

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 920923

BOARD OF COUNTY SUPERVISORS
OF PRINCE WILLIAM COUNTY, VIRGINIA,

Appellant,

V.

KENNETH F. PARSONS, et al,

Appellees.

JOINT APPENDIX

Angela M. Lemmon
Assistant County Attorney
1 County Complex Court
Prince William, VA 22192
(703) 792-6620

Counsel for Appellant

Robert J. Zelnick
12610 Lake Ridge Drive
Woodbridge, VA 22192
(703) 494-7171

Counsel for Appellee

TABLE OF CONTENTS

	<u>Page</u>
1. PETITION FOR CONDEMNATION, FILED JANUARY 16, 1990 WITH EXHIBITS.....	1
2. ORDER CONFIRMING COMMISSIONERS' REPORT AND ORDER OF SUSPENSION, FILED AUGUST 22, 1991.....	36
3. DEFENDANT'S NOTICE OF APPEAL, FILED AUGUST 28, 1991	39
4. PETITIONER'S NOTICE OF APPEAL, FILED AUGUST 28, 1991	41
5. SUPREME COURT ORDER (RECORD NO. 911769) ENTERED FEBRUARY 25, 1992.....	43
6. SUPREME COURT ORDER (RECORD NO. 911791) ENTERED FEBRUARY 25, 1992.....	44
7. PRAECIPE/MOTION TO DISMISS CONDEMNATION PROCEEDINGS WITHOUT COST OR FOR ALTERNATIVE RELIEF, FILED MARCH 16, 1992.....	45
8. TRANSCRIPT OF HEARING BEFORE THE HONORABLE FRANK A. HOSS, JR. ON MARCH 19, 1992.....	49
9. PRAECIPE/MOTION FOR RECONSIDERATION, FILED APRIL 10, 1992.....	80
10. MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION FILED APRIL 14, 1992.....	84
11. TRANSCRIPT OF HEARING BEFORE THE HONORABLE FRANK A. HOSS, JR. ON APRIL 17, 1992.....	95
12. ORDER DENYING PETITIONER'S MOTION TO DISMISS AND AWARDING JUDGMENT AGAINST THE PETITIONER, DATED APRIL 27, 1992.....	123
13. ORDER DENYING MOTION FOR RECONSIDERATION DATED APRIL 27, 1992.....	125
14. NOTICE OF APPEAL, FILED MAY 6, 1992.....	127
15. PETITION FOR APPEAL, FILED JUNE 11, 1992.....	129
16. AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR APPEAL, FILED JUNE 27, 1992.....	158
17. BRIEF IN OPPOSITION TO PETITION FOR APPEAL, FILED JUNE 30, 1992.....	185
18. ASSIGNMENTS OF ERROR.....	204

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

**BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA**

*An entity vested by law with power
to exercise the right of eminent
domain*

Petitioner

v.

**KENNETH F. PARSONS and
KATHLEEN E. PARSONS, his wife**

Owners of Record

SERVE:

**KENNETH F. PARSONS
KATHLEEN E. PARSONS
14319 Dumfries Road
Independent Hill, Virginia 22111**

and

**That Property which is located
at 14207 Dumfries Road in the
Coles Magisterial District of
Prince William County, Virginia,
and which measures approximately
117.82 acres in area. This
property is more particularly
described in a Deed recorded in
Deed Book 1518, Page 1649 among
the land records of Prince
William County, Virginia, and
is designated as Prince William
County Tax Map #35-01-5**

Defendants

LAW NO. 233/8

PETITION FOR CONDEMNATION

**COMES NOW the Petitioner, BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA ("the Board"), by counsel, and files this**

5. The Board seeks to acquire fee simple title to the subject property of the Defendants Kenneth F. and Kathleen E. Parsons.

6. The property to be taken consists of a parcel with the address of 14207 Dumfries Road, Manassas, Virginia 22111, located in the Coles Magisterial District of Prince William County. The property measures approximately 117.82 acres in area, is described in Deed Book 1518, Page 1649 of the land records of Prince William County, and is denoted as Prince William County Tax Map Number 35-01-5.

A metes and bounds description of the property is attached, labelled Exhibit C, and is incorporated in this Petition. A plan showing the boundaries of the property is attached, labelled Exhibit D, and is also incorporated in this Petition.

7. The name and residence of the owners of this property, so far as they are known by the Board, are:

Kenneth F. Parsons and
Kathleen E. Parsons, his wife,
Owners of Record
14319 Dumfries Road
Independent Hill, Virginia 22111¹

8. The Board has made a *bona fide* effort to purchase this property in accordance with the provisions of Section 25-46.5, VA Code Ann., but this effort was ineffectual. By letter dated July 14, 1989, and mailed first class, postage prepaid, from the Director of the Prince William County Department of Public Works to Kenneth Parsons, an offer in the amount of One Million Six Hundred Thousand Dollars (\$1,600,000.00) was made to the Defendants in an effort to purchase the fee simple title to this property. This amount was based upon appraisals received by the Board. A copy of the July 14 letter is attached, labelled Exhibit E, and incorporated in this Petition.

¹ Kenneth F. and Kathleen E. Parsons own the property subject to a Deed of Trust, dated October 6, 1987. The Holders of the Deed of Trust Note are Wade R. Lewis and Oliver W. Besley, Trustees.



ANGELA M. LEMMON
 Assistant County Attorney
 One County Complex Court
 Prince William, Virginia 22192
 (703) 335-6620

COMMONWEALTH OF VIRGINIA

COUNTY OF PRINCE WILLIAM, to wit:

This day personally appeared before me, the undersigned Notary Public, in my jurisdiction aforesaid, SHARON E. PANDAK, who first being duly sworn, stated that she is County Attorney and is authorized to make this proof; and ANGELA M. LEMMON, who, first being duly sworn, stated that she is Assistant County Attorney for Prince William County and is authorized to make this proof; that on information and belief, all of the allegations of this Petition are true.

Given under my hand and seal this 16th day of January, 1990.


 Notary Public

My Commission expires: January 4, 1993

W:CondPars

EXHIBIT A

MOTION: SPELLANE

**December 20, 1988
Regular Meeting
Res. No. 88-972**

SECOND: BECKER

**RE: AUTHORIZE ACQUISITION, BUDGET AND APPROPRIATE
\$3,390,000 FROM LANDFILL RESERVE FUND FOR
SANITARY LANDFILLING**

WHEREAS, the present Sanitary Landfill which currently serves as the municipal waste disposal facility for Prince William County, is expected to reach capacity in 1996; and

WHEREAS, even with the present technology and methods proposed in the County's draft Solid Waste Management Plan, including recycling and resource recovery, a landfill will be required for solid waste disposal into the future; and

WHEREAS, by Resolution No. 88-452, dated May 17, 1988, the Board of County Supervisors directed the County Executive to undertake a comprehensive technical feasibility study of the proposed expansion area of the existing landfill and to conduct an evaluation of potential alternate sites for a sanitary landfill; and

WHEREAS, an evaluation of alternate candidate landfill sites, which included screening and ranking of these sites, and performing detailed investigations and comparisons of the selected alternative site located between Bristow and Aden Road near Independent Hill with the proposed expansion area of the existing Sanitary Landfill, indicates that expansion of the existing landfill will best meet the County's long-term landfilling needs; and

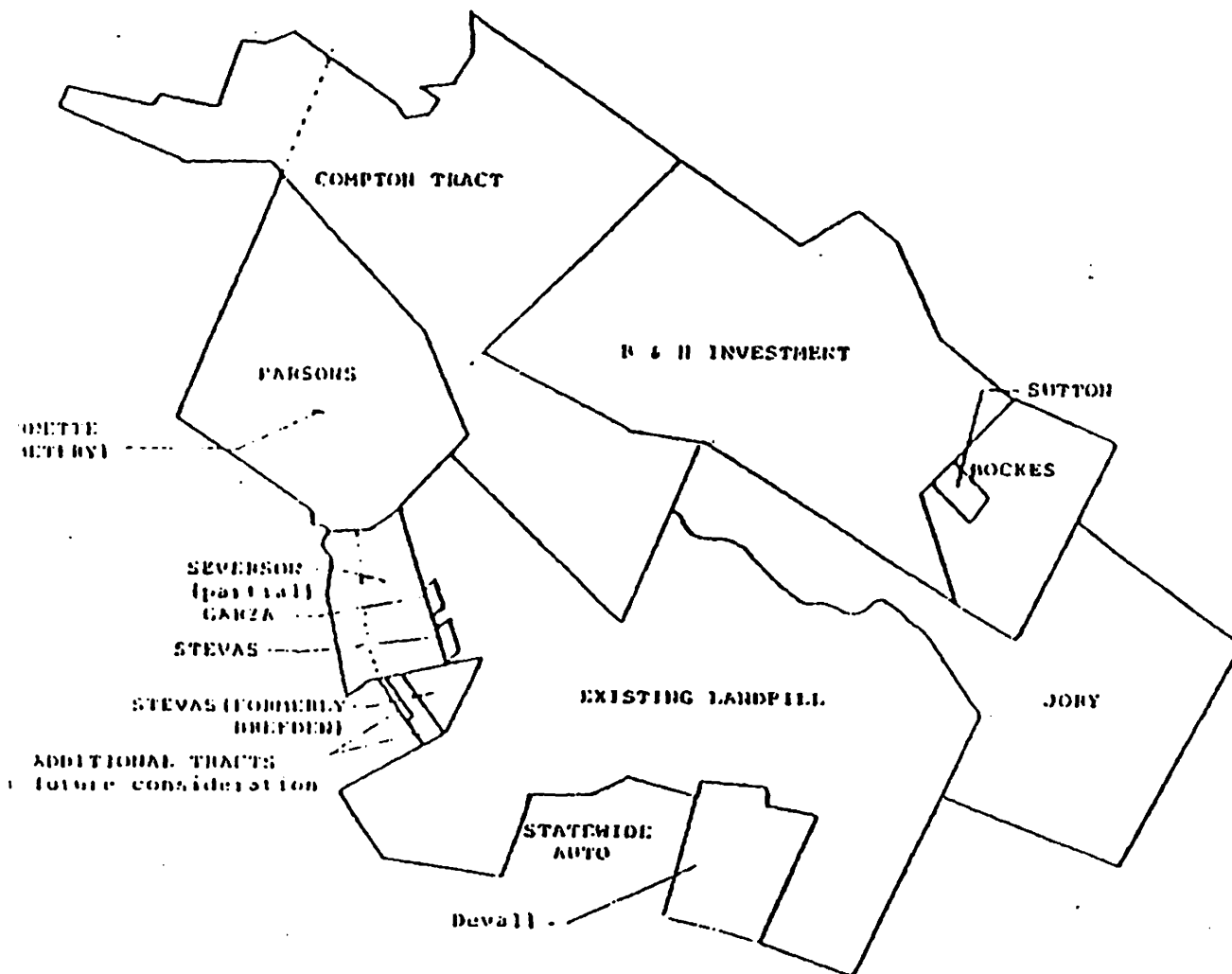
WHEREAS, technical evaluations of the proposed expansion area of the existing landfill indicate that the area is very suitable for landfill expansion, and with appropriate buffers and environmental controls, to include a double liner system, leachate collection and detection, sediment ponds and downgradient monitoring systems, can be designed to have minimal impact on the environment and surrounding properties; and

WHEREAS, the County Executive and Staff recommend approval of this resolution and that the existing landfill be expanded and land be acquired 1) to insure an adequate landfilling capacity is available for the future; 2) to provide a protective buffer from existing development; 3) to prevent future development from encroaching on landfill operations; 4) to provide sufficient area for environmental controls and monitoring areas; and 5) to provide desirable end use for park and recreational facilities; and

WHEREAS, the Solid Waste Management Citizen Advisory Committee, working with County staff in performing these studies, has recommended that the Board of County Supervisors accept the consultants' recommendation to expand the existing sanitary landfill; and

BE IT FINALLY RESOLVED that the Board of County Supervisors indicates its intent as follows:

1. Upon final design and acquisition of each of the properties, to convey the approximate 1,000 foot buffer area, as shown on the attached map, to the Park Authority, with the approximate 500 foot undisturbed buffer located at the outer perimeter of the total property acquired to be designated for passive recreational use and the approximate 500 foot internal portion of the buffer to be utilized by the County only for environmental controls, such as monitoring wells, methane gas controls, treatment facilities and sediment control ponds, and removal of borrow material, with the grading of this latter section to be consistent with the ultimate park use of the property once the landfill is closed. Borrow material shall be removed only when needed as an absolute last resort after consultation with a citizens' oversight committee and shall be done in a manner so as to protect any natural ridge line. Such grading plan to be developed by Public Works in coordination with the Park Authority.
2. Notwithstanding the foregoing, the 500 foot internal additional buffer area adjoining residences shall remain undisturbed up to existing ridge lines, where available, except for disturbances to install environmental controls such as monitoring wells, methane gas controls, sediment ponds, treatment facilities and passive recreational uses.
3. The aforesaid buffer areas shall be conveyed with covenants insuring that
 - (a) such lands will remain park lands in perpetuity;
 - (b) areas designated within the 500 foot undisturbed external buffer shall not be disturbed except to maintain, establish or reestablish natural vegetative cover damaged as a result of fire, insects or disease, or for passive recreational uses such as jogging trails and picnic areas, or for monitoring wells;
 - (c) land clearing and earthmoving activities in the remaining approximately 500 foot internal additional buffer areas will be limited to the installation of environmental control such as monitoring wells, methane gas controls, treatment facilities, sediment control ponds, and grading for the removal of borrow materials for County landfilling operations or for ultimate park use. Borrow materials shall be removed only when needed as an absolute last resort and after consultation with citizens' oversight committee.



Property Owners acres

Phase 1

Jory 167.00

Phase 2

Compton
(southern part) . . 65.62

Phase 3

Stevas 1.00
Stevas 6.09
Severson
(eastern part) . . 23.64
Garza 1.00

Phase 4

Barnette 0.50
Parsons 117.82
Compton
(eastern part) . . 135.73
B&H Investment . . 228.00
Sutton 3.46
Rockes 54.04

TOTAL. 803.90

Parcels for future consideration

Two adjacent to
Stevas 6.12
Devall 29.14
839.16

AGREEMENT TO THE RESOLUTION

December 20, 1988
Res. No. 88-972

M1518 P01849

19379

4200 Pine Ford Rd.
Warrenton, Va.

Grantee address

WOOD & KARENSA, ATTORNEYS AT LAW
3917 CHATHAM BRIDGE ROAD, P.O. BOX 380, FAIRFAX, VA 22030 (703) 272-4600This is to certify that the tax imposed
by Section 51.1-403 (A) has been paid648,000.00
648.00

THIS DEED made this 3rd day of October, 1982 by
and between WADE R. LEWIS and OLIVER W. BESLEY, JR., TRUSTEES,
GRANTORS, parties of the first part, and KENNETH F. PARSONS and
KATHLEEN E. PARSONS, as Tenants by the Entirety with Common Law
Right of Survivorship, GRANTEES, parties of the second part.

W I T N E S S E T H

that for and inconsideration of the sum of \$10.00 in hand paid,
and for other good and valuable consideration the receipt of all
of which is hereby acknowledged, the parties of the first part do
hereby grant, bargain, sell and convey, with SPECIAL WARRANTY OF
TITLE, unto the parties of the second part, as tenants by the
entirety, with the full common law right of survivorship expres-
sly retained, that is, in case of the death of either of the
parties of the second part, title to the land hereby conveyed
shall vest in the survivor fee simple, all those certain lots or
parcels of land described as follows:

Beginning at a point in the westerly line of a 30 foot
right-of-way, said point being a corner of the land of
Southern Investment Company of Arlington and in the easterly
line of Baber and running thence with said line of the land
of Baber, N. 15 08' E. 124.51 feet to a point and N. 47 24'
W. 1611.31 feet to a point;

thence continuing with said line of the land of Baber and
the Southeasterly lines of the land of Callahan and the
aforesaid Baber, N 27 58' E. 2524.64 feet to a point in
the southeasterly line of the land of Baden;

thence with said line of the land of Baden the following
courses and distances:

S 36 08' E. 2070.53 feet to a point;
S 13 31' E. 1007.66 feet to a point; and
S 38 16' W. 255.35 feet to a point in the northerly line of
the land of Tuttle;

thence with said line of the land of Tuttle, the following
courses and distances:

N 34 41' W. 36.82 feet to a point;
S 46 25' W. 970.77 feet to a point;
N 81 37' W. 478.00 feet to a point; and
S 81 50' W. 123.00 feet to the beginning.

Containing 117.8243 acres

TOGETHER WITH AND SUBJECT TO a 50 foot right of way from
State route 234 to the westerly side of the above described
tract and more particularly described in Deed Book 172 at
page 360.

AND BEING the same property conveyed to the parties of the
first part by Deed dated July 10, 1972, and recorded in
Deed Book 638 at page 626 among the land records of Prince
William County, Virginia.

REFERENCE is hereby made to said deed for a more particular description of the property hereby conveyed.

THIS CONVEYANCE is made subject to the restrictions, conditions, rights of way and easements, if any, contained in the instruments forming the chain of title to this property.

The party of the first part covenants that it has the right to convey the aforesaid property unto the party of the second part; that the party of the second part shall have quiet possession thereof, free from all encumbrances except the aforesaid deed of trust; and that the party of the first part will execute such further assurances as may be deemed requisite.

WITNESS the following signature and seal:

WADE R. LEWIS, TRUSTEE (SEAL)

OLIVER W. BESLEY, JR., TRUSTEE (SEAL)

STATE OF Virginia
COUNTY OF _____ to-wit:

I, the undersigned Notary Public in and for the County aforesaid, do hereby certify that WADE R. LEWIS, TRUSTEE, personally appeared before me this date and acknowledged his signature to the foregoing Deed, in my County aforesaid.

GIVEN under my hand this _____ day of _____, 19__.

Notary Public

My Commission expires: _____

STATE OF Virginia
COUNTY OF Fairfax to-wit:

I, the undersigned Notary Public in and for the County aforesaid, do hereby certify that OLIVER W. BESLEY, TRUSTEE, personally appeared before me this date and acknowledged his signature to the foregoing Deed, in my County aforesaid.

GIVEN under my hand this 6th day of October, 1987.

Notary Public

My Commission expires: 4-3-90

RECORDED W/CERTIFICATE ANNEXED

87 OCT 14 AM 9:21

PRINCE WILLIAM CO., VA.

TEST: Chatter
CLERK

Note No. 2 in the sum of \$108,000.00 payable to the order of WADE R. LEWIS AND OLIVER W. BESLEY, JR., TRUSTEES, with interest payable semi-annually; the first payment shall be due and payable six months after the date of this document. Principal shall be payable in fourteen (14) equal annual payments of \$9,400.00.

This entire indebtedness of principal and interest shall be due and payable fifteen (15) years from the date of this document.

NOTICE---THE DEBT SECURED HEREBY IS SUBJECT TO CALL IN FULL OR THE TERMS THEREOF BEING MODIFIED IN THE EVENT OF A SALE OR CONVEYANCE OF THE PROPERTY CONVEYED.

The powers herein, when granted to two or more Trustees, may be exercised by any of them acting individually or by all of them acting together.

The Trustees are hereby authorized and empowered to execute deeds of release releasing the property hereby secured in whole or in part without the necessity of the joinder of the Beneficiary upon due evidence that the Grantor has paid to the Beneficiary or for the benefit of the Beneficiary the agreed release fee, and this deed of trust shall remain in full force and effect as to the residue of the land unreleased.

The Grantor grants to the Beneficiary, or a majority in amount of the holders of the note or notes secured hereby, the right and power to appoint a substitute trustee or trustees at the discretion of the Beneficiary for any reason whatsoever, or, in the event of the resignation, death, incapacity, disability, removal or absence from the State of the Trustees. When such instrument of appointment shall have been executed and acknowledged, and recorded in the Office of the Clerk of the Court where this deed of trust is recorded, the substitute trustee or trustees named therein shall be vested with all the powers, rights, authority and duties of the Trustees under this deed of trust.

The Grantor covenants to pay the debt hereby secured; to pay all taxes and assessments on said premises when due during the continuance of this trust; to keep the improvements, if any, insured against fire and extended coverage in some responsible fire insurance company for at least _____ and to the satisfaction of the Trustees, who shall apply whatever may be received therefrom to the payment of the matter hereby secured, whether due or not; to meet the obligations required by this or any prior deed of trust secured by the hereinbefore described premises; and that upon any default or neglect to pay any such taxes or any prior deed of trust secured by the hereinbefore described premises, the holder of the note hereby secured may at its option, pay any such taxes and assessments, or may have said improvements insured, or may meet the obligations required by any prior deed of trust and the expenses thereof shall be a charge hereby secured and shall bear like interest as the debt hereby secured, and the Grantor hereby covenants to repay the said expenses so advanced to the party advancing the same, upon demand.

The Grantor further covenants and agrees that should there be a loss or damage to the premises covered by insurance other than the insurance hereby required, or should there be any residuary amount due to the Grantor by reason of the sale of the premises under any prior deed of trust, then such recovery in excess of the sums required to be applied to any prior trust or such residuary amount, shall be paid over, and the same is hereby assigned, to the Trustees to be applied as hereinbefore set forth.

The Grantor hereby consents and agrees that the debt hereby secured, or any part thereof, may be renewed or extended beyond maturity as often as may be desired by agreement between the creditor and the Grantor, or any subsequent owner of the property, and all fees or charges for such renewal may be added to the

gations prescribed by said Titles, and the acts amendatory thereof, except only insofar as the provisions of said Titles and the acts amendatory thereof are herein modified.

WITNESS the following signatures and seals:

 (SEAL)
KENNETH F. PARSONS

 (SEAL)
KATHLEEN E. PARSONS

State of Virginia
County of Prince William, to-wit:

I, KARL M. RICE, a Notary Public in and for the State at Large, aforesaid, whose Commission expires on the 29th day of October, 1989, do hereby certify that KENNETH F. PARSONS and KATHLEEN E. PARSONS, whose names are signed to the foregoing instrument dated the 6th day of October, 1987, personally appeared before me in my said State on this day and acknowledged the same.

GIVEN under my hand this 6th day of October, 1987.


Notary Public as aforesaid.

S. 42°18'59"E-2064.36'

S. 60°26'07"E-

KENNETH F. PARSONS, et ux
P.I.N. 035-01-000-0005

117.5384 ACRES
LESS & EXCEPT: 0.5 ACRE
NET AREA: 117.0384 ACRES

CEMETERY, LESS AND
EXCEPT 0.5 ACRE
AS RESERVED BY
DEED BOOK 57, PG. 4.

DIRT ROAD

N. 53°25'33"W-1611.48'

N 6,920,004.3039

E 11,746,123.0240

KENNETH F. PARSONS, et ux

24" OAK
KENNETH F. PARSONS,
et ux

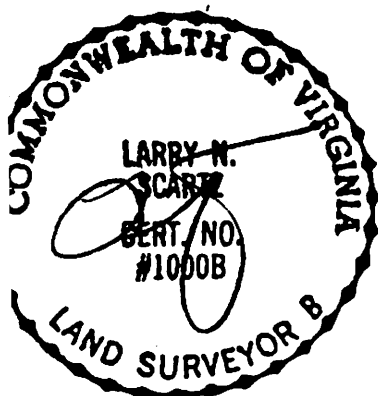
ARTHUR SEVERSON,
et ux

012, 036, 7880
1,790, 027, 2106

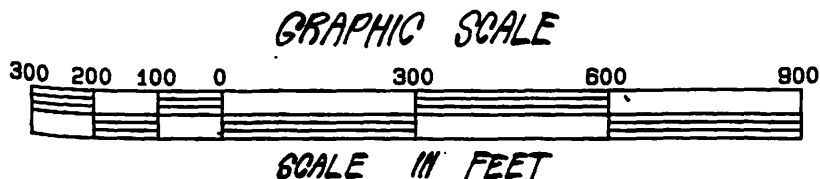
COUNTY OF

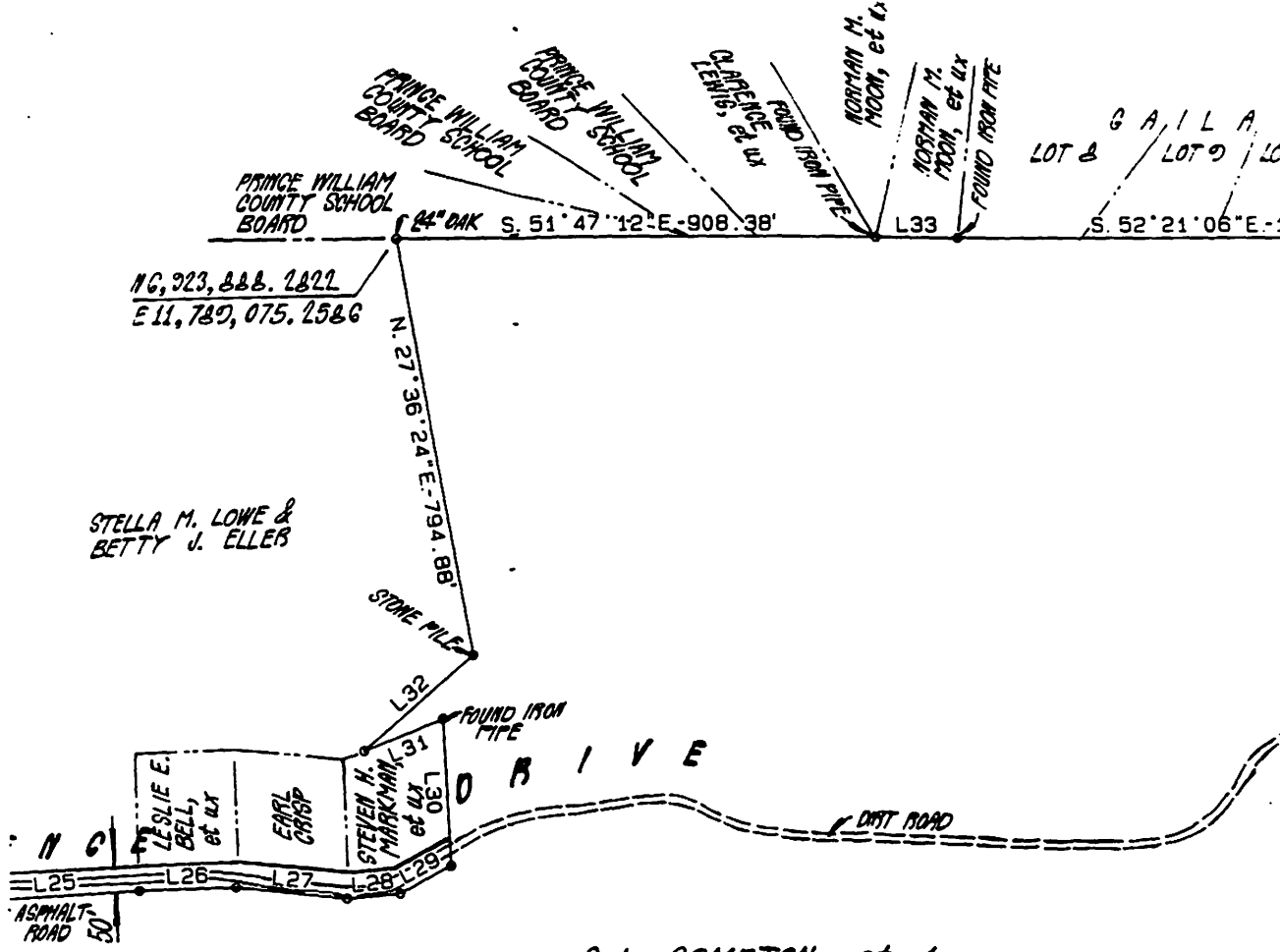
PLAT SHOWING
THE PROPERTY OF
C. L. COMPTON, et al
(DEED BOOK 400, PAGE 85)
AND
KENNETH F. PARSONS, et ux
(DEED BOOK 1512, PAGE 1649)

COLES MAGISTERIAL DISTRICT
PRINCE WILLIAM COUNTY, VIRGINIA
SCALE: 1" = 300' 12 JANUARY 1990

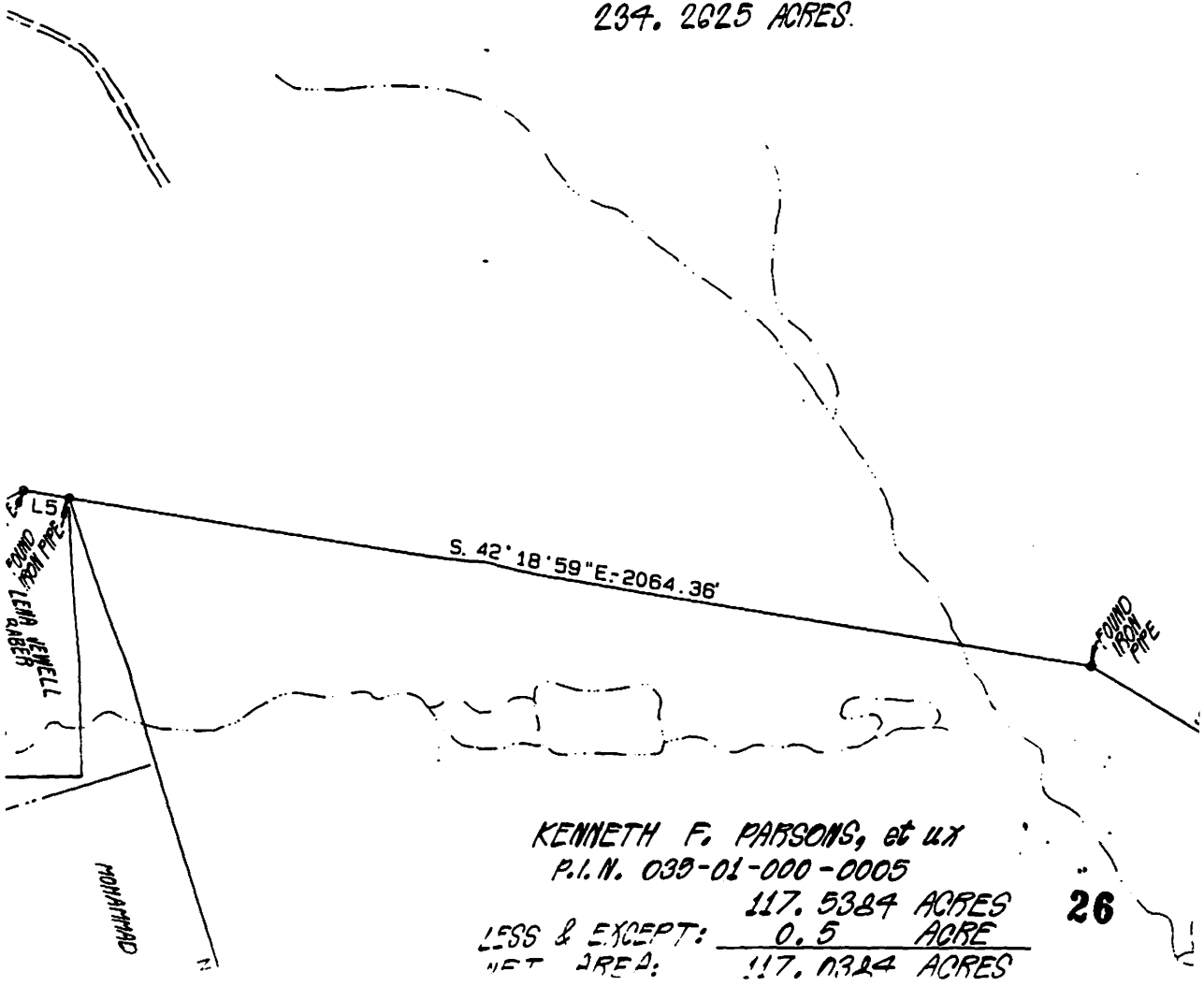


PREPARED BY
LARRY N. SCARTZ
CERTIFIED LAND SURVEYOR
WOODBIDGE, VIRGINIA
TELEPHONE: 703-494-4121, METRO 703-690-4955
TELEFACSIMILE 703-690-3999





C. L. COMPTON, et al
P.I. N. 035-01-000-0057
234.2625 ACRES.



KENNETH F. PARSONS, et ux
P.I. N. 030-01-000-0005
117.5384 ACRES
LESS & EXCEPT: 0.5 ACRE
NET AREA: 117.0324 ACRES

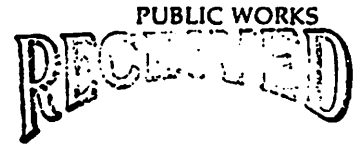


COUNTY OF PRINCE WILLIAM

4361 Ridgewood Center Drive, Prince William, Virginia 22192-5308
(703) 335-6820 Metro 631-1703

Robert W. Wilson
Director

July 14, 1989.



JUL 20 1989

COUNTY ATTORNEY'S OFFICE

Kenneth F. Parsons
14319 Dumfries Road
Independent Hill, VA 22111

Dear Mr. Parsons:

Based upon our previous discussions, we would like to make you an offer to purchase your property, Tax Map No. 35-01-5, consisting of approximately 117.82 acres located adjacent to the existing Prince William County Sanitary Landfill. Attached for your consideration is a proposed real estate contract to purchase the entire property. The offered purchase price is based on an independent appraisal.

At our last meeting, we discussed the constraints of the landfill buffer areas necessary to maintain the integrity of the buffer, and possible arrangements which would allow you to grow plants/trees, or other passive uses, within the buffer. If you believe this option is still viable, within the constraints discussed, we would be willing to pursue this option further.

If you accept the attached contract, please sign it in the presence of a notary and return it to me. As you know, the Board of County Supervisors must also approve the contract.

If there are any questions, please do not hesitate to contact me. We look forward to hearing from you in the near future.

Sincerely yours,

ORIGINAL SIGNED BY
ROBERT W. WILSON

Robert W. Wilson
Director of Public Works

Attachment: Real Estate Sales Contract

cc: Deputy County Executive-CB
✓County Attorney
Chief, Solid Waste Division

4. OTHER CONDITIONS OF PURCHASE:

a. The Sellers shall supply to the Buyer within 10 days of execution of this contract all results of engineering tests, soil borings, and other documents in its possession or under its control related to the engineering, soil, water, and topographic conditions of the site.

b. Sellers covenant that no toxic or hazardous waste or materials or substances are located or have been deposited on the property to the best of their knowledge or belief. In the event that it is determined that such conditions exist, the Purchaser may terminate or rescind this contract without further obligation and shall be reimbursed its deposit or other monies paid by it to the Sellers.

5. **SURVEY:** The Purchaser shall, at its expense, obtain a boundary survey, by a duly licensed surveyor of the subject property. Upon execution of this agreement, the surveyor selected by the Purchaser may enter upon Sellers' property to perform the survey required herein. Upon receipt of the surveyor's report, the Purchaser shall furnish a copy thereof to the Sellers, said report to include the metes and bounds description of and the acreage of the subject property. Sellers' deed conveying the property shall employ the description provided by said surveyor's report.

6. **DEED:** Sellers shall convey the property by General Warranty deed containing the normal English covenants of title. Title to the subject property shall be good and marketable, free and clear of liens, claims, encumbrances, easements except for the fifty foot (50') right-of-way set forth in Deed Book 1518 at Page 1649, covenants and leases of any kind. Marketability of title is defined as good of record and fact, insurable subject only to standard exceptions of title by a title insurance company authorized to transact business in the Commonwealth of Virginia. In the event title is not as aforesaid, the Purchaser may, but is not obligated to, take the property subject to the defect or Sellers shall have a reasonable period of time in

WITNESS the following signatures and seals:

BOARD OF COUNTY SUPERVISORS
PRINCE WILLIAM COUNTY, VIRGINIA

BY: _____
Chairman

ATTEST:

Clerk to the Board

KENNETH F. PARSONS

KATHLEEN E. PARSONS

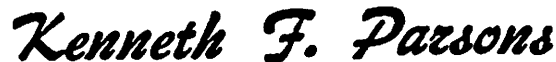
COMMONWEALTH OF VIRGINIA
County of Prince William, to wit:

I, the undersigned Notary Public of and for the jurisdiction aforesaid, do hereby certify that EDWIN C. KING and CATHERINE CLEMEN ROLLINS, Chairman and Clerk, respectively, of the Board of County Supervisors of Prince William County, whose names are signed to the foregoing Real Estate Sales Contract, have this date appeared before me in my jurisdiction aforesaid, and acknowledged the same.

Given under my hand and seal this ____ day of _____, 1989.

NOTARY PUBLIC

My Commission expires: _____



RECORDED

COUNTY ATTORNEY'S OFFICE

34

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

**BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA,**

Petitioner,

v.

KENNETH F. PARSONS, et al.,

Defendants.

Law No. 23318

**ORDER CONFIRMING COMMISSIONERS' REPORT AND
ORDER OF SUSPENSION**

On the 15th day of May, 1991, came the parties to the above-entitled action, in person and by their respective attorneys, upon the pleadings, proceedings and Orders formerly had herein.

Thereupon came the commissioners who were summoned, appointed and sworn to ascertain the value of the rights, privileges and easements in the land owned by Defendants Kenneth F. and Kathleen E. Parsons, which rights, privileges and easements are sought to be taken by the Board of County Supervisors of Prince William County, Virginia.

After counsel for the Petitioner and counsel for the Defendants made opening statements, the commissioners, accompanied by the trial judge and counsel, viewed the property affected by the Petition filed in this action. Thereafter, the parties presented their testimony ore tenus, and out of the presence of the commissioners the instructions were argued by counsel.

Thereupon, the commissioners returned and were instructed by the Court on the law to be applied and after hearing closing arguments by the respective counsel, the commissioners retired.

Thereafter, the commissioners returned and presented the following award:

The value of the rights, privileges and easements taken: \$2,585,000.00.

SEEN AND EXCEPTED TO:



SHARON E. PANDAK

County Attorney
One County Complex Court
Prince William, VA 22192
(703) 792-6620
Counsel for Petitioner



ANGELA M. LEMMON

Assistant County Attorney
One County Complex Court
Prince William, VA 22192
(703) 792-6620
Counsel for Petitioner

AML/jmw W:Conford

BK0135PG1468

V I R G I N I A:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

BOARD OF COUNTY SUPERVISORS
OF PRINCE WILLIAM COUNTY, VIRGINIA

Petitioner

v.

LAW NO. 23318

KENNETH F. PARSONS, et. ux.


Defendants

NOTICE OF APPEAL

PLEASE TAKE NOTICE that pursuant to Rule 5:9 of the Rules of the Supreme Court of Virginia, Defendants, Kenneth F. Parsons and Kathleen E. Parsons, by counsel, hereby file their Notice of Appeal from the Order Setting Aside Commissioners' Reports entered by the Circuit Court of Prince William County on December 17, 1990 and the Order Confirming Commissioners' Report and Order of Suspension entered August 22, 1991 in the above-styled matter.

A transcript of the testimony and other incidents of the case will be filed with the Court. It is hereby certified that a copy of the transcript has been ordered from the court reporter.

KENNETH F. PARSONS and
KATHLEEN E. PARSONS
By Counsel


ROBERT J. ZELNICK
Szabo, Quinto, Zelnick & Erickson, P.C.
12610 Lake Ridge Drive
Woodbridge, VA 22192
Counsel for Defendants

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

**BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA**

Petitioner

v.

KENNETH F. PARSONS, *et al.*

Defendants.

Law No. 23318

NOTICE OF APPEAL

PLEASE TAKE NOTICE that pursuant to Rule 5:9 of the Rules of the Supreme Court of Virginia, the Petitioner, BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY, VIRGINIA, by counsel, hereby files its Notice of Appeal from the Order on the Petitioner's Motion in Limine entered by the Circuit Court of Prince William County on April 19, 1991, the Order Denying Injunction entered by the Circuit Court of Prince William County on May 3, 1991, and the Order Confirming Commissioners' Report entered by the Circuit Court of Prince William County entered August 22, 1991, in the above-styled matter.

A transcript of the testimony and other incidents of the case will be filed with the Court. It is hereby certified that a copy of the transcript has been ordered from the court reporter.

**BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA**

By: _____

Counsel

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on Tuesday the 25th day of February, 1992.*

Board of Supervisors of Prince William County, Appellant,

against Record No. 911769
Circuit Court No. L-23318

Kenneth F. Parsons, et al., Appellees.

From the Circuit Court of Prince William County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By:


Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

**BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA**

Petitioner

v.

KENNETH F. PARSONS, *et al.*

Defendants.

Law No. 23318

PRAECIPE

THE CLERK OF THIS COURT will please schedule this matter for a hearing on the Motion to Dismiss Condemnation Proceedings Without Costs or For Alternative Relief and Order Dismissing Condemnation Proceedings without Payment of Costs at the Prince William County Circuit Court, 9311 Lee Avenue, Manassas, Virginia, on Friday, March 20, 1992, at 10:00 a.m., or as soon thereafter as counsel can be heard.

RESPECTFULLY SUBMITTED

**BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY,**

By: Angela M. Lemmon
Counsel

SHARON E. PANDAK
County Attorney

Angela M. Lemmon
ANGELA M. LEMMON
Assistant County Attorney
1 County Complex Court
Prince William, Virginia 22192
(703) 792-6620
Counsel for Petitioner

FILED
MAR 23 1992
CLERK OF COURT
PRINCE WILLIAM COUNTY
VIRGINIA

4. Pursuant to the provisions of Section 25-46.34(b) VA Code Ann., the Board is entitled to dismissal of these proceedings as a matter of right within thirty days of the effective date of the Order Confirming Commissioners' Report, which is the period within which an appeal could be had from that Order.

5. Section 25-46.34(b) VA Code Ann. provides that any order dismissing condemnation proceedings must provide for the payment of actual and reasonable costs incurred by the landowner. The Board has asked the Defendants to provide an estimate of the costs they have incurred in this matter and, through counsel, the Defendants have refused to provide this information. As a result, the Board is unable to assess its willingness to dismiss this action upon the payment of costs incurred, nor can it assess whether it should challenge the reasonableness of these costs.

6. The Board is entitled to have the opportunity to consider the amount of attorneys fees and costs in assessing whether or not to acquire the property or withdraw the condemnation.

WHEREFORE, the Board respectfully requests that the Court permit the Board to withdraw from the condemnation. The Board further requests that the Court enter that dismissal Order awarding no costs to the Defendants by reason of their willful and unreasonable refusal to provide an estimate of these costs.

In the alternative, the Board requests that the Court further suspend the order confirming the commissioners' report and enter an order directing the Defendants to provide the Board with a statement of costs and documentation thereof and permitting the Board to assess the costs of withdrawing versus acquiring the property and for the Court to hold any necessary hearing to determine reasonable costs.

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ORIGINAL

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
JUL 17 1992
RESOLVED
RICHMOND, VIRGINIA

PRINCE WILLIAM COUNTY BOARD OF SUPERVISORS,

PLAINTIFF,

VS.

: LAW NO. 23318

KENNETH R. PARSONS,

:

DEFENDANT.

:

-----X

THURSDAY, MARCH 19, 1992

MANASSAS, VIRGINIA

THE ABOVE-ENTITLED CAUSE CAME ON TO BE HEARD
BEFORE THE HONORABLE FRANK A. HOSS, JR., JUDGE FOR THE
CIRCUIT COURT OF PRINCE WILLIAM COUNTY, MANASSAS,
VIRGINIA, IN COURTROOM 2, PRINCE WILLIAM COUNTY
COURTHOUSE, 9311 LEE AVENUE, MANASSAS, VIRGINIA, BEGINNING
AT 11:35 A.M., WHEN THERE WERE PRESENT ON BEHALF OF THE
RESPECTIVE PARTIES:

02 MAR 13 PM 1:52
OFFICE
OF THE CLERK
OF THE SUPREME COURT
OF VIRGINIA
RICHMOND, VIRGINIA

P R O C E E D I N G S

(THEREUPON, THE COURT REPORTER WAS SWORN.)

MS. PANDAK: YOUR HONOR, THIS IS HERE ON THE COUNTY'S MOTION TO DISMISS THE CONDEMNATION PROCEEDINGS AND ALLOW THE COUNTY TO WITHDRAW. AND ALSO TO NOT PAY COSTS AND EXPENSES OF THE DEFENDANT SINCE THAT INFORMATION HAS NOT BEEN MADE AVAILABLE.

ON FEBRUARY 26TH, 1992, THE VIRGINIA SUPREME COURT ENTERED AN ORDER OF FINDING THAT THE PARTIES PETITION FOR APPEAL WOULD NOT BE GRANTED AND THAT THERE WAS NO ERROR IN THE COURTS PREVIOUS PROCEEDINGS.

ACCORDING TO STATUTE AND BASED ON THIS COURTS ORDER, PRIOR TO THE NOTICE OF APPEAL BEING FILED AND DATED AUGUST 22ND, 1991, THE TIME PERIOD FOR THE COUNTY MAKING A DETERMINATION WHETHER TO PROCEED WITH THE ACQUISITION OR WITHDRAW WAS SUSPENDED UNTIL THE APPEAL WITH THE VIRGINIA SUPREME COURT WAS COMPLETED. THAT THIRTY DAY TIME PERIOD WILL NOW RUN ON MARCH 26TH.

THE COUNTY DESIRES TO WITHDRAW FROM THIS ACTION BECAUSE THE COST IS TOO HIGH. THE PURPOSES FOR WHICH THE COUNTY HAD DESIRED TO ACQUIRE THE PROPERTY IN THE FIRST PLACE, HAVE BEEN FRUSTRATED, IN THAT IT HAD INTENDED TO ACQUIRE THE PROPERTY FOR BUFFER AND FOR FILL DIRT FOR ITS

1 INJUNCTION.

2 SECONDLY, THE COUNTY HAS NOT PAID ANY MONEY INTO
3 COURT FOR THE VALUATION OF THE PROPERTY. THIRDLY, AS I'VE
4 NOTED, THE COURT SUSPENDED THE IMPOSITION OF THE FINAL
5 ORDER PENDING ANY APPEALS BY THE VIRGINIA SUPREME COURT
6 BEING COMPLETED. AND SO THE COUNTY IS FILING THIS MATTER
7 IN A TIMELY FASHION.

8 FINALLY, THAT SPECIFIC SECTION REFERS TO THE
9 COUNTY PAYING FOR THE EXPENSES AND ATTORNEYS FEES INCURRED
10 BY THE PROPERTY OWNER IN A CONDEMNATION ACTION. IN ORDER
11 TO EVALUATE THAT, I HAVE ASKED MR. PARSONS' COUNSEL, MR.
12 ZELNICK, LAST WEEK, WHAT EXPENSES HAD BEEN INCURRED BY THE
13 PROPERTY OWNER AND I WAS TOLD THAT HE WAS NOT AT LIBERTY
14 TO TELL ME WHAT THOSE WERE BECAUSE HIS CLIENT CONSIDERED
15 IT A MATTER OF PRIVILEGE.

16 THIS GREATLY CONCERNS THE COUNTY WHICH I BELIEVE
17 SHOULD HAVE AN OPPORTUNITY TO EVALUATE, WHEN IT DETERMINES
18 WHETHER OR NOT TO PROCEED WITH ACQUIRING THE PROPERTY,
19 WHAT THE ATTORNEYS FEES AND COSTS ARE PRIOR TO MAKING THAT
20 FINAL DETERMINATION.

21 IN THE ABSENCE OF DOING THAT AND SINCE WE HAVE
22 NO AMOUNT AT WHICH TO EVALUATE OR FOR THE COURT TO
23 EVALUATE, WE HAVE ASKED THAT THE COURT ALLOW THE COUNTY

1 SIMPLY SAYS THAT EXECUTION OF THIS ORDER SHALL BE
2 SUSPENDED PENDING THE APPEAL OF THIS MATTER TO THE SUPREME
3 COURT OF VIRGINIA AND SHALL BE SUSPENDED UNTIL ALL APPEALS
4 ARE FINAL AND DISPOSED OF.

5 THAT CERTAINLY DOESN'T SAY WHAT MS. PANDAK SAYS
6 IT DOES, WHICH IS THAT IT SOMEHOW GIVES THE COUNTY AN
7 EXTENSION OF TIME. IN ADDITION TO THAT, I DON'T THINK THE
8 COURT COULD HAVE GIVEN AN EXTENSION OF TIME BEYOND WHAT
9 THE STATUTE PROVIDES BECAUSE I DON'T THINK THE COURT HAS
10 THAT AUTHORITY.

11 AFTER WE LOOK AT THIS ORDER ITSELF, YOUR HONOR,
12 THE CRITICAL LANGUAGE IS IN CODE SECTION 25-46.34
13 SUBSECTION-B. THAT IS THE PROVISION UNDER WHICH THE
14 COUNTY IS PROCEEDING. IN THE MIDDLE OF THAT PARAGRAPH IT
15 SAYS HOW AT THE TIME AFTER THE HEARING HAS BEGUN, WHICH
16 OBVIOUSLY WE'RE HERE ON AND IS INCLUDED IN THIS CASE AND
17 WE AGREE THAT THE COUNTY HAS NOT ACQUIRED TITLE AND THEY
18 HAVE NOT PAID THE MONEY TO THE COURT. THE KEY LANGUAGE
19 AND I QUOTE, AND BEFORE THE TIME FOR NOTING AN APPEAL FROM
20 ANY FINAL ORDER, UPON A REPORT OF JUST COMPENSATION. AND
21 THEN IT GOES ON TO SAY THAT THE PETITIONER MAY DISMISS THE
22 PROCEEDINGS.

23 BEFORE THE TIME FOR NOTING AN APPEAL, THEY HAVE

1 WHILE THE MATTER IS ON APPEAL. ON 25-46.34, THE
2 LEGISLATURE DRAWS NO SUCH DISTINCTION. IT SIMPLY SAYS THE
3 COUNTY HAS THE RIGHT BEFORE THE TIME FOR NOTING AN APPEAL.

4 OBVIOUSLY, YOUR HONOR, THAT LANGUAGE MUST BE
5 CONSTRUED LITERALLY. IT DOES NOT MAKE ANY REFERENCE AND
6 IT DOES NOT PROVIDE ANY MECHANISM TO EXTEND THAT TIME. I
7 THINK THE REASON FOR THAT IS BECAUSE THAT IS A HIGHLY
8 UNUSUAL METHOD AND A HIGHLY UNUSUAL RIGHT THAT THE
9 CONDEMNING AUTHORITY HAS IN THE CONDEMNATION CASE.

10 IN EFFECT, THEY CAN WAIT UNTIL AFTER THE HEARING
11 IS OVER, AFTER THEY HAVE PUT THE PROPERTY OWNER THROUGH THE
12 EXPENSE AND THE TIME AND THE AGGRAVATION OF GOING THROUGH
13 THE ENTIRE PROCEEDINGS, HAVING THE PROPERTY TIED UP, A
14 LIST PENDENCY IS ON THE PROPERTY, THE MARKET ABILITY OF
15 TITLE IS DESTROYED. DURING THE ENTIRE TIME THESE
16 PROCEEDINGS ARE PENDING, THE LANDOWNER CAN DO NOTHING WITH
17 HIS PROPERTY. HE CANNOT PREVENT THE COUNTY FROM TAKING
18 IT.

19 THEN THE LEGISLATURE SAYS, EVEN AFTER THE
20 COMMISSION HAS MADE THEIR AWARD AND EVEN AFTER THE COUNTY
21 HAS MADE EXCEPTIONS TO THAT AWARD AND THOSE EXCEPTIONS
22 HAVE BEEN DENIED. NOW, THE COURT HAS CONFIRMED THE AWARD.
23 AFTER ALL OF THAT HAS TAKEN PLACE, THE COUNTY STILL HAS

1 THE PROCEEDINGS HAVE BEEN DISMISSED IN ACCORDANCE WITH THE
2 PROVISIONS OF THE CODE SECTION 25-46.34.

3 THE COURT: WHERE ARE YOU READING THAT?

4 MR. ZELNICK: SECTION 25-46.31 SUBSECTION-D.

5 THE COURT: THIRTY-ONE?

6 MR. ZELNICK: YES, SIR. NOW, THAT CODE SECTION
7 IS SIGNIFICANT BECAUSE, IF THERE WERE NOT THE SUSPENSION
8 OF EXECUTION OF THE FINAL ORDER, THE PARSONS COULD HAVE
9 MOVED THIS COURT WITHIN THIRTY DAYS AFTER THE TIME FOR
10 APPEAL HAD ELAPSED FOR AN ENTRY OF JUDGEMENT AND THEN WE
11 COULD HAVE EXECUTED ON THAT JUDGEMENT. THE COUNTY WOULD
12 HAVE BEEN SUBJECT TO THE NORMAL PROCESSES TO EXECUTE ON
13 THE JUDGEMENT JUST LIKE ANY OTHER JUDGEMENT DEBTORS.

14 THE COURT: OR IT COULD HAVE ALSO CHOSEN TO GET
15 OUT FROM UNDER THE WHOLE THING AS WELL UNDER 34-C.

16 MR. ZELNICK: THAT'S CORRECT, BUT HE'S ELECTED
17 NOT TO DO THAT. THE POINT IS HE COULD HAVE GONE AND
18 TREATED THE AWARD AS JUDGEMENT AND LIKE ANY OTHER
19 JUDGEMENT, IF THE DEFENDANT DEBTOR DOES NOT POST A
20 SUPERSEDEAS BOND, IN THIS CASE, THE COURT RULED OVER MY
21 OBJECTION THAT THE COUNTY IS NOT REQUIRED TO POST A BOND.
22 BUT A SUPERSEDEAS IS NOT GRANTED THEN TO THE JUDGEMENT
23 CREDITORS, AS THE COURT KNOWS, IS ABLE TO EXECUTE ON THE

1 SUPREME COURT SAYS THAT THE SUPERSEDEAS DOES NOT EFFECT
2 THE FINALITY OF THE FINAL ORDER, IT SIMPLY SUSPENDS THE
3 EXECUTION. SO WE HAVE THE FINAL ORDER THAT WAS ENTERED.

4 IF THE COUNTY'S POSITION IS ACCEPTED IN THIS
5 CASE, YOUR HONOR, IN EFFECT WHAT THEY'RE SAYING IS THERE
6 IS NO FINAL ORDER AND THE CASE COULDN'T HAVE BEEN
7 APPEALED. OF COURSE, THAT IS DIRECTLY CONTRARY TO CODE
8 SECTION 25-46.26, WHICH SAYS THAT THE ORDER CONFIRMING AN
9 AWARD, IS A FINAL ORDER. AND IT THEN SAYS THAT
10 SUPERSEDEAS MAY BE GRANTED BUT THE SUPERSEDEAS IS FOR
11 EXECUTION AND AGAIN IT'S SIGNIFICANT THAT THE LEGISLATURE
12 IS SILENT THERE. JUST AS THE PARTY AGREED THEREBY, WHICH
13 IS THE FINAL ORDER, I'M READING FROM CODE SECTION
14 25-46.26, ANY PARTY AGREED, THEREBY, MAY APPLY FOR AN
15 APPEAL TO THE SUPREME COURT AND A SUPERSEDIOUS MAY BE
16 GRANTED IN THE SAME MANNER AS IS NOW PROVIDED BY LAW IN
17 THE RULES OF COURT APPLICABLE TO CIVIL CASES.

18 THE SUPERSEDEAS THAT THE COUNTY HAS IN THIS CASE
19 IS NO DIFFERENT FROM THE SUPERSEDEAS IN ANY OTHER CASE.
20 AS THE COURT WELL KNOWS, THE SUPERSEDEAS DOES NOT EXTEND
21 ANY OF THE TIMES IN ANY MATTER WHILE A CASE IS ON APPEAL.
22 WHEN THE APPEAL IS NOTED, THE COURT STILL HAS 21 DAYS
23 AFTER THE ENTRY OF THE FINAL ORDER TO EFFECT A JUDGEMENT

1 COURT ENTERED A DECREE ON JANUARY 15TH, 1948 WHICH
2 CANCELED THE CONTRACT AND ENJOINED THE APPELLANTS FROM
3 FURTHER TRESPASSING AND ORDERED THEM TO SURRENDER OF THE
4 PROPERTY. IT SAYS THE DECREE PROVIDED TO BE SUBJECT TO
5 THIS CONDITION, THAT THE DEFENDANTS ON OR BEFORE THE 24TH
6 DAY OF JANUARY 1948, PAY OVER TO THE COMPLAINANT THE
7 UNPAID BALANCE OF THE PURCHASE PRICE AND IT GOES ON TO SAY
8 OUR MOTION OF THE DEFENDANT IS ORDERED AND EXECUTION OF
9 THIS DECREE IS SUSPENDED FOR 90 DAYS ON THE DATE HEREOF
10 UPON THE DEFENDANTS ENTERING INTO A BOND OF ASSURITY.

11 THE DEFENDANTS DID THAT. THEY APPEALED TO THE
12 SUPREME COURT OF VIRGINIA AND THE SUPREME COURT REFUSED
13 THE APPEAL. THE DEFENDANTS CAME BACK AFTER THAT AND SAID
14 THAT THEY HAD NINE DAYS AFTER THE APPEAL WAS REFUSED IN
15 ORDER TO COMPLY WITH THE TERMS OF THE DECREE. THAT'S
16 EXACTLY WHAT THE COUNTY IS SAYING HERE. THAT AS LONG AS
17 THEY ACT WITHIN THIRTY DAYS AFTER THE SUPREME COURT RULES
18 AS OPPOSED TO THE THIRTY DAYS AFTER THE ENTRY OF THE
19 ORDER, THEY'RE TIMELY.

20 THE VIRGINIA SUPREME COURT REJECTED THAT AND
21 SAID NO, WE HOLD THAT THE OFFER OF COMPROMISE WAS NOT IN
22 TIME. THEY SAY THE APPELLANTS ELECTED NOT TO ACCEPT THE
23 OPTION INTENDED BY THE DECREE BUT TO APPLY FOR AN APPEAL

1 CONDEMNING AUTHORITY, THE TRANSPORTATION COMMISSION, HAD
2 IN FACT, ACQUIRED THE PROPERTY PRIOR TO TRIAL AND THEN
3 THEY TRIED TO NON-SUIT IT. THE CASE HAD TRIAL BECAUSE
4 THEY COULD NOT DISMISS UNDER THIS SECTION BECAUSE THEY HAD
5 ALREADY ACQUIRED AN INTEREST. THE SUPREME COURT REVERSED
6 THE TRIAL COURT AND SAID THEY COULD NOT NON-SUIT IT AT
7 THAT TIME. IT TALKED ABOUT HOW IN 1972 THE GENERAL
8 ASSEMBLY REVISED THE LAW AND SAID THAT MATTERS HEARD BY
9 THE TRANSPORTATION COMMISSIONER ARE TO BE GOVERNED UNDER
10 THE GENERAL CONDEMNATION ACT. AND THEY SAID -- THEY
11 REFERRED TO 25-46.34 AND THEY -- I QUOTE, WHEN THE 1972
12 AMENDMENT TRANSFERRED HIGHWAY CONDEMNATION PROCEEDINGS TO
13 THE VIRGINIA GENERAL CONDEMNATION ACT, SUCH CASES BECAME
14 SUBJECT TO CODE SECTION 25-46.34, WHICH IS NOTED ABOVE,
15 PERMITS DISMISSAL BY THE CONDEMN LAWS AS A MATTER OF RIGHT
16 AND NO TITLE OF POSSESSION HAS BEEN ACQUIRED OR MAKES NO
17 PROVISION FOR SUCH A DISMISSAL AFTER THE CONDEMNOR HAS
18 ACQUIRED AN INTEREST IN THE POSSESSION OF THE PROPERTY.
19 WE THINK THE LEGISLATIVE SILENCE ON THIS SUBJECT IS
20 SIGNIFICANT.

21 THAT IS THE SAME AS WE HAVE HERE, YOUR HONOR.
22 IT'S SIGNIFICANT BECAUSE THE LEGISLATURE IS SILENT ON THE
23 EXTENSION OF TIME. IT IS ALSO SIGNIFICANT BECAUSE THE LAW

1 JUDGEMENT FOR THE PARSONS IN ACCORDANCE WITH THE REPORT OF
2 THE COMMISSIONERS AND AWARD OF THIS COURT, AFFIRMING THAT
3 AWARD.

4 WITH RESPECT TO THE COUNTY'S STATEMENTS AS TO
5 WHY THEY NO LONGER WANT THE PROPERTY, FIRST OF ALL, YOUR
6 HONOR, THAT IS IRRELEVANT. UNDER THE CODE SECTION THEY
7 HAVE THE RIGHT, IF THEY ACT IN A TIMELY FASHION, TO
8 WITHDRAW FOR WHATEVER REASON THEY LIKE AND IF THEY DON'T
9 ACT IN A TIMELY FASHION, THEY DON'T HAVE THE RIGHT TO
10 WITHDRAW.

11 SO WHETHER THEY ARE ACTING FOR THE REASON MS.
12 PANDAK SAID OR OTHER REASONS IS AN IRRELEVANT
13 CONSIDERATION. WE WOULD DISPUTE HER FACTUAL
14 CHARACTERIZATION OF WHY THIS OCCURRED ON THE PROPERTY AND
15 I THINK THAT AN EVIDENTIARY HEARING OBVIOUSLY WOULD BE
16 NECESSARY ON THAT ISSUE, IF IT WAS A RELEVANT
17 CONSIDERATION BUT IT IS NOT.

18 THE ISSUE IS DID THEY ACT IN A TIMELY FASHION.
19 DID THEY ACT WITHIN THE TIME FOR NOTING AN APPEAL. IN
20 WHICH CASE, THEY HAD THE RIGHT WHETHER WE DEEM IT
21 SUFFICIENT, AS LONG AS IT IS SUFFICIENT TO THEM THAT IS
22 GOOD ENOUGH.

23 WITH RESPECT TO THE ISSUE OF THE EXPENSES AND

1 MS. PANDAK: YOU HAVE THAT, YOUR HONOR? AND I
2 BELIEVE IT'S ALSO REFERENCED IN THE FOOT NOTE ANNOTATION
3 TO 25-46.34. IN THAT CASE THERE WAS A MOTION BY THE
4 PROPERTY OWNER WHEN THE TOWN APPEALED THE DECISION IN A
5 SECOND TRIAL TO THE VIRGINIA SUPREME COURT AND IT WAS
6 ACCEPTED. THEN THE PROPERTY OWNER CAME IN AND MOVED THE
7 VIRGINIA SUPREME COURT TO DISMISS THE TOWNS APPEAL BECAUSE
8 THE TOWN HAD NOT PAID THE AWARDS INTO THE COURT AND THE
9 COURT FOUND THAT THAT WAS WITHOUT MERIT.

10 CLEARLY THE COURT IN THAT CASE INTENDED TO
11 PROTECT BOTH PARTIES IN THE ACTION UNTIL IT HAD RENDERED A
12 DECISION ON THE APPEAL ITSELF AND NOT TO MAKE PAYING THE
13 MONEY INTO COURT OR OTHERWISE DISPARATIVE AS TO THE ISSUE
14 ON APPEAL.

15 SECONDLY, I HAVE TO JUST NOTE WITH SOME
16 PUZZLEMENT, MR. PARSONS ANXIOUSNESS NOW FOR THE COUNTY TO
17 TAKE THE PROPERTY. AFTER APPEALING THE COURTS RULING IN
18 THE FIRST TRIAL AND PRESUMPTIVELY INDICATING THAT THE
19 VALUE SIMPLY WASN'T HIGH ENOUGH. WE APPEAR VERY PUZZLED
20 THAT HE WOULD WANT IT BACK AND WOULD WANT TO FORCE US TO
21 TAKE HIS PROPERTY AT THREE POINT FOUR MILLION DOLLARS.
22 THE PRICE ON IT WASN'T ENOUGH FOR HIM EARLIER.

23 TURNING TO THE ISSUE OF THE ORDER ITSELF,

1 PUZZLEMENT. AT LEAST IT'S NOT A MATTER OF PUZZLEMENT TO
2 ME AS TO WHY MR. PARSONS PROBABLY WANTS TO HAVE THE COUNTY
3 BUY AFTER ALL. A LOT OF THE CIRCUMSTANCES HAVE CHANGED IN
4 TERMS OF LAND VALUE IN THIS PARTICULAR AREA SINCE THIS
5 WHOLE PROCESS STARTED BACK, AT LEAST IN JANUARY OF '90 AND
6 I ASSUME SOMETIME BEFORE THAT WHEN NEGOTIATIONS PROBABLY
7 BEGAN IN ACQUIRING MR. PARSONS LAND.

8 IT DOESN'T STRIKE ME -- I DON'T BELIEVE THE
9 LEGISLATURE REALLY INTENDED TO ALLOW A CONDEMNATORY -- TO
10 START THESE PROCEEDINGS AS FAR BACK AS THEY PROBABLY DID
11 IN THIS CASE BUT THEY CERTAINLY DID ON THE 16TH OF JANUARY
12 1990 -- HOLDING SOMEONE'S PROPERTY IN HOSTAGE, IN ESSENCE,
13 FROM THAT POINT ON. AND MR. PARSONS, HE FOUGHT IT TOOTH
14 AND NAIL TO BEGIN WITH. HE DIDN'T WANT THE COUNTY TO TAKE
15 HIS LAND. HE DIDN'T WANT THEM TO HAVE ANYTHING TO DO WITH
16 IT, HE WANTED TO USE IT. HE TRIED EVERYTHING, AS I
17 RECALL, ANYTHING YOU COULD THINK OF TO TRY TO STOP THE
18 COUNTY'S CONDEMNING PROCESS IN THIS PARTICULAR CASE,
19 INCLUDING CONSTITUTIONAL RIGHTS THAT HE RAISED THAT THEY
20 COULDN'T TAKE HIS LAND. BUT THE COUNTY PERSEVERED AND
21 THEY WANTED TO TAKE IT FROM THE BEGINNING AND THEN THEY --
22 AND I MADE THAT RULING AND I DON'T BACK OFF FOR ONE
23 MOMENT. THEY CAME IN HERE AND WANTED ME TO -- EVEN THOUGH

1 IT, I THINK THAT RELATES MORE TO 25-46.34C. IF I HADN'T
2 DONE THAT THEN MR. PARSONS AND I DON'T KNOW WHAT THE
3 POSITION WAS AT THAT TIME LAST YEAR, YOU MIGHT HAVE BEEN
4 ABLE TO COME IN HERE AND SAY UNDER "C" HE COULD HAVE
5 GOTTEN THIS THING SET ASIDE AND GOTTEN HIS LAND BACK. BUT
6 THEN HAVING THIS HANGING OVER HIS HEAD, THIS CLOUD.

7 MR. ZELNICK REFERS TO "D" ON 25-46.31 HE MIGHT
8 BE RIGHT, I DON'T KNOW, IT SEEMS LIKE TO ME IT WAS -- I
9 REALLY DON'T THINK THAT ORDER HAS ANYTHING TO DO WITH IT
10 BECAUSE I THINK 25-46.34B SAYS YOU'VE GOT TO DO ONE OF TWO
11 THINGS AT THE END OF THIS TRIAL. YOU CAN EITHER, ONE, SAY
12 THIS WHOLE THING COSTS TOO MUCH MONEY, WE DO NOT WANT THIS
13 PROPERTY, CONSEQUENTLY WE WANT TO WITHDRAW AND WE CAN DO
14 SO AS A MATTER OF RIGHT OR YOU CAN APPEAL, NOT BOTH AND
15 YOU CHOSE TO APPEAL AND I THINK THAT THE THIRTY DAYS --
16 WELL, I THINK HE'S EXACTLY RIGHT AND THE STATUTE SAYS,
17 BEFORE THE TIME FOR NOTING AN APPEAL AND BEFORE THE TIME
18 FOR NOTING AN APPEAL FROM ANY FINAL ORDER UPON A REPORT OF
19 JUST COMPENSATION. THAT TIME RAN AND I BELIEVE THAT THE
20 COUNTY HAS TO PURCHASE THIS PROPERTY. I'M GOING TO DENY
21 YOUR MOTION TO WITHDRAW.

22 MS. PANDAK: YOUR HONOR, IF I MIGHT INDULGE THE
23 COURT. YOUR HONOR, YOU TALKED ABOUT THE HARM THAT HAS

1 STATUTE HE GETS THE COSTS THAT HE EXPENDED IN DEFENDING
2 THE CONDEMNATION ACTION THAT THE COUNTY BROUGHT. SO HE IS
3 IN EFFECT NOT HARMED.

4 THE COURT: I DON'T KNOW ABOUT THAT.

5 MS. PANDAK: BY THE COUNTY WITHDRAWING FROM THE
6 MATTER --

7 THE COURT: I COULD IMAGINE PLENTY OF SCENARIOS
8 WHERE HE COULD BE IMMENSELY HARMED AND ONE OF WHICH WOULD
9 BE THE FACT THAT THE VALUE OF THE PROPERTY IN ALL
10 LIKELIHOOD IT DECREASED CONSIDERABLY SINCE THE TIME THAT
11 THIS MATTER BEGAN. HE COULD HAVE SOLD IT FOR A LOT MORE,
12 HE THOUGHT IT WAS WORTH A LOT MORE THAN ANYBODY THEN. I
13 DON'T KNOW WHAT HE THINKS IT'S WORTH NOW. APPARENTLY HE
14 THINKS IT'S WORTH I BELIEVE SOMEWHERE CLOSE TO WHAT THE
15 COUNTY COMMISSION SAID SHOULD BE PAID BY THE COUNTY FOR
16 IT. WE COULD SPECULATE, I GUESS ALL DAY, ON WHAT HE MIGHT
17 HAVE DONE IF THE COUNTY HAD DONE SOMETHING ELSE BACK WHEN
18 THEY HAD THE OPPORTUNITY TO DO SOMETHING.

19 MS. PANDAK: YOUR HONOR, I DON'T UNDERSTAND WHAT
20 THE PURPOSE WAS THEN WHEN WE SPECIFICALLY ARGUED THAT THE
21 REASON FOR HAVING THE MATTER SUSPENDED DURING THE PENDENCY
22 OF THE APPEAL --

23 THE COURT: I THINK THE PURPOSE WAS, IF YOU

1 EXPENSIVE WE DON'T HAVE TO FOOL WITH IT OR LET'S GO ON THE
2 MERITS AND SEE IF WE CAN APPEAL IT AND WIN IN THAT
3 FASHION.

4 I DON'T THINK THAT YOU CAN DO BOTH. I DON'T
5 THINK THE STATUTE ALLOWS YOU TO DO BOTH. I DON'T REALLY
6 THINK IT MAKES ANY DIFFERENCE. I THINK MR. ZELNICK'S
7 RIGHT, WHEN YOU DIDN'T DO IT WITHIN THAT THIRTY DAY PERIOD
8 IT WAS WHERE IT BELONGED AND THE COUNTY PURCHASES THE
9 PROPERTY. THAT'S THE WAY I SEE IT.

10 MS. PANDAK: THE COUNTY NOTES ITS EXCEPTION.

11 MR. ZELNICK: I'LL PREPARE AN ORDER, YOUR HONOR.

12 THE COURT: I DON'T KNOW WHICH CODES YOU'RE
13 TALKING ABOUT BUT IT SEEMS TO ME LIKE AFTER YOU'VE LOOKED
14 AT THESE OTHER SECTIONS -- IT SEEMS TO ME LIKE THEY'VE GOT
15 THIRTY DAYS, I GUESS, FROM THE SUPREME COURT ORDER TO PAY
16 THAT MONEY BEFORE I ENTERED A JUDGEMENT.

17 MR. ZELNICK: I'LL PREPARE AN ORDER SIMPLY
18 DENYING THEIR MOTION TO WITHDRAW AND THEN --

19 THE COURT: I DON'T KNOW WHERE WE STAND AFTER
20 THAT. I HAVEN'T SEARCHED IT OUT, WHICH I ASSUME YOU ALL
21 WILL. IF YOU'RE GOING TO APPEAL IT AGAIN I GUESS YOU'LL
22 DO AN ORDER OF --

23 MS. PANDAK: YES, SIR, I WILL HAVE TO.

1 ABOVE-ENTITLED MATTER WAS CONCLUDED.)

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VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

**BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA**

Petitioner

V.

KENNETH F. PARSONS, *et al.*

Defendants.

Law No. 23318

PRAECIPE

THE CLERK of this Court will please place the above-styled case on the docket to be called Friday, April 17, 1992, at 10:00 a.m., or as soon thereafter as counsel may be heard, for the following actions:

MOTION FOR RECONSIDERATION

**BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA**

BY COUNSEL

Sharmar Pardo

SHARON E. PANDAK
County Attorney
1 County Complex Court
Prince William, Virginia 22192
Counsel for the Petitioner

1967 JAN 19 PM 1:53

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

**BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA**

Petitioner

v.

KENNETH F. PARSONS, *et al.*

Defendants.

Law No. 23318

MOTION FOR RECONSIDERATION

COMES NOW the Petitioner, BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY, VIRGINIA, by counsel, and requests this honorable court to reconsider its verbal ruling on March 19, 1992, that the Petitioner is not entitled to a dismissal of the condemnation proceedings in this action.

Respectfully submitted,

BY COUNSEL



SHARON E. PANDAK
County Attorney
Prince William County
1 County Complex Court
Prince William, Virginia 22192
(703) 792-6620
Counsel for Petitioner

FILED
MAR 22 1992
CLERK OF COURT
PRINCE WILLIAM COUNTY
VIRGINIA

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

**BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA**

Petitioner

V.

KENNETH F. PARSONS, *et al.*

Defendants.

Law No. 23318

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

COMES NOW the BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY, VIRGINIA ("the County"), by counsel, and respectfully requests this honorable Court to reconsider its oral decision of March 19, 1992 for the following reasons:

STATUS OF THE CASE

As the Court is very familiar with this matter, we will not dwell on the facts. The Court will recollect, however, that on August 22, 1991, it entered an order confirming the May 15, 1991 Report of Commissioners of just compensation in this condemnation action. The order contained a provision that suspended its execution pending appeal. The County appealed that order to the Virginia Supreme Court and the Defendants KENNETH F. PARSONS and KATHLEEN PARSONS ("the Parsons") simultaneously appealed an earlier decision in this case. On February 25, 1992, the Supreme Court rejected both petitions for appeal.

On March 19, 1992, the County requested this Court to allow it to withdraw from the instant condemnation action. After hearing argument of counsel, the Court declined to allow the County to withdraw and dismiss the action. The Court indicated that its suspension of entry of its order of August 22, 1991 in the order

1. *Condemnations can be dismissed before title vests.*

The rule in Virginia is that a condemnation action can be dismissed at any time before title vests in the public body. *Keys v. Shirley*, 153 Va. 461, 150 S.E. 401, 402 (1929)², citing *Board of Supervisors v. Proffit*, 129 Va. 9, 105 S.E. 666, 667 (1921).³ This is obvious from the language of Section 25-46.34(d), VA Code Ann., which allows parties to a condemnation action to stipulate to a dismissal of the proceedings before the vesting of title. While no stipulation is involved in the instant matter, this subsection reflects the clear intention of the General Assembly that public entities should be given the right to withdraw from a condemnation action before title vests. The sole purpose of preceding subsection (b), allowing unilateral withdrawal by the condemnor, is to set up a reasonable time within which the governing body must decide whether to acquire the property after the price has been determined.⁴

² In *Keys* the State Highway Commissioner moved to condemn land for a road and, upon paying the damages into the court, took possession during the pendency of the condemnation proceedings. While the Virginia Supreme Court held that, upon payment of compensation and construction of the roadway, title to the property was absolutely vested in the government, it stated the general rule that the government is entitled to withdraw a condemnation action at any time before title vests.

In *Proffit* the board of county supervisors of Louisa County after commencing a condemnation action moved to dismiss the proceeding. The Virginia Supreme Court reversed the trial court's refusal to grant the dismissal. It found that the rights of the landowners were fully protected. The Court in its opinion noted:

"If after having commenced the proceeding in the circuit court they [the county board], in the exercise of their official discretion, decided that it would be for the interest of the county to abandon that proceeding for any reason appearing to them sufficient, it is not for the courts, in the absence of any evidence other than the facts appearing in this case, to sustain the charge of bad faith."

³ This is consistent with the general rule in other states in the absence of a statutory provision clearly to the contrary. "Eminent Domain", 9 Am. Jur. Pl. & Pr. Forms (Rev.), p. 645; 121 ALR 12; 5 ALR2d 724; 68 ALR3d 610.

of Section 25-46.24, VA Code Ann. That section provides that, upon return of the commissioners' report and the confirmation of same by the court, "compensation and damages, if any, to the property owners *may be paid* into the court, upon which title to the property and rights condemned shall vest in the petitioner..." [emphasis added].

It is undisputed that no title or interest in the property has passed to the County, nor has the County taken possession of the property. In fact, by order dated May 3, 1991, this Court specifically denied the County an injunction against certain activity by the Parsons on the property indicating that the County had no interest which should be protected because it had no title. One of the reasons which the Court stated for so finding was that the County had not paid compensation into Court thereby recognizing the statutory interdependence between payment and the passing of title.

The clear purpose of the condemnation process is to fix the price of property, not to compel the taking of land by a public entity. The condemnation statutes indicate no legislative intent to compel possession of property by the government once it embarks upon condemnation, or indeed, at any point before title vests or judgment is final. In fact to do so would be contrary to public policy as expressed in State law reserving to public entities the determination when to condemn, which makes the decision to proceed with a condemnation a legislative and not a judicial act. The cost of taking the property is a question which must necessarily be taken into consideration by a board of county supervisors before it can determine whether the financial condition of the county treasury or funds available warrant the acquisition, and it is because of this that the board is vested by statute with the discretion to determine whether or not it will proceed. This is a discretion which cannot be properly exercised until it has definitely learned what the total cost will

amount of the award had not and has not been entered against the County as provided pursuant to Section 25-46.31(d), VA Code Ann.

Section 25-46.31(d), VA Code Ann., is instructive on the issue of when an award becomes final such that judgment can be entered on it. In pertinent part that section provides that

If the petitioner fails to pay into court any sum necessary for paying the total award which has been confirmed *finally* or the interest to which the owner is entitled under this section for a period of *thirty days after the time for noting an appeal*, the court shall enter judgment therefor against the petitioner, unless the proceedings have been dismissed in accordance with the provisions of Section 25-46.34.

[emphasis added]. This section makes it clear that judgment cannot be entered until 30 days *after* the time for noting an appeal.

Clearly since the order was suspended simultaneously with its entry, prior to the County noting its appeal, and pending the disposition of that appeal, the time within which the County could move by right under Section 25-46.34(b), VA Code Ann., to withdraw from the proceedings was extended and would not have expired until at least 30 days after the decision by the Supreme Court on February 25, 1992.

Finally, the general rule is that the taking of an appeal from an order of judgment in a condemnation action does not, by itself, prevent the condemnor from withdrawing from the action.

The right to abandon pending an appeal, or after decision on appeal, provided such right is claimed within a proper time, is generally recognized.

121 A.L.R. 12, 64 "Anno. - Eminent Domain Proceedings - Abandonment"; "Eminent Domain", 27 Am Jur 2d Section 454, p. 375. The law establishes no special rule that the County's right to withdraw, even though exercised, as described above, within the limits established by statute, is prejudiced or eliminated simply by the pursuit of an appeal.

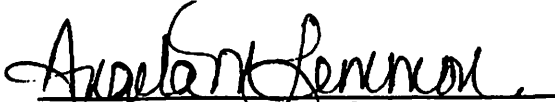
4. *The Court should not depart from the general rule in favor of implementing an estoppel theory.*

The Court suggested that the County should not be allowed to withdraw from this action because of the length of the proceedings. The Court seemed to indicate that there were good faith requirements in addition to the statutory requirements for withdrawal. While the County believes as a matter of fact that there is no evidence of bad faith on its part in these proceedings, it is clear as a matter of law that such equitable considerations have no application in a condemnation proceeding.

First, estoppel does not lie against the government when it is acting in its legislative capacity. *See Masterson v. Virginia Beach Board of Zoning Appeals*, 233 Va. 37, 353 S.E.2d 727 (1987); *Norfolk & Western Ry. Co. v. Board of Supervisors*, 110 Va 95, 65 S.E. 531 (1909).

Secondly, as previously indicated, the determination to condemn property is a legislative one. If the Court were to exercise its power to prevent a legislative body from taking legislative action, such as withdrawing from a condemnation within the framework established by statute, then the Court would essentially be exercising a legislative function. This is clearly impermissible. Since the Court has only judicial powers it cannot exercise legislative powers to force the Board of County Supervisors to pursue a condemnation from which it has the legal authority to withdraw.

Thirdly, there is no good reason to apply the doctrine of estoppel or laches here since the County has proceeded diligently in this matter. The fact that there have been two trials of this matter should not be held against the County, if for no other reason than the award of the first commission was rejected by the Court, albeit at the County's request, and a new trial was ordered. There is no evidence that the County has proceeded in bad faith or wrongfully procured two trials. The



ANGELA M. LEMMON
Assistant County Attorney
1 County Complex Court
Prince William, Virginia 22192
Counsel for the Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum in Support of Motion for Reconsideration was mailed, first class, postage prepaid, to Robert J. Zelnick, Szabo, Quinto, Zelnick and Erickson, P.C., 12610 Lake Ridge Drive, Woodbridge, Virginia, 22192, Counsel for the Defendants, this 13th day of April 1992.


SHARON E. PANDAK

W:\sep\parsmem

Q 20923

1 V I R G I N I A

2 IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

3 -----X

4 PRINCE WILLIAM BOARD :

5 OF SUPERVISORS :

6 Petitioner, :

7 versus, :

8 KENNETH F. PARSONS, :

9 Defendant. :

10 -----X

11 Manassas, Virginia

12 Friday, April 17, 1992

13 The above-entitled action came on to be heard
 14 before the Honorable Frank A. Hoss, Jr., a Judge in and for
 15 the Circuit Court of Prince William County, 9311 Lee Avenue,
 16 Manassas, Virginia 22110, beginning at approximately 10:25
 17 o'clock a.m., before Lisa S. Stablier, a verbatim court
 18 reporter.

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CLERK
 SUPREME COURT OF VIRGINIA
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 AT LAW NO. LA-23318

92 MAY 13 PM 4:32
 CLERK OF COURT
 JUDICIAL BRANCH
 1000 E. MAIN ST.
 RICHMOND, VA 23219
 FAX 781-651-1500



P R O C E E D I N G S

(The Court Reporter was sworn.)

MR. ZELNICK: Good morning, Your Honor.
Your Honor, I filed a motion to have entry of an order reflecting Your Honor's ruling in the case the last time we were here.

THE COURT: Do I have the original orders in the file?

MR. ZELNICK: No; I have it here, Your Honor.

THE COURT: Do you have your original?

MS. PANDAK: Your Honor, I believe you have that in the file.

MR. ZELNICK: The county has asked for a reconsideration, so I think it would be appropriate if they went first.

MS. PANDAK: Your Honor, the county has filed a memorandum in support of its motion for consideration. Has the court reviewed that?

THE COURT: Yes.

MS. PANDAK: I will be brief, then. The county respectfully requests that the court reconsider its opinion of March 19th on the bases that it is clear, both



1 compensation be paid into the court.

2 Thirdly, the county is not in a position
3 to exercise effectively its legislative discretion as to
4 whether or not to proceed with the taking of property once an
5 award is made until all of the proceedings with respect to
6 that which might affect the ultimate compensation have been
7 concluded. And in this case, that would not have been
8 concluded until after the Virginia Supreme Court acted on the
9 appeal on February 25th, 1992.

10 The court's order of April 22nd, 1991,
11 which confirmed the commissioner's report, had in it
12 specifically a suspension. It has been argued to the court
13 by the condemnee that that suspension had only partial
14 effect. I think that it cannot be held to have partial
15 effect in one case and not in another case.

16 It is clear that the suspension provision
17 was in that order, and it was prior to the time of noting an
18 appeal. Specifically, Section 25-46.34(b), which is the
19 Section that specifically allows a condemnor to withdraw,
20 says that the indication of a desire to withdraw should
21 precede the time for noting an appeal.

22 The county protected itself in that
23 regard by asking for the suspension in the court's order of



1 a long period of time following that, and so you end up with
2 a date of March 25th, 1992, by which the county had to
3 indicate its desire to withdraw from the proceedings.

4 The county brought this matter before the
5 court for hearing on March 19th, 1992, and it was clearly
6 within that time period, and, I believe, proceeded diligently
7 to indicate its legislative desire to withdraw from the
8 condemnation.

9 Finally, we have touched on the issue of
10 estoppel, and I think it is clear that estoppel does not run
11 against the county and that the county has not proceeded in
12 bad faith in this matter, the court having earlier determined
13 that the offer made by the county was a bona fide offer and
14 the county having effectively convinced the court to find
15 that the first trial should be reversed and proceed with a
16 second trial.

17 Thank you, Your Honor.

18 THE COURT: Well, I do not quite
19 understand, from reading your brief and listening to you
20 today, how you address the meaning of the language in the
21 statute that says, before the time for noting an appeal.

22 MS. PANDAK: Your Honor, the county's
23 position is that that Section is not intended by the General



1 order was entered. They chose to file an appeal. They lost
2 the appeal, and then they moved to abandon.

3 Now, the California Supreme Court said
4 they could not do that, that it was too late. And if I can
5 read briefly from the opinion, this is on page 167 of 46
6 Pacific 2d, it says: We agree with the contention of G.H.
7 Deacon Investment Company that once the thirty-day period
8 provided in Section 1255(a) starts to run, an appeal does not
9 stay its operation.

10 We are of the opinion that one of the
11 major purposes intended by Section 1255(a) was to compel the
12 condemnor to decide within thirty days after entry of the
13 interlocutory decree whether it desires to abandon.

14 This does not in any way deprive the
15 condemnor of its right to appeal. When an interlocutory
16 decree of condemnation is entered, the condemnor, in the
17 absence of an appeal by the condemnee, knows how much the
18 improvement will cost.

19 If it decides not to abandon but decides
20 to appeal, it may do so. If the appeal by the condemnor is
21 unsuccessful, the condemnor has lost its right to abandon and
22 must pay. This rule is fair and just to all concerned.

23 Your Honor, as I argued the first time,



1 use of the English language, if it so intended to allow for
2 an additional period of time beyond an appeal, to simply
3 state that in the statute. The statute does not state it.

4 The cases cited by the county -- the Keys
5 versus Shirley case is an older case, and the law was very
6 different at that time. Under the Code Section in effect at
7 that time, which was old Code Section 4387, it provided that
8 if the amount is not paid by the condemning authority within
9 three months, then either party could file for withdrawal and
10 it would be dismissed.

11 That is completely different. The
12 statute has been substantially revised by the legislature
13 when 25-46.34 was adopted. There is simply no reason to
14 believe that the legislature meant anything other than what
15 the clear, plain, and unambiguous language of the statute
16 provides.

17 And I have other authorities from Nichols
18 talking about statutory interpretation and how the fact that
19 the general rule which the county relies on is only a general
20 rule in states where there is no statutory authority. And in
21 states where there is statutory authority, then it comes down
22 to a matter of legislative intent.

23 Also, from another ALR annotation, 68 ALR



1 make a decision. And if they, in fact, choose to appeal and
2 they lose the appeal, just like in the Los Angeles versus
3 Deacon case, then the time has expired.

4 It is not an issue in this case of
5 vesting, it is not an issue of estoppel; it is simply an
6 issue of have they complied with the time requirement set out
7 in the Code, and they have not.

8 MS. PANDAK: Your Honor, I would make a
9 couple points in response to Mr. Zelnick. He indicates that
10 the Keys and Proffitt cases are old cases and have been
11 abrogated by changes in state statute.

12 A case which he cited to Your Honor at an
13 earlier hearing, the Trout case, which we believe is largely
14 -- the holding is not applicable to this situation, says
15 specifically: In subjecting highway condemnations to the
16 Virginia Condemnation Act, the General Assembly was
17 presumably aware of the state of the law established by
18 Proffitt and Keys.

19 The language of Code Section 25-46.34
20 made applicable the highway condemnations by the 1972
21 amendment and indicates a legislative intent to leave the
22 state of that law undisturbed.

23 I think that that clearly brings those



1 trying to determine what the legislature meant by
2 25-46.34(b). As I understand it, when the words of the
3 statute are clear and unambiguous a judicial construction is
4 not required.

5 It seems clear to me that, in this
6 particular case, clearly the county has not taken possession
7 of the property nor have they paid the money. And I take it,
8 then, that title has not passed, which much is made of in the
9 arguments made by the county in their brief.

10 I guess it is true that title has not
11 passed. But as Mr. Zelnick points out, if the legislature
12 had stopped there, then I think you would be correct; but it
13 did not stop there.

14 Then it goes on to say, and it seems to
15 me in very plain language, quoting, and before the time for
16 noting an appeal from any final quarter upon a report of just
17 compensation. Plain and simple construction of that to me
18 means that you have that time within which to withdraw or you
19 cannot withdraw.

20 Now, I am not certain as to what the full
21 import of the order that we entered at the end of this case
22 suspending the execution of the payment -- it certainly did
23 not specifically say that I was extending the time for the



1 MR. ZELNICK: There are some others in
2 the "wherefore" paragraph, and in the "appearing" paragraph
3 there is some language, but I think it is more form as
4 opposed to substance.

5 THE COURT: Well, you have a few minutes
6 left. What about the interest? I don't have one order here.
7 Do I not have yours?

8 MR. ZELNICK: I just gave it to the
9 bailiff to hand up, Your Honor.

10 MS. PANDAK: Your Honor, if you would
11 like, I have highlighted the two orders so that you can see
12 the difference, if that would be useful to the court.

13 THE COURT: I don't have the county's
14 order.

15 MS. PANDAK: Should I provide this to the
16 bailiff? I have gone through and highlighted the differences
17 in the two orders.

18 THE COURT: Yes. Thank you.

19 MS. PANDAK: Your Honor, I would beg to
20 differ with Mr. Zelnick's mention with respect to the issue
21 other than that of interest.

22 I think that the county's order more
23 accurately reflects the court's ruling in this regard, even



1 THE COURT: What is your position on the
2 interest?

3 MS. PANDAK: Your Honor, we have asked
4 that the order be suspended in its execution pending any
5 appeal. And secondly, I believe that it would be
6 inappropriate for the court to award interest, as Mr. Zelnick
7 requests, from September 22nd, 1991.

8 First and primarily, the Virginia Supreme
9 Court in the case of Bartz versus Board of Supervisors of
10 Fairfax County -- and I have a copy of that holding if the
11 court needs it. I would refer the court to page 357, midway
12 down the second column: Interest on an amount is appropriate
13 for any period of time the owner has neither control nor use
14 of the property nor the monetary award.

15 The court goes on further in what is
16 designated as part of headnote two: Interest as a part of
17 just compensation is appropriate only after the property is
18 taken or damaged.

19 The court in short holds that interest is
20 not appropriate, even in this case where a lis pendens was
21 filed, until the time that either title is taken or that the
22 property owners have lost control of the property.

23 THE COURT: Is it your position that they



1 to the running of interest. They just have a right to
2 ordinary supersedeas that any appellant might have.

3 THE COURT: Why do you think you are
4 entitled to interest from September 22?

5 MR. ZELNICK: Well, Your Honor, I am
6 relying on the same case that the county relies on, which is
7 the Bartz case. And the court has, I see, the Southeast 2d
8 copy in front of it. I would direct the court's attention to
9 page 360, in the very first paragraph.

10 In that case, in Bartz, Your Honor, the
11 trial court awarded the landowner interest from the date the
12 order was entered confirming the report, which is May 22nd,
13 until the payment was made by the county on May the 26th. It
14 was four days worth of interest, but because of the amount of
15 the award, it was a substantial amount of money.

16 And in the middle of that paragraph the
17 court says: Code Section 25-46.34(b) affords the condemnor
18 thirty days after the trial court sets the final amount of
19 the compensation award to accept or reject the compensation
20 without any penalty.

21 In this case, the county exercised its
22 options to pay for the property at the said price within the
23 thirty-day period, therefore there is no statutory or



1 have been applicable.

2 THE COURT: How about (c) above that,
3 Ms. Pandak?

4 MS. PANDAK: I think (c) is equally
5 compelling in supporting the county's argument that no
6 interest shall be allowed during any time distribution of the
7 fund or upon appeal. We appealed it, and Mr. Parsons
8 appealed the earlier holding of the court.

9 MR. ZELNICK: Well, (c) doesn't apply,
10 because it talks about distribution of the fund paid into
11 court. The county has never paid any money into court.

12 THE COURT: Or upon appeal.

13 MR. ZELNICK: The statute says: No
14 interest shall be allowed during the time any distribution of
15 the fund paid into court was delayed in the trial court or
16 upon appeal.

17 But it is talking about distribution of
18 the fund being delayed. In this case, there was no fund to
19 be delayed.

20 THE COURT: So if the county had paid the
21 money in, then there would not be -- interest would not
22 accrue; is that what you are saying?

23 MR. ZELNICK: Yes. Well, no. It then



1 that there has to be -- there is a judgment rate of interest.

2 And there is also, Your Honor, a
3 constitutional argument, and I would cite to Nichols on
4 eminent domain. And it says that the right to interest upon
5 judgment in condemnation has been generally held to depend on
6 statutory authorization, although even in the absence of
7 legislative sanction, it has been said that the
8 constitutional provision for just compensation requires the
9 allowance of such interest.

10 But the Bartz case, Your Honor, I submit
11 is right on point. The supreme court did not say that the
12 property owner is not entitled to interest; they simply said
13 that the court was wrong in awarding interest because the
14 county had a thirty-day grace period.

15 THE COURT: That is right.

16 MR. ZELNICK: And I think the clear
17 implication of that case is that once that thirty-day grace
18 period expires, then interest is to run. And it is certainly
19 not fair for the county to be able to file an appeal and drag
20 the proceedings out and not allow the property owner to get
21 interest on his money.

22 THE COURT: What is your September 21
23 date? That is the date that --



1 it if he wanted. He has not chosen to do so, and he would
2 not be precluded from doing that.

3 The condemnation proceeding was to set
4 the price if the county wanted to acquire the property. He
5 has not been restricted in his use of that property.

6 If the court enters an order now barring
7 any suspension, then the county would be required, pursuant
8 to 25-46.31, to pay, within the thirty days, the money into
9 the court. And if it does not, then interest would begin to
10 run.

11 There is no inequity here, even if that
12 is the argument that Mr. Zelnick is attempting to make. I
13 think it is clear from the Bartz case and clear from the
14 statute that interest should not be imposed retroactively
15 during the time an appeal is pending.

16 THE COURT: I think Mr. Zelnick is
17 correct on this as well. I think interest should run from
18 September 22, thirty days afterwards. And I think that is
19 what the Bartz case indicates, as it says you have thirty
20 days within which to withdraw without penalty.

21 It seems to me that the penalty referred
22 to must be the interest that would accrue if you choose to go
23 ahead and not withdraw an appeal and are not able to prevail



V I R G I N I A:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

BOARD OF COUNTY SUPERVISORS
OF PRINCE WILLIAM COUNTY, VIRGINIA

Petitioner

v.

LAW NO. 23318

KENNETH F. PARSONS, et el.

Defendants

ORDER

THIS ACTION came on to be heard the 19th day of March, 1992, upon Petitioner's Motion to Dismiss Condemnation Proceedings Without Costs, or for Alternative Relief, and was argued by counsel.

IT APPEARING to the Court that on August 22, 1991, a final Order was entered herein confirming the May 15, 1991 Report of Commissioners of just compensation, that the suspension of execution of said Order by the Court did not extend the time within which the County could withdraw from the condemnation proceedings, that the time for noting an appeal from said final Order had expired prior to the date the Petitioner filed its Motion to Dismiss, and the Petitioner is not entitled to dismiss the condemnation proceedings, it is therefore

ORDERED that Petitioner's Motion to Dismiss be, and the same hereby is denied. It is further

ORDERED that the Defendants, Kenneth F. Parsons and Kathleen E. Parsons are hereby awarded judgment against the Petitioner, Board of County Supervisors of Prince William County, Virginia, in

V I R G I N I A:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

BOARD OF COUNTY SUPERVISORS
OF PRINCE WILLIAM COUNTY, VIRGINIA

Petitioner

v.

LAW NO. 23318

KENNETH F. PARSONS, et el.

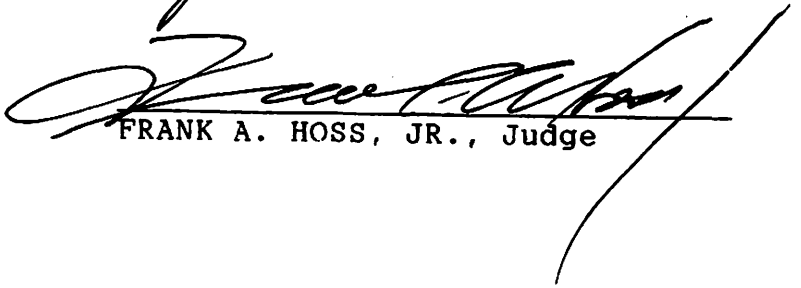
Defendants

ORDER

THIS ACTION came on to be heard the 17th day of April, 1992, upon Petitioner's Motion for Reconsideration of the Court's oral ruling of March 19, 1992 that Petitioner is not entitled to a dismissal of the condemnation proceedings in this action, and was argued by counsel. Upon consideration whereof, and for the reasons stated from the bench, it is

ORDERED that Petitioner's Motion for Reconsideration is hereby denied.

ENTERED this 27th day of April, 1992.


FRANK A. HOSS, JR., Judge

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA

Petitioner

v.

KENNETH F. PARSONS, *et al.*

Defendants.

Law No. 23318

NOTICE OF APPEAL

PLEASE TAKE NOTICE that pursuant to Rule 5:9 of the Rules of the Supreme Court of Virginia, the Petitioner, BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY, VIRGINIA, by counsel, hereby files its Notice of Appeal from the Order denying the Petitioner's Motion to Dismiss Condemnation Proceedings Without Costs, or for Alternative Relief, entered by the Circuit Court of Prince William County on April 27, 1992; and from the Order denying the Petitioner's Motion for Reconsideration, also entered by the Circuit Court of Prince William County on April 27, 1992.

A transcript of the testimony and other incidents of the case will be filed with the Court.

BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA

By: _____

Counsel

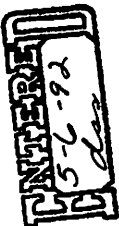
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PRINCE WILLIAM COUNTY VA.
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RICHMOND, VIRGINIA

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IN THE

Supreme Court of Virginia

AT RICHMOND

Record No.

**Board of County Supervisors of Prince William County,
Appellant**

v.

**Kenneth F. Parsons and Kathleen E. Parsons,
Appellees**

PETITION FOR APPEAL

SHARON E. PANDAK
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Counsel for the Appellee

*Brief Printing Specialist, 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-0700*

SUBJECT INDEX

	Page
TABLE OF CITATIONS.....	iii
ASSIGNMENTS OF ERROR.....	1
STATEMENT OF THE CASE	2
QUESTIONS PRESENTED	3
STATEMENT OF FACTS	3
ARGUMENT	5
 I. IN THIS CASE, THE BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY HAD BOTH THE RIGHT TO APPEAL A DECISION IT BELIEVED WAS FLAWED AND TO WITHDRAW FROM THIS EMINENT DOMAIN PROCEEDING AFTER ITS PETITION FOR APPEAL WAS DENIED.	5
A. In the absence of an express statutory provision, a condemning authority may withdraw a condemnation action at any time before the landowner acquires a vested right in the condemnation award.	6
B. Section 25-46.34(b) does not abrogate a condemning authority's right to appeal and withdraw in all cases.	12
C. A trial court's suspension of execution of its own confirmation order in a condemnation pending appeal suspends the running of the time period described in Section 25-46.34(b) for the withdrawal of the action.	15
 II. A TRIAL COURT'S STAY OF EXECUTION OF ITS OWN CONFIRMATION ORDER IN A CONDEMNATION CASE PREVENTS TITLE TO THE PROPERTY AND THE AWARD FROM PASSING, SO THAT INTEREST WILL NOT BEGIN TO ACCRUE ON THE AWARD BEFORE THE SUSPENSION IS LIFTED.	19

TABLE OF CITATIONS

	Page
<u>CASES</u>	
<i>Bartz v. Board of Supervisors of Fairfax County</i> , 237 Va. 669, 379 S.E.2d 356 (1989)	13, 14, 18 ⁽ⁿ¹⁰⁾ , 20-21
<i>Board of Supervisors v. Proffit</i> , 129 Va. 9, 105 S.E. 666, (1921)	8
<i>Cape Charles v. Ballard Bros. Fish Co.</i> , 200 Va. 667 107 S.E.2d 436 (1959)	15-17, 17 ⁽ⁿ¹⁰⁾
<i>Craufurd v. Smith</i> , 93 Va. 623, 23 S.E. 235 (1896)	19
<i>Crisman v. Swanson</i> , 193 Va. 247, 68 S.E.2d 502 (1952)	13-14
<i>Fallsburg Power and Manufacturing Co. v. Alexander</i> , 101 Va. 98, 43 S.E. 194 (1902)	7 ⁽ⁿ²⁾
<i>Jones v. Williams</i> , 6 Va. (2 Call) 102 (1799)	19
<i>Keys v. Shirley</i> , 153 Va. 461, 150 S.E. 401 (1920)	8
<i>Nationwide Mutual Insurance Co. v. Finley</i> , 215 Va. 700, 214 S.E.2d 129 (1975)	19
<i>Norfolk and O.V. Ry Co. v. Turnpike Co.</i> , 111 Va. 131, 144, 68 S.E. 346, (1910)	8
<i>Painter v. St. Clair</i> , 98 Va. 85, 34 S.E. 989 (1900)	7-8
<i>South Carolina State Highway Department v. Bobotes</i> 180 S.C. 183, 121 ALR 1 (1937)	9, 9-10 ⁽ⁿ⁴⁾
<i>Sutherland v. Swannanoa Corporation</i> , 189 Va. 149, 52 S.E.2d 92 (1949)	17-18 ⁽ⁿ¹⁰⁾
<i>Turner v. Turner</i> , 80 Va. 379 (1885)	19
<i>Williams v. Fairfax Redevelopment and Housing Authority</i> , 227 Va. 309, 315 S.E.2d 202 (1984)	8-9

**IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND**

Record No. _____

**Board of County Supervisors
of Prince William County, Virginia**

vs.

Kenneth F. Parsons, *et al.*

PETITION FOR APPEAL

ASSIGNMENTS OF ERROR

The trial court erred in refusing to permit the Board of County Supervisors of Prince William County to withdraw from this eminent domain proceeding. The trial court also erred in imposing interest on the award beginning on September 22, 1991, the 30th day following entry of its Order Confirming the Commissioners' Report. The trial court took both actions notwithstanding the fact that it had suspended execution of its Order pending appeal. These actions were error because:

1. The Board of County Supervisors, as condemnor, had both the right to appeal a condemnation decision which it believed was flawed, and to withdraw from the eminent domain proceeding when its Petition for Appeal was denied; the provisions of Section 25-46.34(b), VA Code Ann., do not abrogate either of these rights in this case.

Ruling from the bench, Judge Hoss denied the Board's Motion to Withdraw. On April 17, 1992, the Board argued its Motion For Reconsideration of that ruling, which was also denied from the bench. On April 27, 1992, Judge Hoss entered two orders which reflect these rulings, and the Board duly noted its exceptions to these orders. These are the orders from which the Board now seeks an appeal.

The Board's Notice of Appeal from the two orders of April 27, 1992, was filed in the Circuit Court of Prince William County on May 6, 1992. Transcripts of the relevant hearings of March 19 and April 17 were filed on May 13, 1992.

QUESTIONS PRESENTED

Must a condemning authority forego appealing an apparently flawed condemnation decision in order to retain its statutory right to withdraw the condemnation after confirmation of the commissioners' report? (*Assignment of Error Number 1*)

Does not a trial court stay of execution of its own order in a condemnation case pending appeal prevent title to the property and the award from passing so that the condemnor can exercise its statutory right to withdraw the condemnation pursuant to Section 25-46.34(b), VA Code Ann., upon completion of the appellate process? (*Assignment of Error Number 1*)

Does not a trial court stay of execution of its own order in a condemnation case pending appeal prevent title to the property and the award from passing such that interest will not begin to accrue on the award before the suspension is lifted? (*Assignment of Error Number 2*).

STATEMENT OF FACTS

While this case has had a long and complicated procedural history, only a few facts are relevant to the questions the Board raises on this Petition for Appeal.

denied the Board's motion. On April 27, 1992, Judge Hoss entered two orders memorializing the March 19 and April 17 rulings.

Judge Hoss construed the provisions of Section 25-46.34(b), VA Code Ann., to require a condemnor to exercise its right to withdraw an action *before* the expiration of the time for noting an appeal from the final order, regardless of whether the execution of the final order has been suspended and whether an appeal has, in fact, been taken. The judge indicated that the suspension of this August 22, 1991, order and the subsequent appeals noted by both the Board and the Parsons did not extend the time within which the Board could withdraw the condemnation action. The Court also imposed interest on the award from September, 1991, pending disposition of the appeal. It is these rulings which the Board asks this Court to overturn.

ARGUMENT

I. THE BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY HAD BOTH THE RIGHT TO APPEAL A DECISION IT BELIEVED WAS FLAWED AND TO WITHDRAW FROM THIS EMINENT DOMAIN PROCEEDING AFTER ITS PETITION FOR APPEAL WAS DENIED.

In the provisions of the Virginia General Condemnation Act (Section 25-46.1, *et seq.*, VA Code Ann.), the General Assembly has clearly conferred at least two rights on condemning authorities: the right to appeal a trial court decision confirming a commission's report (Section 25-46.26) and the right to withdraw a condemnation action after a trial court has confirmed a commission's report and upon the payment of the landowner's litigation costs (Section 25-46.34(b)).¹ This appeal arises because the Circuit Court of Prince William County has ruled that

¹ All statutory citations, unless otherwise noted, are to the Code of Virginia.

concept of eminent domain as an inherent attribute of sovereignty is intact in Virginia.²

As this Court noted in *Painter v. St. Clair*, 98 Va. 85, 34 S.E. 989 (1900):

The power of eminent domain is an incident of sovereignty. It is vested in the legislature, and it can only be set in motion by virtue of legislative enactment by which the time, manner and occasion of its exercise are directed and controlled, except as restrained by the Constitution. *The legislature is clothed with exclusive authority to determine when the necessity exists for exercising the power.* It may exercise it directly, or it may select such agencies as it pleases, and confer upon them the right, subject only to the limitations contained in the Constitution; and with respect to it, "due process of law" only requires that it shall be exercised in subordination to the established principle that private property cannot be taken for public use without the consent of the owner, save upon payment to him of just compensation.

34 S.E. at 990. (Emphasis added). Eminent domain is a right to be exercised or not within the discretion of the legislature. Without an express limitation, this discretion must extend to a decision to abandon a condemnation; to reject property which the legislature has begun to take but which it has not yet acquired.

Before the Condemnation Act existed in its present form, Virginia adopted this general rule that a condemnation action can be dismissed if the condemning authority has not actually acquired the property.

It is true that, "at any time before any rights have vested," the court had the absolute right, on motion of the chairman [of the state highway commission], to dismiss the proceedings.

² "Whenever the public use of property requires it, the private rights of property must yield to this paramount right of the sovereign power to take it for the public use." *Fallsburg Power and Manufacturing Company v. Alexander*, 101 Va. 98, 43 S.E. 194, 196 (1902).

Well and firmly established as this principle is, it was not applied by the trial court. In denying the Board's motion to withdraw, the judge remarked:

It does seem -- you could argue that my interpretation or Mr. Zelnick's interpretation ... chills the County's right to appeal, perhaps it does but it seems to me like that somewhere along the way that their rights should be chilled. Somewhere along the way that they've got to take some action in which they can be held accountable. *March 17, 1992, Transcript P. 28, ll. 14 - 20.*

were not read by this Court in *Williams* to compel the government to take land. Therefore, without an express statutory provision, a locality should retain its right to withdraw a condemnation, even after the confirmation of the commission's report. Indeed, this rule is required for the prudent management of the public's affairs.

The purpose of the condemnation process is to fix the price of property, not to compel a public entity to take a particular piece of land. The condemnation statutes indicate no general legislative intent to compel possession of property by the government once it embarks upon condemnation or, indeed, at any point before title vests or judgment is final. In fact to do so would be contrary to public policy as expressed in the Constitution, the Condemnation Act, and in this Court's decisions which reserve to public bodies the determination to condemn, and which make the decision to proceed with a condemnation a legislative, and not a judicial, act. These provisions and decisions recognize that the probable cost of taking any property must be considered by a board of supervisors before it can determine whether the financial condition of the county treasury warrants the acquisition. Because of this, legislative bodies like boards of supervisors are vested with discretion to determine whether and when an eminent domain action will begin.

The condemning authority's duty to evaluate the need for the land against the price of the land continues beyond the filing of the action; the legislature's discretion cannot be properly exercised until the legislature learns what the total and final cost of any acquisition will be. This continued balancing between cost and need remains a legislative duty which ought not be excused as a judicial matter. See *South Carolina State Highway Department v. Bobotes*, 180 S.C. 183, 121 ALR 1, 6 (1937).⁴ In Virginia, the landowner is protected against any harm he might suffer by

⁴ In *Bobotes*, the South Carolina Supreme Court described the public policy concerns which resulted in South Carolina's constitutional and statutory scheme, which is similar to Virginia's. In that case, the South Carolina Highway Department sought to condemn property, was dissatisfied with the verdict of the trial court, and

owners *may* be paid into court, upon which title to the property and the rights condemned shall vest in the petitioner." (Emphasis added). There is simply no support for the contention that condemnation in Virginia, as a general matter, is designed to *force* a locality to acquire any property against which it has begun proceedings. On the contrary, the general rule would permit a locality, such as Prince William County, to withdraw a condemnation before it actually acquires the property if it determines that the amount which is must pay is too high, or the property is no longer as necessary as was at first expected. In the absence of a statutory provision, this right to withdraw survives beyond the filing of the commission's report and up to the point at which the condemning authority acquires the land.

It is undisputed that no title to or interest in the property has passed to the Board, nor has the Board taken possession of the property. In fact, by order dated May 3, 1991, the trial court specifically *denied* the Board an injunction against certain activity by the Parsons on the property, indicating that the Board had no property interest which the court could protect because it had no title. One of the reasons for so finding was that the Board had not paid compensation into court, thereby recognizing the statutory interdependence between payment and the passage of title established by Section 25-46.8 and Section 25-46.24. The trial court found on April 17, 1992, that the Board has not acquired title to this property. *17, 1992, Transcript, P. 15, ll. 5 - 11.*

In this case, the Board has not acquired the Parsons property. The trial court had no jurisdiction of its own to force the Board to acquire it.⁶ The court w:

⁶ During the March 19, 1992 hearing, Judge Hoss indicated that his denial of the Board's motion was based, at least in part, on equitable theories of estoppel. *March 19, 1992 Transcript, P. 28, ll. 14-20.* Judge Hoss appeared to abandon these grounds during the hearing on the Motion for Reconsideration held on April 17, 1992. *April 17, 1992 Transcript, P. 14, l. 22 - P. 16, l. 15.* For the reasons stated in the Board's Memorandum in Support of Motion for Reconsideration and

case, the language to describe the time period would have been "before noting an appeal from any final order" rather than "before *the time for* noting an appeal from any final order." (Emphasis added.) The question is whether the interpretation of the words "before the time for noting an appeal from any final order" requires a conclusion that exercise of the right of appeal, which will take a period of longer than 30 days in most cases, must preclude the exercise of the right of withdrawal.

As the condemnation statutes establish, and as this Court found in *Bartz v. Board of Supervisors of Fairfax County*, 237 Va. 669, 379 S.E.2d 356 (1989), land is "taken" in eminent domain proceedings either actually, by taking possession of the property or by payment into court, or procedurally, by the condemning authority's inaction beyond the period established by the statutes within which it must act to take or reject the property. That period is established by Section 25-46.34(b) which, according to the Court, "affords the condemnor thirty days after the trial court sets the *final* amount of the compensation award to accept or reject the compensation amount without any penalty." 379 S.E.2d at 360.

The Board believes that the term "final order" in Section 25-46.34(b) necessarily grants the Board, and all condemning authorities, the right to appellate review of trial court orders *before* the election period described in Section 25-46.34(b) begins to run. As a general matter, this Court has construed the running of an analogous election period following entry of a final decree construing a will to begin only after an appeal has been disposed of. In the case of *Crisman v. Swanson*, 193 Va. 247, 68 S.E.2d 502 (1952), the Supreme Court construed then Section 64-15, which provided

that in a suit by the surviving consort for construction of the will, the court shall upon application provide by order that the surviving consort shall be allowed not exceeding one month for renunciation "after final decree has been entered in the suit construing the will".
We hold this to mean that in the case of an appeal, the one month period for renunciation is to run from the date of the final decree of this court.

- C. A trial court's suspension of execution of its own confirmation order in a condemnation pending appeal suspends the running of the time period described in Section 25-46.34(b) for the withdrawal of the action.**

As outlined above, the Board contends that the time period described in Section 25-46.34(b) could not begin to run in this case until after the disposition of the appeal because the August 22, 1991 Order was not *final* within the meaning of that section until that point. Further, the trial court's suspension of the August 22, 1991 final order so that the Board could note and pursue an appeal extended the time for the Board to exercise its legislative discretion to withdraw from the condemnation.⁸

This Court's decision in *Cape Charles v. Ballard Brothers Fish Company*, 200 Va. 667, 107 S.E.2d 436 (1959), establishes the effect of an appeal on the finality of an order confirming a commission's report in a condemnation case. In that case, in which the facts were strikingly similar to those of this case, the trial court conducted two hearings on the issue of just compensation. The report of the first commission was set aside on the landowner's exceptions. The Town of Cape Charles took exceptions to the report of the second commission, which were overruled. The Town noted an appeal from the trial court's order confirming the report of the second commission.

Like the order in this case, the trial court's final order in *Ballard* contained a provision which stated that its terms were to be suspended pending the outcome of an appeal. At that time, Section 25-22 was in effect. Section 25-22 required the condemning authority to pay the award into court within three months of the filing of the commission's report or risk dismissal of the entire action on the landowner's motion. The day which was three months after the filing of the report fell while the *Cape Charles* case was on appeal to the Supreme Court. Therefore, the property

⁸ Also, that time period ought to have been tolled by the Parsons' own appeal.

Charles holding establishes that suspension of a condemnation order pending appeal defers the "finality" of the order such that the statutory period during which the condemnor must elect to take or reject does not begin to run. This holding is not affected by the length of that period; therefore, it is applicable to this case. The import of the decision is not changed if the period is changed from 3 months to 30 days, because the election period simply does not begin to run until the suspension is lifted.¹⁰

¹⁰ Counsel for the Parsons has argued that, rather than the holding in *Cape Charles*, a condemnation case, it is the holding of *Sutherland v. Swannanoa Corporation*, 189 Va. 149, 52 S.E.2d 92 (1949), a suit on a contract, which controls the determination of the effect of a suspension on a condemnation order. The decision in the *Swannanoa* case is not compelling for two reasons.

Swannanoa took possession of property sold to it by Sutherland without paying the entire purchase price. In the action for trespass brought by Sutherland, the trial court found that Swannanoa had wrongfully taken possession of the property and ordered it to vacate the premises. However, the court's order gave Swannanoa the option to pay the balance of the purchase price for the property and revive the contract, provided it did so by a January 24, 1948, nine days from the date of the order. The order was suspended pending appeal.

When the Supreme Court denied Swannanoa's petition for appeal on April 26, 1948, Swannanoa attempted to exercise its option to pay the balance of the purchase price within nine days of the denial. Sutherland would not accept the payment, and another action was brought in which the trial court found that the suspension of the order pending appeal had not suspended the time within which Swannanoa could exercise its option. This Court affirmed, noting that the trial court's order had recited the date by which the option to purchase could be exercised. Swannanoa had no right to exercise that option without amendment to the trial court's order to change the specific date recited in the order. By the time the petition for appeal had been denied, no court had the power to make the necessary amendment.

Critical to the *Swannanoa* analysis, and a significant difference from *Cape Charles* and this case, is the origin of the right whose exercise has been affected or not affected by a suspension of a final order. The trial court in *Swannanoa* clearly found that, as of the date of judgment, Sutherland owned the property in question and Swannanoa had no right to occupy it. However, the trial court was willing to extend a *privilege* to Swannanoa, which it did not otherwise have under the law, to obtain a right to the property by paying the balance of the purchase price by January 24, 1948.

The origin of the right to withdraw a condemnation is far different than the privilege created by the trial court in *Swannanoa*. As previously discussed, the right to determine whether and when to acquire private property for a public purpose is an inherent attribute of sovereignty; so too is the right to withdraw a condemnation.

As part of his April 27, 1992 Order denying the Board's motion to withdraw this condemnation, Judge Hoss entered judgment on the award reported by the commissioners and confirmed on August 22, 1991. Judge Hoss further ordered the Board to pay interest accruing on the award from September 22, 1991, the 30th day following entry of the August 22, 1991, order of confirmation, notwithstanding the fact that execution of the August 22 order was suspended pending the outcome of any appeals. Neither appeal taken from the trial court was disposed of until this Court's orders of February 25, 1992. Under these circumstances, the Board contends that the imposition of interest from September 22, 1991, was error.

- A. Under both the rules pertaining to condemnation actions and the general theories upon which interest is available on any money judgment, interest does not begin to accrue on a condemnation award unless and until title to the award vests in the landowner.**

In general, "interest is the compensation due to a person whose money is loaned to or used by another. *Turner v. Turner*, 80 Va. 379 (1885). It is commonly imposed on judgments not paid to the judgment creditor when due because "it is natural justice that one who has the use of another's money should pay interest on it." *Jones v. Williams*, 6 Va. (2 Call) 102 (1799). The rule on its accrual is that one who has the use of another's money must pay interest on it from the time he receives it until the time he repays it. *Craufurd v. Smith*, 93 Va. 623, 23 S.E. 235 (1896). Any delay in payment of money which belongs to another causes the accrual of interest in the same way that it would accrue if the money had been voluntarily loaned. *Nationwide Mutual Insurance Co. v. Finley*, 215 Va. 700, 214 S.E.2d 129 (1975) Therefore, if a condemnation award were like any other civil judgment, one would expect that interest would accrue on it under the theory that any delay in payment of the award to the landowner past the time that the landowner is entitled to it amounts to a use of the landowner's money for which interest is due.

establishes that the accrual of interest on a condemnation award begins at the time of taking.

Using this rule, the Court found that Fairfax County had not taken possession of the property or otherwise exerted dominion over it before paying the award. Therefore, it was not until payment of the award that title to the property passed to the county. Before title to the property passed to the county, no taking had occurred such that the landowners were entitled to interest on the award.¹²

Under the Court's holding in *Bartz*, and in accordance with the general view of interest as a payment for the use of someone else's money, if the Board had not taken the Parsons property as of September 22, 1991, it was error for the trial court to have imposed interest from that date. Therefore, the critical question with regard to the imposition of interest in this case is whether and as of when title to the Parsons' property has been taken by the Board. The Board contends that the suspension of execution of the August 22, 1991 Order, has delayed the passage of title so that no interest is due to the Parsons on this award.

B. Suspension of execution of the trial court's order of August 22, 1991, has delayed the taking of the property such that interest has not accrued on the award.

In pertinent part, the trial court's order of August 22, 1991, provided that:

the execution of this order shall be suspended pending the appeal of this matter to the Virginia Supreme Court, and shall be suspended until all appeals are finally disposed of.

Since no condemnation order can be executed without causing the passage of title, this suspension has effectively delayed the taking of the property.

It cannot be disputed that execution of a condemnation order requires the condemning authority to pay the amount of the award. Nor can it be disputed that

¹² A corollary to this rule is that, at the time of taking, title to the property vests in the condemning authority and title to the award vests in the former landowner.

of interest on the condemnation award beginning on September 22, 1991, was plainly wrong and should be reversed.

CONCLUSION

For the foregoing reasons, the Board of County Supervisors of Prince William County respectfully requests this Court to reverse the trial court's orders of April 27, 1992 and permit it to withdraw this condemnation with the payment of the costs as described in Section 25-46.34(b), VA Code Ann., to the Parsons.

Respectfully submitted,

BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA

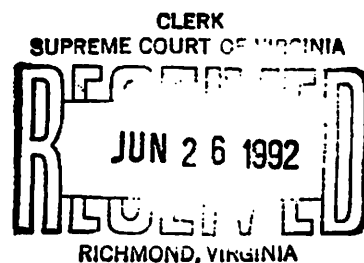
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County Attorney

pertinent part that section provides that, "if the petitioner fails to pay into court any sum necessary for paying to total award which has been confirmed finally or the interest to which the owner is entitled under this section for a period of thirty (30) days after the time for noting an appeal, the court shall enter judgment therefor against the petitioner, unless the proceedings have been dismissed in accordance with the provisions of Section 25-46.34." (Emphasis added). This section makes it clear that judgment cannot be entered until 30 days after the time for noting an appeal has expired. That time would not have expired until September 22, 1991, so interest ought not to have been imposed until October 22, 1991, in any event.

While it is instructive, Section 25-46.31(d) is not applicable in this case, in which the suspension of execution would have deferred the requirement for payment until March 27, 1991, 30 days after the suspension was lifted.

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND



Record No. 920923

BOARD OF COUNTY SUPERVISORS
OF PRINCE WILLIAM COUNTY, VIRGINIA

Appellant

v.

KENNETH F. PARSONS, et al.

Appellees

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF
PETITION FOR APPEAL SUBMITTED BY BOARD OF COUNTY
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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
ASSIGNMENT OF ERROR	1
STATEMENT OF THE NATURE OF THE CASE	2
QUESTIONS PRESENTED	4
STATEMENT OF FACTS	5
ARGUMENT	6
<p>I. THE ACT ALLOWS A CONDEMNOR TO DISMISS AS A MATTER OF RIGHT ANYTIME BEFORE A TAKING OCCURS AND AFTER THE AMOUNT OF JUST COMPENSATION IS DETERMINED ON APPEAL OR, IF NO APPEAL IS REQUESTED, WITHIN THIRTY DAYS AFTER THE AMOUNT IS DETERMINED IN THE CIRCUIT COURT</p>	
<p>II. THE ACT DOES NOT PROTECT A LANDOWNER FROM HARDSHIP RESULTING FROM THE INSTITUTION AND SUBSEQUENT DISMISSAL OF AN ACTION BEYOND REQUIRING THE CONDEMNOR TO PAY THE LANDOWNER'S COSTS AND FEES INCURRED "AND OTHER REASONABLE EXPENSES AND COMPENSATION FOR TIME SPENT AS A RESULT OF THE CONDEMNATION PROCEEDINGS</p>	
<p>III. FORCING A CONDEMNOR TO CHOOSE BETWEEN ITS STATUTORY RIGHT TO APPELLATE REVIEW AND ITS STATUTORY RIGHT TO DISMISS BEFORE A TAKING OCCURS VIOLATES PUBLIC POLICY</p>	
<p>IV. THE TRIAL COURT'S REFUSAL TO PERMIT THE BOARD TO EXERCISE ITS LEGISLATIVE DISCRETION TO WITHDRAW VIOLATES THE SEPARATION OF POWERS</p>	
CONCLUSION	22
CERTIFICATE	23

STATUTES AND RULES	Page
Va. Code Section 25-46.8	6
Va. Code Section 25-46.24	7
Va. Code Section 25-46.26	7,17
Va. Code Section 25-46.34 (a)	7
Va. Code Section 25-46.34 (b)	7,15,16
Rule 5:9 (a), Rules of the Supreme Court of Virginia	7

OTHER AUTHORITIES

Nichols' The Law of Eminent Domain, Section 26.42, pp. 26-337 to -338 (Rev. 3rd Ed. 1990)	6
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ASSIGNMENT OF ERROR

The Circuit Court committed error in holding that the Board of County Supervisors of Prince William County is not permitted to dismiss this eminent domain proceeding which it had instituted but rather is now required to take the real property which is subject to this action.

STATEMENT OF THE NATURE OF THE CASE

The real property at issue in this case was and is owned by Kenneth F. Parsons and Kathleen Parsons (the Parsons). The Board of County Supervisors of Prince William County, Virginia (the Board) made an offer to purchase this property from Parsons for \$1,600,000. Parsons rejected the offer and made a counter-offer in the sum of approximately \$76,000,000. The counter-offer was rejected by the Board.

On or about January 16, 1990, the Board filed a petition for Condemnation in The Circuit Court of Prince William County pursuant to the Virginia General Condemnation Act, Va. Code Sections 25-46.1 *et seq.* (the Act) naming the Parsons as Owners of Record. The petition sought condemnation of 117.82 acres of land for uses associated with solid waste management, as authorized by a Board resolution indicating not only the need to expand the adjacent existing land fill, but also the need to establish a buffer area of 500 feet to separate residences from the sanitary landfill and an additional area for buffer purposes as well as for removal of fill dirt to accomplish proper landfilling procedures.

On March 22, 1990, Parsons filed an Amended Answer and Grounds of Defense alleging, *inter alia*, that the taking was not necessary for any public purpose, that the Board was attempting to deny Parsons equal protection and due process of law, that the Board's

Both the Board and Parsons filed petitions for appeal with the Supreme Court of Virginia in November of 1991. On February 25, 1992 this Court refused both petitions for appeal.

On or about March 17, 1992, the Board passed a resolution directing that the condemnation action be dismissed for the reasons that "it is not in the interests of the public health, safety and welfare to acquire this property for the price established by the condemnation commission which sat on May 15, 1991." The Board filed its Motion to Dismiss Condemnation proceedings and the motion was argued to the court on March 19, 1992.

The Board's attorney stated the reasons for its motion in the following words:

The County desires to withdraw from this action because the cost is too high. [Also] the purposes for which the County had desired to acquire the property in the first place have been frustrated, in that it had intended to acquire the property for buffer and for fill dirt for its expansion of the sanitary landfill. Mr. Parsons has removed virtually all of the buffer and removed most of the fill dirt. And so, [the] purposes for which the county had in seeking the condemnation they have been frustrated.

(*Transcript, March 19, 1992*, p. 3, lines 19-23, p. 4 lines 1-4). Board counsel pointed out that the County had neither acquired any interest in the property nor taken possession of the property, and that it had not paid any money into court for payment to Parsons in the event the land were eventually to be taken (*Id.* p. 4, lines 14-23, p. 5, lines 1-7). The court was also informed that the Board had inquired of Parsons' attorney what costs and attorney's fees Parsons had incurred in the matter but that Parsons had refused to divulge these expenses on the basis of privilege. (*Id.* p.5, lines 8-15).

The Court denied the Motion to Dismiss.

On or about April 10, 1992 the Board filed a motion for reconsideration, which was argued to the court on April 17, 1992. The court denied the motion for reconsideration, and also held, over the Board's objection, that interest on the condemnation judgment

STATEMENT OF FACTS

This *amicus* brief adopts the statement of facts set forth in the Board's Petition for Appeal.

However, the parties would emphasize the importance of the following facts:

1. The County never entered onto the property and never paid funds into court.
2. It is uncontroverted that Board has never acquired any interest in the property.
3. A primary purpose of taking the subject property, as indicated in the Board's resolution prior to filing suit and in the Petition for Condemnation itself, was for use as undisturbed buffer for the expansion of the existing adjacent landfill. The Board also sought the property for fill dirt for expansion of the existing landfill.
4. The Board unsuccessfully sought an injunction to prevent the Parsons from removing trees (buffer) and fill dirt from the subject property while the condemnation suit was pending, which actions rendered the subject property much less suitable, and possibly unsuitable, for the stated public purposes.

- 2) If the condemnor does any work on or causes any injury or damage to the property, it is then not entitled to abandon the proceedings without the consent of the owner. Id. Section 25-46.8
- 3) Condemnor's payment into court of the amount ascertained as compensation and damages causes title to the property and rights being condemned to vest in the condemnor. Id. Section 25-46.24.
- 4) "Any party" aggrieved by an order confirming, altering or modifying the commissioners' report of just compensation is entitled to apply for an appeal to the Supreme Court of Virginia and a supersedeas may be granted. Id. Section 25-46.26.
- 5) If the hearing to set the amount of just compensation has not yet begun, and the condemnor has not acquired any title in or taken possession of the subject property, the condemnor may obtain a dismissal as a matter of right, but such order of dismissal shall require payment to the affected landowner or landowners of their reasonable expenses actually incurred in preparing for trial "in such amounts as the court deems just and reasonable." Id. Section 25-46.34 (a).
- 6) "At any time" after a hearing to set the amount of just compensation has begun, and the condemnor has not acquired any title in or taken possession of the subject property, or paid any money into court, the condemnor may obtain a dismissal as a matter of right "before the time for noting an appeal from any final order upon a report of just compensation," but such order of dismissal shall require payment to the affected landowner or landowners of their attorney's fee, witness fees including reasonable expert witness fees (not exceeding three), and other reasonable expenses and compensation for time spent as a result of the condemnation proceedings "in such amounts as the court deems just and reasonable." Id. Section 25-46.34 (b).
- 7) An order confirming a report of just compensation is final for purposes of appeal, any party aggrieved by such an order may apply for an appeal to the Virginia Supreme Court, and a supersedeas may be granted in the manner provided by law for civil cases. Id. Section 25-46.26

Until taking, the condemnor may discontinue or abandon his effort. The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost.

Id. at 284, 60 S. Ct. at 236 (emphasis added).

This is the rule followed in Virginia. This Court has held that it is proper to dismiss a condemnation proceeding after final judgment is rendered when the condemnor has neither taken possession of the property nor paid the award because the condemnor has up to that point not made a binding decision to take the property. Williams v. Fairfax County Redevelopment and Housing Authority, 227 Va. 309, 314, 315 S.E.2d 202, 205 (1984).

This Court stated in Williams:

The [condemnation] award merely establishes the price which the condemnor must pay if it elects to take the property. . . . Before title can vest, the condemnor must either take possession of the land pursuant to Code Section 25-46.8 or pay the award.

Id. at 314, 315 S.E.2d at 205.

Although fiscal reasons alone are sufficient justification for allowing dismissal prior to taking, other sound bases for this rule are illustrated other cases. For example, in City of Scottsdale v. Paradise Valley Water Company, 152 Ariz. 251, 731 P.2d 616 (App. 1986) the city initially sought to condemn the water company's water distribution system. After the complaint in condemnation was filed, the city was informed that isolating the water company's distribution system from its other facilities would cost \$86,000.00 more than originally projected and that the wells being drilled to produce water for the distribution system were dry. The court allowed dismissal and noted the city's apparent good faith in attempting to reach a purchase agreement and then in pursuing the condemnation action. *Id.* at 254, 731 P.2d at 619.

Volin v. Arlington Co. Electoral Bd., 216 Va. 674, 679, 222 S.E.2d 793, 797 (1976). It is the duty of the courts to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal; to this end, a statute is not to be construed by singling out a particular phrase. Virginia Electric v. Bd. of County Supervisors, 226 Va. 382, 388, 309 S.E.2d 308, 311 (1983).

The trial court based its ruling on the portion of 25-46.34 (b) indicating that that the right to dismiss is limited to a time period of thirty days after a "final order upon a report of just compensation." This language, although not as clear as it could be, can plainly be reconciled with the principles discussed above by viewing a "final order" (for purposes of dismissal) as not existing until after the case is returned to the trial court from the appellate court.

Directly on point is the decision of this Court in Crisman v. Swanson, 193 Va. 247, 68 S.E.2d 502 (1952). In Crisman a decedent's surviving spouse sought to challenge the trial court's decree construing the decedent's will, but also did not want to lose her right to renounce the will should the appeal not be successful. The Court held as follows concerning the dilemma:

Section 64-15 of the Code of 1950 provides that in a suit by the surviving consort for construction of the will, the court shall upon application provide by order that the surviving consort be allowed not exceeding one month for renunciation "after final decree has been entered in the suit construing the will." We hold this to mean that in the case of appeal, the one month period for renunciation is to run from the date of the final decree of this court. Cf. Simmons v. Simmons, 177 Va. 629, 15 S.E.2d 43.

Id. at 254, 68 S.E.2d at 507 (emphasis added).

It is significant that the Simmons case is cited by the Court in its holding. At issue in that case was whether it was too late for Mrs. Simmons to renounce any and all devises and bequests under her late husband's will and elect instead to receive property according to her statutory rights. The Court held that it was not too late, even though Mrs. Simmons

II

**THE ACT DOES NOT PROTECT A LANDOWNER
FROM HARDSHIP RESULTING FROM THE INSTITUTION AND
SUBSEQUENT DISMISSAL OF AN ACTION BEYOND REQUIRING THE
CONDEMNOR TO PAY THE LANDOWNER'S COSTS AND
FEES INCURRED "AND OTHER REASONABLE EXPENSES AND
COMPENSATION FOR TIME SPENT AS A RESULT OF THE
CONDEMNATION PROCEEDINGS."**

It is well-established that no "taking" or "damage" is inflicted upon a landowner merely by the filing of a condemnation action or the prosecution of said proceedings. As recently as 1989, this Court stated:

Without further interference with an owner's right to use and dispose of his land, the filing of condemnation proceedings and a lis pendens does not constitute a taking of the property requiring just compensation under the Virginia Constitution. Similarly, allegations of potential diminution of property value resulting from the institution of these proceedings does not constitute damage to the property envisioned by Va. Const. art I, Section 11.

Bartz v. Bd. of Supervisors of Fairfax County, 237 Va. 669, 675, 379 S.E.2d 356,359 (1989). See also State Highway Com. v. Kreger, 128 Va. 203, 105 S.E. 217 (1920) (alleged injury suffered by landowner as result of filing of eminent domain proceeding is noncompensable, incident to the exercise of the sovereign power of eminent domain); United States v. Mahowald, 209 F.2d 751 (8th Cir. 1954) (any reduction in value of property caused by pending condemnation is incident of ownership, not rising to the level of a "taking" in the constitutional sense).

Although land is not "taken" or "damaged" by virtue of the presence of condemnation proceedings, there is no doubt that a landowner does, in fact, incur expenses and costs by choosing to contest the proceeding. Recognizing this, many states allow a landowner to recover attorney's fees and costs incurred in some or all condemnation cases.

In some states, the landowner must prove "bad faith" on the part of the condemnor

The Parsons argue that Section 25-46.26 reflects the intent of the General Assembly to cut off the a condemnor's right to dismiss due to the passage of time involved in an appeal. Parsons' counsel argued to the trial court as follows:

In effect, they [the Board] can wait until after the hearing is over, after they have put the property owner through the expense and the time and the aggravation of going through the entire proceeding, having the property tied up, a list [sic] pendency [sic] on the property, the market ability [sic] of title is destroyed. During the entire time these proceedings are pending, the landowner can do nothing with his property. He cannot prevent the county from taking it.

.....
I think the legislature has made a determination that our balance at that point, the time has come that the condemning authorities rights to withdraw from these proceedings come to an end. They they cannot wait throughout the entire proceedings and go through the time for the appeal to be heard and then finally, after the appeal is heard, then they can come back and withdraw.

*(Transcript, March 19, 1992, p. 9, lines 10-18; p. 10, lines 3-9)*³

This argument was accepted by the Circuit Court judge as the reason to prevent the Board from withdrawing the present action. The trial court ruled that the Board had waited too long to dismiss the case, stating:

It doesn't strike me--I don't believe the legislature really intended to allow a condemnatory--to start these proceedings as far back as they probably did in this case but they certainly did on the 16th of January, 1990--holding someone's property in hostage, in essence, from that point on.

.....

[T]hey have two trials, the county loses both trials and they appeal

³ The Parsons' argument that the Board should not be allowed to dismiss because the proceedings had "destroyed" the property's marketability appears disingenuous. Real estate prices in the Commonwealth, particularly in northern Virginia, have dropped dramatically in the period of over two years that this action has been pending, but the date of valuation for condemnation purposes can be no later than the date the petition was filed. Va. Code Section 25-46.3 (b). Thus, it is entirely likely that the Parsons would receive less from the property were they to sell it today than they would from a judgment valuing the property as of January, 1990.

III

**FORCING A CONDEMNOR TO CHOOSE BETWEEN
ITS STATUTORY RIGHT TO APPELLATE REVIEW AND ITS
STATUTORY RIGHT TO DISMISS BEFORE A TAKING OCCURS
VIOLATES PUBLIC POLICY**

Virginia Code Section 25-46.26 states that any party aggrieved from an order of the court confirming, altering or modifying the commissioners' report is entitled to apply for an appeal to the Supreme Court of Virginia. In the present case, both the Parsons and the Board exercised this right by filing petitions for appeal with this Court in November of 1991.

The opportunity for Supreme Court review of a condemnation action trial court ruling is appropriate and important. See Va. Code Section 25-46.26. All parties to the proceeding should therefore have unfettered access to such review. Similarly, the right of a condemnor to be able to withdraw before a taking occurs is well-established and sanctioned by the General Assembly; the condemnor should in all cases be allowed to so dismiss.

There is no conflict between the right to appeal and the right to dismiss at a later time. Both rights are important, and both should be protected. The trial court's ruling, however, fails to protect both rights; it presents a false dichotomy, forcing a choice where no choice reasonably should be made.

The decision in the present case, when applied to future cases, would effectively remove the right of a condemnor to weigh all the factors in a particular case and impartially consider the advice of counsel as to the merits of appealing an adverse decision. If the condemnor chooses to appeal and is unsuccessful, it is then forced to purchase the property at a price in excess of its available resources. It is also forced to purchase the property without regard to factors beyond its control such as a change in the circumstances leading

The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute at issue] abridges expression that the First Amendment was meant to protect.

Id.

The principle behind the ruling of the trial court will affect not just the interests of a particular county board of supervisors, but the interests of every citizen of the Commonwealth who pays taxes to and receives benefits and services from the municipal and quasi-municipal corporations which govern them. Those citizens, as represented by their elected local government officials, should not have appellate review of decisions which affect them denied or unnecessarily and irrationally chilled.

Indeed, the interests to be protected in this case reach far beyond the rights of citizens as taxpayers. Apart from the interests of any person or party, the tenet of equal and fair access to appellate review is fundamental to our notion of justice. It must in all cases be guarded by the courts as a basic principle of public policy.

Under the trial court's ruling, a condemnor will be motivated to dismiss the case rather than exercise its right to appeal. Indeed, the trial court's decision in this case establishes a perverse incentive to dismiss (rather than appeal) and then refile the action and achieve, *de facto*, the result of a remand after appeal. This is poor policy, to say the least, and is not reasonably supported in any manner by the statutes governing either dismissal or appeal in condemnation actions. It is a result, however, which is consistent with and will be promoted by a rule which forces a condemnor to choose between appealing what it believes to be an unjust award and prematurely dismissing the case.

The decision of the trial court is contrary to the statutory scheme of the General Condemnation Act, violates public policy, and runs roughshod over the condemnor's statutory right to appeal, and should therefore be reversed.

In Highway Commissioner v. Herndon, 225 Va. 380, 302 S.E.2d 55 (1983) the State Highway and Transportation Commissioner sought to amend a certificate of deposit over ten years after it was filed in a "quick take" proceeding. This Court held that such amendment, in the absence of manifest fraud or arbitrary or capricious action, is allowed as a matter of right, stating:

If the original determination by the Commissioner, in designing the road and recording a certificate, is a legislative act, it follows that an amendment thereof to correct errors is of like character.

Id. at 386, 302 S.E.2d at 59. Similarly, in the present case, if the original determination by the Board to institute a condemnation action is a legislative act (as it unarguably is), then the decision by the same Board to dismiss the action is also a legislative decision, not a judicial decision.

When a court ignores legislatively determined policy which is not unconstitutional, it invades the province of the legislature and violates the separation of powers mandated by the Virginia Constitution. See Etheridge v. Medical Center Hospitals, 237 Va. 87, 101, 376 S.E.2d 525, 532 (1989). A court order which directs a board of supervisors to rezone property to a specific classification encroaches upon the board's legislative discretion in contravention of the principle of separation of powers. Board of Supvrs. v. Farley, 216 Va. 816, 818, 223 S.E.2d 874, 876 (1976). Cf. Chesapeake Development Authority v. Suthers, 208 Va. 51, 55, 155 S.E. 2d 326, 330 (1967) (General Assembly may delegate legislative power to local governing bodies).

The trial court's decision in the present case invaded the legislative province of the Board and therefore is void and of no effect as violative of the provisions of the Virginia constitution mandating separation of judicial and legislative powers.

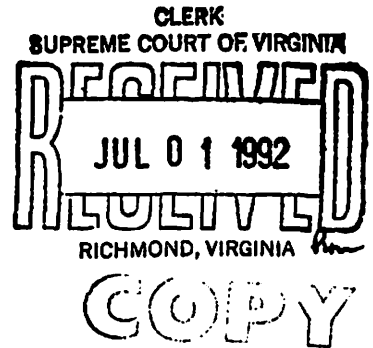
CERTIFICATE

I hereby certify that 3 true and correct copies of the foregoing brief *amicus curiae* were mailed this 26 day of June, 1992, to:

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IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. 920923

BOARD OF COUNTY SUPERVISORS
OF PRINCE WILLIAM COUNTY, VIRGINIA

Appellant

vs.

KENNETH F. PARSONS & KATHLEEN E. PARSONS

Appellees

BRIEF IN OPPOSITION TO APPEAL

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SUBJECT INDEX

	<u>PAGE</u>
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE	2
QUESTIONS PRESENTED	2
STATEMENT OF FACTS	3
ARGUMENT	3
I. THE COUNTY'S MOTION TO DISMISS THE CONDEMNATION PROCEEDINGS WAS UNTIMELY BECAUSE IT WAS NOT FILED BEFORE THE TIME FOR NOTING AN APPEAL FROM THE FINAL ORDER, AS REQUIRED BY VIRGINIA CODE §25-46.34 (b) .	3
II. THE TRIAL COURT PROPERLY AWARDED INTEREST ON THE COMPENSATION AWARD BEGINNING THE 31ST DAY AFTER ENTRY OF THE FINAL ORDER	11
CONCLUSION	14
CERTIFICATE	15

OTHER AUTHORITIES

PAGE

4 Am. Jur. 2d, <u>Appeal and Error</u> , §371	9
6 Nichols, Law of Eminent Domain (rev. 3d ed. 1990) §26.42	3-5, 10
6 Nichols, Law of Eminent Domain (rev. 3d ed. 1990) §26.64	12

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Appellees

BRIEF IN OPPOSITION TO APPEAL

To the Honorable Chief Justice and Associate Justices of the
Supreme Court of Virginia:

COME NOW the appellees Kenneth F. Parsons and Kathleen E.
Parsons (hereinafter Parsons), by counsel, and submit their Brief
in Opposition to the Petition for Appeal filed by the Board of
County Supervisors of Prince William County, Virginia (hereinafter
County).

STATEMENT OF FACTS

The Statement of Facts contained in the County's Petition of Appeal is substantially correct, except as qualified in the Statement of the Case, supra.

ARGUMENT

- I. THE COUNTY'S MOTION TO DISMISS THE CONDEMNATION PROCEEDINGS WAS UNTIMELY BECAUSE IT WAS NOT FILED BEFORE THE TIME FOR NOTING AN APPEAL FROM THE FINAL ORDER, AS REQUIRED BY VIRGINIA CODE §25-46.34 (b) .

The County devotes several pages of its Petition to a discussion of the concept of eminent domain as an inherent attribute of sovereignty, arguing that "...without an express statutory provision, a locality should retain its right to withdraw a condemnation, even after the confirmation of the commission's report." (Petition for Appeal, p. 9). Surprisingly, the County ignores the fact that there does exist an express statutory provision governing the right to withdraw a condemnation, namely Virginia Code §25-46.34. Accordingly, the focus of the inquiry in this case should be upon the statutory scheme for condemnation established by the legislature, and not upon the broad generalities relied upon by the County. As stated in 6 Nichols, Law of Eminent Domain, (rev. 3d ed. 1990) §26.42:

proceedings was lost.

The County employs a tortured analysis and argument in its attempt to evade the clear meaning of Virginia Code §25-46.34(b). First, it argues that because the County did not take possession of the subject property, title has not passed and accordingly the County retains the right to withdraw from the proceedings. This contention is patently without merit in light of the express language of Virginia Code §25-46.34(b) which by its very terms is only applicable if the condemnor has not "already acquired the title or a lesser interest or estate in or taken possession of such property..." The date of taking is merely the last date by which the County can constitutionally dismiss the proceedings. The legislature always retains the power to establish an earlier date:

It must be remembered, however, that the punctum temporis (point of time) when the taking is effected, while it marks the limit beyond which the right to discontinue the proceedings cannot constitutionally extend, is not necessarily the test of the expiration of the right, since the legislature may, if it sees fit, deny the right to discontinue at an earlier period. The question is really one of determining the intention of the legislature, subject only to the aforementioned constitutional limit.

6 Nichols, Law of Eminent Domain, (rev. 3d ed. 1990) §26.42, at page 26-340.

Secondly, the County argues that as a matter of public policy, it should retain the right to dismiss the condemnation proceedings after it has learned the cost of the land acquisition. The Parsons

Packaging, Inc., 240 Va 297, 397 S.E.2d 110 (1990):

However, "it is the responsibility of the legislature, not the judiciary, to formulate public policy, to strike the appropriate balance between competing interests, and to devise standards for implementation." [citations omitted]. Once the legislature has acted, the role of the judiciary "is the narrow one of determining what [the legislature] meant by the words it used in the statute." [citation omitted]. "[T]he contentions now pressed on us should be addressed to the political branches of the Government...and not to the courts." [citations omitted]

240 Va at 304, 397 S.E.2d at 114.

Thirdly, the County contends that since it has a statutory right to appeal an adverse decision on the trial for just compensation, the time to file a motion to dismiss the proceedings does not begin to run until the appellate process has been completed. This contention is also directly contrary to the express language of Virginia Code §25-46.34(b). If the legislature had intended to allow the County to dismiss the proceedings after an appeal had been decided, it could have easily so provided. The Maryland statute on abandonment of condemnation proceedings provides as follows:

(d) Limitation on abandonment -- No condemnation proceeding may be abandoned:

1. After taking has occurred;
2. More than 120 days after the entry of final judgment, unless an appeal is taken;

supplied) if it wishes to dismiss the proceedings without the landowners' consent. The legislature has properly exercised its discretion and struck the balance between the condemnor's rights and the landowners' rights by limiting the condemnor's unilateral right to dismiss the proceedings to the 30-day period immediately following entry of the final order, and not extending that right until the appellate process has been completed.

Lastly, the County contends that because the August 22, 1991 Order confirming the Commissioners' report contained a provision which suspended execution pending appeal, this Order was not final and the time period for the County to dismiss the condemnation proceedings was extended (Petition for Appeal, p. 15-18). As Judge Hoss noted, he did not intend that suspension of execution of the August 22, 1991 Order would extend the time for the County to withdraw the condemnation proceedings, and that in fact he did not have the authority to extend the time. (April 17, 1992 Transcript, p. 15-16).

It is well established that suspension of execution of a judgment does not affect the finality of that judgment. Hirschkop v. Commonwealth, 209 Va 678, 166 S.E.2d 322 (1969). Rather, supersedeas operates against the enforcement of the judgment pending appeal, but does not operate against the judgment itself. 4 Am. Jur. 2d, Appeal and Error, §371. The August 22, 1991 Order

was properly denied by the trial court.

II. THE TRIAL COURT PROPERLY AWARDED INTEREST ON THE COMPENSATION AWARD BEGINNING THE 31ST DAY AFTER ENTRY OF THE FINAL ORDER.

In the case of Bartz v. Board of Supervisors of Fairfax County, 237 Va 669, 379 S.E.2d 356 (1989), the order confirming the commissioner's report was entered by the trial court on May 22, 1987. In said order, the trial court ordered the condemnor, Fairfax County, to pay interest on the award at the judgment rate (8% per annum) from the date of the order until the award was paid. Fairfax County paid the compensation award four days later, on May 26, 1987, and appealed the trial court's ruling requiring it to pay interest from the time of the entry of the order until payment was made. This Court agreed with the County and reversed the trial court's ruling:

Code §25-46.34(b) affords the condemnor thirty days after the trial court sets the final amount of the compensation award to accept or reject the compensation amount without any penalty. In this case, the County exercised its option to pay for the property at the set price within the thirty-day time period. Therefore, there is no statutory or constitutional basis for the trial court to require the County to pay any interest on the compensation award.

237 Va at 676, 379 S.E.2d at 360.

The inescapable conclusion to be drawn from the Bartz case is that the trial court can properly award interest on the compensation award after the thirty day time period set forth in Virginia Code §25-46.34(b) has expired. That is precisely what the

landowner." (Petition for Appeal, p. 19). Rather, this Court agreed that receipt of payment by the landowner was the crucial consideration and that the award of interest was proper:

In the case before us, shortly after the amounts of the awards were paid into court the condemnor, by filing exceptions to the report, challenged the legality of the proceedings and the amounts of the awards. Furthermore, it has prosecuted this appeal from the final judgments entered upon the awards. Of course, the condemnor was entirely within its right in taking these steps, but in so doing it has precluded the landowners from receiving the amounts of the awards...(emphasis supplied).


195 Va at 466, 78 S.E.2d at 676.

In the Bartz decision, supra, Justices Russell and Whiting dissented, suggesting that the failure to allow an award of prejudgment interest from the date the condemnation petition was filed would render Virginia's condemnation proceedings unconstitutional. Although the majority of this Court rejected the view that interest should run from the date of the filing of the petition for condemnation (which in this case was January 16, 1990), there is no doubt that it should run from the 31st day following entry of the final order confirming the award of just compensation. The position that the County now advocates in the instant case is precisely that danger which Justices Russell and Whiting warned against in their dissent in Bartz:

...[A] condemnor may file his petition for condemnation, destroy the marketability of the property immediately by recording a memorandum of lis pendens, freeze the value of the property at the level which existed when the petition was filed, withhold payment until the

CERTIFICATE

In accordance with Rule 5:18 of the Rules of the Supreme Court of Virginia, I hereby certify that I have this 30th day of June 1992, mailed, postage prepaid, by certified mail, four (4) copies of this Brief in Opposition to Appeal to the Clerk of the Supreme Court of Virginia and mailed, postage prepaid, one copy of said Brief to Sharon E. Pandak, County Attorney for Prince William County, One County Complex Court, Prince William, Virginia 22192, Counsel for Appellant.



ROBERT J. ZELNICK

ASSIGNMENTS OF ERROR

The trial court erred in refusing to permit the Board of County Supervisors of Prince William County to withdraw from this eminent domain proceeding. The trial court also erred in imposing interest on the award beginning on September 22, 1991, the 30th day following entry of its Order Confirming the Commissioners' Report. The trial court took both actions notwithstanding the fact that it had suspended execution of its Order pending appeal. These actions were error because:

1. The Board of County Supervisors, as condemnor, had both the right to appeal a condemnation decision which it believed was flawed, and to withdraw from the eminent domain proceeding when its Petition for Appeal was denied; the provisions of Section 25-46.34(b), VA Code Ann., do not abrogate either of these rights in this case.
2. Interest should not begin to accrue on the condemnation award in this case until title to the property passes to the Board and the right to the award vests in the Parsons, neither of which had occurred by September 22, 1991.