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16. Abstract <p>The study examined the condemnation process in the Virginia Department of Transportation (VDOT) by collecting information from attorneys, appraisers, judges, VDOT managers and staff, and other condemners both within and outside Virginia. Of particular interest were alternatives that exist to the present procedure for selecting the condemnation tribunal and a determination of whether such alternatives hold promise for overcoming difficulties that may be associated with the existing system.</p> <p>A number of initiatives are identified that, if implemented, may result in improvements in Virginia's condemnation process. They include increasing the use of contract appraisers, especially in highly controversial cases; additional training for staff appraisers and negotiators; review of past cases in which awards were excessive; greater use of pretrial discovery; and, consideration of an alternative to the current methods for composing and selecting condemnation tribunal.</p>			
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AN EXAMINATION OF ALTERNATIVES TO
VIRGINIA'S CONDEMNATION PROCEDURES

by

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Research Scientist

(The opinions, findings, and conclusions expressed in this report are those of the author and not necessarily those of the sponsoring agencies.)

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INTRODUCTION, BACKGROUND, AND RATIONALE

The major elements of the right-of-way acquisition process include appraisals, negotiations, relocations, and utility adjustments. It is during the negotiation stage that the Virginia Department of Transportation endeavors to reach agreement and settlement with the property owner. If agreement and settlement cannot be reached through negotiations, the Department can exercise its power of eminent domain and initiate condemnation proceedings in order to acquire the property. In such cases, the monetary compensation due the property owner is determined by the courts, assisted by a hand-picked tribunal called a commission.

Nationally, a wide variety of tribunal configurations and condemnation procedures are used to make determinations in condemnation cases. In a 1972 study conducted by Dennis Merrill of the Virginia Transportation Research Council, Condemnation Procedure Alternatives for Virginia, Mr. Merrill points out no less than 10 alternative types of condemnation tribunals being used by the 50 states. The report also notes that variations of these basic alternatives exist so that no 2 procedures are exactly alike. In a subsequent 1975 report, Condemnation: Who Should Sit in Judgement?, he states:

Because of ambiguities there is no easy solution to the condemnation problem and there may very well be no 'ideal' tribunal. The best solution for a particular state will depend on practical considerations such as condemnation habits and traditions, the geography of the state, the kinds of condemning agencies which are active in the state, the amount of condemnation, the workload on the state courts, the quality and independence of the judiciary, and others. ... Condemnation has inherent difficulties which make it likely that the controversy will continue regardless of what tribunal is used.

The aforementioned reports present a thorough examination of alternative condemnation procedures along with the opinions of judges, attorneys, and appraisers in the Commonwealth regarding those alternatives. The reports did not, however, present specific proposals to the Department regarding condemnation procedures in use at that time. Furthermore, these studies did not examine the appraisal and negotiation processes, which, as major components of the acquisition process, bear a significant relationship to condemnation.

In late 1986 during the course of the legislatively mandated Senate Joint Resolution Number 7 (SJR-7) Study, a study was initiated to examine the various aspects of the condemnation process as it is administered both in Virginia and, to a lesser extent, elsewhere. This report presents the results of that study.

PURPOSE AND SCOPE

The purpose of this study is to examine the condemnation process as it is presently administered by the Virginia Department of Transportation and to determine how shortcomings associated with that process might be related to the right-of-way process or to certain of its components. The study includes an examination of alternatives that exist to the present procedure for selecting the condemnation commission and a determination of whether these alternatives hold promise for overcoming difficulties that may be associated with the existing system. In addition, the study included an examination of the right-of-way acquisition process particularly with respect to appraisal and negotiations activities to determine how it impacts on condemnation procedures and results. Although the study concerns itself for the most part with the condemnation activities of the Department, input was also solicited from other authorized condemners in the Commonwealth and from selected transportation agencies in other states.

METHODOLOGY

The completion of this study required that information be obtained from a variety of sources. A description of the procedures used to obtain that information follows.

Interviews

To enable the author to gain a thorough knowledge of the Department's condemnation process, the right-of-way manager and an appraiser or negotiator in each district right-of-way office were interviewed. In addition, informal discussions were held with other district and central office right-of-way staff and representatives from the Regional Federal Highway Administration office. In order to ascertain impressions of the process from those outside these departments, four attorneys who have litigated against the Commonwealth in condemnation cases, three judges who frequently adjudicate condemnation trials, two members of the Commonwealth Transportation Board (both of whom are attorneys), and one independent fee appraiser were interviewed. Finally, representatives from state departments of transportation in Colorado, Delaware, Florida, Maine, Maryland, Michigan, Pennsylvania, North Carolina, and Texas were interviewed as well as those from authorized condemners in the Commonwealth including AT&T, Amtrak, Appalachian Power Company, Columbia Gas, Metro (Washington D.C. based), MCI, and Virginia Power Company.

Questionnaires

Questionnaires (see Appendices A, B, and C) were mailed to 68 attorneys appointed to represent the Department in condemnation cases, to 101 independent contract appraisers retained by the Department who frequently testify in those cases, and to 19 attorneys who often litigate against the Commonwealth in condemnation cases.

Attendance at Condemnation Trials

In order to observe how the principals involved in condemnation trials interact and to generally become familiar with the conduct of the trial proceedings, six condemnation trials in various parts of the state were attended.

Literature Review

Statutes and codes from Virginia and other states were reviewed as were reports published by those and other condemnors both within and outside the Commonwealth. Information was also drawn from legal journals, law review articles, right-of-way and appraisal journals, and Transportation Research Board publications.

Case Analysis

A sample of 800 condemnation cases tried during the past 10 years was examined to enable the researcher to make some statistical inferences. Case files were used to ascertain dollar amounts at stake, differences between Department offers and commission awards, damage amounts, case durations, and elements that may be unique to specific areas of the state.

THE ACQUISITION PROCESS

The right-of-way acquisition process is comprised of three major parts: appraisals, negotiations, and relocations and is dictated by Title 25, Section 248 of the 1950 Code of Virginia, as amended. This section requires an appraisal for fair market value and is further controlled by federal guidelines and regulations that specify the minimum requirements necessary to determine fair market value. The approval commences once the public hearing has been completed and is a professional application used to determine both the fair market value of the property to be acquired and the damage, if any, to the remaining property attributable to the project construction. Fair market value is defined as the amount a willing buyer would pay a willing seller for a property. Damage is identified as any reduction in value to a remaining property associated with its acquisition and proposed use. Any increase in value is declared an enhancement, which may be used to offset a damage but cannot be used to offset the fair market appraisal. Appraisals are approved by a qualified reviewer prior to the initiation of negotiations or eminent domain proceedings. To further ensure that the appraisal process maintains a high

degree of quality and equity both for the property owner and the taxpayers of the Commonwealth, central office staff periodically conduct statewide audits of both appraisals and appraisal reviews.

Title 25, Section 248 of the 1950 Code of Virginia, as amended, also requires that the negotiator examine the plans, title report, appraisal, relocation assistance information, replacement housing report and building retention value report as the offer to a landowner is prepared. In negotiating with the owner, the negotiator examines the property, improvements, and means of access to the property, and explains the plans and the effect of construction on the property. An offer based on the approved appraisal is made, and the owner is advised of relocation benefits that are applicable. In all instances, Department negotiators are urged to seek an economically justifiable agreement and settlement with the property owner. If the property owner does not accept the offer, Title 33, Chapter 1, Article 7 of the 1950 Code of Virginia, as amended, entitles the Department to condemn the property.

THE CONDEMNATION PROCESS

The condemnation process is initiated by the filing of a certificate and later by a petition with the court in the jurisdiction of the subject property whereby the State Highway and Transportation Commissioner becomes the petitioner and asks the court to appoint a commission to determine what amount should be paid to the property owner. Section 25-46.20 of the 1950 Code of Virginia, as amended, specifies that such cases will be decided by a five-member commission comprised of freeholders who reside in the jurisdiction of the subject property. It further provides that, if the parties to a condemnation proceeding cannot agree on the commissioners, each party must submit a list of at least six names from which the court selects nine to be summoned. From the nine that are summoned, each party eliminates two and the remaining five are appointed to hear all testimony. On the day of the trial, the commissioners, the litigants, and sometimes the judge view the subject property. Afterwards, all parties return to the courtroom where the evidence is presented. Once all the evidence is heard, the commission is instructed to make an award based on their view of the property and of associated facts and circumstances. They are not bound by the opinions presented in court by experts nor by the weight of the evidence. The law presumes the expertise of the selected commissioners and charges them to ascertain what will be a just compensation for the land proposed to be taken and damage, if any, to property remaining. Either party has the right to file an exception to the award that is rendered, and the judge can either deny or rule in favor of the exception. If the party entering the exception is not satisfied with the ruling on it, an appeal can be filed to the Supreme Court of Virginia. If a new trial is ordered by the Supreme Court of Virginia, the case is heard by a newly selected panel of commissioners, and all testimony entered in the previous trial is disregarded.

Not all properties on which condemnation proceedings are initiated are concluded by trial. The fact that a petition and certificate have been filed with the court does not preclude the continuance of negotiations in

an effort to reach a mutually satisfactory agreement with the property owner.

REVIEW OF CASE HISTORIES IN VIRGINIA

To enable the researcher to make statistical inferences regarding appraisals and awards and to generally note what the statewide trend has been during the past 6 to 10 years, a sample of the most recent 100 cases tried in eight districts were selected for review. Complete information was obtainable for 667 cases, which generally included those tried between 1977 and 1987 for interstate, primary, and secondary system takings and represent 19 percent of the cases tried during that period. In addition, another sample of 1,083 parcels acquired between 1982 and 1987 was also selected to permit the researcher to ascertain the typical ratio of acceptance of options, agreements, and Certificate filings.

A comparison of the frequency of condemnation cases tried over the aforementioned 10-year period clearly illustrates recent intensified efforts on the part of the Department's right-of-way staff to reach settlement with property owners. Table 1 shows that since 1983, while the number of Certificate filings has been on the increase as a result of the Department's upscaled construction program, the number of condemnation cases tried has been on a steady decline. Since right-of-way transactions can take place over a number of years, it was impossible to trace what percent of the total parcels acquired in a given year are concluded by trial. Hand-picked samples of representative projects revealed that, as a rule, 72 to 75 percent of negotiated agreements are obtained by option; 22 to 28 percent of initial offers made to property owners by Department staff are refused. If agreement cannot be reached, the Department files a Certificate of Deposit or Take, which initiates the condemnation process. Even though this action allows the Department to obtain right of entry onto the subject property, negotiations continue. Approximately 60 to 65 percent of offers that are initially refused are settled through continued negotiations after the Certificate is filed. Thus, usually between 10 percent and 15 percent of total acquisitions are resolved in court in any given year.

While the statistical analysis presented here does not permit a projection of the number of condemnation cases that will be tried each year, there is little doubt that the Department's expanded construction program, which could require the acquisition of upwards of 4,000 parcels annually, will result in a substantial increase in the condemnation case load.

Table 1
Condemnation Case Load by Fiscal Year

<u>FY</u>	<u>Number of Cases Tried</u>
1987	53
1986	95
1985	169
1984	307
1983	357
1982	407
1981	337
1980	347
1979	386
1978	403
1977	<u>641</u>

Total 3,502

A sample of 1,083 parcels that were acquired between 1982 and 1987 is presented in Table 2. As the table shows, settlement can be reached in a variety of ways. For this sample, initial offers were accepted in 659 (61 percent) of the cases. Settlement on an additional 116 parcels was reached after the Department increased its original offer. In this sample, 308 (28 percent) of the landowners refused all offers, and Certificates of Deposit were filed and settlement was reached in 194 (62 percent) of these instances, leaving only 114 cases to be resolved in court. Thus, only 10.5 percent of the 1,083 parcels acquired in this sample actually had to be litigated. While the tendency for the majority of settlements to be reached outside the courtroom is indicative of the continued efforts of the district right-of-way staffs to avoid litigation, there are monetary costs resulting from such actions. Each settlement beyond first offer acceptances costs the Department something. Although dollar amounts for this sample were not obtained, a cursory review of these cases revealed increases over original offers typically ran between 15 percent and 40 percent.

Table 2
Summary of Method of Settlement for
A Sample of 1,083 Parcels by System

	<u>Total Parcels</u>	<u>First Offer Accept.</u>	<u>Offers Accepted After Increase</u>	<u>Refusals</u>	<u>Agreements After Certif.</u>	<u>Court Cases</u>
Primary Projects	349	221	20	108	61	26
Secondary Projects	409	255	54	100	67	6
Urban Projects	<u>325</u>	<u>183</u>	<u>42</u>	<u>100</u>	<u>66</u>	<u>13</u>
Total	1,083	659	116	308	194	45*

*Of the 308 refusals, 69 cases were still pending at the time the sample was drawn and examined.

While the preceding sample of parcels was drawn to enable the researcher to determine the frequency and variety of methods by which settlements are made, a sample of 667 actual condemnation cases was examined to permit the researcher to ascertain the monetary aspects of condemnation. Table 3 presents a breakdown of this sample, which includes court cases that occurred during the period between 1977 and 1987. Though there is some disparity among the districts, the table shows that, statewide, total awards rendered for this sample were, on average, higher than the Department's offer. Translated into dollars, for these 667 properties, the Department offered a little over \$17 million but ended up paying over \$35 million. If these figures are indicative of the norm, and both case histories and staff commentary corroborate the fact that they are, the cost of procuring right of way resulting from decisions rendered by the condemnation tribunal is significant. For the 10-year period covered by this sample, the right-of-way expenditure for 28,000 properties was roughly \$400 million. Based on the fact that the above sample represents one fifth of the 3,500 cases tried during this period, one can infer that if the settlements for all cases resemble those in the sample, excesses of awards over offers for all cases may have been 5 x \$18 million, or \$90 million. The reader should also bear in mind that these figures include only some of the legal costs and none of the manpower costs that must be borne by the Commonwealth.

Table 3

Profile of Condemnation Case Offers
and Awards by District
(N = 667)

<u>District</u>	<u>No. Cases</u>	<u>Amount Offered</u>	<u>Amount Awarded</u>	<u>Excess of Award Over Offer</u>
Bristol	102*	\$ 2,841,236	\$ 7,355,734	\$ 4,514,498
Culpeper	79	2,621,357	5,148,898	2,527,541
Fredericksburg	60	521,672	1,103,505	581,833
Lynchburg	57	671,268	1,064,881	393,613
Richmond	184*	5,273,527	11,181,840	5,908,313
Salem	52	1,738,854	2,845,253	746,399
Staunton	45	631,841	1,103,857	472,016
Suffolk	88	3,018,128	5,702,115	2,683,987
Total	667	\$17,317,883	\$35,506,083	\$18,188,200

*Although these districts submitted more than the necessary 100 cases, all were included in the sample.

An examination was made of the composition of the awards rendered in the sample to determine what portion of the award excesses constituted damages and what portion constituted increases in the amount of the Department's appraisal. In this sample, 42 percent of the excess awards was for damages and 58 percent was for increases in land values. Of particular importance here, is the fact that damage awards were made in 68 percent of

these cases, while Department staff made damage offers in only 25 percent. Moreover, in 99 percent of the cases for which the landowner sought damages, an award was made. There is great disparity between the treatment of damage assessments by the landowners' appraisers and the Department's appraisers. In general, condemnation commissioners overwhelmingly side with the property owner regarding damage assessments. There were also numerous cases in which damages were not sought but were awarded by the commission.

Further examination of these cases also revealed that staff appraisals typically do not differ significantly from those made by landowner appraisers nor from those made by appraisers contracted by the Department. Where differences do exist, they most often have to do with damage assessments rather than fair market value.

In summary, the data suggest that while the Department has attempted to settle as many cases as possible without litigation, the costs of such administrative settlements can exceed original offers by 15 percent to 40 percent. While the size of these monetary settlements are not insignificant, they do not approach the awards that typically result when the condemnation tribunal decides the values of the properties. In these cases, the Department runs the risk of paying more than twice the estimated right-of-way costs, exclusive of certain contract and legal fees.

RESULTS OF INQUIRIES TO APPRAISERS, ATTORNEYS AND JUDGES

Contract Appraisers

Questionnaires (Appendix A) were mailed to 101 contract appraisers who are retained by the Department to perform appraisals and to testify in court. Completed questionnaires were received from 47.

The majority of contract appraisers generally feel the pretrial sessions held prior to the condemnation trial adequately prepare them for their role in condemnation cases. These sessions are usually held in the office of the attorney selected to represent the Department and provide a means for a review of the facts of the case by both parties. While there was consensus that pretrials are an important means for revealing all the facts of the case, about half the appraiser group indicated that the level of detail they were required to produce was greater than they normally compiled for their other clients. Furthermore, many of the contract appraisers were of the opinion that landowner appraisals are typically less detailed than those conducted by contract appraisers employed by the Department.

Only 13 percent of the appraisers felt that the amounts sought by landowners in condemnation cases usually represented just compensation. The most frequent commentary received on this issue was that values established by landowners tended to be "subjective," "inflated," "typically exaggerated," and "not based on market value." These testimonies, they said, are often given by witnesses who testify to "fallacious opinions of

value, yet are accepted by the court as experts," and this has a direct impact on the incidence of exaggerated awards.

Contract appraisers were asked a series of questions regarding the commission tribunal. About 60 percent feel the present system for selecting commissioners favors the landowner and 68 percent that condemnation awards are usually excessive. These responses are based on their belief that particularly in rural areas, commission members are usually friends of the landowner and are often biased in issuing award verdicts. Table 4 shows contract appraiser responses to a question concerning alternatives to the current commission tribunal. As shown, about 72 percent favor employing a panel of qualified professionals to hear evidence at condemnation trials. There is little support for the jury alternative from this group and even less for maintaining the current set-up. (It should be noted that percentages do not total 100 because several respondents favored both the jury and the panel options).

Table 4

Tribunal Preference of Contract Appraisers
(N=47)

<u>Alternative</u>	<u>% Response</u>
Jury	21.3
Panel of Qualified Professionals	72.3
Commission System	15.0

A space for comments was provided on the questionnaire to afford the contract appraisers the opportunity to provide candid observations regarding the condemnation activity and to assist the author in determining why they responded to some of the questions as they did. These commentaries were useful in illuminating some items that otherwise would have been unknown to the author and in pinpointing the principal concerns of this group.

On Commissions

"We need a panel of qualified commissioners to eliminate bias...."

"The fact that either side can participate in the selection process is absurd on the face of it. The results are to the landowner's advantage...the worst he can do is get only two or three of his sympathizers. The Commonwealth has no sympathizers."

"Commissioners should be selected from a different jurisdiction and should not know the condemnee."

"They tend to be impressed by intimidating attorneys who emphasize irrelevant points."

"We should employ a panel selected in various localities by unbiased state officials. They should serve for a specified period and consist of real estate professionals."

On Landowner Witnesses

"Typically the landowner employs an incompetent, unethical appraiser who gets accepted by the court as an expert. Expert testimony should be restricted to real experts."

"Courts are too lenient in their interpretation of real estate experts. Discredited appraisers are allowed to appear repeatedly in some jurisdictions and give fallacious opinions of value."

"The licensing of appraisers would diminish the use of experts for the moment who have neither the technical training nor the ethical constraint to make a good unbiased witness."

On Attorneys

"More time should be spent familiarizing the attorney with sales in the area to better prepare him for cross examination of the landowners' appraiser."

"Everything depends on the attorney. Some are much better and more familiar with condemnation than others."

"Retain good condemnation attorneys."

While the preceding represent only a small percentage of the many comments received from the contract appraiser group, these and other candid remarks proved extremely useful in ascertaining the consensus of the group on certain issues. Repetitive comments about the commissioner tribunal, for example, affirmed the fact that contract appraisers as a group feel the commission procedure is deficient and that they favor a panel of qualified professionals as the alternative. These individuals are also frustrated over the extreme detail they go into in preparing appraisals as compared to those often prepared by appraisers testifying on behalf of landowners.

Contract Attorneys

Questionnaires were mailed to 68 attorneys retained to represent the Department in condemnation cases. These attorneys are paid an hourly fee and work very closely with Department staff, contract appraisers, and the Attorney General's Office. Completed questionnaires were received from 25 (37 percent) of the attorneys polled.

The attorney group was first asked a series of questions about the appraisal process. Fifty-six percent of this group feel the Department's appraisals are as a rule low and 40 percent that they are about right. About 44 percent feel contract appraisals are usually higher than Departmental appraisals, and 40 percent that they are about the same. Fifty-two percent of the attorneys rate the contract appraiser a better witness than the Department's staff appraiser, whereas only 4 percent feel

the staff appraiser is superior in this regard. Moreover, 60 percent are of the opinion that testimony from appraisers holding certain professional designations is perceived by the courts as having more credibility than that from those who do not hold such designations. Further commentary on these issues indicates that the majority of the attorney respondents view contract appraisers as being generally more independent and knowledgeable of the general real estate market, more experienced in giving testimony, and more at ease on the witness stand than staff appraisers. Moreover, they point out that contract appraisers are often acquainted with commission members and vice versa, whereas this is not generally the case with the Department's staff appraisers.

When asked if they felt that the effects of damages and enhancements on the completed project were being properly taken into account, 52 percent of the attorneys replied affirmatively, and 44 percent replied negatively. Commentary on this issue revealed that attorneys are convinced that the Department's practices regarding damage assessments deserve the immediate attention of management, especially in view of the fact that a substantial proportion of the differences between Department offers and commission awards are typically attributable to damages. Most are also of the opinion that contract appraisers are more prone to take damages into account than are staff appraisers.

The attorneys generally echoed the sentiments of the contract appraisers regarding the commission tribunal. Table 5 presents a comparison of attorney and appraiser responses to two questions about commissions.

Table 5
Responses to Questions Regarding the Commission System,
by Percentage
(N=72)

<u>Questions</u>	<u>Response</u>	<u>Attorneys</u>	<u>Appraisers</u>
Present system favors:	Landowner	60.0%	59.6%
	State	0.0%	0.0%
	Neither	40.0%	29.8%
	No Response	0.0%	10.6%
Condemnation awards are:	Too low	0.0%	0.0%
	Too high	56.0%	68.1%
	About right	40.0%	19.1%
	No response	4.0%	12.8%

As indicated, the two groups are similar in their assessment of both the system and the size of condemnation awards, although the attorneys as a group find slightly less fault with the awards than do the appraisers. The two groups are similarly aligned in their choices for alternatives to the current commission system. Table 6 shows that neither group particularly favors a change to a jury system, and both favor the employment of a professional panel, although the appraisers are more in favor of the latter alternative than the attorneys. (Percentages in Table 6 do not total 100

because several respondents in both groups favored both the jury and the panel options).

Table 6

Tribunal Preferences of Contract
Appraisers and Attorneys, by Percentage
(N=72)

<u>Alternative</u>	<u>Attorneys</u>	<u>Appraisers</u>
Jury	20.0%	21.3%
Panel of Qualified Professionals	52.0%	72.3%
Present Commission System	32.0%	15.0%

Attorneys, like the appraiser group, also provided much commentary on a variety of condemnation issues, the most prevalent being that regarding commission selection, damages, the use of discovery, and comparisons of staff and contract appraisals. Those statements that best sum up all commentaries received on these four issues are included here.

On Commission Selection

"There is a great deal of cronyism between commissioners, landowners, and their attorneys....The system invites cronyism and VDOT has few cronies."

"We need a selection system for commissioners which would guarantee a group not selected by the landowner or the Commonwealth."

"It is difficult to get commissioners to serve...Many view it as an inconvenience....Fees should be increased to \$100 a day."

On Damages

"There are instances where damages are unknown to staff appraisers at the time of the appraisal. These are often pointed out by the landowner either before or during the trial."

"Staff should spend more time preparing for defense of damage claims...VDOT appraisers always seem to underestimate damages....They need to look more closely at enhancements offsetting damages."

On the Use of Discovery

"Attorneys should be allowed to use discovery more extensively. There should be no surprises in the courtroom."

"It is hard to be reasonably well prepared on large cases because of the discovery requirements in which landowner fees and costs have to be paid by the Commonwealth. I know of no other system where one side has to pay the other side's discovery cost except condemnation cases....There is a chilling effect on the Commonwealth trying to

obtain discovery of the other side's evidence prior to trial...it makes it difficult during...the trial when you don't know what the other side's evidence will be."

"Discovery should be used to require that a copy of all appraisals be given to both parties."

On Appraisals and Appraisers

"We should never use appraisers from another area....He cannot be totally aware of the changes in circumstances in the local area....The best source is to get an appraiser from within the county or from adjacent counties."

"We should depend more on contract appraisers, especially in controversial cases....The staff appraisal should never be used as the primary one in these instances."

"The contract appraiser seems more at ease on the stand....He is usually known by the commissioners....The Department's staff appraiser has a vested interest."

To summarize, the attorney group favors the employment of a panel of qualified professionals as the preferred alternative to the condemnation commission. This group is quite concerned about excessive damage awards and feel the Department should closely examine its practices with respect to damage assessments. As a group, they feel staff appraisals are slightly conservative and depending on the situation, prefer the contract appraiser to the staff appraiser as the key witness in condemnation trials. Much commentary was received regarding the use of pretrial discovery. Attorneys as a group are reluctant to use extensive discovery, mostly due to the expense involved. However, several experienced, knowledgeable attorneys were of the opinion that the Commonwealth could reap a great deal of benefit by exercising discovery in certain instances.

Landowner Attorneys

Completed questionnaires were received from 7 of the 19 attorneys contacted who have litigated against the Commonwealth in condemnation cases. Four additional landowners' attorneys were interviewed. While this group shared many of the same concerns as the contract attorney group, certain contrasting opinions between the two groups are worthy of mention. First, landowners' attorneys are more critical of staff appraisers than contract attorneys. As a group, 75 percent feel the Department's staff appraisals are too low (compared to 56 percent for the contract attorney group), and 71 percent feel that contract appraisers are better witnesses than staff appraisers (compared to 52 percent for the contract attorney group). This group also does not deem professional designations as an enhancement to appraisal credibility. In contrast to all other groups questioned on the issue, exclusive of judges, the landowners' attorneys do not feel condemnation awards are typically excessive. Nearly 90 percent feel awards are usually about right, that the system favors neither the Commonwealth nor the landowner, and that the commission system should be retained with no modification.

Judges

It was decided during the planning stages of this study that the viewpoint of those adjudicating at condemnation trials should be obtained. It was felt their viewpoint might be the least biased of all parties to be queried since they have no direct relationship with either litigant other than to oversee the trial. Because of the study's short duration and scheduling problems, only three judges were interviewed.

The judges find little fault with the composition and selection procedures for empanelling condemnation commissioners and do not feel extensive qualifications for commissioners are necessary. In fact, two of the three were of the opinion that a jury trial may be preferable to the commission hearing. Their feeling is that condemnation cases are no more complex than civil and criminal cases: the outcome of each should be decided on the weight of the evidence rather than the expertise of the jurors. When asked whether they had with any regularity been forced to grant continuances due to the failure of summoned commissioners to appear, all replied that the right of subpoena requiring all commissioners summoned to appear resulted in few problems with "no shows." Two of the judges did say it was their normal practice to summon eleven or twelve commissioners for every case in the event any had to be stricken for cause or for any other reason. All of the judges reported that they granted continuances in extreme situations only, and that seldom was an insufficient complement of commissioners the cause for continued condemnation trials in their court.

The three judges were in agreement on certain aspects of the appraisal process. First, they all felt that appraisals should be conducted by appraisers who reside and work in the subject property area, be they staff or contract appraisers. Second, they were in accord that, historically, the local contract appraiser has performed better on the witness stand than the Department's staff appraiser. Third, they felt that in a display of loyalty to the Commonwealth, staff appraisers often tend to be slightly biased in their determination of land value and damages. Contract appraisers, they said, may tend to be more realistic in their approach to appraisals simply "because they can't get fired."

All three judges stressed the fact that the Department's employment of local attorneys has been an important aspect of successful condemnation deliberations in their jurisdiction. Each was extremely complimentary of these attorneys and pointed out that the outcome of a condemnation many times hinges on the knowledge, experience, and preparedness of appointed fee counsel.

While the judges do not find too much fault with the condemnation activity as it is currently administered, one interesting suggestion was offered regarding the procedure for selecting commissioners. It was suggested that the landowner and the Department each be allowed to select two commissioners and the judge be allowed to choose the fifth. This procedure was also mentioned in many conversations this writer had with both Department and contract employees. Those offering this suggestion feel it might eliminate the propensity for commissions to be "stacked three to two" in favor of one side or the other.

VDOT Staff

The final group queried regarding the condemnation process consisted of appraisers, negotiators, and managers from the Department's central and district offices. Rather than administering structured interviews, the author chose to participate in open-ended discussions with these individuals, both singly and in groups. These discussions were held both during personal visits and by telephone and included approximately thirty individuals. While all of the items discussed cannot be addressed in this document, several key issues emerged that appear to be of concern to the majority of those participating in the discussions.

The issue on which the majority of the staff is most vocal is the method by which commission members are selected. The staff is nearly unanimous in its conviction that an alternative to the commission system is needed. One staff member perhaps best echoed the sentiments of the majority when he said:

"In rural counties particularly, the landowner's attorney limits his selection of potential commissioners to 'good ole boy friends', that is, social and professional acquaintances whom he knows will not only favor his client but surely grant a high award which will result in a high legal fee for himself."

Staff feel there is a tendency for the commission to consist of individuals who, because of friendships and business associations, may be sympathetic to the landowner. The alternative to the commission preferred by the majority is the employment of a professional panel comprised of members possessing specific qualifications related to real estate valuation who are appointed by the court or a higher authority to serve in each jurisdiction. The second most frequently offered alternative is the establishment of an arbitration board to hear evidence and make awards prior to trial. This board could be configured much like the panel but would be presided over by a chairman rather than a judge. Staff were of the opinion that if this alternative were exercised, it might alleviate crowded court dockets and reduce some of the costs associated with court trials since only those awards that were appealed by one of the litigating parties would proceed to court.

A second item that concerns the staff is the tendency for the courts to allow testimony from landowner appraisers who are recognized as experts in the field of real estate but who often possess few, if any, professional credentials. Many of those interviewed feel that appraiser certification or licensing would help to alleviate these occurrences. Toward that end, staff appraisers appear eager to seek professional credentials that will enhance their credibility in the courtroom, and they desire the support of the Department's management in these efforts.

A third issue addressed by the staff centered around the Department's relationship with appointed fee counsel. The staff are convinced of the importance of the utilization of attorneys who show adeptness in trying condemnation cases.

In summary, the majority of the remarks obtained from the staff regarding condemnation concerned three key issues. First, there is general

dissatisfaction with the composition and selection process of the commission tribunal. In the staff's view, the commission procedure is flawed on two counts: (1) it usually consists of individuals who possess little knowledge of the technical aspects of real estate valuation; and (2) it tends to consist of individuals who, because of friendship or business associations with either the landowner or his attorney, may be biased in the awards they render. As an alternative, the staff favors the employment of a qualified panel appointed either by the court or a higher authority for a specified term. Second, the staff favors measures that would prevent landowner employment of appraisers who hold few, if any, professional credentials, yet are recognized by the courts as experts in real estate valuation. The staff supports licensing, certification, or specific designations for all appraisers who testify in court. Moreover, most are eager themselves to obtain the professional designations and education necessary to be recognized as highly credible professionals both on the witness stand and by the appraisal industry. Third, the staff stressed the importance of utilizing attorneys who are adept in handling condemnation cases.

COMMENTARIES FROM OTHER AUTHORIZED CONDEMNORS

Representatives from nine state transportation agencies and seven authorized condemnors in the Commonwealth were interviewed. A brief discussion of those interviews follows.

Authorized Condemnors in the Commonwealth

Of the seven in-state condemnors contacted, only Virginia Power Company and Appalachian Power Company were involved in condemnation with any frequency. Both representatives interviewed report that awards tend to greatly exceed offers, especially in rural areas, and that damages comprise a large portion of them. Like the preponderance of individuals queried during this study, they feel the commission system borders on being unfair and needs replacing. They favor either the employment of a professional jury or a blue ribbon panel. They also support any efforts aimed at establishing stringent qualifications for appraisers who testify in court. In addition, both companies' representatives related that they have found extensive use of pretrial discovery to be a cost-effective practice, especially where the monetary award potential is high. Comments received from judges and others participating in this survey indicate that pretrial discovery is used more extensively by the power companies than by the Department.

Other State Transportation Agencies

Representatives from state transportation agencies in Colorado, Delaware, Florida, Maine, Maryland, Michigan, North Carolina, Pennsylvania, and Texas were interviewed by telephone. A brief summary of the major features of the condemnation processes used in each are presented graphically in Table 7 to allow the reader to make comparisons. It should be noted that in the states that provide for an initial hearing or trial

before a commission or board, the landowner has an automatic right to reject the award and demand a jury trial. This trial is usually a new proceeding, and neither the testimony given before the commission nor the award is admissible as evidence.

Colorado Department of Transportation

Roughly 15 percent of the properties acquired by the Colorado DOT require condemnation action. The landowner has the choice of having the case heard by either a court appointed board of commissioners or a jury. In 90 percent of these cases a board of commissioners hearing is requested. It consists of three paid freeholders from the county of the subject property, while the jury consists of between six and twelve freeholders from the county. Although the excess of awards over offers tends to be increasing, a fair number are very close to the DOT's offer, especially for very small cases.

Delaware Department of Transportation

About 7 percent of the property acquisition cases in Delaware are heard in condemnation court. Cases are heard by a combination jury and commission comprised of 3 persons who are empanelled on a case-by-case basis and are selected from a list of 11 court-proposed commissioners who are "impartial, disinterested, and judicious" citizens of the county of the subject property. They are referred to as a "blue ribbon" jury but have no special qualifications in the field of property valuation. Cases are presided over by a Superior Court judge. According to the representative interviewed, awards are not usually exorbitant and the majority of excess awards are typically attributable to damage settlements rather than differences of opinion in market value.

Florida Department of Transportation

Between 5 percent and 10 percent of property acquisitions in Florida require a condemnation trial, which is heard by a 12-member jury. Awards nearly always exceed the original offer. Of particular interest is the fact that Florida's eminent domain law requires the state to pay all landowner fees resulting from the litigation process.

Maine Department of Transportation

Between 10 percent and 15 percent of the Department's acquisition cases are heard by the State Claims Board, which is composed of five members: two appraisers, two attorneys, and a commissioner from the jurisdiction of the case. They are appointed by the Governor to serve a four-year term. Hearings are actually heard by three members of the Board, one appraiser, one attorney, and the county commissioner. Awards are typically 50 percent to 100 percent above the state's offer in small cases and 10 percent to 20 percent above it in large cases. Almost 100 percent of the decisions are appealed to either a judge or jury.

Maryland State Highway Administration

Condemnation cases are heard by Boards of Property Review, which are essentially arbitration boards appointed by the court for each county. They are comprised of a lawyer, a farmer, and an engineer. If an award rendered is unsatisfactory to the property owner, a jury trial is ordered.

Michigan Department of Transportation

Either party in the litigation may demand a jury trial; otherwise, condemnation cases are heard by the court. A procedure involving three mediators who make an award may be ordered by the judge. This procedure is not binding, however, and the Department usually does not agree with the mediators since they hear no expert testimony regarding property values and damages. Approximately 5 percent of the Department's acquisitions proceed to condemnation court, and 95 percent of these are heard by a jury. In the majority of cases, awards are significantly higher than the Department's offer, although awards in urban cases tend to be more excessive than those in rural ones. In 1983, legislation was enacted requiring the state to pay all landowner expert witness costs and attorney's fees up to one third of the award in excess of the state's offer. This has resulted in added expense to the state and a tendency for more property owners to seek court action.

North Carolina Department of Transportation

Either party may demand a hearing before three court-appointed commissioners who determine the amount of compensation to be awarded. This hearing may be waived and is followed by a jury trial. Between 4 percent and 5 percent of the acquisition cases are heard by a jury, and awards typically exceed the Department's offer by 75 percent to 100 percent.

Pennsylvania Department of Transportation

Approximately 15 percent of the Department's acquisition cases are settled by a court-appointed three-member Board of View consisting of an attorney, who is chairman, and two businessmen. Each county maintains a Board of View that serves for a specified term of two to three years. In urban areas, Board of View members receive a yearly salary, and in rural areas they are paid a per diem. While awards are typically more than the Department's original offer, they are not considered to be excessive.

Texas Department of Highways

A board of three court-appointed commissioners determine the compensation to be awarded in litigated cases. If an objection is noted by either party and the case is not subsequently settled, a jury trial is ordered. Approximately 20 percent of the acquisitions in Texas require a commissioner hearing, and about 50 percent are settled at this hearing. Most of the remainder are settled administratively, and only about 2 percent proceed to a jury trial. On average, commissioner awards are 18 percent higher than the Department's offer, and jury awards about 50 percent higher. In 1984 the state passed House Bill 101, which allowed enhancement to offset the appraised value. This law was deemed extremely advantageous to the state but was declared unconstitutional both by a Texas trial court and by an appellate court. It was repealed in 1987.

Table 7

Features of Condemnation Processes in
10 State Transportation Departments

State	Tribunal Type and Membership	Selection Method and Composition	Percentage of Cases Requiring Litigation	Relationship of Award to Offer
Virginia	Commission; Members: 5	Selected from 12 freeholders submitted by the litigants	12-15%	
Colorado	(a) Board of Commissioners; Members: 3 (b) Jury; Members: 6-12	(a) Paid freeholders appointed by the court (b) Summoned citizens of the county	15%	Awards are generally slightly higher than offers
Delaware	Combination jury and commission; Members: 3	Selected by court on a case-by-case basis; must be freeholders in subject property county	7%	Awards are higher than offers, but most are damage settlements rather than differences in market value
Florida	Jury; Members: 12	Summoned citizens	5-10%	Information not made available
Maine	State Claims Board; Members: 3	Appointed by Governor to serve 4-year term in each jurisdiction. Comprised of one attorney, one appraiser and a county commissioner	10-15%	Awards are 10-100% above offers

Table 7, continued . . .

State	Tribunal Type and Membership	Selection Method and Composition	Percentage of Cases Requiring Litigation	Relationship of Award to Offer
Maryland	(a) Property Review Board; Members: 3 (b) Jury	(a) Arbitration boards appointed to serve in each county; comprised of a lawyer, farmer, and engineer (b) Summoned citizens	Information not made available	Information not made available
Michigan	Jury; Members: unknown	Summoned citizens	5%	Awards are significantly higher than offers
North Carolina	(a) Commission; Members: 3 (b) Jury	(a) Appointed by court to hear evidence upon demand of either litigant (b) Summoned citizens	4-5%	Awards typically exceed offers by 75-100%
Pennsylvania	Board of View; Members: 3	Court appointed for a specified term for each county; consists of an attorney and two businessmen	15%	Awards are usually more than offers but are not considered to be excessive
Texas	(a) Commission; Members: 3 (b) Jury	(a) Court appointed (b) Summoned Citizens	10%	(a) Commission awards are typically 18% higher than offers (b) Jury awards are typically 50% higher than offers

SUMMARY AND CONCLUSIONS

This study examines the condemnation process in the Virginia Department of Transportation by collecting information from those involved daily in that process--namely, attorneys, appraisers, judges, department managers and staff, and representatives from other condemners within and outside the Commonwealth of Virginia. The author gave attention not only to condemnation procedures but to the entire acquisition process (which can ultimately lead to the condemnation alternative). Interviews and questionnaires were used to obtain information from nearly 150 individuals on the subject of improving the process. In addition, data from condemnation case histories were compiled from Virginia's nine transportation districts, and the author observed six condemnation trials.

The percentage of cases that are ultimately litigated is small in view of the volume of parcels negotiated for by the Department's Right of Way Division. Of the 28,452 properties negotiated for during the ten year period between 1977 and 1987, only about 3,500 (12.3 percent) were litigated, and the number of cases that proceeded to court during that period steadily declined. This decline appears to be the direct result of intensified efforts by right-of-way staff to negotiate and settle administrative agreements after the filing of the Certificate of Deposit, and, in part, to an increased awareness and knowledge of this staff of property valuation, appraisal procedures, and techniques of negotiation. Nevertheless, the cost of these administrative settlements, both before and after the filing of the Certificates of Deposit, has escalated right-of-way costs for approximately 25 percent of parcels for which right-of-way staff negotiate. These costs are small, however, when compared to those that typically accrue when the condemnation tribunal decides what the value of these properties should be. Cases that proceed to court cost the Department, on average, more than twice the original estimate, exclusive of contractual and legal fees. Those administering the right-of-way program have become increasingly aware of the costs of proceeding to court and of the magnitude of some condemnation awards; thus, they are taking steps to avoid litigation if at all possible. While these efforts should and will continue, so should those aimed at improving the process governing the cases that ultimately find their way to court.

Issues

Commission Composition

Although several major issues appeared to concern those who responded to the survey, the one on which the majority was the most vocal was the composition and selection of the five-member tribunal used for hearing condemnation cases. In Virginia this tribunal is selected jointly by the parties in the case. There was general dissatisfaction with the tribunal by the majority of those interviewed: In their view, the tribunal frequently consists of individuals who may have little knowledge of the technical aspects of real estate valuation (the only qualification for

membership is that one own land in the jurisdiction of the subject property) and who, because of friendships or business associations, may be sympathetic to one side or the other (in rural areas such leanings usually favor the landowner).

The majority of contract appraisers and right-of-way staff (and to a lesser extent attorneys) favor some alternative to this type of tribunal. The one most favored, which appears to be successful in other states, is the employment of a blue ribbon panel of members appointed by the court or a higher authority (such as the Governor) for a specified term. These panelists normally possess specific qualifications related to real estate valuation. Other alternatives suggested include an arbitration board and juries. About 20 percentage of those questioned felt the commission tribunal should be retained as is; a few of these said that if it were retained, qualifications for membership specifically related to real estate valuation should be established. Judges were among the 20 percent who generally favor the retention of the existing system.

Appraisals

A majority of survey respondents suggested that appraisals conducted by the Department's right-of-way staff are more conservative than those conducted by contract appraisers. Accordingly, to the extent that this occurs, it may be argued that such appraisals may tend to damage the Department's case in the eyes of the condemnation commission. Staff appraisers were also viewed by those responding as often tending to exhibit loyalty to the Department in their testimony to such a degree that landowners' attorneys accuse them of being biased in their appraisals. In addition, some attorneys responding to the survey suggested that staff appraisers have a conflict of interest because they are in the Department's employ.

These survey results may be misleading. An examination of sample cases showed that staff appraisals of fair market value do not differ significantly from those made by landowners' appraisers or appraisers contracted by the Department. Where differences exist, they most often appear to be in the valuation of compensation for damages not for fair market value. This evidence suggests that what are perceived as mistakes in appraisals are more likely difficulties in making damage assessments. It is reasonable to argue then that this perception is caused by two things: (1) a tendency in the past for appraisals to lean to the conservative side and (2) the obvious differences between damage offers and damage awards. The first is becoming less prevalent and is no longer a significant problem, but the second needs attention. One section of this report includes a suggestion that may assist in addressing the damage issue.

Staff appraisers are deemed by a majority of survey respondents as less effective witnesses than contract appraisers. In their view: (1) staff appraisers tend to convey loyalty to the Department in their testimony and are sometimes perceived as being less than objective in their valuations; (2) contract appraisers tend to be viewed as more effective

witnesses because they are more experienced in giving testimony for court than staff appraisers; and (3) contract appraisers are often known by some or all of the commission members, thus their testimony is often given more weight than that of staff appraisers. The majority of those questioned felt that the attainment of additional education and courtroom experience by staff appraisers may help to narrow this credibility gap. Although these measures may help some, it is probably safe to say that there will always be accusations of loyalty levelled at those employed by the Department who make courtroom testimony in its behalf.

Those surveyed also point out that testimony is allowed from landowner witnesses who often possess few, if any, professional real estate credentials. Yet, not only are these individuals recognized by the court as experts in the field of real estate, they are often not required to provide significant documentation in support of their valuations. On the other hand, all appraisers employed by the Department are required to provide extensive documentation for their appraisals and final valuations. In addition, most contract appraisers hired by VDOT were noted as having one or more professional designations, such as MAI, RM, SRA, SR/WA, ASA, or SRPA.

Legal Issues

Two legal issues raised by survey respondents centered on continuances and pretrial discovery.

Continuances are quite costly to the Department, especially since interest on certificates of deposit accrues during continuance periods. Judges and attorneys suggest three major reasons cases are continued. First, they may occur because the Code is permissive regarding the summoning of substitute commissioners to appear. In the ideal situation, nine commissioners appear before the court when summoned; each side eliminates two, leaving five to hear the case. Where less than nine summoned commissioners appear, it is not possible to retain five to hear the case. Such cases are then ordered continued subject to the availability of court docket. This rescheduling can sometimes take months. A second reason is that landowners' attorneys request continuances when they feel it will be advantageous to their client. This is usually the case when construction has not yet begun or improvements to be acquired have not yet been removed. Finally, continuances are requested by Department attorneys in cases where critical evidence is not yet available or additional time is necessary to prepare the case.

Several of those participating in the survey were of the opinion that greater use of discovery might enhance the Department's position at the trial. According to those surveyed, extensive pretrial discovery may have been used sparingly in the past because of the expense associated with its use, since the Department must pay all costs of discovery if it initiates this process.

DISCUSSION OF POTENTIAL AREAS OF IMPROVEMENT

In the course of this study, a number of initiatives have been identified that if implemented, may result in improvements in Virginia's condemnation process. These are grouped under four major headings as follows: (1) items that are within the purview of Department; (2) an item that may be implemented pending a joint effort by the Department and the Attorney General's Office; (3) items that require legislative examination to determine the feasibility and desirability of implementation; and (4) an item that would require examination by the Virginia Supreme Court.

Items That Can be Implemented by the Department

Use of Contract Appraisers

The use of contract appraisers may strengthen the Department's position in court. For cases in which contract appraisers are used, the Department's staff appraiser could be used as a cooperative or supportive witness rather than a primary witness. The Department also may wish to consider using contract appraisers as principal witnesses for the Commonwealth in selected contested cases, especially when a substantial amount of money is at issue. It is also important that staff appraisals and testimonies be from appraisers whose work normally includes assignments within the jurisdiction of the subject property.

Training and Professional Development

The Department is likely to realize significant benefits over the long-run from training its staff appraisers and negotiators in the art of expert testimony. Such training is available from certain appraisal organizations and would enable staff appraisers to respond effectively in instances during which fee appraisal testimony is not appropriate or available. In addition, Department right-of-way staff should be encouraged to extend their education in the right-of-way area and pursue the attainment of some or all of the professional designations pertinent to the profession. The credibility and esteem of these individuals will be greatly enhanced if the Department takes appropriate initiatives to train them so that they meet or exceed the right-of-way certification standards of the private appraisal industry.

Other avenues aimed at increasing the professionalism and enhancing the abilities and technical expertise of the appraisal staff could also be sought. Appraisers should be encouraged to belong to certified right-of-way and appraisal organizations, and a procedure for paying membership fees for these organizations or a means to offset some out-of-pocket costs to these individuals could be investigated as an additional incentive to participate.

Emphasis on Settlement

The Department's district and central office right-of-way managers and staff should continue to place strong emphasis on negotiations and settlement with property owners. The monetary risk to which the Department subjects itself once cases proceed to condemnation is clear. It is important that this message be sent to all appraisal and negotiation staff. Consideration should also be given to encouraging appraisers to use the upper range of comparable values in determining the offer that is made to the landowner.

Review of Policies and Procedures Regarding Damages

In view of the fact that a substantial proportion of the differences between offers made by the Department for certain properties and awards made by condemnation commissioners are attributable to damages, it is suggested that management establish policies and procedures regarding damage assessments. It is probable that such policies and procedures could be ascertained by studying the facts of past cases in which damages have been awarded.

Review of Excessive Awards

It is recommended that the Department enact a policy to conduct an in-depth review of those condemnation cases that result in excessive awards. All aspects of each case should be examined including the principals involved, offers and counter offers, trial transcripts, courtroom performance, and any other pertinent or unusual facts of the case. Such reviews might lead to the identification of common features of cases that result in excessive awards. By identifying such features, the Department can begin to address them appropriately.

An Item That May be Implemented Pending Joint
Study by the Department and the
Attorney General's Office

One proposal that may provide an opportunity for improving the condemnation process would have to be explored jointly by the Department and the Attorney General's Office.

Pretrial Discovery

It is recommended that the policies regarding use of discovery by fee counsel be reviewed. Information made available during this study from two large power companies in the Commonwealth suggests that although extensive pretrial discovery can be an expensive proposition, it may be money well spent in certain instances. It may be beneficial for the Department to

work with the Attorney General's Office and fee counsel to determine the conditions under which the use of discovery may be appropriate.

Items that May be Implemented Pending Legislative Examination

Several proposals for improving the condemnation process will require legislative examination. It is recommended that a legislative study be commissioned to address the following items: the composition and selection of the condemnation tribunal and the failure of summoned commissioners to appear.

Composition and Selection of the Condemnation Tribunal

Currently, this commission is drawn from lists submitted by the litigants. It frequently contains individuals who have little knowledge of real estate valuation. There exists the potential for commissioners, because of business or professional associations with the litigants, to be sympathetic to one side or the other. For these reasons, an examination is needed of the feasibility and desirability of adjusting the current tribunal composition and selection process. The following are among alternatives that might be included in the study scope.

- o Employment of a blue-ribbon panel the members of which are appointed by the Governor for a specified term to hear cases in each jurisdiction of the state. Specific qualifications would be required, such as professional real estate designations or a proficiency in a right-of-way related profession.
- o Retention of the existing commission system with modifications to commission qualifications such as real estate or legal credentials, and the establishment of a provision requiring that the five members be in agreement regarding the award. If such agreement cannot be reached, a new trial would be ordered.

Failure of Summoned Commissioners to Appear

To reduce the occurrence of continued cases, a clarification is needed of Section 25-46.20 of the 1950 Code of Virginia, as amended, regarding the summoning of commissioners. There are instances where fewer than nine summoned commissioners appear and a complement of five cannot be retained to hear the case. Though these occurrences are infrequent, they result in such cases having to be continued, subject to court docket. While it is currently the practice in some circuit courts to summon more than nine candidate commissioners, a clarification of the Code would encourage uniformity for all jurisdictions in the Commonwealth.

An Item Over Which the Virginia Supreme Court Has Jurisdiction

One proposal for improving the condemnation process would require examination by the Supreme Court of Virginia.

Payment of Pretrial Discovery Costs for Both Litigants

Pretrial discovery can be an effective means of preparing all parties for the condemnation litigation. Both the Virginia and Appalachian Power Companies have found it in their best interest to use discovery extensively. Since the Rules of Court require that the Commonwealth pay all discovery costs in the Department's condemnation cases, fee counsel have been reluctant to utilize discovery; consequently, the Supreme Court of Virginia may wish to examine the merits of a change in the Rules of Court that would lessen the cost of discovery to the Commonwealth.

REFERENCES

1. Blacks Law Dictionary (4th ed., 1951).
2. Baynes, Thomas E., Eminent Domain and Condemnation: The Law In Florida (1986).
3. Merrill, Dennis G., Condemnation Procedure Alternatives for Virginia, Virginia Highway and Transportation Research Council (1972).
4. Merrill, Dennis G., Condemnation: Who Should Sit In Judgement?, Virginia Highway and Transportation Research Council (1975).
5. Michie's Jurisprudence of Virginia and West Virginia, Section 72 (1985).
6. Virginia Code, Section 33.1-89 (1984).
7. Virginia Code, Section 25-248 (1985).
8. Virginia Code, Section 25-46.20 (1985).

APPENDICES

Appendices A, B, and C present the reader with copies of the questionnaire that was mailed to contract attorneys and appraisers who are retained by the Department and to attorneys who frequently represent property owners in condemnation cases. —

APPENDIX A
ATTORNEY CONDEMNATION QUESTIONNAIRE

ATTORNEY CONDEMNATION QUESTIONNAIRE
(Please respond to all questions)

1. Do you feel appraisals conducted by Department of Transportation staff are generally () too low, () too high, or () about right? Please explain your selection.

2. Do you feel appraisals conducted by contract appraisers are generally () lower, () higher, or () about the same as those conducted by Department staff. If lower or higher, please explain your answer.

3. Are the effects of damages and enhancements the completed highway project will have on the after value of the property being properly taken into account? () Yes () No If your answer is no, why do you feel this way?

4. Do you feel testimony from appraisers who hold professional designations is perceived by the courts as having more credibility than that from those who do not hold such designations? () Yes () No

5. Who is generally a better witness, () the staff appraiser () the fee appraiser, or () neither? Please explain your answer.

6. What, if anything, do you feel the VDOT district staff could do to help you in the preparation for trials?

7. In your opinion, does the present system for selecting condemnation commissioners favor the () landowner, () Commonwealth, or () neither? Please explain your answer.

8. Do you feel condemnation awards are generally () too low, () too high, or () about right?

9. Do you favor enhancements offsetting damages as specified in Section 33.1-130? () Yes () No

- 10. Would you favor enhancements offsetting the take? () Yes () No
- 11. How often do you represent the Department in condemnation trials that you feel could have been settled administratively? () Often () Seldom () Never.
- 12. What difficulties, if any, have you encountered in the selection of commissioners?

- 13. What changes, if any, in the selection procedure would you recommend?

- 14. Would you favor a jury system? () Yes () No
- 15. Would you favor employing a panel comprised of qualified professionals? () Yes () No
- 16. It has been suggested that under the present system, the appointment of a commission that is not weighted in favor of one side is impossible. Do you agree? () Yes () No
Please comment on your answer.

- 17. What additional comments, suggestions, or ideas do you have regarding any aspect of condemnation proceedings? Please be candid.

- 18. Would you like to discuss these issues further in a personal interview? If so, please include your name and telephone number below.

Name: _____

Telephone: () _____

Thank you for your participation. Please return by _____ to:

Michael Perfater, Research Scientist
 Va. Transportation Research Council
 P. O. Box 3817 University Station
 Charlottesville, Va. 22903

APPENDIX B
CONTRACT APPRAISER CONDEMNATION QUESTIONNAIRE

CONTRACT APPRAISER CONDEMNATION QUESTIONNAIRE

(Please respond to all questions)

1. Is pre-trial preparation by fee attorneys adequately preparing you for your role in Department condemnation cases? Yes No If no, what is lacking?

2. Are VDOT appraisal requirements about the same, less stringent, or more stringent than those for your other clients? If more or less stringent, how do they differ?

3. Do you feel you need to supply more, less, or about the same amount of supporting data for your appraisals than is required for those conducted by VDOT staff and landowner's appraisers?
4. Do you feel the value for land/damages established by the landowner in condemnation cases usually represents just compensation? Yes No If no, please explain.

5. Does having your appraisal reviewed by a VDOT reviewer affect your final determination of value? Yes No If yes, what effect does it have?

6. In your opinion does the present system of condemnation commissioner selection favor the landowner, Commonwealth, or neither? Please explain your answer.

7. Do you feel condemnation awards are generally too low, too high, or about right?
8. Do you favor enhancements offsetting damages as specified in Section 33.1-130? Yes No
9. Would you favor enhancements offsetting the take? Yes No
10. How often do you represent the Department in condemnation trials which you feel could have been settled administratively? Often Seldom Never

11. What changes, if any, would you make in current condemnation procedures?

12. Would you favor a jury system instead of the commissioner system? () Yes
() No

13. Would you favor employing a panel comprised of qualified professionals? () Yes
() No

14. Under the present system, it has been suggested that it is impossible to appoint a
commission which is not weighted in favor of one side. Do you agree? () Yes
() No Would you comment on your answer?

15. What additional comments, suggestions, or ideas do you have regarding any aspect
of condemnation proceedings? Please be candid.

16. Would you be willing to discuss these issues further in a personal interview? If
so, please include your name and telephone number below.

Name: _____

Telephone: () _____

Thank you for your participation. Please return by _____ to:

Mike Perfater, Research Scientist
Va. Transportation Research Council
P. O. Box 3817 University Station
Charlottesville, Va. 22903

APPENDIX C
LANDOWNER ATTORNEY CONDEMNATION QUESTIONNAIRE

ATTORNEY CONDEMNATION QUESTIONNAIRE
(Please respond to all questions)

Do you feel appraisals conducted by Virginia Department of Transportation (VDOT) staff are generally () too low, () too high, or () about right? Please explain your selection.

Do you feel appraisals conducted by contract appraisers are generally () lower, () higher, or () about the same as those conducted by VDOT staff. If lower or higher, please explain your answer.

Are the effects of damages and enhancements the completed highway project will have on the after value of the property being properly taken into account? () Yes () No If your answer is no, why do you feel this way?

Do you feel testimony from appraisers who hold professional designations is perceived by the courts as having more credibility than that from those who do not hold such designations? () Yes () No

Who is generally a better witness, () the VDOT staff appraiser () the fee appraiser, or () neither? Please explain your answer.

In your opinion, does the present system for selecting condemnation commissioners favor the () landowner, () Commonwealth, or () neither? Please explain your answer.

Do you feel condemnation awards are generally () too low, () too high, or () about right?

Do you favor enhancements offsetting damages as specified in Section 33.1-130? () Yes () No

- 9. Would you favor enhancements offsetting the take? () Yes () No
- 10. What changes, if any, in the procedure used for selecting condemnation commissioners would you recommend?

- 11. Would you favor a jury system? () Yes () No
- 12. Would you favor employing a panel comprised of qualified professionals? () Yes () No
- 13. It has been suggested that under the present system, the appointment of a commission that is not weighted in favor of one side is impossible. Do you agree? () Yes () No
Please comment on your answer.

- 14. What additional comments, suggestions, or ideas do you have regarding any aspect of condemnation proceedings? Please be candid.

Thank you for your participation. Please return to:

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