

# VIRGINIA EMINENT DOMAIN: Frequently Asked Questions<sup>1</sup>

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## What is eminent domain?

Eminent domain is the power to take or damage private property for a public use, provided that the owner is paid just compensation. VA. CONST. art I, § 11. Using this power, entities with the power of eminent domain may acquire private property from a property owner even if the owner does not wish to sell.

## What is a “public use”?

Virginia Code § 1-219.1 defines public use to include only the following:

- (i) the property is taken for the possession, ownership, occupation, and enjoyment of property by the public or a public corporation;
- (ii) the property is taken for construction, maintenance, or operation of public facilities by public corporations or by private entities provided that there is a written agreement with a public corporation providing for use of the facility by the public;

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<sup>1</sup> These questions and answers are intended to give Virginia property owners a general overview of the eminent domain or condemnation process. The information contained in these questions and answers is not a complete statement of the laws and procedures governing eminent domain in Virginia and should not be used as a substitute for legal advice. Individuals whose property is being taken by eminent domain should consult an attorney to discuss the specific facts of their case.

- (iii) the property is taken for the creation or functioning of any public service corporation, public service company, or railroad
- (iv) the property is taken for the provision of any authorized utility service by a government utility corporation;
- (v) the property is taken for the elimination of blight provided that the property itself is a blighted property; or
- (vi) the property taken is in a redevelopment or conservation area and is abandoned or the acquisition is needed to clear title where one of the owners agrees to such acquisition or the acquisition is by agreement of all the owners.

### **What is “just compensation”?**

Just compensation is the dollar value of the property taken or damaged. Virginia has adopted the rule established by the Supreme Court of the United States: a landowner is entitled to the “full and perfect equivalent for the property taken or damaged.” Chairman of Highway Comm’n of Va. v. Fletcher, 153 Va. 43, 47 (1929); *see also* United States v. Miller, 317 U.S. 369, 373 (1943) (“[Just] compensation means the full and perfect equivalent in money of the property taken.”).

### **Who has the power to take private property using eminent domain?**

In Virginia, the ability to take or damage private property using the power of eminent domain must be granted by statute. Entities with this power are called “condemners” or “condemning authorities.”

The following are some of the condemning authorities in Virginia:

- Cities, counties and towns (VA. CODE § 15.2-1901.1)
- School boards (VA. CODE § 22.1-127)
- Commissioner of Highways (VDOT) (VA. CODE § 33.1-89)
- Virginia Aviation Board (VA. CODE § 5.1-2.5)
- Virginia Public Building Authority (VA. CODE § 2.2-2276)
- Department of Conservation and Recreation (VA. CODE § 10.1-201)
- Watershed Improvement Districts (VA. CODE §10.1-635)
- Water and Sewer Authorities (VA. CODE §15.2-5114)
- Hospital Authorities (VA. CODE §15.2-5343)
- Electric Authorities (VA. CODE §15.2-5425)
- Drainage Districts (VA. CODE § 21-323)

- Department of Conservation and Recreation (VA. CODE § 28.2-628)
- Sanitation Commissions (VA. CODE § 21-166)
- Public Service Corporations (VA. CODE §§ 56-49, -260)
- Department of Conservation & Recreation (VA. CODE § 10.1-201)
- Telephone and Telegraph Companies (VA. CODE § 56-464)
- Railroads (VA. CODE § 56-347)
- Virginia Port Authority (VA. CODE § 62.1-136)

### **Are there special provisions for condemning private property for pipelines?**

Title 56 of the Code of Virginia governs public service companies and public utilities. Pursuant to Code § 56-49, public utilities have the power to condemn private property for pipelines so long as the pipelines are for an approved public use. Public utilities must apply for approval of a proposed project by the State Corporation Commission (VA. CODE § 56-265.2) and must comply with all other State Corporation Commission and statutory regulations and guidelines.

Prior to acquiring property using the power of eminent domain, a public utility must obtain a certificate of public convenience and necessity for its project. VA. CODE § 56-49(2). In determining whether it will issue a certificate of public convenience and necessity for a gas pipeline project, the State Corporation Commission must consider the effect of the pipeline on the environment, public safety, and economic development. VA. CODE § 56-265.2:1(A). The public utility must provide written notice of the proposed pipeline project and must file a copy of all plans, specifications, and maps of the proposed pipeline with the State Corporation Commission for public inspection. VA. CODE § 56-265.2:1(B). After written notice is filed, if any interested party requests a public hearing, the State Corporation Commission will hold such a hearing to receive public comment regarding the proposed pipeline project prior to issuing an approval of the project. VA. CODE § 56-265.2:1(C). The State Corporation Commission may require that the public utility change the route of the proposed gas pipeline or place other conditions on its approval of the project. VA. CODE § 56-265.2:1.

### **What is the step-by-step process of a condemnation?**

#### Prior to condemnation:

- The condemnor must identify a public use and determine the scope of its project. This includes creating plans for the project and determining what parcels of private property will need to be acquired for the project.

- The condemnor provides notice of the project to the property owners who may be affected by the project. Notice may be in the form of City Council meetings, local television stories, signs posted, flyers, newspaper notices, or direct contact by the condemnor with the property owners.
- If the condemnor believes the value of just compensation is over \$25,000, the condemnor must have the property appraised before beginning negotiations with the property owner. VA. CODE § 25.1-417(2).
- In performing an appraisal, the appraiser will likely:
  - Visit the property—the property owner has the right to accompany the appraiser on the inspection of the property. VA. CODE § 25.1-417(2).
  - Take measurements of the property
  - Ask for leases applicable to the property or other relevant documents
- Upon completion of an appraisal, the condemnor must attempt to purchase the property from the property owner by providing a written offer to purchase the property. VA. CODE § 25.1-204. The condemnor’s offer to purchase the property may not be less than the appraised value. VA. CODE § 25.1-417(3). The condemnor must provide a copy of all appraisals of the property obtained by the condemnor prior to making its offer. VA. CODE §25.1-417(3).

Condemnation proceedings:

- If the property owner does not accept the condemnor’s offer, and the condemnor has “quick-take” power,<sup>2</sup> it will file a Certificate of Take or Certificate of Deposit with the circuit court in the city or county where the property is located. The condemnor must also deposit money equal to the amount that the condemnor has estimated to be the value of just compensation. Once a Certificate has been filed, the condemnor is entitled to enter the property and begin work on its project. *See, e.g.*, VA. CODE § 33.1-120.
- Once funds have been deposited with the court, the property owner may withdraw the funds by filing a petition with the court. *See, e.g.*, VA. CODE § 33.1-124. Withdrawal of the funds does not prohibit the property owner from later contesting the amount of just compensation during trial.
- The condemnor must file a Petition for Condemnation within a year of the date it filed the Certificate of Take. Among other things, the Petition must explain the public use for which the property is being taken, the condemnor’s authority

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<sup>2</sup> “Quick-take” power allows certain condemning authorities, like the Virginia Department of Transportation (VDOT), to enter the property and begin its project prior to the commencement of condemnation proceedings. The condemning authority is required to deposit with the court the amount it has estimated to be just compensation prior to entering the property and beginning its work.

to use the power of eminent domain, and the work that will be done on the property. VA. CODE § 25.1-206. If the condemnor does not have “quick-take” power, the Petition for Condemnation is the beginning of condemnation proceedings. The Petition must be served on all owners of the property.

- The property owners must file an answer or grounds of defense within 21 days of service of the Petition. VA. CODE § 25.1-213. Failure to file an answer does not preclude an owner from challenging the amount of just compensation at trial, but it does waive an owner’s right to raise any defenses to the condemnation action. VA. CODE § 25.1-214.
- If defenses to the condemnation action are raised, the property owners and condemnor will schedule a hearing at which a judge will rule on the defenses. VA. CODE § 25.1-419. If the judge rules in favor of the property owner on a defense, then the condemnation will not be permitted to go forward.
- If no defenses are raised or a judge rules in favor of the condemnor on the defenses, the property owners and condemnor will schedule a date for the trial on just compensation.<sup>3</sup>
- Prior to the scheduled trial date, the parties may exchange “discovery” to obtain documents and information about each other’s cases. Both written discovery (interrogatories and requests for production of documents) and depositions are permitted, but discovery is limited to matters that are relevant to the issues. VA. SUP. CT. R. 4:1, 4:5, 4:8, 4:9. A scheduling order may be entered to determine dates on which certain information, such as the opinions of expert witnesses, must be disclosed to the opposing party.
- A trial will be held in the circuit court to determine just compensation for the property taken and damaged. This trial may be held in front of a judge (“bench trial”), in front of a jury of five property owners, or by condemnation commissioners. The property owner has the right to request that the trial be held before a jury or before commissioners. VA. CODE § 25.1-213. As part of the trial, the parties go with the judge and/or jury to “view” the property. VA. CODE § 25.1-231.
- At trial, a determination is made regarding the value of just compensation the condemnor must pay the property owner for the property taken and damaged.
- After trial, either party may make exceptions to the determination of just compensation and apply to the Supreme Court of Virginia for an appeal. VA.

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<sup>3</sup> Setting a trial date does not preclude the parties from settling the case without going forward with the trial. The parties settle the case when they reach an agreement on the price to be paid for the property taken and damaged. Sometimes, a mediator is used to aid the parties in reaching a settlement. Direct negotiations between the parties are also permitted at any time. If a settlement is reached, the trial on just compensation does not take place.

CODE §§ 25.1-233, -239.

- Once a determination is made during trial regarding the amount of just compensation, the condemnor must pay that amount (or the difference in that amount and the amount previously deposited with a Certificate of Take) into court. The property owner may petition to withdraw those funds. All of the lienholders and/or creditors with an interest in the property must be notified of the owner's intent to withdraw the funds. The circuit court may hold a hearing to determine who is entitled to the funds. VA. CODE § 25.1-241.
- Upon payment into court of the amount determined to be just compensation, the condemnor becomes the owner of the property. VA. CODE § 25.1-237.

### **Is the property owner entitled to any additional money or reimbursement?**

- If the determination of just compensation at trial is 30% or more above the condemnor's last written offer (made within 60 days of receipt of a written appraisal report by the property owner's appraiser), then the court may order the condemnor to reimburse the property owner for all reasonable costs (other than attorney fees) and all reasonable fees and travel costs of up to three experts who testified at trial. VA. CODE § 25.1-245.
- If the condemnor initiates discovery (for example, the condemnor is the first party to serve interrogatories or requests for production or the first party to request depositions), then it must pay all discovery costs, including the costs and expenses of the property owner's experts. VA. SUP. CT. R. 4:1(b)(4)(D).
- If the condemnation action is abandoned (the condemnor decides not to take the property) or if the judge rules in favor of the property owner on a defense to the take and denies the condemnor's right to take the property, then the condemnor must reimburse the property owner for his reasonable costs and expenses incurred as a result of the condemnation proceedings, including expert and attorney fees. VA. CODE § 25.1-419.
- If the condemnor is a state agency (a county, city, town, etc.), then the state agency must pay reasonable relocation expenses, including:
  - Actual expenses incurred in moving yourself, your business, your farm, or your personal property. VA. CODE § 25.1-406(1).
  - Actual expenses incurred in searching for a replacement business or farm. VA. CODE § 25.1-406(3).
  - Additional payments for increased interest costs or debt services costs, closing costs, recording fees, etc. for homeowners who have lived in their house for at least 180 and are forced to move as a result of the condemnation. VA. CODE § 25.1-409.

