North Carolina State Highway Com*. 109 S.E.2d 219 (N.C. 1959); *Dolezal v Cedar Rapids*, 209 N.W. 2d 84 (Iowa 1973); *State ex rel. Price v. Parcel No. 1-1.6401 Acres of Land*, 243 A.2d 709 (Del. 1968); *Borough of Saddle River v. 66 East Allendale*, LLC, 77 A.3d 1161 (N.J. 2013); *Stark v. Poudre School Dist.,* 560 P.2d 77 (Colo. 1977); *State by Attorney Gen. v. Pioneer Mill Co*., 637 P.2d 1131 (Haw. 1981); *Heath v. Commissioner of Transp.,* 398 A.2d 1192 (Conn. 1978); *Dept. of Public Works and Bldgs. v. Rogers*, 233 N.E.2d 409, 412 (Ill. 1968); *Palazzi v. State*, 319 A.2d 658, 664 (R.I. 1974).

language similar to Virginia Model Jury Instruction 46.060, *Id.* at 227-230, and concluded, citing a Delaware case, that

> [i]n ascertaining market value in an eminent domain proceeding reasonable probability of a rezoning of the condemned property, to permit the highest and best use, may be considered in determining market value.

Id. at 230. On this basis, the North Carolina court approved of testimony "that there was a reasonable probability that a part of [the landowner's] land would be rezoned by the City and changed from residence to business property in the near future." *Id.* at 229.

This Court should hold that evidence of the reasonable probability of a rezoning is admissible in an eminent domain matter. Such a holding would be consistent with the holdings of this Court and other courts throughout the country.

F. Neither Helmick's expert land planner nor its appraiser engaged in impermissible speculation.

1. Helmick's land planning expert Charles Carter based his opinion on facts related to the property.

Mr. Carter found that rezoning of the Helmick property was reasonably probable. Like the landowner's expert in *Lynch*, his conclusion is "not speculative, but, based upon study and planning, represented a real and present potential use in light of existing conditions and circumstances." 247 Va. at 393. Carter's report explores in detail several key components:

i) the zoning of abutting properties as Light Industry and Commercial

Services, and the light industrial use of those properties;

ii) the designation of the portion of the Helmick property taken as Commercial and within the Urban Services Area in the County's Comprehensive Plan;

iii) the Board of Supervisors' actions to bring the Helmick property within the water and sewer services area;

iv) the property's rights to 16 sewer taps; and

v) the Board of Supervisor's decisions to approve 8 zoning changes from Agricultural to a more intense designation between 2006 and 2015.

JA 39-111.

These facts are all relevant to determining whether it was reasonably probable that the property could be rezoned, and to the value of the property. Carter should have been permitted to testify to these facts and to discuss the supporting exhibits 23, 42-43 and 48. The trial court should have permitted him to opine that it was reasonably probable that the approximately 31.5 acres of the Helmick property planned commercial would be rezoned to Light Industry.[13]

These facts and this testimony did not involve speculation on specific future uses or imagined buildings generating rent. *Compare City of Va. Beach v. Oakes*, 263 Va. 510, 517 (2002). For example, Helmick did not attempt to introduce plans depicting a development consistent with the Light Industry zoning designation. *Compare Lynch,* 247 Va. at 393. Instead, Carter was a predicate witness to support

[13] The County's Light Industry zoning district permits uses within the Commercial Services district as well as some additional retail, commercial and light industrial uses. Helmick proffered the Light Industry district regulations as Exhibit 48, JA 589, and the circuit court excluded this exhibit in a September 6, 2017 order. JA 833.

Helmick's appraiser's highest and best use conclusion, and Carter should have been permitted to testify.

2. Helmick's expert appraiser Charles Dennis did not value the property as if it had already been rezoned pursuant to a "hypothetical rezoning."

The trial court erroneously adopted VDOT's use of the term "hypothetical rezoning" when characterizing the testimony of Helmick's experts. Neither witness, however, relied on a specific zoning application or evaluated the property as if a rezoning had already been approved. Instead, Helmick's appraiser Dennis valued the property in its current state, but recognized that the reasonable probability of a rezoning to commercial or the Light Industry classification increased the value of the property.

Based on Dennis's highest and best use conclusion, and the available comparable sales in the market, he could not use agriculturally zoned properties to value the property. VDOT's own appraiser acknowledged that there were no properties zoned Agricultural but planned Commercial. JA 1010. Consequently, Dennis chose properties with zoning classifications and other characteristics that made them more similar to the Helmick property than rural, agriculturally zoned land, and discounted those sales to made a qualitative adjustment[14] to account for

[14] Qualitative analysis is an acceptable means of valuing property when employing the comparable sales approach, and it "recognizes the inefficiencies of

the fact that those properties were already zoned Commercial Services, Heavy Industry or Light Industry. His adjustment grid identified all four of the comparable sales as "Superior" to Helmick's property because of their zoning classification. JA 688. VDOT's own appraiser used a similar approach to value the property after the taking. Robinson used sales of commercially zoned properties when valuing the property after the taking, and made a downward adjustment to their sales price to account for the zoning difference. JA 507.

Dennis also made qualitative adjustments for other factors like utility service, size, and access. The reasonable probability of rezoning the property is one of many factors that helps determine the value.

Dennis should have been permitted to testify about his value of the Helmick property and his conclusion that its highest and best use was to rezone it to Light Industry or another commercial zoning district. That evidence is consistent with this Court's precedent and the treatment of this issue by courts around the country.

The trial court should have also permitted Dennis to testify about the comparable sales he used to value the property. His use of comparable sales zoned CS (Commercial Services), HI (Industrial), and LI (Light Industry), even though the Helmick property is zoned A-1 (Agricultural), is consistent with appraisal

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real estate markets and the difficulty of expressing adjustments with mathematical precision." THE APPRAISAL OF REAL ESTATE, 403 (14th ed. 2013).

practice and has been permitted by other courts. For example, the Court of Appeals of Missouri has ruled:

> The property must be evaluated under the restrictions of the existing zoning and consideration given to the impact upon market value of the likelihood of a change in zoning. This may be done either by determining the subject property's value as rezoned, minus a discount factor to allow for the uncertainty that rezoning would actually take place, or by determining the property's value with its existing zoning, plus an incremental factor because of the probability of rezoning.

State ex rel. Missouri Highway & Transp. Com. v. Sturmfels Farm Ltd. Partnership, 795 S.W.2d 581, 585 (Mo. Ct. App. 1990) (internal citations and quotations omitted; citing 4 NICHOLS ON EMINENT DOMAIN § 12C.03[2].2).

Additionally, Hawaii has permitted an appraiser to testify to summaries of transactions involving hotel and apartment properties when the property was zoned residential, because there was evidence to support a conclusion that it was reasonably probable the property would be rezoned to allow for hotel and apartment uses. *State by Attorney Gen. v. Pioneer Mill Co.,* 637 P.2d 1131, 1137-1139 (1981).

III. The circuit court should not have given Instruction 7.

A. Standard of Review.

This Court reviews jury instructions

> to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly

> raises. This is a mixed question of law and fact. It is error to give an instruction that incorrectly states the law; whether a jury instruction accurately states the relevant law is a question of law that we review de novo.

Lawlor v. Commonwealth, 285 Va. 187, 228 (2013) (internal citations and quotations omitted).

B. Argument.

The circuit court improperly instructed the condemnation commissioners as follows:

> In determining the fair market value of the subject land, you shall only consider uses that may be made of the land under its existing zoning category of A-1 Agricultural. You may not consider a hypothetical rezoning of the subject land from A-1 Agricultural to a different zoning category before, on, or after the date of take on August 20, 2014 or an envisioned future change from the existing zoning category of A-1 Agricultural to a different zoning category. A hypothetical rezoning and an envisioned future change in zoning are speculative and remote.

JA 1167.

As explained above, this is an incorrect statement of the law and is inconsistent with the Court's holdings in *Pruner*, *Gorman*, *Lynch* and *DuVal*. The circuit court should have permitted Helmick to present evidence of the reasonable probability of rezoning of the property, as well as the impact of that characteristic on its value. Admitting this evidence would be consistent with the instruction given by the North Carolina Supreme Court in *Barnes*:

> In arriving at your verdict as to the fair market value of the property you may take into consideration the reasonable probability of a change of the zoning ordinance in the near future and the influence that that circumstance might have on the value of the land.

109 S.E.2d at 230.

IV. The circuit court erred by prohibiting Helmick's representative from testifying about the bases for his opinion of the value of the property taken and by excluding exhibits 27 and 44 through 47.

A. Standard of Review.

The standard of review stated in *Karverly* and cited above is applicable here because the trial court's decision was influenced by a mistake of law – specifically that a property owner cannot use comparable sales, or commercially zoned sales, to explain the basis of his valuation when his property is zoned Agricultural. *Comm'r of Highways v. Karverly, Inc.,* 295 Va. 380, 388, n.7 (2018) (internal quotations and citations omitted).

B. Argument.

Helmick's representative, Melvin Helmick, was precluded from explaining any substantive basis for his opinion that the Helmick property was worth $6 per square foot because the court incorrectly ruled that such explanation could only be given by an expert appraiser, and that any evidence related to the reasonable probability of rezoning was inadmissible. JA 833. The court thus barred him from mentioning Exhibit 27, the letter he received from the County adding his property

into the sewer and water district, and Exhibits 44-47, which were deeds for properties that he reviewed in determining the value. He was also not permitted to discuss his familiarity with sales of nearby properties, even though Mr. Helmick has over 60 years' experience owning and developing property. JA 1066.

This Court has consistently held that "[i]t is generally recognized that the opinion testimony of the owner of property, because of his relationship as owner, is competent and admissible on the question of the value of such property, regardless of his knowledge of property values." *Haynes v. Glenn*, 197 Va. 746, 750 (1956). It logically follows that landowners should also be able to explain the bases for their opinions of the value of their property.

V. Instruction 8 was an incomplete and prejudicial recitation of a portion of Culpeper County's Comprehensive Plan.

A. Standard of Review.

As stated above, whether a jury instruction is improper "is a mixed question of law and fact. It is error to give an instruction that incorrectly states the law; whether a jury instruction accurately states the relevant law is a question of law that we review de novo." *Lawlor*, 285 Va. at 228.

B. Argument.

Instruction 8 was an incomplete quotation from the County Comprehensive Plan. It should not have been given at all since the entirety of the relevant chapter of the Comprehensive Plan was in evidence as Helmick's Exhibit 7. JA 1254-1272.

The objectionable portion of Instruction 8 states

> You have also heard evidence about Culpeper County's Future Land Use Map. The Future Land Use Map does not stand-alone and is not itself the future plan. It and many companion documents are part of Culpeper County's Comprehensive Plan.
>
> The Comprehensive Plan is general in nature and is merely a guide for possible future development in the County. The Comprehensive Plan does not restrict or permit any uses of the land by the owner. You have also heard evidence about Culpeper County's Future Land Use Plan. The Future Land Use Plan is not an assurance of community acceptance of a commitment to future development by the County.

It is improper to use an instruction to paraphrase an exhibit, thereby elevating its importance in the minds of the commissioners. *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 134 (1992). This is especially true when the instruction is prejudicial because it omits other germane statements from the Comprehensive Plan, like "[t]his chapter sets forth the *Future Land Use Plan* which is the primary land use element of the Comprehensive Plan. It identifies those areas planned for future growth and the anticipated land use associated with such growth." JA 1254. By giving Instruction 8 as written, which did not include this additional language, it undermined the importance and meaning of the Comprehensive Plan's designation of the Helmick Property as Commercial and within the Urban Services Area.

Conclusion

This Court should reverse the judgment and remand the case to the circuit court for a new trial consistent with its opinion.

Dated: November 26, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 26, 2018, the Opening Brief and Appendix were filed electronically via the VACES system with the Supreme Court of Virginia and that three copies of the same were hand delivered to the clerk's office. This same date, a copy of the Opening Brief and Appendix were sent via email to all counsel of record, at the email addresses below:

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