



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II  
Attorney General

January 10, 2014

900 East Main Street  
Richmond, Virginia 23219  
804-786-2071  
FAX 804-786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

Honorable J. Chapman Petersen  
Member, Senate of Virginia  
Post Office Box 1066  
Fairfax, Virginia 22038

Dear Senator Petersen:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issues Presented

You ask several questions regarding the recently amended Article I, § 11, of the Constitution of Virginia, the related legislation contained in §§ 25.1-100 and 25.1-230.1 of the *Code of Virginia*, and a previous opinion of this Office ("Prior Opinion")<sup>1</sup> that concern the power of eminent domain as it relates to just compensation owing for lost access. Specifically,

1. You ask how I reconcile my Prior Opinion and the award of damages in *State Highway & Transportation Commissioner v. Linsly*,<sup>2</sup> where direct access to a public highway was replaced by indirect access via a service road, with the statement in newly enacted § 25.1-230.1 that "[t]he body determining just compensation may not consider an injury or benefit that the property owner experiences in common with the general community, including off-site circuitry of travel and diversion of traffic, arising from an exercise of the police power;"
2. You ask whether a landowner, whose "particular entrance onto his property may be unchanged, is entitled to compensation if the road to which he has direct access is changed to a service drive;"
3. You ask whether the "reasonableness" standard in *State Highway & Transportation Commissioner v. Dennison*<sup>3</sup> remains applicable or whether it has been replaced with "material impairment" under § 25.1-100;
4. You ask whether my Prior Opinion, concluding that the holding of *State Highway Commissioner v. Easley*<sup>4</sup> would not bar a damage claim due to installation of a median or other traffic regulation in a

---

<sup>1</sup> 2012 Op. Va. Att'y Gen. 37.

<sup>2</sup> *State Highway & Transp. Comm'r v. Linsly*, 223 Va. 437, 290 S.E.2d 834 (1982).

<sup>3</sup> *State Highway & Transp. Comm'r v. Dennison*, 231 Va. 239, 343 S.E.2d 324 (1986).

<sup>4</sup> *State Highway Comm'r v. Easley*, 215 Va. 197, 207 S.E.2d 870 (1974).

case where the loss of access occurs conjointly with a taking or damaging of the property, still applies in light of the definition of "lost access" provided in §§ 25.1-100 and 25.1-230.1;<sup>5</sup> and

5. You ask if the determinations of whether there is a material impairment of access and/or whether property owners are entitled to just compensation for lost access, as defined under §§ 25.1-100 and 25.1-230.1, will be made by judges as legal findings or by juries/commissioners as factual findings.

### Response

It is my opinion that:

1. The holding in *Linsly* and the views expressed in my Prior Opinion remain valid after the adoption of § 25.1-230.1, especially in light of the express statement made in § 25.1-100 by the General Assembly that its statutory definition of "lost access" neither diminishes any existing right or remedy nor creates any new right or remedy, other than to allow the body determining just compensation to consider a change in access in awarding just compensation;

2. Whether any particular change in access to a specific landowner's property constitutes compensable lost access is a fact-dependent question and, therefore, is properly a matter for the body determining just compensation to resolve, based on the evidence in each case;

3. The "reasonableness" standard articulated in *Dennison* is not in conflict with the new statutory definition of "lost access" in § 25.1-100 as being a "material impairment of direct access to property" and, thus, the reasonableness standard and the statutory definition may be read together in determining whether a change in access constitutes compensable lost access caused by the taking or damaging of private property for public use;

4. The holding in *Easley* and the views expressed in my Prior Opinion remain valid after the enactment of the General Assembly's definition of "lost access" in § 25.1-230.1(B); where a loss of access occurs conjointly with a taking or damaging of private property, just compensation may include damages for lost access unless the body determining just compensation finds that the injury sustained is one "the property owner experiences in common with the general community, including off-site circuitry of travel and diversion of traffic, arising from an exercise of the police power;" and

5. Whether there is a material impairment of direct access and whether a property owner is entitled to just compensation for lost access are questions of fact properly left to the body determining just compensation, unless the facts in a specific case lead the court to conclude that reasonable persons cannot differ, in which circumstance the court may proceed with the determination as a matter of law.

### Background

After passage in the 2011 and 2012 Sessions of the General Assembly, and successful presentation to the voters of the Commonwealth, Article I, § 11, of the Constitution of Virginia was amended as follows:

Section 11. Due process of law; obligation of contracts; taking *or damaging* of private property; prohibited discrimination; jury trial in civil cases.

---

<sup>5</sup> I respectfully disagree with your inquiry's characterization of the Prior Opinion. I previously stated that the holding in *Easley* would allow a damage claim due to lost access—not traffic regulation—occurring conjointly with a taking or damaging of the property. See 2012 Op. Va. Att'y Gen. 37, 45.

That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, ~~nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly;~~ and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

*That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use. Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking. The terms "lost profits" and "lost access" are to be defined by the General Assembly. A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services. In all other cases, a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property. The condemnor bears the burden of proving that the use is public, without a presumption that it is.<sup>[6]</sup>*

On January 1, 2013, complementary legislation defining the term "lost access" and providing procedures to determine the just compensation related thereto also became law.<sup>7</sup> These new statutory provisions now provide, in pertinent part, that

"Lost access" means a material impairment of direct access to property, a portion of which has been taken or damaged as set out in subsection B of § 25.1-230.1. This definition of the term "lost access" shall not diminish any existing right or remedy, and shall not create any new right or remedy other than to allow the body determining just compensation to consider a change in access in awarding just compensation.<sup>[8]</sup>

The body determining just compensation shall include in its determination of damage to the residue any loss in market value of the remaining property from lost access caused by the taking or damaging of the property. The body determining just compensation shall ascertain any reduction in value for lost access, if any, that may accrue to the residue (i) beyond the enhancement in value, if any, to such residue as provided in subdivision A 1 of § 25.1-230, or (ii) beyond the peculiar benefits, if any, to such other property as provided in subdivision A 2 of § 25.1-230, by reason of the taking and use by the petitioner. If such peculiar benefit or enhancement in value shall exceed the reduction in

---

<sup>6</sup> See 2011 Va. Acts ch. 757; and 2012 Va. Acts chs. 736, 738.

<sup>7</sup> See 2012 Va. Acts chs. 699, 719.

<sup>8</sup> VA. CODE ANN. § 25.1-100 (Supp. 2013).

value, there shall be no recovery against the landowner for such excess. The body determining just compensation may not consider an injury or benefit that the property owner experiences in common with the general community, including off-site circuitry of travel and diversion of traffic, arising from an exercise of the police power. The body determining just compensation shall ensure that any compensation awarded for lost access shall not be duplicated in the compensation otherwise awarded to the owner of the property taken or damaged.<sup>[9]</sup>

Any and all liability for lost access and lost profits shall be established and made a part of the award of just compensation for damage to the residue of the property taken or damaged.<sup>[10]</sup>

### Applicable Law and Discussion

On January 26, 2012, subsequent to the passage of the first reference of the constitutional amendment, but prior to the enactment of legislation defining "lost access," I answered several questions related to the impact of the proposed constitutional amendment on existing eminent domain jurisprudence.<sup>11</sup> In light of the Prior Opinion and the passage of the legislation, I turn now to your specific queries.

#### I.

First, you ask whether the principles stated in *Linsly* remain valid law after the General Assembly enacted § 25.1-230.1 to provide that "[t]he body determining just compensation [for a taking or damaging of private property] may not consider an injury or benefit that the property owner experiences in common with the general community, including off-site circuitry of travel and diversion of traffic, arising from an exercise of the police power."<sup>12</sup> I see no conflict between the established precedent contained in *Linsly* and the new statutory provisions defining "lost access."

*Linsly* concerned the conversion of an existing highway into a limited access highway. As a result of the project, the Commissioner of Highways (the "Commissioner") acquired 0.48 acre of land and easements resulting in the extinguishment of the landowner's direct highway access.<sup>13</sup> The Commissioner planned to substitute direct highway access with indirect access via a newly constructed service road.<sup>14</sup> The Court found that just compensation to the landowner for the damaged residue "is the difference between the value of the residue immediately before and immediately after the taking" and that the determination should include any change of value to the residue resulting from the substituted access.<sup>15</sup> The Court distinguished the substitute access at issue in *Linsly* from other cases where direct access was merely reduced or limited.<sup>16</sup> As discussed in the Prior Opinion of this Office:

---

<sup>9</sup> Section 25.1-230.1(B) (Supp. 2013).

<sup>10</sup> Section 25.1-230.1(D).

<sup>11</sup> 2012 Op. Va. Att'y Gen. 37.

<sup>12</sup> Section 25.1-230.1(B).

<sup>13</sup> *Linsly*, 223 Va. at 439, 290 S.E.2d at 835.

<sup>14</sup> *Id.* at 439-40, 290 S.E.2d at 835-36.

<sup>15</sup> *Id.* at 444, 290 S.E.2d at 839.

<sup>16</sup> *Id.* at 441-44, 290 S.E.2d at 837-39.

[a]n easement of access to a public road (generally, an easement by implication) is a property interest, and its extinguishment by the Commonwealth or a locality under powers of eminent domain would be a form of “damage” in a legal sense. In . . . *Linsly*, the landowner has lost his abutter’s easement of access to a major public highway, a substantive property right, resulting in damage in the legal sense. The damage suffered entitles the landowner to just compensation.<sup>[17]</sup>

Prior to the amendment of Article I, § 11 and the new statutory provisions defining “lost access,” courts declined to permit a property owner to submit to the body determining just compensation (jury or commission)<sup>18</sup> evidence of damages caused by lost access unless the case involved an extinguishment of direct access.<sup>19</sup> The Virginia Constitution now expressly states that lost access is a component of just compensation to be provided in the taking or damaging of private property and directs the General Assembly to define the term “lost access” by statute.<sup>20</sup> The General Assembly now has defined compensable “lost access” more broadly than the extinguishment of direct access.<sup>21</sup> The effect of the new law, as I discuss below, is that a jury or commission determining just compensation now will consider evidence regarding lost access damages even in cases where direct access is not extinguished. The legislature signaled that intention with its qualification in § 25.1-100 that the new “lost access” definition “shall not diminish any existing right or remedy, and shall not create any new right or remedy *other than* to allow the body determining just compensation to consider a change in access in awarding just compensation.”<sup>22</sup> This qualification also signals the legislature’s intention that, except in instances of conflicts (notably, for example, the question of when a jury or commission may consider evidence of damage sustained by lost access), existing eminent domain statutes and the related body of case law remain applicable, including *Linsly*.<sup>23</sup>

It will be the responsibility of the empanelled jury or commission determining just compensation to weigh the evidence and make the necessary findings of fact, guided by instructions from the court consistent with Article I, § 11, the eminent domain statutes, and the related body of case law. In accordance with directions provided by the General Assembly in its new enactments, this fact finding will include determinations of whether the taking or damaging of the property has resulted in “a material impairment of direct access to property”<sup>24</sup> and whether that impairment is “an injury . . . that the property

---

<sup>17</sup> 2012 Op. Va. Att’y Gen. at 44.

<sup>18</sup> “Body determining just compensation” is defined in § 25.1-100 to mean “a panel of commissioners empanelled pursuant to § 25.1-227.2, jury selected pursuant to § 25.1-229, or the court if neither a panel of commissioners nor a jury is appointed or empanelled.” This statutory definition applies to the legal analysis and discussion of this Opinion.

<sup>19</sup> See *Easley*, 215 Va. at 203, 207 S.E.2d at 874-75 (finding that the trial court erred in permitting commissioners to consider as an element of damages the reduction in access of the parcels to Route 58).

<sup>20</sup> VA. CONST. art. I, § 11 (“Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking. The terms “lost profits” and “lost access” are to be defined by the General Assembly.”).

<sup>21</sup> Section 25.1-100 (“‘Lost access’ means a material impairment of direct access to property, a portion of which has been taken or damaged as set out in subsection B of § 25.1-230.1.”).

<sup>22</sup> Section 25.1-100 (emphasis added).

<sup>23</sup> See 2012 Op. Va. Att’y Gen. at 42 (“Except to the extent of conflicts with the Amendment, the vast majority of our existing eminent domain statutes and related body of case law should remain applicable.”).

<sup>24</sup> Section 25.1-100.

owner experiences in common with the general community, including off-site circuitry of travel and diversion of traffic, arising from an exercise of the police power.”<sup>25</sup>

In your question, you highlight one sentence from the new enactments; however, “[a] statute is not to be construed by singling out a particular phrase[, for] every part is presumed to have some effect and is not to be disregarded unless absolutely necessary.”<sup>26</sup> Principles of statutory construction require that statutes related to a similar subject be construed together in order to achieve a harmonious result.<sup>27</sup> Consequently, the sentence to which you point is properly interpreted in the context of both the amended Article I, § 11 and the related statutory provisions in §§ 25.1-100 and 25.1-230.1.

In my opinion, the new statute’s provision related to injuries experienced in common with the general community and arising from an exercise of the police power would not have changed the result in *Linsly*. *Linsly* involved the extinguishment of an abutter’s easement of access - a property interest, and the court held that the extinguishment constituted a compensable taking. *Linsly* did not address an injury arising from the exercise of police power and experienced in common with the general community; therefore, the provisions you emphasize in the new statute would not have applied in that case. A landowner’s right to just compensation arises from the taking or damaging of property, not the exercise of the police power by the regulation of traffic. Accordingly, under both *Linsly* and the new statute, there is a right to just compensation where there is a taking or damaging of property, but not where there is only the exercise of the police power in the regulation of traffic.

## II.

Your second question asks whether a landowner is entitled to just compensation for lost access if the entrance to his property remains unchanged, but the road to which he has access is changed. Such a determination may involve a number of factors based on more detailed information than you have provided.<sup>28</sup> Accordingly, an answer to your question would require factual determinations that, under

---

<sup>25</sup> Section 25.1-230.1(B). I note that this latter determination is a codification of existing case law and does not represent a change in how just compensation is determined as regards lost access damages. See *State Highway Comm’r v. Howard*, 213 Va. 731, 732, 195 S.E.2d 880, 881 (1973) (“[A]n abutting landowner cannot recover damages for interference with his right of access by the installation of a median strip on a four-lane highway because the abutter has no property right in the continuance or maintenance of the flow of traffic past his property. Circuitry of route imposed upon the abutter, resulting from the exercise of a police power in the regulation of traffic, is an incidental result of a lawful act. It is not the taking or damaging of a property right.”).

<sup>26</sup> See *Jeneary v. Commonwealth*, 262 Va. 418, 430, 551 S.E.2d 321, 327 (2001) (quoting *Commonwealth v. Zamani*, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998)).

<sup>27</sup> See *Prillaman v. Commonwealth*, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957) (“statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of ... a single and complete statutory arrangement”).

<sup>28</sup> For example, it is unclear from your inquiry whether your hypothetical situation envisions a circumstance where no land is taken. Nonetheless, I note that a property owner may be able to recover just compensation if the jury or commission determines that, as a result of lost access, irrespective of any taking of land, a damaging of the property has occurred in the legal sense. See *Potomac Elec. Power Co. v. Fugate*, 211 Va. 745, 749-50, 180 S.E.2d 657, 660 (1971) (“[T]he word ‘damaged’ as used in [the Virginia Constitution’s eminent domain provision] means damaged in the legal sense, that is, damage resulting from a legal invasion, as opposed to a mere physical invasion, of property or property rights. The constitutional requirement of compensation does not ... import the necessity of payment in every case where financial loss, giving the word ‘damage’ its ordinary rather than its legal meaning, might be shown as the result of a public undertaking.”); *Richmeade, L.P. v. City of Richmond*, 267 Va. 598, 602-03, 594 S.E.2d 606, 609 (2004) (“Taking or damaging property in the constitutional sense means that the governmental action adversely affects the landowner’s ability to exercise a right connected to the property.”). Since 1902, when

current law, a jury or commission now will make. Attorneys General decline to render opinions where the request involves a matter that requires a factual determination or is a question of fact rather than of law.<sup>29</sup> Consequently, I respectfully must decline to render an opinion on whether a landowner would be entitled to just compensation for lost access in the circumstance you present. Instead, as the Virginia Supreme Court has observed, “[i]t will be for commissioners and juries, under the supervision of the courts, to determine upon the facts of each case whether or not there has been such damage to property as should be compensated.”<sup>30</sup>

### III.

Your third question asks whether the “reasonableness” standard relating to access has been replaced with a “material impairment” standard from the new statutory definition of “lost access.” The “reasonableness” standard arises, in part, from the Virginia Supreme Court’s ruling in *State Highway & Transportation Commissioner v. Dennison*.<sup>31</sup> In *Dennison*, the Court agreed with a jury instruction providing that:

[T]he owner of land abutting a public highway is only entitled to *reasonable access* to his property. His rights of access are subordinate to the right of the State to control traffic over its highways. If you find that the landowners in this case will have *reasonable access* to the property after the construction of this project, you shall not make any awards for residue damages that might result from a change in access.<sup>32]</sup>

Although the new constitutional and statutory language does not employ the same terminology as the reasonableness standard stated in *Dennison*, it is unnecessary to find a conflict between the two. Indeed, it is quite possible to read the provisions together as complementary.

While the *Dennison* rule bars compensation if reasonable access remains, the new statutory language requires compensation if the taking includes a material impairment of direct access. The General Assembly has not provided a definition for either “material” or “reasonable.” In the absence of such a statutory definition, the plain and ordinary meaning of a term is controlling.<sup>33</sup> The word “material”

---

the Virginia Constitution first included the term “damaged” in its eminent domain provision, VA. CONST. of 1902, art. IV, § 58 (“The General Assembly ... shall not enact any law whereby private property shall be taken *or damaged* for public uses, without just compensation.”) (emphasis added), Virginia has recognized that just compensation may be appropriate in some circumstances where no taking of property occurs. See *Tidewater Ry. Co. v. Shartzter*, 107 Va. 562, 572-73, 59 S.E. 407, 411 (1907) (finding a property owner, no part of whose land is taken, nevertheless entitled to compensation for diminished value of property from a railroad whose nearby operation generated smoke, noise, dust and cinders). But see *Byler v. Va. Elec. & Power Co.*, 284 Va. 501, 731 S.E.2d 916 (2012) (rejecting property owners’ claims for damages for diminished value of their properties from the blighting effects of nearby electric transmission lines; “[t]here must be some ‘damage to the property itself, [that] does not include a mere infringement of the owner’s personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution.’”) (quoting *Shartzter*, 107 Va. at 571, 59 S.E. at 410).

<sup>29</sup> See, e.g., Ops. Va. Att’y Gen.: 2009 at 77, 79; 2006 at 19, 24; 1999 at 132, 132-33; 1991 at 122, 124; 1986-87 at 1, 6.

<sup>30</sup> *Tidewater Ry. Co. v. Shartzter*, 107 Va. 562, 574, 59 S.E. 407, 411 (1907).

<sup>31</sup> *Dennison*, 231 Va. at 246, 343 S.E.2d at 328-29.

<sup>32</sup> *Id.* (emphasis added).

<sup>33</sup> See, e.g., *Sansom v. Bd. of Supvrs.*, 257 Va. 589, 594-95, 514 S.E.2d 345, 349 (1999); *Commonwealth v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980).

means "having real importance or great consequences," and the word "reasonable" means "moderate" or "fair."<sup>34</sup> I am of the opinion that the standards may be read together. If a jury or commission were to find reasonable access to remain after a taking, the jury or commission logically also could conclude the impairment not to be material. Alternatively, if a jury or commission were to find the impairment to be of real importance or great consequence, the jury or commission likely would not find remaining direct access to be moderate or fair considering the circumstances of the taking.

IV.

You also ask for confirmation of my Prior Opinion as it related to the holding in *Easley*, which I restate here for the purpose of clarity:

The proposed [constitutional] Amendment will not change the rule in *Easley* for cases where a median or other regulation of traffic leads to diminished access and there is no taking or damaging of property. In such cases, no just compensation, including lost profits or lost access, would be due because the median or other traffic regulation would be an exercise of the police power and not an exercise of the power of eminent domain. In cases, however, where a loss of access occurs conjointly with a taking or damaging of private property, the [constitutional] Amendment provides that just compensation will include damages for the lost access. Under the [constitutional] Amendment, the term "lost access," and thus the degree of loss that will qualify for compensation, is to be defined by the General Assembly. The property owner will have the opportunity to present evidence of the damages sustained as a result of the lost access to the body determining just compensation, but in any event, the property owner will have to show that the lost access has resulted in a diminution of value in the residue property in order to receive compensation for that damage.<sup>[35]</sup>

These conclusions remain unchanged. As discussed in the Prior Opinion, "[a]n abutting landowner's right of access to a public road is subordinate to the police power of the state reasonably to control the use of streets so as to promote the public health, safety, and welfare,"<sup>36</sup> and no compensation is due to the owner of property abutting a public road "when the state, in the exercise of its police powers, reasonably regulates the flow of traffic on the highway."<sup>37</sup> Neither the recent constitutional amendment nor the accompanying statutes appear to have changed the rule in *Easley* for cases where a median or other regulation of traffic leads to diminished access and there is no taking or damaging of property. "In such cases, no just compensation, including lost profits or lost access, would be due because the median or other traffic regulation would be an exercise of the police power and not an exercise of the power of eminent domain."<sup>38</sup> To be clear, "the abutter has no property right in the continuance or maintenance of the flow of traffic past his property."<sup>39</sup> In its definition of "lost access," the General Assembly chose to continue this distinction by prohibiting compensation for "an injury . . . that the property owner

---

<sup>34</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 717, 974 (10th ed. 1994).

<sup>35</sup> 2012 Op. Va. Att'y Gen. at 45.

<sup>36</sup> *Easley*, 215 Va. at 203, 207 S.E.2d at 875 (citing *Wood v. Richmond*, 148 Va. 400, 138 S.E. 560 (1927) (closing one service station's curb cut to a public street is a non-compensable act of the police power)).

<sup>37</sup> *Id.*

<sup>38</sup> 2012 Op. Va. Att'y Gen. 37, 44-45.

<sup>39</sup> *Howard*, 213 Va. at 732, 195 S.E.2d at 881.

experiences in common with the general community, including off-site circuitry of travel and diversion of traffic, arising from an exercise of the police power.”<sup>40</sup>

V.

Your final two inquiries address whether certain findings are legal questions to be determined by the court or factual questions to be presented to the finder of fact. Specifically, you ask if the determination of whether there is a material impairment of access and/or whether property owners are entitled to just compensation for lost access, are legal findings or factual findings. To reiterate the current law, a property owner is entitled to just compensation related to lost access if he suffers a material impairment of direct access to his property arising from an exercise of eminent domain.<sup>41</sup> Necessarily, if the taking or damaging has caused a material impairment to direct access, then the property owner is entitled to just compensation calculated as the loss of value to the residue.<sup>42</sup> The threshold question, then, is whether there has been a material impairment of access to the property caused by the taking or damaging.

Although the General Assembly did not explicitly state whether the determination of material impairment is a factual or legal finding, determining “materiality” or the state of having “real importance or great consequences”<sup>43</sup> would appear to be an inherently fact-dependent exercise.<sup>44</sup> Generally, “[i]t is only when the issue is one about which reasonable persons cannot differ—the question so plain in the meaning and interpretation that should be given to it—that no doubt is admitted of its legal significance and effect, that it becomes a question of law for the courts to determine.”<sup>45</sup> The question of material impairment, then, in my opinion, is one of fact unless the facts in a specific case lead the court to find that reasonable persons cannot differ, in which case the court may proceed with the determination as a matter of law.<sup>46</sup> Once the fact finder, or the court, finds a material impairment of direct access amounting to lost access, “[t]he body determining just compensation shall include in its determination of damage to the residue any loss in market value of the remaining property from lost access caused by the taking or damaging of the property.”<sup>47</sup>

---

<sup>40</sup> Section 25.1-230.1(B).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See *supra* note 46 and accompanying text.

<sup>44</sup> See *e.g.* Panther Coal Co. v. Looney, 185 Va. 758, 768, 40 S.E.2d 298, 303 (1946) (“Whether an owner’s use of the water on his own land that afterwards flows through a neighbor’s land is a reasonable use, and whether damage resulting to a lower riparian owner is material and substantial, are in their nature primarily jury questions, and where there is evidence which the jury might reasonably believe and from which they may draw reasonable inferences, their verdict, approved by the trial court, may not properly be disturbed.”).

<sup>45</sup> Speer v. Kellam, Adm’r, 204 Va. 893, 898, 134 S.E.2d 300, 304 (1964) (quoting Whitfield v. Dunn, 202 Va. 472, 476, 117 S.E.2d 710, 713 (1961)).

<sup>46</sup> Moses v. Southwestern Va. Transit Mgmt. Co., 273 Va. 672, 678, 643 S.E.2d 156, 160 (2007) (“The issue becomes one of law for the circuit court to decide only when reasonable minds could not differ about what conclusion could be drawn from the evidence.”) (quoting Jenkins v. Pyles, 269 Va. 383, 389, 611 S.E.2d 404, 407 (2005)).

<sup>47</sup> Section 25.1-230.1(B).

### Conclusion

Accordingly, it is my opinion that:

1. The holding in *Linsly* and the views expressed in my Prior Opinion remain valid after the adoption of § 25.1-230.1, especially in light of the express statement made in § 25.1-100 by the General Assembly that its statutory definition of “lost access” neither diminishes any existing right or remedy nor creates any new right or remedy, other than to allow the body determining just compensation to consider a change in access in awarding just compensation;
2. Whether any particular change in access to a specific landowner’s property constitutes compensable lost access is a fact-dependent question and, therefore, is properly a matter for the body determining just compensation to resolve, based on the evidence in each case;
3. The “reasonableness” standard articulated in *Dennison* is not in conflict with the new statutory definition of “lost access” in § 25.1-100 as being a “material impairment of direct access to property” and, thus, the reasonableness standard and the statutory definition may be read together in determining whether a change in access constitutes compensable lost access caused by the taking or damaging of private property for public use;
4. The holding in *Easley* and the views expressed in my Prior Opinion remain valid after the enactment of the General Assembly’s definition of “lost access” in § 25.1-230.1(B); where a loss of access occurs conjointly with a taking or damaging of private property, just compensation may include damages for lost access unless the body determining just compensation finds that the injury sustained is one “the property owner experiences in common with the general community, including off-site circuitry of travel and diversion of traffic, arising from an exercise of the police power;” and
5. Whether there is a material impairment of direct access and whether a property owner is entitled to just compensation for lost access are questions of fact properly left to the body determining just compensation, unless the facts in a specific case lead the court to conclude that reasonable persons cannot differ, in which circumstance the court may proceed with the determination as a matter of law.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II  
Attorney General