

WEST VIRGINIA EMINENT DOMAIN¹

The West Virginia State Bar, Young Lawyers Section

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I. EMINENT DOMAIN AND CONDEMNATION DEFINED

“Eminent domain” is “[t]he inherent power of a governmental entity to take privately owned property, esp[ecially] land, and convert it to public use, subject to reasonable compensation for the taking,”² whereas “condemnation” is the legal proceeding that an entity files in the exercise of its eminent domain power to take private property for public use.³

Neither the United States Constitution nor the West Virginia Constitution expressly vest the government with the power of eminent domain. The Fifth Amendment to the United States Constitution states, “nor shall private property be taken for public use, without just compensation.”⁴ Similarly, Article III, Section 9 of the West Virginia Constitution provides:

Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner, as may be prescribed by general law; provided, that when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.

Despite the lack of express constitutional authorization, both the Supreme Court of the United States and the Supreme Court of Appeals of West Virginia have recognized that the power of eminent domain is an inherent and necessary attribute of federal and state sovereignty,

² *Eminent Domain*, BLACK’S LAW DICTIONARY (10th ed. 2014); *see also* Gomez v. Kanawha County Commission, 237 W. Va. 451, 459, 787 S.E.2d 904, 912 (2016) (“Eminent domain is the power of the State to take or damage private property for a public purpose upon payment of just compensation.”).

³ *See Condemnation and Condemnation Proceeding*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁴ U.S. CONST. amend. V. The Supreme Court of the United States reasoned that “the fifth amendment’s limitation on taking private property is a tacit recognition that the power to take private property exists.” JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.11 (4th ed. 1991) (citing Bauman v. Ross, 167 U.S. 548, 574 (1897)).

respectively.⁵ The relevant constitutional provisions providing for just compensation establish limits on the exercise of this inherent and important power.⁶ By enacting Chapter 54 of the West Virginia Code, the West Virginia Legislature⁷ more precisely defined the contours and limitations of this inherent power.

With this background in mind, the remainder of this handbook will discuss the highlights of the substantive and procedural aspects of eminent domain and condemnation under West Virginia law.

II. ENTITIES VESTED WITH THE POWER OF EMINENT DOMAIN

Pursuant to West Virginia Code Section 54-1-1, the power of eminent domain can be exercised by the United States, the State of West Virginia, local governments created pursuant to West Virginia law, and every corporation organized under West Virginia law or authorized to transact business in West Virginia “for any purpose of internal improvement for which private property may be taken or damaged for public use” under Section 54-1-2.

West Virginia Code Section 54-1-2(a) sets forth the “public uses for which private property may be taken or damaged.” Those public uses include, for example, the construction,

⁵ See Bauman, 167 U.S. at 574 (“The right of eminent domain . . . is the offspring of political necessity, and is inseparable from sovereignty unless denied to it by its fundamental law. It cannot be exercised except upon condition that just compensation shall be made to the owner; and it is the duty of the state, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it.” (quotations omitted)); *State ex rel. Dep’t of Nat. Res. v. Cooper*, 152 W. Va. 309, 312, 162 S.E.2d 281, 283 (1968) (“While the power of eminent domain is alluded to in Article III, Section 9 of the Constitution of West Virginia, such section is not the source of that power. The right of the state to take or damage property for public use is an inherent attribute of sovereignty and is not dependent upon constitutional or statutory provisions.”); see also Gomez, 237 W. Va. at 459, 787 S.E.2d at 912 (“The right of the State to take private property for public purposes is an inherent attribute of sovereignty, irrespective of any constitutional or statutory provision.” (footnote omitted)).

⁶ See *Cooper*, 152 W. Va. at 313, 162 S.E.2d at 283.

⁷ See Gomez, 237 W. Va. at 459, 787 S.E.2d at 912 (“The right of eminent domain may be delegated and vested by the Legislature in the various subdivisions of the State, such as counties and regional airport authorities.” (footnote omitted)).

maintenance, and operation of public roads, bridges, telephone lines, and railroads.⁸ Eminent domain may also be used for, but is not limited to, other conventional public uses such as government buildings, public schools, libraries, and hospitals.⁹ Further, the public uses for which private property may be taken or damaged include “constructing, maintaining and operating pipelines . . . for manufacturing gas and for transporting petroleum oil, natural gas, manufactured gas, and all mixtures and combinations thereof, by means of pipe . . . when for public use.”¹⁰ The Court has made clear that “whether a use is public or private is to be determined by the character of such use and not by the number of persons who avail themselves of the use.”¹¹ In fact, the Supreme Court of Appeals of West Virginia has held that “[c]ondemnation of private property to erect an electric power transmission line to a single commercial consumer serves a public use.”¹² Moreover, the specific purposes for which the power of eminent domain is conferred are not limited to those enumerated in the West Virginia Code.¹³

⁸ See W. VA. CODE §§ 54-1-2(a)(1)–(2); *see also* State ex rel. Anderson v. Dailer, 140 W. Va. 513, 530, 85 S.E.2d 656, 667 (1955) (citing line of West Virginia cases that “hold that the Legislature has the power to confer upon municipal corporations authority to construct bridges, automobile parking facilities, public hospitals, flood walls, sewer systems, and other public improvements”). For information regarding the state road commissioner’s power of eminent domain, specifically, see W. VA. CODE § 17-17-15 (describing the state road commissioner’s authority to purchase or condemn toll bridges) and § 17-17-18 (describing the state road commissioner’s power of eminent domain, generally).

⁹ See W. VA. CODE §§ 54-1-2(a)(7), (9).

¹⁰ See *id.* §§ 54-1-2(a)(3)–(5).

¹¹ Waynesburg S. R. Co. v. Lemley, 154 W. Va. 728, 736, 178 S.E.2d 833, 838 (1970) (citing Caretta Ry. Co. v. Va.-Pocahontas Coal Co., 62 W. Va. 185, 57 S.E. 401 (1907)).

¹² Syl. Pt. 1, Handley v. Cook, 162 W. Va. 629, 252 S.E.2d 147 (1979).

¹³ See W. VA. CODE § 54-1-11 (“The power of eminent domain conferred on any incorporated company or body politic by sections one and two of this article shall not be deemed or construed to be limited or restricted in any manner by the enumeration by any other provision of this Code of any specific purpose for which such power may be exercised.”).

The question of whether property is being taken for a public use is a question of law for the court, and not a question of fact for a jury.¹⁴ While the traditional “fixed and definite use” test¹⁵ for evaluating whether a taking is for public use was recently called into question, the Supreme Court of Appeals of West Virginia declined to decide the issue.¹⁶

III. CONDEMNATION PRACTICE AND PROCEDURE¹⁷

Practitioners are encouraged to thoroughly review the applicable procedural requirements set forth in West Virginia Code Section 54-2-1, *et seq.*, before instituting or defending an condemnation proceeding. The below provides an overview of the procedures set forth therein.

A. Pre-condemnation Access

Before filing a petition for condemnation, public or private entities vested with the power of eminent domain are permitted to “enter upon lands for the purpose of examining the same, surveying and laying out the lands, ways and easements which [such entities] desire[] to appropriate, provided no injury be done to the owner or possessor of the land.”¹⁸ Without the consent of the owner or possessor of the property, such entities are not permitted to open fences

¹⁴ *Gomez v. Kanawha Cty. Comm’n*, 237 W. Va. 451, 461, 787 S.E.2d 904, 914 (2016).

¹⁵ The Supreme Court of Appeals of West Virginia summarized the fixed and definite use test as follows:

(1) That the use which the public is to have of the property taken must be fixed and definite, and on terms and charges fixed by law; (2) that such public use must be a substantial beneficial one, obviously needful for the public, which it cannot do without, except by suffering great loss or inconvenience; (3) that the necessity for condemnation must be apparent and that the public need must be an imperious one.

Carnegie Nat. Gas Co. v. Swiger, 72 W. Va. 557, 570 79 S.E. 3, 9 (1913).

¹⁶ *Mountain Valley Pipeline, LLC v. McCurdy*, 238 W. Va. 200, 793 S.E.2d 850, 860 (2016) (“While the *Courtland* and *Handley* cases may call into question the fixed and definite use test, the continued viability of that test is a question we need not decide today. What is patently clear is that private property may not be taken for a private use.” (citing *Charleston Urban Renewal Auth. v. Courtland Co.*, 203 W. Va. 528, 509 S.E.2d 569 (1998); *Handley v. Cook*, 162 W. Va. 629, 252 S.E.2d 147 (1979)).

¹⁷ Justice Menis Ketchum published pattern jury instructions for use in civil actions, including condemnation actions. The pattern jury instructions are available at <http://www.courtswv.gov/legal-community/patternJuryInstructions/index.html>.

¹⁸ W. VA. CODE § 54-1-3.

or enclosures on the property, engage in any construction on the property, or otherwise injure the property until obtaining a right of entry to do so as provided in the Code.¹⁹

The State of West Virginia and agencies or political subdivisions thereof have broader pre-condemnation access rights. Upon at least three days' notice to any person residing on the property, the State may, by its authorized agents,

enter and bring necessary or desirable machinery, equipment and tools upon any property, waters and premises in this State, to make thereon such surveys, inspections, examinations, investigations, tests, soundings and drillings as the [State] shall deem necessary or desirable for the purpose for which the property, or an interest or right therein, is proposed to be taken, which shall include, but shall not be limited to, laying out the lands, ways and easements, and acquiring data and information deemed necessary or desirable by the applicant in contemplation of acquiring the property, waters or premises, or an interest or right therein, by the power of eminent domain.²⁰

However, it is “the duty of the [State] to compensate the owner reasonably for the use of his property and to pay him the amount of any actual or demonstrable damages proximately resulting from any such entry or acts.”²¹ Should the owner and the State disagree as to the proper amount of said damages, the State is required to “institute a condemnation proceeding for the purpose of determining the amount thereof, if any.”²²

B. Jurisdiction and Venue

A party seeking to exercise its power of eminent domain by taking private property for a public use through a condemnation action may file a petition for condemnation in “the circuit court . . . of the county in which the estate is situated,” or, if the tract lies in two different

¹⁹ *Id.*

²⁰ W. VA. CODE § 54-1-3a.

²¹ *Id.*

²² *Id.*

counties, “the application in relation thereto may be made in either county.”²³ While state circuit courts appear to be the preferred forum for condemnation proceedings, federal court may also be available if the requirements of diversity-of-citizenship jurisdiction are met.²⁴

C. The Petition

When the condemnor²⁵ seeks to acquire the fee simple title to a parcel of land, all persons who own an interest or estate in the property must be joined as respondents²⁶ in the condemnation proceeding.²⁷ Likewise, when the condemnor seeks to acquire an estate less than fee, all persons who are owners of the lesser estate must be named as respondents, and the petition must state the manner and extent of their respective interests.²⁸ If there are interest owners in the property proposed to be taken whose names are unknown to the condemnor, or the condemnor does not know whether there are any other interest owners in the property, or there are contingent or executory interests or estates that are likely to vest in or open to include persons not in being, the petition should so state, and such persons must be joined “by the

²³ *Id.* § 54-2-1.

²⁴ See 12 WRIGHT & MILLER, FED. PRAC. & PROC. CIV. § 3055 (2d ed. 2017) (“[A] few cases involving the exercise of the power of eminent domain under the law of a state reach the district courts under their diversity-of-citizenship jurisdiction. These cases are governed by the federal procedure, but state laws affecting substantive rights must, of course, be given effect”) (footnotes omitted); 13 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 71.1.03[2][c] (3d ed. 2017) (“While a condemnation action involving the state power of eminent domain may be commenced originally in district court based upon diversity jurisdiction, most cases reaching federal court that involved the state power of eminent domain are actions that were removed from state court to federal court.”); see also *Markham v. City of Newport News*, 292 F.2d 711, 714 (4th Cir. 1961) (“When the controversy was between citizens of different states, the right to remove to a federal court a condemnation proceeding to determine just compensation was upheld notwithstanding the fact that the state’s exercise of its power of eminent domain was an attribute of its sovereignty and despite state statutes providing for such proceedings in designated state courts.” (footnote omitted)). See 28 U.S.C.A. § 1332 for diversity-of-citizenship jurisdictional requirements.

²⁵ The terms “condemnor,” “petitioner,” and “applicant” are used interchangeably throughout this handbook in reference to the entity seeking to exercise the power of eminent domain.

²⁶ The terms “respondent,” “condemnee,” and “defendant” used interchangeably throughout this handbook in reference to the party whose property is the subject of a condemnation proceeding.

²⁷ Syl. Pt. 1, *State by Dep’t of Nat. Res. v. Cooper*, 152 W. Va. 309, 162 S.E.2d 281 (1968). For information regarding the special protections afforded to persons with disabilities see West Virginia Code Section 54-2-4.

²⁸ W. VA. CODE § 54-2-2.

general description of parties unknown.”²⁹ However, the condemnor need not join any person who only has “a contingent or executory interest in the property proposed to be taken” so long as that person is “virtually represented” by another named party or parties.³⁰

In addition to naming the requisite parties, the petition must describe the property sought to be taken, whether in fee or an interest less than fee, “with such particularity as to enable the court to determine that no more property is being appropriated than reasonably necessary for the purpose for which it is being acquired.”³¹ The petition can include more than one parcel of land, but only where the ownership of the parcels is the same; if the ownership of the parcels is different, the parcels must be the subjects of separate proceedings.³² The petition must also state the nature and amount of any liens upon or conflicting claims to the property, the nature and amount of such liens and claims, and the names and residences of the holders of such liens or claims to the extent known to the condemnor.³³ As a practical matter, a condemnor may want to consider naming the sheriff of the relevant county as a respondent in the action to account for any tax liens that may exist on the property.³⁴

²⁹ *Id.*

³⁰ *Id.* This section further provides that failure to join a party with a contingent or executory interest who is virtually represented by another party will not render a condemnation order or decree “erroneous or void because of such nonjoinder.” *Id.*

³¹ Syl. Pt. 2, *Monongahela Power Co. v. Shackelford*, 137 W. Va. 441, 73 S.E.2d 809 (1952); *see also* W. VA. CODE § 54-2-2 (“If an estate less than a fee is proposed to be taken, the petition shall describe with reasonable certainty the particular estate less than fee which it is proposed to take[.]”).

³² *See* W. VA. CODE § 54-2-2; *see also* *State by Dep’t of Nat. Res. v. Cooper*, 152 W. Va. 309, 313, 162 S.E.2d 281, 284 (1968) (“As required by Code, 1931, 54-2-2, as amended, the petitioner proceeded against the owners of the 68 acre tract in one action and in a separate action against the owners of the 15 acre parcel of land.”).

³³ W. VA. CODE § 54-2-2.

³⁴ Those entities who are “required . . . to obtain a certificate of public convenience and necessity for the construction and location of a high voltage transmission line” have an additional pleading requirement: they must “file a certificate or attested copy of such certificate with its petition to condemn real or personal property.” *Id.* § 54-2-2a. Failure to do so will result in the dismissal of the petition for condemnation. *Id.*

D. Notice

West Virginia law requires ten days' notice to "owners, claimants and persons holding liens, whose interests the applicant seeks to condemn,"³⁵ before the court may appoint commissioners or render judgment on the petition,³⁶ and said "notice may be given either before the petition is presented or afterwards."³⁷ However, when the owners of the property proposed to be taken, or persons with other legal interests in it, live outside the State of West Virginia, or their whereabouts or identities are otherwise unknown, notice may be served by a Class II legal advertisement that includes "a specific description of the property in which they are interested that is proposed to be taken, and stating the purpose to which it is intended to be appropriated, and the time and place at which a hearing will be asked upon the application."³⁸ These advertisements must be published in the county where the land sought to be condemned is situated.³⁹ Similarly, "[w]here water is to be taken," a Class II legal advertisement is also required to provide "notice to riparian owners having land below the point at which the water proposed to be taken."⁴⁰

³⁵ *Id.* § 54-2-3.

³⁶ *Adams v. Trustees of Town of Clarksburg*, 23 W. Va. 203, 209 (1883) ("[T]herefore the court could not under such circumstances appoint such commissioners; their power to do so could only be called into action upon proof of at least ten days' personal service of notice on the land-owners, or their appearance and waiver of such notice."); *Syl. Pt. 3, Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.*, 17 W. Va. 812, 812 (1881) ("Before the court can enter judgment upon an application made to appropriate land to public use, the owner of the land must have notice of such application; but at whatever stage of the proceedings the owner of the land is notified to appear, after such notice he has the right to contest the appropriation of his land to the petitioner's use.").

³⁷ *Id.* § 54-2-3. When filing a condemnation petition, "the applicant may [also] file a notice of the pendency of such proceeding." *Id.* § 54-2-4a. Filing a notice of *lis pendens* makes "every purchaser or encumbrancer whose conveyance or encumbrance is not then recorded or docketed . . . a subsequent purchaser or encumbrancer" making them "bound by the proceeding to the same extent and in the same manner as if he were a party therein." *Id.*; *see also* W. VA. CODE § 55-11-2 (detailing the requisite contents of the notice of *lis pendens* and procedures for the recordation and indexing thereof).

³⁸ W. VA. CODE § 54-2-3.

³⁹ *Id.*

⁴⁰ *Id.*

E. Entry Upon Posting of Bond and Vesting of Defeasible Title

1. State Entities

Under Section 54-2-14a, the State of West Virginia, or any of its political subdivisions, petitioning for condemnation may “acquire title to, and enter upon, take possession of, appropriate and use the property, or interest or right therein, sought to be condemned for the purposes stated in the petition” so long as “the court or judge is satisfied that the purpose for which the property or interest or right therein, is sought to be condemned is a public use for which private property may be appropriated on compensating the owner.”⁴¹ But before it can enter the land, the applicant must “pay into court such sum as it shall estimate to be the fair value of the property, or estate, right, or interest therein, sought to be condemned, including, where applicable, the damages, if any, to the residue beyond the benefits, if any, to such residue, by reason of the taking.”⁴²

Once the payment is made, “the title to the property, or interest or right therein, sought to be condemned, shall be vested in the applicant.”⁴³ Accordingly, at the applicant’s request, the court or judge must “make an order permitting the applicant at once to enter upon, take possession, appropriate and use the property, or interest or right therein, sought to be condemned for the purposes stated in the petition.”⁴⁴ However, once the applicant enters upon, takes

⁴¹ *Id.* § 54-2-14a.

⁴² *Id.* In some instances, the condemnee may be liable for the costs of the condemnation proceeding. *Id.* (“If the amount allowed by the report of the condemnation commissioners, or the verdict of the jury, if there be one, does not exceed the sum paid into court and it shall appear that the latter amount was tendered by the applicant to the defendant prior to the institution of the proceeding, the defendant shall pay the costs of the proceeding in the trial court unless the refusal to accept the tender was based on some ground other than that of insufficiency of compensation and any damages.”).

⁴³ W. VA. CODE § 54-2-14a.

⁴⁴ *Id.*

possession of, and begins working on the property, the applicant is prohibited from abandoning the condemnation proceeding.⁴⁵

Upon petition to the court or judge, any person entitled to the estimated compensation paid into court may

be paid his pro rata share of the money paid into court, or a portion thereof, as ordered by the court or judge, but the acceptance of such payment shall not limit the amount to be allowed by the report of the condemnation commissioners, or the verdict of a jury, if there be one.⁴⁶

If the applicant's payment exceeds the compensation ascertained by the commissioners or jury, the persons who already received their estimated pro rata share of compensation must repay their pro rata share of excess compensation, but without interest.⁴⁷ In addition, "[i]f the applicant has the right to abandon the proceeding and does so," the persons who already received their estimated pro rata share of compensation must similarly repay it without interest.⁴⁸ Conversely, if the applicant owes more than what it has already been paid, then the applicant may, within three months, pay the remaining amount plus ten percent interest into the court.⁴⁹ After the condemnation applicant has paid the excess amount, the "title to the property, or interest or right therein . . . shall be absolutely and indefeasibly vested in the applicant in fee simple or to the extent described in the petition."⁵⁰

⁴⁵ *Id.*

⁴⁶ *Id.*; *see also id.* ("No party to the condemnation proceeding shall be permitted to introduce evidence of such payment or of the amount so paid into court, or of any amount which has been accepted by any party, nor shall reference be made thereto during the course of the trial.").

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* "Provided, that in the case of a public road title to the right-of-way only shall absolutely vest in the applicant."
Id.

2. Private Entities

Under Section 54-2-15,

[a]ny business corporation, entitled to exercise the powers of eminent domain . . . may file with its petition a bond for a sufficient amount with good sureties, payable to the owner of the property proposed to be taken . . . and if the owner . . . make[s] no objection to such bond, the applicant shall be entitled to take possession of the property sought to be condemned, for the purposes stated in the petition.⁵¹

Or, if the owner objects to the bond, “the court or judge shall fix a day for the hearing of any objections to such bond and of the request of the applicant to approve the same.”⁵² Once the court is

satisfied as to the form, amount and sufficiency of such bond and sureties, and that the purpose for which the property is to be appropriated is a public use for which private property may be taken upon compensating the owner, the court or judge shall approve the bond and make an order permitting the applicant to enter upon, take possession, appropriate and use the land or property sought to be condemned for the purposes stated in the petition.⁵³

However, the court retains the power to require the applicant, if necessary, “to give a new and additional bond with sureties satisfactory to the court or judge.”⁵⁴ As is the case with state entities, once the applicant enters upon, takes possession of, and begins working on the property, the applicant is prohibited from abandoning the condemnation proceeding.⁵⁵

⁵¹ *Id.* § 54-2-15.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *See id.*

F. Determination of Just Compensation

“[T]he primary purpose of an eminent domain proceeding is to determine the amount which the condemnor shall be required to pay the defendant as just compensation for the property taken.”⁵⁶ Accordingly, “[t]he guiding principle of just compensation is reimbursement to the owner for the property taken and the owner is entitled to be put in as good a position pecuniarily as if [the] property had not been taken. . . . [The condemnee] must be made whole but he is not entitled to more.”⁵⁷ It is well established in this State that in an eminent domain proceeding, “the proper measure of the value of the property taken is the owner’s loss, not the taker’s gain.”⁵⁸ However, “[t]he determination of what constitutes just compensation ‘cannot be reduced to inexorable rules[.]’”⁵⁹

Generally, the measure of compensation to be awarded to one whose property interests are taken for public use in a condemnation proceeding is the fair market value of the property interests at the time of the taking.⁶⁰ Fair market value has been defined as “the price for which the land could be sold in the market by a person desirous of selling to a person wishing to buy, both freely exercising prudence and intelligent judgment as to its value, and unaffected by compulsion of any kind.”⁶¹ For the purpose of determining the fair market value of property interests taken for public use,

⁵⁶ *State Road Comm’n v. Bd. of Park Comm’rs*, 154 W. Va. 159, 166, 173 S.E.2d 919, 924 (1970).

⁵⁷ *Id.* at 167, 173 S.E.2d at 925.

⁵⁸ *Id.*; *see also* *United States v. 69.1 Acres of Land*, 942 F.2d 290, 292 (4th Cir. 1991) (“‘Just compensation’ is the amount of money necessary to put a landowner in as good a pecuniary position, but no better, as if his property had not been taken. . . . No citizen has a right . . . to reap a windfall from the public treasury because his land must be taken. Overcompensation is just as unjust to the public as undercompensation is to the property owner.”).

⁵⁹ *Id.*

⁶⁰ *See* *W. Va. Dep’t of Highways v. Berwind Land Co.*, 167 W. Va. 726, 732, 280 S.E.2d 609, 613 (1981).

⁶¹ *Syl. Pt. 5, Wheeling Elec. Co. v. Gist*, 154 W. Va. 69, 173 S.E.2d 336 (1970). As the Supreme Court of Appeals of West Virginia recently explained, “only elements of value that a reasonable buyer or seller would typically consider should be included in an analysis of fair market value. The emphasis is on a reasonable buyer and seller,

consideration should be given to every element of value which ordinarily arises in negotiations between private persons with respect to the voluntary sale and purchase of land, the use made of the land at the time . . . it is taken, its suitability for other uses, its adaptability for every useful purpose to which it may be reasonably expected to be immediately devoted, and the most advantageous uses to which it may so be applied.⁶²

Though there are many factors to be considered, under the project influence rule, any increase or decrease in value to the condemned land directly attributable to the project for which the land is taken must be disregarded in determining the market value of the land.⁶³ Furthermore, the date upon which the property is to be valued is fixed: “the date of take for the purpose of determining the fair market value for the fixing of compensation to be made to the condemnee is the date on which the property is lawfully taken by the commencement of appropriate legal proceedings.”⁶⁴

Where only a portion of a tract of real property is condemned, there may be damages to the property that remains after that portion is taken, known as the residue. In such cases,

[t]he approved and general rule for the measure of damages . . . is the fair market value for the land at the time it was taken, plus the difference in the fair market value of the residue immediately before and immediately after the taking less all benefits which may accrue to the residue from the construction of the improvement for which the land was taken.⁶⁵

not on a unique buyer or seller.” *Gomez v. Kanawha Cty. Comm’n*, 237 W. Va. 451, 464, 787 S.E.2d 904, 917 (2016).

⁶² *Berwind Land Co.*, 167 W. Va. at 733, 280 S.E.2d at 614 (quoting Syl. Pt. 7, in part, *Strouds Creek & Muddlety R.R. Co. v. Herold*, 131 W. Va. 45, 45 S.E.2d 513 (1947)).

⁶³ *Gomez*, 237 W. Va. at 466, 787 S.E.2d at 919. However, the *Gomez* court noted that there may be “exceptional situations where evidence of enhancement or depreciation resulting from the taking are admissible, such as when the condemnor’s proposed use of the land taken is consistent with the highest and best use of the property in the private marketplace.” *Id.*

⁶⁴ Syl. Pt. 1, *W. Va. Dep’t of Highways v. Roda*, 177 W. Va. 383, 352 S.E.2d 134 (1986).

⁶⁵ Syl. Pt. 3, *W. Va. Dep’t of Highways v. Bartlett*, 156 W. Va. 431, 194 S.E.2d 383 (1973).

The Supreme Court of Appeals of West Virginia recently explained that the project influence rule referenced above does not apply to the valuation of the residue.⁶⁶

1. Compensation Commissioners

When the circuit court determines “that proper notice has been given and that the case is one in which the applicant has lawful right to take property for the purposes stated in the petition,” the court must appoint “five disinterested freeholders . . . [as] commissioners to ascertain what will be a just compensation and any damages to the persons entitled thereto, for the property, or interest or right therein, proposed to be taken.”⁶⁷ West Virginia Code Section 54-2-6 details the process by which the five disinterested freeholders are appointed.

After the commissioners are appointed, take an oath that is certified and filed with the clerk,⁶⁸ and are informed by the court of their duties and responsibilities and the law applicable to their deliberations,⁶⁹ they may then hold hearings to determine the measure of just compensation and damages.

The court may, or upon the motion of any party, must “preside over and supervise all hearings held by the condemnation commission or appoint for such purpose one of its own commissioners, or a special commissioner, to be known as a court commissioner, who shall

⁶⁶ See *Gomez*, 237 W. Va. at 465–66, 787 S.E.2d at 918–19 (“We emphasize that the project influence rule is implicated in condemnation actions for property that is taken. When only a portion of the property is taken, leaving the landowner in possession of a ‘residue,’ then any increase or decrease in the fair market value of the residue caused by the public improvement may be considered by the jury. The residue may be valued by its highest and best use that accounts for the public improvement.”).

⁶⁷ W. VA. CODE § 54-2-5. For more information regarding who may serve as a commissioner see West Virginia Code Section 54-2-5.

⁶⁸ *Id.* § 57-2-7.

⁶⁹ *Id.* § 57-2-7a.

preside over and supervise all hearings held by the condemnation commission.”⁷⁰ Regardless of who presides over the commissioners’ hearing, however,

[t]he person presiding, or the clerk of the court, may sign and issue subpoenas for witnesses, including subpoenas duces tecum, and may swear any witness that the evidence which he will give relating to the matter to be reported by the condemnation commission shall be the truth, the whole truth, and nothing but the truth.⁷¹

Further, “[t]he person presiding shall rule on all questions of evidence, instruct the condemnation commissioners as to the law, and otherwise exercise all the functions of a judge in the trial of a civil action to the extent necessary for the determination of any issues before the condemnation commission.”⁷² If “a court commissioner is appointed to preside over . . . the hearings . . . such court commissioner shall be allowed for his services a reasonable sum to be fixed by the court, such sum to be taxed in the bill of costs against the moving party.”⁷³ The commissioners are not required to view the property proposed to be taken “unless a demand therefor is made by a party in interest.”⁷⁴

⁷⁰ *Id.* § 54-2-7b.

⁷¹ *Id.* Although the commission is comprised of five commissioners,

[a]ny three of the commissioners may act in the absence of the others, and any one of them may sign and issue subpoenas for witnesses in like manner as a justice, and with like effect; and may swear any witness who appears before them, that the evidence which he will give relating to the matters to be reported upon by the said commissioners shall be the truth, the whole truth, and nothing but the truth.

Id. § 54-2-8. In addition, any three commissioners

may adjourn their sessions from time to time as shall be necessary; and any person interested may attend in person or by attorney, produce and examine witnesses, read depositions duly taken, and other proper evidence, and be heard, if he requests it, in support of his rights, according to the usages and rules of law.

Id.

⁷² *Id.* § 54-2-7b.

⁷³ *Id.*

⁷⁴ *Id.* § 54-2-8.

After the commissioners have viewed or heard any proper evidence, the commissioners shall ascertain the amount of just compensation due to the owner or owners of the property interests acquired and prepare a report that satisfies the requirements of the Code.⁷⁵ If necessary, and if requested by the property owner or owners, “the commissioners shall . . . state in their report what sum has been fixed as damages.”⁷⁶ Then, the commissioners’ report “shall be signed by at least three of the commissioners, and forthwith returned to the clerk’s office of the court, to be filed with the papers of the case.”⁷⁷ After the commissioners’ report is completed and final, either party to the proceeding may, within ten days, “file exceptions thereto, and demand that the question of the compensation, and any damages to be paid, be ascertained by a jury.”⁷⁸

If neither party objects to the commissioners’ report or if neither party demands that the question of compensation be tried to a jury, “the court . . . shall confirm such report, and order it to be recorded in the proper order book of the court.”⁷⁹ “If good cause be shown against the report, or if it be defective or erroneous on its face, the court . . . may set it aside or recommit it to the same commissioners for further report[.]”⁸⁰ Or, the court may appoint other commissioners.⁸¹ Finally, “[i]f the commissioners report their disagreement, or fail to report in reasonable time, other commissioners may in like manner be appointed. And so again, from time to time, as often as may be necessary.”⁸²

⁷⁵ *See id.* § 54-2-9.

⁷⁶ *Id.* § 54-2-9a. The parties may also waive the finding of the condemnation commissioners any time before the commissioners are appointed or before the commissioners make a final report. *See id.* § 54-2-11a.

⁷⁷ *Id.* § 54-2-9.

⁷⁸ *Id.* § 54-2-10.

⁷⁹ *Id.*

⁸⁰ *Id.* § 54-2-11.

⁸¹ *Id.*

⁸² *Id.*

2. Jury of Freeholders

If a party “demand[s] that the question of the compensation . . . be ascertained by a jury,” the court shall select and impanel twelve freeholders to ascertain compensation.⁸³ These jurors are selected in the same manner as juries in civil actions.⁸⁴ Although the issue of compensation shall be tried like any other cause of action before the court, West Virginia law prohibits the parties from calling the commissioners as witnesses.⁸⁵ Like the commission, the jury is also not required to view the property proposed to be taken unless a demand is made by one of the interested parties.⁸⁶ If a party demands that the property be viewed, the judge will accompany the jury to view the property.⁸⁷

G. Vesting of Indefeasible Title, Payment, and Recordation

After the commissioners’ report, or the verdict of the jury, has been “confirmed and ordered to be recorded,” and within three months thereof, the condemnor may pay the sum ascertained for just compensation, plus “ten percent interest . . . from the date of the filing of the petition until payment,” to the court.⁸⁸ Once compensation plus interest has been paid by the condemnor, the “title to the property, or interest or right therein . . . shall be absolutely vested in the applicant in fee simple or to the extent described in the petition.”⁸⁹

If, after the award of the commissioners or jury is finalized, the condemnor owes more than what it has already been paid, then the condemnor may, within three months, pay the

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* § 54-2-12.

⁸⁹ *Id.* “Provided, that in the case of a public road title to the right-of-way only shall absolutely vest in the applicant.”
Id.

remaining amount plus ten percent interest into the court.⁹⁰ Similarly, if just compensation is less than what the condemnor already paid into the court, the condemnor is entitled to a refund of the difference.⁹¹

Generally, a “[p]ayment of an award or judgment . . . may be made to the clerk of the court in which such proceeding is had, and such payment shall be deemed to be a payment into court.”⁹² After payment has been made, but within ten days thereof, “the condemnor shall serve notice upon the parties of record except nonresidents and unknown parties whose interests the applicant seeks to condemn, or upon their counsel of record.”⁹³ In that regard, “[s]ervice . . . by registered or certified mail to the parties’ last-known addresses . . . [is] sufficient.”⁹⁴ After payment into the court, the money is distributed to all interested persons.⁹⁵

Once the property has been taken by the condemnor, “the clerk of the court in which such proceeding is had shall, at the cost of the condemnor, file and record with the clerk of the county court of each county wherein such land is, a certified copy of the order or orders of appropriation.”⁹⁶ From that point on, the condemnor will be considered “a purchaser of the land or the estate or interest therein so taken or appropriated, with like effect as if the record owner, if

⁹⁰ *Id.*; *see also id.* § 54-2-17 (“When judgment is rendered against the applicant, pursuant to the preceding section, for any excess ascertained by such subsequent report or verdict, with interest, the applicant shall thereafter have no right to the possession of the land until the judgment is satisfied[.]”).

⁹¹ *Id.* § 54-2-14.

⁹² *Id.* § 54-2-18.

⁹³ *Id.*

⁹⁴ *Id.* “[F]ailure to serve such notice shall result in the accrual of interest at ten percent upon the award, judgment or money paid into court from the filing of the petition until such notice is served or until disbursement be made to the persons entitled thereto.” *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* § 54-2-20.

made a party to such proceeding, had executed to such applicant a deed for the land or the estate or interest therein so taken or appropriated.”⁹⁷

H. Inverse Condemnation and the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs Act

While a condemnation proceeding is an action brought by a condemnor in the exercise of its power of eminent domain, “inverse” or “reverse” condemnation is a landowner’s action to recover just compensation for a taking by physical intrusion.⁹⁸ The state has a duty to institute condemnation proceedings within a reasonable time after completing a construction or improvement project causing probable damage to private property to ascertain such damages.⁹⁹ If the state fails to do so after a reasonable time, the injured property owner may seek a writ of mandamus to compel the state to institute condemnation proceedings.¹⁰⁰ Though an exhaustive discussion of inverse condemnation is beyond the scope of this handbook, it is worthwhile to note that under the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs Act (the “Federal Act”),¹⁰¹ if a court renders a

⁹⁷ *Id.*

⁹⁸ W. Va. Dep’t of Transp. v. Dodson Mobile Home Sales & Servs., Inc., 218 W. Va. 121, 123 624 S.E.2d 468 (2005).

⁹⁹ Syl. Pt. 1, State ex rel. Griggs v. Graney, 143 W. Va. 610, 103 S.E.2d 878 (1958).

¹⁰⁰ State ex rel. Henson v. W. Va. Dep’t of Transp., 203 W. Va. 229, 232, 506 S.E.2d 825, 828 (1998).

¹⁰¹ The Federal Act is codified at 42 U.S.C. § 4601, *et seq.*, and as one treatise explains,

The Uniform Relocation Assistance and Real Property Acquisitions Policies for Federal and Federally Assisted Programs Act, sometimes referred to as the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, was enacted to provide a uniform policy for the fair and equitable treatment of persons displaced by federally funded or assisted programs. The Act provides financial assistance and other benefits to displaced persons injured by the acquisition of real property by a state or federal agency using federal funds. The Act’s purpose is to consolidate federal relocation efforts and standardize a type and amount of relief available to dislocated persons, regardless of the agency involved. Its major purpose is to assure that one who is displaced by a federally assisted program does not suffer a loss if the loss can be reasonably compensated by a money payment.

judgment in favor of a landowner in an inverse condemnation proceeding against a state agency subject to the Federal Act or the state agency reaches a settlement of such a proceeding, the landowner must be reimbursed by the state agency for “any reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the owner actually incurred.”¹⁰² While an extensive discussion of the Federal Act is also beyond the scope of this handbook, a practitioner who is confronted with a potential taking of land by a state agency with federal funding, whether by traditional condemnation proceedings or by inverse condemnation, should investigate the applicability of the Federal Act, its requirements, and the numerous benefits and protections afforded to displaced persons pursuant to its provisions and attendant regulations.

27 AM. JUR. 2D *Eminent Domain* § 808 (2017). The West Virginia Legislature has determined through West Virginia Code Section 54-3-3 that, “subject only to any restrictions or limitations imposed by the constitution of the State of West Virginia,” the Federal Act is binding on the State and its subdivisions. *W. Va. Dep’t of Highways v. Reed*, 228 W. Va. 716, 724 S.E.2d 320, 328 (2012) (emphasis omitted) (citations omitted). As the Supreme Court of Appeals of West Virginia explained,

As a condition of receiving federal assistance for a project resulting in the acquisition of real property, a State agency must agree to comply with the terms of the Act. The general purpose of the federal Act is “to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices[.]”

Dodson, 218 W. Va. at 124–25, 624 S.E.2d at 471–72.

¹⁰² 49 C.F.R. § 24.107 (2015). Notwithstanding the Property Acquisition Act, “[c]osts and attorney’s fees may be awarded in mandamus proceedings involving public officials because citizens should not have to resort to lawsuits to force government officials to perform their legally prescribed nondiscretionary duties.” Syl. Pt. 1, *State ex rel. W. Va. Highlands Conservancy, Inc. v. W. Va. Div. of Env’tl. Prot.*, 193 W. Va. 650, 458 S.E.2d 88 (1995).