

## MAY A CONDEMNOR COMPEL A LANDOWNER TO ACCEPT LAND AS A COMPONENT OF JUST COMPENSATION?

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In a recent eminent domain action, the Virginia Department of Transportation (VDOT) asserted that it could include the conveyance of adjacent parcels of land to a condemnee as a component of just compensation. The Landowner objected, stating that it was entitled to compensation solely in the form of money. The case was settled before the court opined, but the idea of conveying surplus VDOT land to a landowner will surely occur again. Whether or not VDOT can compel a landowner to accept land as part of just compensation is an important question.

In *Commissioner of Highways v. Lomas, LLC*,<sup>1</sup> VDOT took approximately a half acre of land from a 5-acre shopping center for the widening of U.S. Route 1 in the Woodbridge area. The taking eliminated many parking spaces; VDOT’s initial appraisal was for \$4.2 million, including a large damage component. VDOT then sent a revised appraisal of \$1.5 million with the following extraordinary assumption: VDOT would, and could, convey about 24,000 square feet of land it acquired from the neighboring landowners to mitigate the loss of parking as part of the just compensation. In short, VDOT sought to satisfy the constitutional right to just compensation by tendering “replacement land.”

It is firmly established that eminent domain statutes (or any statute affecting an individual’s private property rights) must be strictly construed by Virginia courts.<sup>2</sup> The relevant statutes, in turn, require that condemners offer the landowner, and “deposit” with the Court, an “amount” that estimates “the fair value of the land taken, or interest therein, or damage done.”<sup>3</sup> An “amount” that can be “deposited” is clearly a reference to monetary compensation, and cannot be reasonably construed to include an interest, right or ownership in some other piece of real property. Of course, a landowner can agree to a land swap, but it cannot be coerced.

Although Virginia courts have not directly addressed the propriety of non-monetary compensation in a proceeding initiated under existing eminent domain statutes, the Virginia Supreme Court in a related context indicated that this is *not* an acceptable practice. In *Louisville & Nashville R.R. Co. v. Interstate R.R. Co.*,<sup>4</sup> two railway companies disputed the placement of a cross section to connect

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<sup>1</sup> *Commissioner of Highways v. Lomas, LLC*, CL-15-634 (Prince William County Circuit Court),

<sup>2</sup> *Mahan v. NCPAC*, 227 Va. 2330 (1984); *Charlottesville v. Maury*, 96 Va. 383 (1898).

<sup>3</sup> Va. Code §§ 25.1-417, 33.2-1001, -1019(B).

<sup>4</sup> *Louisville & Nashville R.R. Co. v. Interstate R.R. Co.*, 108 Va. 502 (1908)

their respective rail tracks.<sup>5</sup> When it became clear the parties could not agree, the Virginia State Corporation Commission made a determination that required connecting track to be constructed through Louisville's property, not Interstate's. Louisville argued that this resolution, ordered by the State Corporation Commission, amounted to a taking and required just compensation to be paid by Interstate. The Court agreed. Moreover, the fact that the tracks could be used by *both* railway companies, including Louisville—in essence giving each an equal right and interest in the tracks—was not sufficient to constitute compensation. The Court clarified the meaning of just compensation: "Being entitled to compensation for its lands taken or used...the appellant was entitled to payment thereof in the manner prescribed by law—that is, in money."<sup>6</sup> The Court went on: "We know of no authority or power by which a person, whether individual or corporation, can be deprived of his property for a public use and be compelled to take as compensation therefor rights or interests, however valuable they may be..."<sup>7</sup>

In *Nichols on Eminent Domain*, viewed by the Virginia Supreme Court as the leading treatise on eminent domain, the authors plainly state, "no just compensation can be made except *in money*."<sup>8</sup> The treatise even goes on to clarify, "land or anything else may be compensation, but it must be at the election of the party."<sup>9</sup> American Jurisprudence states: "Generally a condemnor cannot force a condemnee to accept compensation in any form other than money."<sup>10</sup> Similarly, in *Dunlick*, the Supreme Court of Idaho held "the condemnor cannot force an exchange of land, nor require the condemnee to purchase other lands in lieu of that taken, nor pay for the land taken and damages to the remainder in anything except cash."<sup>11</sup>

In *Lomas*, *supra*, the landowner argued that VDOT could not compel it to take replacement land as a component of just compensation. Concluding otherwise would require Virginia to depart from a strict construction of Virginia statutes, *Louisville*, and from a principle widely accepted by authoritative treatises, and sister states. In response, VDOT based its argument on a New Jersey case, *State by Comm'nr of Transp. v. Weiswasser*, 693 A.2d 864 (N.J. 1997), which ought to be viewed as an outlier and minority position. *Lomas* settled before the issue was resolved, but it certainly appears that Virginia should follow the majority rule, constraining the state from compelling landowners to take replacement land as a component of just compensation.

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 507.

<sup>7</sup> *Id.*

<sup>8</sup> 3-8 *Nichols on Eminent Domain*, 8.02

<sup>9</sup> *Id.*

<sup>10</sup> 26 Am. Jur. 2d, *Eminent Domain*, § 218.

<sup>11</sup> *State ex. rel. Rich v. Dunlick, Inc.*, 286 P.2d at 1115.