

**CONSTITUTIONAL AMENDMENT
to Eminent Domain**

- Constitutional Amendment and Chapter 699 and 719 (2012) statutes were effective January 1, 2013
- VDOT's position is that, the changes are applicable only to certificates of takes filed after that date

CONSTITUTIONAL AMENDMENT

- Establishes Public Use requirement as a part of Constitution that cannot be easily changed
- Defines elements of just compensation by adding two additional items:
 - Damage payment for lost access
 - Damage payment for lost profit;
- And original
 - Value of property take
 - Damage to residual property caused by taking
- Taking by utility companies and railroads are a public use
- Eliminates taking where the "primary use" is for
 - a) Private gain/benefit/enterprise
 - b) Increasing jobs/Tax revenue
 - c) Economic development
- Condemner bears burden of proof of public use

Other Considerations

- No more property can be taken than is necessary for intended public purpose
- Transportation projects have been found to be a public use
- No change in appraisal being required to establish value of land and easement taking
- No change in paying damages to residual property if determined by the appraised before or after values
- No change in using enhancements resulting from the project to offset damages
- Chapter 699 and 719 statutes clearly state that payments for these four elements are not to be duplicative

New Elements of Just Compensation

Lost Access

- Chapter 699 and 719 statutes provide additional definitions and clarifications
- VDOT's view is that lost access change is more defining than broadening
 - 1) Direct access means ingress/egress on or off a public road at a location where the property adjoins that road
 - 2) A change in access experienced in common with the general community and is not compensable as damages. Includes:
 - (a) Off-site circuitry of travel
 - (b) Diversion of traffic
 - (c) Exercise of police powers
- As in the current process, any damages determined for access loss will be a part of the appraisal, considering damages to the residual property resulting from all affects of the taking, with the potential reduction of damages by considering enhancements
- No duplication of payment is allowed
- Most likely previous court precedence cases will still be applicable – such as Lindsey, Wood, etc.

Lost Profit

- Will be most difficult to define and value
- Statutes in Chapter 699 and 719 (2012) provides definition and rules
- Applicable to:
 - Owner of business or farm operation conducted on property taken
 - Only tenants with exclusive possession of substantial of all the property taken
 - Not applicable to total takes

- Timeframe
 - Claim can be raised by an applicable party anytime from initiation of appraisal up to eminent domain trial
 - Public acquirer is not required to consider lost profit in appraisal or include in offer for the offer to be considered bona fide
- To raise a claim the owner must provide and prove to a reasonable certainty:
 - Federal tax return and/or income statement for 3 years prior to date of take relating to business from where property is taken
 - Continue to provide tax data until date of agreement/decision
 - Loss is directly and proximately caused by taking of land and is not prohibited by conditions in statute
 - Any calculation of a claim meets the definition of business profit and is determined in accordance with generally accepted accounting principles
- VDOT has developed a form with questions that will be provided to business owners, on request, in order to obtain data needed to determine validating of claim for lost profits

Going Forth

- VDOT has added information about the Constitutional change to its Guide for Property Owners and Tenant booklet (on Internet) that is distributed at public information meetings and with formal offer package
- VDOT is increasing its preliminary cost estimates on projects where commercial businesses may be affected. As there is no historical data VDOT is using estimated average business values assuming a 10% profit and then calculating the 3 year loss based on 15 to 50% for each affected parcel. The result is adding from \$45,000 in western Virginia to \$120,000 in northern Virginia, per potentially applicable parcel. Again no actual data is available.

- VDOT's appraisers continue to address potential damages to residues resulting from multiple factors including lost access, but no compensations for loss profits will be included in appraisal
- VDOT will make bona fide offer for property taken and negotiate to achieve a voluntary conveyance where possible
- VDOT agents will only address lost profits if raised by the landowner and then not interpret statutes. Will provide form for claim of loss profit if requested
- VDOT will analyze any claims for lost profit when it is filed to determine if settlement is appropriate. It should be global settlement of all acquisitions and lost profit issues
- If settlement of both acquisition value and loss profit claim is not possible a certificate of take will be filed based on bona fide offer of appraised value and the monetary deposit with certificate will be limited to offer value. (will not include lost profit)
- After filing certificate VDOT will continue to consider settlement and will prepare specialty witness for trial testimony
- As there are many unknowns on lost profits and many legal rulings anticipated, it will take 3 to 4 years to fully clarify the legal implications

Pre – Questions

- This change does not affect the Quick Take provisions
- The statute confirms that police power action and changes of general community benefit are not compensable to individual property owners
- Access management changes within the existing right of way are not compensable; however, closure of private entrances by access control lines could be compensable if it results on a loss of value of the adjoining property
- Calculation of lost profits will be a subjective valuation even though it's based on financial information and is projected for only 3 years. Focus will be on how the take affected the business income and profits. Loss of parking and/or storage areas will be issues in both loss profits and permanent damages to the residual property