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SECOND JUDICIAL CIRCUIT

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RE: Michael Fernandez, D.D.S., LTD v. Commissioner of Highways
Case No.: CL18-3017

Dear Counsel:

This matter came before the court on defendant's Demurrer and Plea in Bar. After consideration of the pleadings, arguments, transcript of the hearing, and briefs filed by counsel, the court finds that the demurrer should be sustained on the basis discussed below.

This is a suit seeking a declaratory judgment regarding reimbursement of relocation expenses pursuant to the Relocation Assistance and Real Property Acquisition Policies, §§ 25.1-400 *et seq.* [hereinafter, "Virginia Relocation Act"]. The expenses were incurred when the plaintiff dental office lost rented office space in a building as a result of it being taken in eminent domain proceedings. Plaintiff alleges that once it found a building to relocate to, it required extensive build-out and renovation allegedly costing several hundred thousand dollars to make it useable for a dental practice. It complains that despite repeatedly submitting documentation requested by the defendant [hereinafter, "VDOT"], VDOT has only paid minimal amounts, approved some amounts but not yet paid them, and has not made any determination regarding other claims for reimbursement. Given these facts, plaintiff seeks a declaratory

judgment ordering VDOT to provide it relocation benefits and pay the reimbursements requested. In response, VDOT filed a demurrer and plea in bar listing eighteen largely conclusory bases. Because the court finds dispositive the assertion that there is no private cause of action under the Virginia Relocation Act, it declines to address the multitude of other bases for the demurrer and plea in bar.

Plaintiff's Complaint explicitly alleges that its claims are pursuant to the Declaratory Judgment Act, §§ 8.01-184 *et seq.*, and the Virginia Relocation Act. Specifically, plaintiff seeks payment of moving and related expenses as provided by § 25.1-406. Thus, as an initial matter, in order for plaintiff to proceed a private cause of action must exist under the Virginia Relocation Act.[1] The fact that plaintiff seeks relief under the Declaratory Judgment Act does not alter the need for the independent existence of a private cause of action. *See Cherrie v. Va. Health Servs.*, 292 Va. 309, 318 (2016) (the Declaratory Judgment Act "does not *create* a right of action or, for that matter, any substantive rights at all," so that one "cannot use the Declaratory Judgment Act as a platform for asserting non-existent private rights of action"). Whether or not a private cause of action exists depends upon applicable "'substantive law,'" consisting of the Constitution, statutes, and common law. *Id.* at 314. Historically, there was neither a Constitutional nor common law right to the relocation benefits sought by plaintiff. There is a constitutional right to compensation for property taken or damaged for public use. *See, e.g., Jenkins v. Cty. of Shenandoah*, 246 Va. 467, 469-70 (1993). For a lessee, this right provides entitlement to an apportioned share of the total just compensation award when leased property is taken, as compensation for its property interest in the leasehold. *Lamar Corp. v. Richmond*, 241 Va. 346, 349-50, 352 (1991). However, Relocation Act benefits "are entirely separate and distinct from the landowner's constitutional right to just compensation and damages in a condemnation proceeding." *State Highway & Transp. Comm'r v. Edwards Co.*, 220 Va. 90, 96 (1979) (error to enjoin condemnation proceeding until the rights of the owner under the Virginia Relocation Act were resolved). As a result, there is not a constitutional basis for a private cause of action for the relocation benefits plaintiff seeks.

Nor is there a common law cause of action for these relocation benefits. As indicated by *Lamar* and *Edwards Co.*, no such cause of action is recognized under Virginia law. Further, this cause of action has not historically been recognized nationally at common law, as discussed in *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30 (1983), which addressed the federal Uniform

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[1] The parties herein mix and match use of the terms "private right of action" and "private cause of action," without making a distinction between the two. However, a right of action and a cause of action are different legal concepts. *See, e.g., Thorsen v. Richmond SPCA*, 292 Va. 257, 278 (2016) ("A cause of action is the operative set of facts giving rise to a right of action. A right of action cannot arise until a cause of action exists because a right of action is a remedial right to presently enforce an existing cause of action. Some injury or damage, however slight, is essential to a cause of action.") (internal citations omitted). Since there can be no right of action without a cause of action, the court will limit its analysis to the existence of a private cause of action under the Virginia Relocation Act.

Relocation Act [hereinafter, "URA"]. The Court noted that "the elements of the federal law of eminent domain are largely derived from the common law," under which "[a] tenant . . . residing or doing business at condemned premises, received nothing." *Id.* at 36-37. It went on to state that the URA abrogated the common law in this regard, as it "was intended to alleviate the 'disproportionate injuries'" inflicted in the form of costs such as moving expenses incurred as a result of a government taking. *Id.* at 37.

This leaves the Virginia Relocation Act itself as a source for a private cause of action. A statute may provide for a private cause of action either expressly or by implication; clearly the Virginia Relocation Act does not expressly provide for a private cause of action. In order to infer a private cause of action under a statute, there must be "demonstrable evidence that the statutory scheme necessarily implies it," and "[t]he necessity for such an implication must be palpable." *Cherrie*, 292 Va. at 315. In addition, a court is "not [to] infer a private right of action when the General Assembly expressly provides for a different method of judicial enforcement." *Id.* at 316. Where, as here, a statute is in derogation of the common law, it is "'to be strictly construed and not to be enlarged in [its] operation by construction beyond [its] express terms.'" *Isbell v. Commercial Inv. Assocs.*, 273 Va. 605, 613 (2007) (citations omitted). Thus, "'[a] statutory change in the common law is limited to that which is expressly stated in the statute or necessarily implied by its language because there is a presumption that no change was intended.'" *Id.* at 613-14 (citations omitted). It goes without saying that statutory construction is required as part of determining whether a private cause of action exists, and the point of such construction "'is to ascertain and give effect to legislative intent.'" *Conger v. Barrett*, 280 Va. 627, 630 (2010) (citations omitted).

There are no Virginia state court appellate decisions addressing whether or not the Virginia Relocation Act provides a private cause of action. However, there are federal decisions addressing this issue under the Uniform Relocation Act. These decisions are helpful and persuasive for a number of reasons. First, the Virginia Relocation Act was enacted in response to the requirements of the federal URA. The federal URA conditioned the provision of federal funds for projects involving condemnation upon "'satisfactory assurances'" that displaced persons will be given such relocation payments and assistance 'as are required to be provided by a Federal agency.'" *Norfolk Redevelopment*, 464 U.S. at 32. As a result, "[i]n order to qualify for federal funds . . . many States, such as Virginia . . . have adopted legislation modeled on the [URA]." *Id.* Therefore, whether Congress intended to provide a private cause of action under the URA is relevant to the interpretation of the Virginia Relocation Act. Second, as a practical matter, the Virginia and federal standards for implying a private cause of action do not significantly differ, as both seek to determine legislative intent. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) ("we must first determine whether Congress *intended to create a federal right*"). As discussed above, Virginia looks to whether a private cause of action is necessarily implied from the structure of the relevant statutes. Federal courts simply further flesh out *how* that implication is reached

by looking to whether the statute contains "rights-creating terms," has an individual as opposed to group or governmental focus, and provides a private remedy. *Id.* at 284.

In general, federal courts have held that there is no private cause of action under the URA for relocation benefits such as those sought by the plaintiff herein. In the Eastern District of Virginia, the court in *Clear Sky Car Wash, LLC v. City of Chesapeake*, 910 F. Supp. 2d 861 (E.D. Va. 2012), *aff'd on other grounds*, 734 F.3d 438 (4th Cir. 2014), held that there was no private cause of action under URA provisions providing for the payment of relocation expenses (provided for in Subchapter II of the URA).[2] It adopted the reasoning of *Delancey v. City of Austin*, 570 F.3d 590 (5th Cir. 2009), to find there was no private cause of action. *Clear Sky*, 910 F. Supp. 2d at 877. *Delancey* applied *Gonzaga* to a different URA provision than that before the *Clear Sky* court, but which was part of the same Subchapter II. In particular, *Delancey* reasoned there was no private cause of action because the URA provisions targeted the governmental entity conducting the take, rather than the individuals affected by the take, and did not set forth any "'rights-creating language.'" *Clear Sky*, 910 F. Supp. 2d at 877. *Clear Sky* found this reasoning was equally applicable to claims under 42 U.S.C. § 4622[3] of Subchapter II of the URA for payment of relocation expenses. *Id.* at 877-78. Further, it found that the only judicial remedy intended was pursuant to the Administrative Procedures Act. *Id.* at 878-79.

More recently, *Osher v. City of St. Louis,* 903 F.3d 698 (8th Cir. 2018), followed a similar approach as *Clear Sky* in finding that there is no private cause of action for payment of relocation benefits under the URA. As in *Delancey* and *Clear Sky*, *Osher* found no sign of intent to create a private cause of action based upon the absence of rights-creating language in the URA, and because the URA "'focus[es] on the person regulated rather than the individuals protected.'" *Osher*, 903 F.3d at 702 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001)). It specifically noted that the provisions of 42 U.S.C. § 4622 contain a mandate for agencies, not individuals. As well, since the URA directed the head of the Department of Transportation to develop "'such regulations as may be necessary to carry out this chapter,'" the court held that further "'counsel[s] against . . . finding a congressional intent to create individually enforceable private rights.'" *Id.* at 703 (citations omitted). Finally, the court rejected the argument that since the only disclaimer of private rights was in 42 U.S.C. § 4602(a), and that only addressed the provisions 42 U.S.C. § 4651, then private rights of action impliedly

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[2] Plaintiff cites only to the Fourth Circuit *Clear Sky* opinion and argues that it is inapposite because it only addresses rights claimed under Subchapter III, not Subchapter II. However, the District Court also addressed Subchapter II rights, but that portion of the decision was not taken up on appeal, as has been noted by other courts facing this same argument. *See, e.g., Nimco Real Estate Assocs. v. Nadeau*, 2017 U.S. Dist. LEXIS 61660, *8, *10 (D.N.H. 2017) (noting that Clear Sky did not appeal the Subchapter II decision and that Nimco "failed to notice the distinction between the district court and circuit court decisions"). The plaintiff herein makes the same error as Nimco in overlooking this point.

[3] Plaintiff acknowledges that 42 U.S.C. § 4622 is the "federal corollary" of § 25.1-406, the Virginia code provision it seeks relief under.

existed under all other sections. It quite logically held that "express disavowal of rights under one section, however, does not amount to an unambiguous manifestation of intent to create enforceable rights under another." *Id.*

Similarly, § 25.1-406 of the Virginia Relocation Act evidences neither the intent nor the necessity to imply a private cause of action. It requires the state agency to make specified payments, consistent with other sections of the act that impose requirements on state agencies. Section 25.1-406 does not state an individual entitlement to these payments, and thus does not use language indicating that a private right of action should be implied. In addition, § 25.1-402 provides for agencies "to promulgate such rules and regulations as are necessary to carry out the provisions of this chapter," demonstrating that administrative remedies are intended. Plaintiff's argument that since only § 25.1-417(B) disclaims the creation of any rights, then all other provisions of the Virginia Relocation Act impliedly do create private rights, proves too much. Section 25.1-417(B) mirrors 42 U.S.C. § 4602, so plaintiff's argument is subject to the same analysis as provided in *Osher.* Reading the Virginia Relocation Act as a whole, and considering its overall structure and the background for its enactment, does not create a necessary implication that a private cause of action exists. Accordingly, the court holds that there is no private cause of action for payment of relocation expenses under § 25.1-406 or other provisions of the Virginia Relocation Act. Thus, plaintiff also cannot bring a declaratory judgment action concerning those provisions.

As a result, the court sustains defendant's demurrer on the basis discussed above. Because plaintiff's Petition for Declaratory Judgment, as currently pleaded, clearly and expressly asserts claims only under the Virginia Relocation Act, the court does not address any other bases for the demurrer and plea in bar. Plaintiff is granted leave to amend to the extent it seeks to assert other potentially viable causes of action. Mr. Greene is asked to prepare an order consistent with the court's ruling.

Very truly yours,

William R. O'Brien

WRO:ahj:dls