

Virginia Code § 55-154.2: An Unconstitutional Taking of Virginia
Landowners' Ownership Interest in Mine Voids for the
Benefit of Private Industry

By Henry Webb¹ and Patrick R. Baker²

HEADNOTE: This article examines the law of the Commonwealth of Virginia regarding the ownership of the increasingly valuable mine voids left behind after coal or other minerals have been removed from beneath a parcel of property. First, the article analyzes the rule of law from 1920 until 1981 under the Virginia Supreme Court's decision in the *Clayborn v. Camilla Red Ash Coal Cocase* and an associated case, which confirmed that it was Virginia landowners, and not the coal companies, that owned the mine voids beneath the landowners' property. Second, the article considers Virginia Code § 55-154.2 as originally enacted in 1981 and as amended in 2012, which stripped the landowners of their ownership interest in the mine voids and gave that ownership interest to private coal companies. Finally, the article establishes that Virginia Code § 55-154.2 constitutes an unconstitutional taking of private property for a non-public use under Article I, Section 11 of the Constitution of Virginia.

TABLE OF CONTENTS

I. Introduction	2
II. From 1920 to 1981, Virginia Landowners at All Relevant Times Possessed an Ownership Interest in Mine Voids Under <i>Clayborn v. Camilla Red Ash Coal Co.</i> and <i>Levisa Coal Co. v. Consolidation Coal Co.</i>	4
A. <i>Clayborn v. Camilla Red Ash Coal Co.</i>	4
B. <i>Levisa Coal Co. v. Consolidation Coal Co.</i>	7
III. Virginia Code § 55-154.2: The Virginia Legislature Takes Landowners' Ownership Interest in Mine Voids Away and Gives it to Private Coal Companies.....	12
IV. Virginia Code § 55.154.2 is an Unconstitutional Taking Under Article I, Section 11 of the Constitution of Virginia	16

¹ Henry Webb, J.D., M.B.A., Associate Professor of Law, Indiana University of Pennsylvania. He currently teaches law courses with the Eberly College of Business and Information Technology's Department of Finance and Legal Studies. Professor Webb previously taught at the Royal Melbourne Institute of Technology's Ho Chi Minh City, Vietnam campus, at the Qatar University College of Law in Doha, Qatar, and at the Appalachian School of Law in Virginia. Prior to becoming a professor, Professor Webb practiced environmental and construction litigation with law firms in Seattle and Atlanta. He earned a B.B.A. from the University of Mississippi, a J.D. from the Lewis & Clark Law School, and an M.B.A. from the University of Georgia.

² Patrick R. Baker, J.D., Assistant Professor of Law, the University of Tennessee Martin. He currently teaches Law in the College of Business & Global Affairs within the Department of Accounting, Finance, Economics, & Political Science. Before joining UTM, Patrick served as an Associate Professor of Law at the Appalachian School of Law. At ASL he served as the founding director of the Natural Resources Law Center. His scholarship

V. Conclusion.....20

I. Introduction

Mine voids or pore spaces (collectively, “Mine Voids”) are the hollow, underground spaces left behind after coal or other minerals have been removed from beneath a parcel of property.³

tax revenue, or economic development, except for the elimination of a public nuisance existing on the property.”¹⁰ The coal companies to which Virginia legislature gifted Virginia landowners’ ownership interest in Mine Voids are in no way public entities, nor can it be said that Virginia Code § 155-54.2 is necessary to eliminate a public nuisance existing on the landowners’ properties. Thus, Virginia Code § 155-54.2 is unconstitutional under Article I, Section 11 of the Constitution of Virginia, as amended, and the statute is unlikely to survive a legal challenge.

Part II of this article will consider Virginia law regarding the ownership of Mine Voids from 1920 to 1981 under *Clayborn* and an associated case, *Levisa Coal Co. v. Consolidation Coal Co.* Part III will further examine Virginia Code § 155-54.2. Finally, Part IV will demonstrate that Virginia Code § 155-54.2 constitutes an unconstitutional taking under Article I, Section 11 of the Constitution of Virginia.

II. From 1920 to 1981, Virginia Landowners at All Relevant Times Possessed an Ownership Interest in Mine Voids Under *Clayborn v. Camilla Red Ash Coal Co.* and *Levisa Coal Co. v. Consolidation Coal Co.*

For more than 60 years, Virginia law regarding Mine Void ownership was clear: the landowner at all relevant times maintained ownership of the Mine Voids, with the mineral rights owner possessing merely an incidental easement for the use of the Mine Voids until the coal that was the subject of the mineral rights grant was exhausted.

A. *Clayborn v. Camilla Red Ash Coal Co.*

The Virginia Supreme Court established the above rule of law in the 1920 *Clayborn v. Camilla Red Ash Coal Co.* case. In *Clayborn*, the Clayborns owned fee simple title to an eight acre tract of land known as the “Helton Tract,” except for the coal thereunder, which had been deeded to the Camilla Red Ash Coal Company (“Camilla”) in 1887. Camilla also owned a tract of land on the western side of the Helton Tract (the “Western Tract”) and leased the coal

¹⁰ Va. Const. art. I, § 11

an additional burden upon the servient estate than he would have to haul timber from an adjoining tract over a tract upon which he had bought the timber with the right of removal.¹⁸

Finally, the Court held that Camilla's use of the tunnel beneath the Helton Tract to transport coal from the Burk Tract placed an "additional and unlawful burden upon the estate of the [Clayborns], which ought to be restrained. . . . The track through the Helton tunnel rests upon land owned by the appellants. The coal company has the unquestioned right to use that tunnel so long as it needs it in hauling coal from the residue of the Helton tract. . . . The use of it for any other purpose is a trespass, for which the only adequate remedy is an injunction." After agreeing to grant the injunction sought by the Clayborns, the Court remanded the case back to the trial court for a determination of what, if any, damages the Clayborns were entitled to.¹⁹

Thus, beginning in 1920, Virginia law with regard to Mine Void ownership was that a landowner granted to a coal company only an estate determinable in the coal, as well as certain incidental easements as necessary to mine and remove the coal, including an easement for the use of the Mine Void, until such time as the coal that was the subject of the mineral rights grant was exhausted. The landowner at all relevant times continued to possess an ownership interest in the Mine Void and, upon the removal of all coal from beneath the landowner's property, the coal company's incidental easement for the use of the Mine Void was automatically terminated by operation of law.

B. Levisa Coal Co. v. Consolidation Coal Co.

The durability of the rule of law established in *Clayborn* was demonstrated by another recent decision of the Virginia Supreme Court, *Levisa Coal Co. v. Consolidation Coal Co.* In that case the Levisa Coal Company ("Levisa Coal") acquired the mineral rights on various

¹⁸ *Clayborn*, 105 S.E. at 120.

¹⁹ *Clayborn*, 105 S.E. at 122-123.

parcels of property via a 1937 severance deed. That deed granted Levisa Coal ownership of the “the coal, metals and timber, together with all of the rights, privileges, and easements incident thereto, in, on, or under” those parcels of property. The deed did not, however, expressly convey to Levisa Coal the right to use any part of the estate conveyed or the associated easements to support mining activities on other lands.²⁰

In 1956, Levisa Coal entered into a lease with Island Creek Coal Company (“Island Creek”) and granted Island Creek “the sole and exclusive right and privilege of mining and removing all of the coal from all the seams underlying the Tiller Vein or seam of coal or the horizon of such seam,” with the Tiller Vein being located among the parcels Levisa Coal acquired via the 1937 sever4 (t)-2 (h,(t)-6 (h (i)-6 (t)-6 (h)x ()]TJ8o)-4 (f)-1 (s)-5 (u)-4 (ch)-4 (su5 Tw 8.0

At some point, Consolidation stopped pumping excess groundwater collecting in the Buchanan Mine into the Levisa River and began to instead pump that groundwater, as well as additional water released into the Buchanan Mine as a result of Consolidation's mining operation there, into a number of idled mines formerly operated by Island Creek, including the VP3 Mine. At that time Consolidation was pumping nearly 2,500 gallons of wastewater per minute into the VP3 Mine, which had the capacity to hold approximately 6.4 billion gallons of wastewater.²⁴

In July 2006, Levisa Coal filed a lawsuit against Consolidation seeking injunctive relief and a declaratory judgment prohibiting Consolidation from continuing to pump wastewater from the Buchanan Mine into the VP3 Mine. At a hearing on Levisa Coal's request for a preliminary injunction in November 2006, Consolidation argued it had the legal right to pump wastewater from the Buchanan Mine into the VP3 Mine because Island Creek had agreed to permit Consolidation to do so. In response, Levisa Coal argued that while the 1956 lease had provided Island Creek with the right to mine coal from the VP3 Mine, it provided Island Creek

leased property for any purpose Island Creek deemed “needful of convenient in carrying out its mining operations or other operations” was “about as broad and expansive as we might imagine.” Applying that interpretation of the lease, the court ruled that Consolidation “has the right to place any kind of storage wate

operations on other lands. We further held that ‘[i]f the coal owner expects more’ than the right to mine and remove the coal within his estate ‘he ought to stipulate for it’ in the deed or lease.²⁸

The Court observed that it discerned no practical distinction between supporting adjoining mining operations by using tunnels to transport coal, as in *Clayborn*, and in storing wastewater from adjoining mining operations in the voids, tunnels, and shafts of an unrelated mine, as in this case. As such, the Court held, “when the 1937 deed conveyed the solid mineral estate of the . . . parcels to Levisa Coal, the parties to that deed contemplated only that the coal and other minerals would be mined from that estate, and that the deed conveyed only an incidental easement to use that portion of the parcels retained by the surface owner as was necessary to support such mining operations. Nothing in the deed conveyed any right to use the voids, tunnels and shafts created below the surface for any purpose other than to support the mining operations on those parcels.”²⁹

Based on the above, the Court held that since the 1937 deed did not convey any right to use any portion of the mineral estate to support mining operations on other lands, the 1956 lease could not have granted such rights to Island Creek. Simply put, Levisa Coal never possessed the right to use the mineral estate to support mining operations on other lands, and so could never have granted any such right to Island Creek: “[Island Creek] simply lacks the authority to permit [Consolidation] to store wastewater from other r0 Td32 (, 5)-6 (e)4 (l)-2 (s)-1 (.)10 12

Coal, Island Creek, or Consolidated ever possessed was an incidental easement to use those Mine Voids until the coal within the VP3 Mine was exhausted. Consequently, the Court ruled the circuit court had erred in ruling that Consolidation had the right to store wastewater from the Buchanan Mine in the VP3 Mine, reversed the circuit court's ruling, and remanded the case for further proceedings consistent with the Court's opinion.³⁰

As both the 1920 *Clayborn* case and the 2008 *Levisa* case make clear, the rule of law regarding Mine Void ownership was well-settled in Virginia prior to the enactment of Virginia Code § 155-54.2 in 1981: When a landowner granted a coal company the ownership of the coal beneath a parcel of property, the landowner granted to a coal company only an estate determinable in the coal, as well as certain incidental easements as necessary to mine and remove the coal, including an easement for the use of the Mine Void created by the removal of the coal until such time as the coal that was the subject of the mineral rights grant was exhausted. The landowner at all times continued to own the Mine Void itself, and upon the exhaustion of the coal granted to the coal company, the coal company's incidental easement to use the Mine Voids was terminated by operation of law.

III. Virginia Code § 55-154.2: The Virginia Legislature Takes Landowners' Ownership Interest in Mine Voids Away and Gives it to Private Coal Companies

First enacted in 1981, Virginia Code § 55-154.2 stated as follows:

Except as otherwise provided in the deed by which the owner of minerals derives title, the owner of minerals shall be presumed to be the owner of the shell, container chamber, passage, and space opened underground for the removal of the minerals, with full right to haul and transport minerals from other lands and to pass men, materials, equipment, water and air through such space. No injunction shall lie to prohibit the use of any such shell, container chamber, passage or space opened underground by the owner of minerals for the purposes herein described. The provisions

³⁰ *Levisa* 662 S.E.2d at 52-54.

of this subsection shall not affect contractual obligations and agreements entered into prior to July 1, 1981.³¹

By transferring ownership of the Mine Voids from the landowners to the coal companies, Virginia Code § 155-54.2 completely departed from the Virginia Supreme Court's holding in *Clayborn* and essentially overruled the precedent

In 2012, the Virginia legislature further overruled the *Clayborn* decision by amending Virginia Code § 155-54 to add the following provisions:

B. Notwithstanding the provisions of subsection A³², with respect to the coal mineral estate, unless expressly excepted by the instrument creating the mineral ownership or lease interest³³, the owner or, if leased, the lessee of the coal mineral estate or its successor, assign, sublessee, or affiliate retains the right to any coal remaining in place after the removal of surrounding coal, as well as the right to use the shell, container chamber, passage, space, or void opened underground that was created by the removal of the coal.

1. Any such shell, container chamber, passage, space, or void opened underground that is within the boundaries of a mine permit issued under Title 45.1 may be used consistent with state and federal regulations for any activity related to removal of coal from any lands for which a permit to mine coal has been approved, and no injunction shall lie to prohibit such use.

2. Any such shell, container chamber, passage, space, or void opened underground that is located in a sealed mine for which a mining permit no longer exists may be used consistent with state and federal regulations for any activity related to removal of coal from any lands for which a permit to mine coal has been approved only with the consent of the owner of such shell, container chamber, passage, space, or void. Such consent shall not be unreasonably withheld if the

³¹ VA. CODE ANN. § 55-154.2 (1981).

³² Subsection A of the amended statute is the original text of the statute as enacted in 1981, quoted above.

³³ On its face, VA Code § 55.154.2 only shifts ownership of the Mine Voids to the coal companies in cases where the instrument granting the mineral rights to the coal company did not expressly state that the ownership of the

owner has been offered reasonable compensation for such use. In determining whether an offer of compensation is reasonable, a court shall be guided by the compensation set forth in other leases for the use of mine voids as is customary in the area.

C. The provisions of subdivisions B 1 and B 2 (i) shall not affect any provision contained in any contract in effect as of July 1, 2012, expressly prohibiting the use of any shell, container chamber, passage, space, or void opened underground that was created by the removal of the coal; (ii) shall not alter any contract entered into prior to July 1, 2012, that provides for the payment of compensation from the lessee to the lessor expressly for the use of any shell, container chamber, passage, space, or void opened underground that was created by the removal of the coal; and (iii) shall have no bearing on or application to any determination of ownership rights in natural gas or coalbed methane.³⁴

Subsection B clarifies that not merely an owner of mineral rights, but also that owner's "successors, assigns, sublessees, and affiliates" are the owners of the associated Mine Void, such that the original landowner will likely be deprived of its ownership interest in the Mine Void in perpetuity.

Subsection B(1) clarifies that any Mine Void that is within the boundaries of a mine permit issued under Title 45.1 of the Virginia Code "may be used consistent with state and federal regulations for any activity related to removal of coal from any lands for which a permit to mine coal has been approved, and no injunction shall lie to prohibit such use."³⁵ The effect of Subsection B(1) is to make it clear that, for any mine that remains permitted und(er)-11 (1)-2 (4)JTJ that mine for any activities related to the removal of coal from any lands for which a mining permit has ever been granted. Interestingly, subsection B(1) does not require that the Mine

Void be used only in connection with the mining of coal from other actively permitted mines, but instead allows the use of the Mine Void in connection with the removal of coal from the much broader and more nebulously defined “any lands for which a permit to mine coal has been approved.” Thus, a coal company could, under Subsection B(1) use a Mine Void within

the Mine Voids after the mine has been sealed shall be allowed “with the consent of the owner” of the Mine Voids, provided however that “[s]uch consent shall not be unreasonably withheld if the owner has been offered reasonable compensation for such use. In determining whether an offer of compensation is reasonable, a court shall be guided by the compensation set forth in other leases for the use of mine voids as is customary in the area.”³⁷ Thus, as long as the coal company offers the landowner compensation that comports with the amount of compensation coal companies have paid to other landowners for the continued use of their Mine Voids, the landowner is completely powerless to prevent the coal company from continuing to own and use the landowner’s Mine Voids in perpetuity.

Although the language of Subsection A and Subsection B(2) of the 2013 amendment regarding which party is the “owner” of the Mine Voids is contradictory and appears to have been poorly drafted, the end result is the same: Virginia Code § 155-54.2 takes the landowners’ ownership interest in the Mine Voids as recognized by the Virginia Supreme Court in the Clayborn case and transfers that ownership interest to the private coal companies. As discussed below, Virginia Code § 155-54.2 is an unconstitutional taking, and is thus void and without effect, pursuant to the Article I, Section 11 of the Constitution of Virginia.

IV. Virginia Code § 55.154.2 is an Unconstitutional Taking Under Article I, Section 11 of the Constitution of Virginia

Prior to January 1, 2013, Article I, Section 11 of the Constitution of Virginia stated:

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

³⁷ VA. CODE ANN. § 55-154.2(b)(2) (2012).

statute took ownership of the Mine Voids away from the landowners and delivered it to the private coal companies upon its enactment in 1981.

O

Virginia to strengthen its protection of private property rights via a voter referendum in November 2012, and the Constitution was formally amended on January 1, 2013.⁴⁴

As amended, Article I, Section 11 expressly prohibits the taking or damaging⁴⁵ of private property for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except as necessary to eliminate a public nuisance existing on the private property.⁴⁶ Further, the Amendment places the burden of proving that the use is public upon the “condemnor,” the governmental entity exercising its power of eminent domain.

Thus, following its amendment, Article I, Section 11 even more clearly establishes the unconstitutionality of Virginia Code § 55.154.2. As demonstrated above, prior to 1981, a Virginia landowner who granted mineral rights to coal companies, whether by deed or by lease, continued to own the Mine Voids created by the removal of coal from beneath the landowner’s property. The coal company possessed only an incidental easement to use the Mine Voids until such time as the coal that was the subject of the mineral rights grant was exhausted. In 1981, Virginia Code § 155-54.2 stripped Virginia landowners of their ownership interest in the Mine Voids and delivered that ownership interest to private coal companies. The 2012 amendment of that statute, although poorly drafted, went even further in depriving Virginia landowners of their ownership interest in the Mine Voids, as the amended statute allowed the coal companies to use the Mine Voids in the service of lands for which a mining permit had

⁴⁴ Danielle B. Ridgely, *Will Virginia’s New Eminent Domain Amendment Protect Private Property?*

