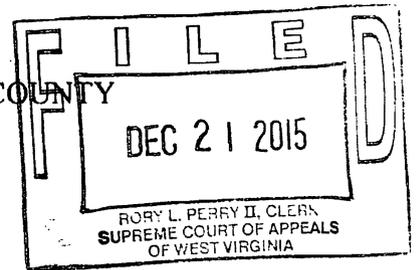


IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

ON A PETITION FOR A WRIT OF PROHIBITION
FROM AN ORDER OF THE CIRCUIT COURT OF RALEIGH COUNTY
CIVIL ACTION NO. 14-C-506



**STATE OF WEST VIRGINIA, ex rel.
DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS, a state agency,**

Petitioner,

v.

No. 15-1112

HONORABLE ROBERT A. BURNSIDE, Jr.,
Judge, Circuit Court of Raleigh County, West Virginia,
MCNB BANK AND TRUST CO., a West Virginia
corporation, and the Sheriff of Raleigh County,
West Virginia,

Respondents.

**RESPONDENT MCNB BANK AND TRUST CO.'S BRIEF
IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION**

December 21, 2015

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TABLE OF CONTENTS

QUESTIONS PRESENTED.....1

STATEMENT OF THE CASE:.....3

 I. Preliminary Statement.....3

 II. Clarification of Relevant Facts Omitted from the Petition.....5

 A. The Property; Assessment of Just Compensation; Deduction for
 Remediation Cost.....5

 B. Original Ownership of the Property and Confirmed Releases from the
 Underground Storage Tanks (“USTs”); MCNB’s Acquisition of Property by
 Foreclosure of Its Borrower, a Subsequent Owner.....9

SUMMARY OF ARGUMENT9

STATEMENT REGARDING ORAL ARGUMENT AND DECISION11

ARGUMENT.....15

I. THE EXTRAORDINARY WRIT OF PROHIBITION DOES NOT LIE
 IN THIS CASE.....15

 A. Legal Standard.....15

 B. Petitioner Is Incorrect that the Five Factor Test for Issuance of a Writ is Met in
 this Case.....17

 1. Petitioner Has Other Adequate Means to Obtain the Desired Relief,
 both within the Condemnation Proceeding Itself and by Direct Appeal
 after Entry of a Final Order or Jury Verdict.....18

 2. Petitioner Will Not Be Damaged or Prejudiced In a Way that Is Not
 Correctable on Appeal, and Mere Delay until a Determination Is Ripe
 for Appeal is Not “Prejudice”23

 3. The Circuit Court’s Order Is Not “Clearly Erroneous” as a Matter of
 Law24

 a. The Circuit Court’s Order Comports with the “Just
 Compensation” Mandate of the Governing Statutes and
 Constitutional Law.....25

i.	Petitioner has no authority to arbitrarily estimate the Property value, because a condemnor’s authority is always subject to governing law protecting the constitutional right of “just compensation”	26
ii.	The Circuit Court properly rejected Petitioner’s method of deducting dollar-for-dollar its estimated cost of cleanup from the fair market value of the Property, which method is improper even if environmental contamination is considered in the “just compensation” analysis.....	30
b.	The Circuit Court’s Order Comports with Constitutional “Due Process, where MCNB Has No Liability for the Environmental Cleanup and Is Not Afforded Its Defenses in the Condemnation Proceeding.....	34
c.	The Circuit Court’s Order Does Not Place Public Funds at Unnecessary Risk.....	35
4.	The Circuit Court’s Order Is Not an Oft Repeated Error and Does Not Manifest Persistent Disregard for Either Procedural or Substantive Law.....	36
5.	The Circuit Court’s Order Does Not Raise New and Important Problems or Issues of Law of First Impression.....	37
•	CONCLUSION.....	38
	CERTIFICATE OF SERVICE	39

TABLE OF AUTHORITIES

Cases

<i>Adams v. Trustees</i> , 23 W. Va. 203 (1883)	5, 35
<i>Crawford v. Taylor</i> , 138 W. Va. 207, 75 S.E.2d 370 (1953).....	15
<i>Durm v. Heck's Inc.</i> , 184 W. Va. 562, 401 S.E.2d 908 (1991).....	21
<i>Evans v. Robinson</i> , 197 W. Va. 482, 475 S.E.2d 858 (1996)	25
<i>Hinkle v. Black</i> , 164 W. Va. 112, 262 S.E.2d 744 (1979)	15, 18, 22, 24, 34
<i>Hoover v. Berger</i> , 199 W. Va. 12, 483 S.E.2d 12 (1996).....	16, 17, 18, 20, 23
<i>Housing Auth. of City of New Brunswick v. Suydam Investors, L.L.C.</i> , 177 N.J. 2, 24, 826 A.2d 673, 687 (N.J. 2003).....	34
<i>In the interest of Tiffany Marie S.</i> , 196 W. Va. 223, 470 S.E.2d 177 (1996).....	24
<i>James M.B. v. Carolyn M.</i> , 193 W. Va. 289, 456 S.E.2d 16 (1995).....	21
<i>Morgan v. Price</i> , 151 W. Va. 158, 150 S.E.2d 897 (1966).....	25
<i>State by State Rd. Comm'n v. Prof'l Realty Co.</i> , 144 W. Va. 652, 658, 110 S.E.2d 616, 620 (1959).....	13, 27
<i>State ex rel. Allstate Ins. Co. v. Gaughan</i> , 203 W. Va. 358, 508 S.E.2d 75 (1998).....	17
<i>State ex rel. Brooks v. Zakaib</i> , 214 W. Va. 253, 259, 588 S.E.2d 418, 424 (2003).....	16
<i>State ex rel. DeFrances v. Bedell</i> , 191 W. Va. 513, 446 S.E.2d 906 (1994).....	16
<i>State ex rel. Evans v. Robinson</i> , 197 W. Va. 482, 475 S.E.2d 858 (1996).....	18
<i>State ex rel. Gordon Mem' Hosp. v. W. Va. State Bd. of Examiners for Reg. Nurses</i> , 66 S.E.2d 1 (W. Va. 1951).....	18
<i>State ex rel. Owners, Inc. v. McGraw</i> , 233 W. Va. 776, 760 S.E.2d 590 (2014).....	18, 23, 24, 35, 36
<i>State ex rel. Shelton v. Burnside</i> , 212 W. Va. 514, 575 S.E.2d 124 (2002).....	17
<i>State ex rel. Suriano v. Gaughan</i> , 198 W. Va. 339, 345, 480 S.E.2d 548, 554 (1996).....	16

<i>State ex rel. Tucker Co. v. Solid Waste Auth. v. W. Va. Div. of Labor</i> , 668 S.E.2d 217	22, 23
<i>State ex rel. United States Fidelity & Guar. Co. v. Canady</i> , 194 W. Va. 431, 437, 460 S.E.2d 677, 683 (1995).....	16
<i>State ex rel. Weirton Med. Ctr. v. Mazzone</i> , 214 W. Va. 146, 587 S.E. 2d 122 (2002)	11, 16
<i>State ex. rel. West Va. DHHR v. West Va. PERS</i> , 393 S.E.2d 677, 183 W. Va. 39 (1990).....	35
<i>State ex rel. Williams v. Narick</i> , 164 W. Va. 632, 264 S.E.2d 851 (1980).....	15
<i>State Rd. Comm'n v. Bd. of Park Comm'rs of City of Huntington</i> , 154 W. Va. 159, 167, 173 S.E.2d 919, 925 (1970).....	13, 26, 27
<i>U.S. v. 564.54 Acres of Land</i> , 441 U.S. 506 (1979).....	27
<i>U.S. v. Boe</i> , 543 F.2d 151, 158 (CCPA 1976).....	15
<i>U.S. v. Gen'l Motors Corp.</i> , 323 U.S. 373 (1945)	27
<i>U.S. v. Miller</i> , 317 U.S. 369 (1943)	28
<i>U.S. v. Virginia Elec. & Power Co.</i> , 365 U.S. 624 (1961).....	27

Constitutions

U.S. Const. amend. V	35
W. Va. Const., Art. III, § 9.....	35

Statutes

42 U.S.C.A. § 4601 <i>et seq.</i>	28
42 U.S.C.A. § 4651	29
W. Va. Code § 54-2-9.....	11, 19, 20
W. Va. Code § 54-2-10.....	11, 19, 20
W. Va. Code § 54-2-11.....	11, 20
W. Va. Code § 54-2-14a	1, 3, 13, 25, 26, 28
W. Va. Code § 58-5-1.....	21

Federal Regulations

40 C.F.R. § 280.220.....4
40 C.F.R. § 280.230.....4
49 C.F.R. § 24.102(d).....29
49 C.F.R. § 24.103.....29

Rules

W. Va. R. App. P. 5 13, 21
W. Va. R. Civ. P. 54.....22

Other

7A Nichols on Eminent Domain (Dec. 2001) § 13B.0430, 31
Advisory Opinion 9: "The Appraisal of Real Property That May be Impacted by Environmental Contamination," Appraisal Standards Board, *Uniform Standards of Professional Appraisal Practice*, 2009-10 ed. (Washington, D.C.: the Appraisal Foundation)..... 13, 31
Jack R. Sperber, *A Clean Look at Dirty Property: Emerging Issues and Common Problems when Valuing Contaminated Properties in Eminent Domain Proceedings*, SS035 ALI-ABA 705, 720 (Feb. 2011).....30, 31, 32

QUESTIONS PRESENTED

In its Writ of Prohibition, Petitioner presented the following “questions” for determination by this Court:

- A. Prohibition is the Only Remedy to Correct a Clear Legal Error.

- B. The Respondent Clearly Exceeded Its Legitimate Powers by Requiring the Petitioner to Deposit a Sum of Money Greater than the Sum Established by the Petitioner as Just Compensation as a Condition of Awarding the Petitioner Right of Entry Upon and Defeasible Title To the Subject Property, in Direct Contravention of the Authority Granted the Petitioner by West Virginia Code 54-2-14a.
 - i. West Virginia Code 54-2-14a grants the Petitioner sole and exclusive authority to establish just compensation to be paid to a property owner for the Petitioner to obtain right of entry and defeasible title to property condemned for public road construction.

 - ii. The Respondent’s Order disbursing the Petitioner’s required deposit of \$1,012,500 to MCNB disregards conflicts in state law regarding the Petitioner’s right to recover an excess deposit and places public funds at unnecessary risk.

(Pet. at 6.)

Although the questions presented are repeated verbatim, Respondent moves to strike or disregard Question “A” because the Order below did not decide that issue, nor did the Circuit Court of Raleigh County, West Virginia (“Circuit Court”) certify that question to this Court.¹

¹ Even if considered, the issue raised, i.e., that “[p]rohibition is the only remedy to correct a clear legal error,” is erroneous as a matter of law because it is clear that in this context, just compensation is ultimately determined by the report of condemnation commissioners or verdict of a jury and is subject to review through the normal appeal process. Accordingly, even if a legal error were to occur, the extraordinary remedy of a writ of prohibition is not the “only” remedy available, nor is it an appropriate remedy in this case. A writ of prohibition cannot be used to correct a non-final determination or even alleged errors that are correctable later by the determination of the commissioners, the jury, or on appeal. Under the unique circumstances of this case, Petitioner has another remedy at its disposal as well: to the extent any environmental remediation is necessary, the full cost (which it seeks to deduct from MCNB’s

With regard to Question “B” and its subparts, Respondent objects to the extent that the issues presented have imbedded in them false assumptions (including that MCNB has any liability for the remediation costs), which do not fairly present the sole issue decided by the Circuit Court’s Order. The Circuit Court’s Order granted Petitioner right of entry and defeasible title to the Property immediately upon its deposit of the precise sum established by Petitioner’s own appraisal of the fair market value of the property, no more and no less. (AR 005.) The Circuit Court explicitly declined to determine, at the right-of-entry stage, liability for remediation and environmental cleanup of the property, if any. (AR 006.) As stated in the Order, “The Court finds that it is not required to determine who bears liability for the cost of environmental cleanup and remediation at this stage of the proceedings. If the Court ultimately finds Defendant MCNB to be correct in its assertion that it is not liable for said costs, this finding would affect the ultimate award of just compensation to the Defendant, but not necessarily the Court’s determination of what initial deposit should be made for the Petitioner to gain right of entry and defeasible title to the subject property.” (A.R. 004.)

Respondent respectfully suggests that the sole issue presented, if any, on the record below is more properly framed as follows:

Whether the Circuit Court exceeded its legitimate powers when it held that “[a]t this stage of the proceedings, the Court finds that the report of Petitioner’s appraiser, Kent Kesecker, represents the Petitioner’s estimate of ‘fair value’ of the property to be taken and damages to the residue at \$1,012,500” (AR 004), without dollar-for-dollar deduction of the estimated remediation cost from the established fair market value, where MCNB (a bank in the chain of title merely because it foreclosed on a subsequent owner of the property) is not “the responsible party” for the remediation, if any.

property value) can be covered by the party actually responsible as provided by the governing environmental laws. Thus, there is no conceivable “error” for which the “only remedy” is prohibition.

For all of the reasons discussed herein, the answer to this question is resoundingly “no.” Simply no abuse of discretion or usurpation of power has occurred, as must be found for a writ of prohibition to issue, and a contrary ruling would run counter to the plain terms of the governing eminent domain statute and the constitutional protections of “just compensation” and procedural due process. Furthermore, given the relief available to Petitioner in the condemnation proceeding and by direct appeal, as well as the agency’s ability to collect remediation costs from the known, solvent responsible party, there is no credible basis at all for Petitioner’s claim that public funds are “placed at unnecessary risk.” (Pet. at 6.)

STATEMENT OF THE CASE

I. PRELIMINARY STATEMENT

This proceeding, an extraordinary writ to “prohibit” the lower tribunal, is nothing more than an attempt by Petitioner to take a shortcut around the procedures established by statute and to get a free pass from its constitutional obligation to pay “just compensation” in the amount that fully indemnifies the property owner for *its loss*. The decision below—a non-final ruling subject to ultimate determination by report of commissioners, jury verdict, and by appeal—properly applied W. Va. Code § 54-2-14a and gave effect to its plain terms and its intended purpose. As the United States Supreme Court has consistently held, the Fifth Amendment is intended to fully indemnify the property owner, and therefore, the appropriate method of compensation is the one that puts the owner in the position it would have been but for the taking. The constitutional mandate of “just compensation” will be violated if the valuation method advanced by Petitioner is accepted in this case.

Petitioner argues that MCNB should be forced to pay the bill for all estimated cleanup costs, which, absent the taking, MCNB would never have incurred or been held liable for under

the applicable environmental laws. In fact, by letter dated September 15, 2006, the West Virginia Department of Environmental Protection, Office of Environmental Remediation (“WVDEP”) has already determined that “[t]he responsible party for remediation of petroleum contamination associated with the confirmed release is the owner(s) of the underground storage tanks at the time of the confirmed release.” (AR 092.) There is no question that the Bank was not the “owner” or “operator” of the petroleum underground storage tanks (“UST”) during the relevant times at issue, as those terms are defined in the statute. *See* 40 C.F.R. §§ 280.220; 280.230. (AR 104-05.) As a matter of law, MCNB, which acquired the Property by foreclosure from a subsequent owner after the confirmed releases occurred, does not have any liability for the environmental cleanup costs that Petitioner seeks.

As such, this condemnation proceeding—whereby Petitioner seeks to deduct, dollar-for-dollar, all projected remediation costs from the fair market value of the Property—is akin to an environmental cost-recovery action without affording MCNB its procedural rights and defenses that it would otherwise be entitled to. Due process requires that MCNB only be assessed cleanup costs to the extent that it is actually liable under the environmental statutes, and requires Petitioner to establish that the expenses it seeks to deduct represent actually-incurred costs that are necessary and reasonable. Instead, Petitioner seeks to simply inject a rough estimate of projected costs into a just compensation proceeding and charge the aggregate amount against an innocent landowner, MCNB, regardless of its non-existent liability and contrary to the proper valuation methods under just condemnation law.

There is no statutory authority for such a vast eminent domain power, which would exceed the Court’s legitimate powers and cut harshly against the displaced landowner. The overriding purpose of federal and state constitutional provisions providing that “private property

shall not be taken or damaged for public use, without just compensation” is to make the property owner, whose property is condemned, whole. U.S.C.A. Const. Amend. 5; Constitution of West Virginia, Article 3, Section 9. The provisions regulating the exercise of power of eminent domain must be strictly construed to protect the landowner and to protect the rights to private property. *See, e.g., Adams v. Trustees*, 23 W. Va. 203, 207 (1883) (“All the authorities concur in holding, that as private property can be taken for public uses, against the consent of the owner, only in such cases, and by such proceedings as may be specially prescribed by law, and as these proceedings are contrary to the course of the common law, and are in derogation of common right, they are to be strictly construed, and that the party who would avail himself of this extraordinary power, must fully comply with all the provisions of the law entitling him to exercise it.”).

To hold otherwise would allow Petitioner to pursue an innocent owner for cleanup costs simply by deducting the expense, dollar-for-dollar, from the fair market value of the Property, while presumably another State agency, the WVDEP, would still maintain the right to recover from the actual party responsible in a subsequent action. When, as here, the valuation method employed by Petitioner diverges so substantially from the relevant, reliable and federally-accepted appraisal standards so as to violate the “just compensation” mandate of the West Virginia and United States Constitutions, the Circuit Court is correct to reject, at the right-of-entry stage, a dollar-for-dollar reduction of the Property’s established fair market value. The Circuit Court’s sound judgment should not be disturbed.

II. CLARIFICATION OF RELEVANT FACTS OMITTED FROM PETITION

The facts relevant to this proceeding are contained in the Circuit Court’s findings in in the record below. However, as background and because facts pertinent to the transfer of

ownership of the property and concerning the issue of liability for environmental remediation were omitted from Petitioner's brief, they are set forth for the Court's convenience here:

A. The Property; Assessment of Just Compensation; Deduction for Remediation Cost

1. MCNB is the current owner of property located at the Former Plaza Exxon, 4210 Robert C. Byrd Drive, Beckley, Raleigh County, West Virginia (the "Property"). On or about May 20, 2014, Petitioner West Virginia Department of Transportation, Division of Highways ("WVDOH") brought an Application to Condemn Land for Public Use (the "Complaint") against MCNB to acquire the Property by condemnation. (AR 017-025.)

2. The report of Kent Kesecker, a certified general appraiser hired by the Petitioner, provides that the fair market value of the Property sought to be condemned in this proceeding, including the damages, if any, to the residue of the land of the Defendants beyond the benefits, if any, to any such residue by reason of the taking is \$1,012,500. (AR 002-03; Hearing Tr. at 6-7.)

3. On or about November 18, 2013, the WVDOH issued its Revised Statement of Just Compensation and Summary, advising MCNB that the full amount established as just compensation for the Property was \$417,100. (AR 002, 027.)

4. Included in the WVDOH's just compensation calculation was a deduction of \$595,400 for the estimated total cost of environmental remediation arising from underground storage tanks ("UST") at the Property. (AR 003, 110.) The project estimate was prepared by Core Environmental Services, Inc. ("Core"), which proposed alternate viable options for performing the recommended remediation.²

5. In the proceeding below, MCNB took the deposition of Mr. Sajid Barlas, Civil Engineer for Petitioner WVDOH, who testified as to the content of Core's project estimate

² Because Petitioner only included the first page of Core's project estimate in the Appendix at AR 029, the complete three-page document is submitted with Respondent's Response to Petitioner's Motion for Leave to Include Documents Not Contained in the Record, attached thereto as Exhibit A.

report, which Mr. Barlas described as “a cost breakdown to remediate the site.” (Sajid Barlas Dep. at 33.)³ Mr. Barlas testified that Petitioner did not obtain a project estimate from any other entity other than Core. (*Id.* at 38.)

6. Mr. Barlas testified that at least one component of Core’s plan, i.e., to remove the Property building and canopy, and take it away from the site, would have been necessary for the highway construction anyway. (*Id.* at 34.)

7. Mr. Barlas testified that the Core project estimate included alternate viable options for remediation. (*Id.* at 34-44.) In an internal email dated August 9, 2013, from Mr. Barlas to Tim Priddy of WVDOT’s engineering division, Mr. Barlas made summary recommendations based on Core’s project estimate, which included remediation options ranging as low as \$100,000 and \$225,000. (*Id.* at Ex. 4 and 4.)

8. Mr. Barlas testified that the “Stage 1” estimate of \$519,000 could be performed for approximately \$225,000 with “some of the work is being done by DOH,” rather than a private contractor, and “using our own equipment.” (*Id.* at 36-37, 41.)

9. Mr. Barlas testified that another approach could be as low as \$100,000 by allowing Petitioner to leave some contamination in place. Mr. Barlas stated that he was not aware of any evidence that the contamination onsite was migrating from the Property (*id.* at 36). and explained this alternative as follows:

Another option would be to purchase this property and only do a very limited excavation in the area where the new road will be and once the construction is over, install wells and take this site through risk-based programs such as UECA (Uniform Environmental Covenant Act). This will allow us to leave some of the contamination in place after we prove that the remaining

³ Relevant excerpts from Mr. Barlas’ deposition transcript are submitted with Respondent’s Response to Petitioner’s Motion for Leave to Include Documents Not Contained in the Record, attached thereto as Exhibit B.

contamination is not moving off site and does not pose any health risks. Taking a site through UECA can also cost up towards [\$100,000] and will require a year or better.

(*Id.* at Ex. 4, in part; *see also id.* at 44 (correcting typographical error of “\$1000,000” and clarifying that actual estimate is \$100,000); *id.* at 38 (describing this email as “my sum of my recommendations”).)

10. Mr. Barlas also described the WVDEP’s long history of monitoring groundwater at the Property site, which began in 1987. Based on his review of WVDEP materials received by FOIA request, Mr. Barlas prepared a written summary of the Property’s “history,” “current activities,” and Mr. Barlas’ “suggestions.” (*See* AR 065; *see also* Barlas Dep. at 24-33, describing content of AR 065.) The “current activities” at the Property involved only quarterly groundwater sampling. (*Id.*) In the summary of his “suggestions,” Mr. Barlas did not recommend excavation, but rather stated the he “would like to wait and see the June 2013 results” from the next quarterly sampling. (*Id.*)

11. In his deposition, Mr. Barlas explained that, absent Petitioner’s highway construction Project, the current “wait and see” approach of conducting quarterly water samplings would likely have continued:

Q: Absent the Department of Highways building a road through the Sonic site, if that hadn’t happened what would have happened at the site? Would it have continued on as it was?

A: I assume.

(*Id.* at 33.)

12. The record below contains no evidence to suggest that, absent the Project, Core’s proposal to excavate, load, and transport “3,300 tons” of soil from the Property would have been

an action taken by anyone in the private marketplace. (*See supra* n.2, attached to Respondent's Response at Ex. A.)

13. At the hearing before the Circuit Court, counsel for Petitioner informed Judge Burnside that the "these exact numbers [for environmental remediation] . . . arise from an estimate that was done by an expert—a consultant retained by the Division of Highways—*for this specific project.*" (Hearing Tr. at 9 (emphasis added). The costs thus reflect the State's use.

14. On December 23, 2013, MCNB objected to the WVDOH's assessment of just compensation and deduction for estimated remediation.

15. MCNB provided an Appraisal Report, dated August 2, 2012, valuing the Property at no less than \$1,294,100.⁴ (AR 003-004.)

16. WVDOH declined to increase its previously-made offer.

B. Original Ownership of the Property; Confirmed Releases from the USTs; MCNB's Acquisition of the Property by Foreclosure of Its Borrower, a Subsequent Owner

17. In June 2014, MCNB submitted a FOIA request to the West Virginia Department of Environmental Protection ("WVDEP") to obtain all documents relating to the confirmed release(s) from the USTs on the Property. (AR 104.)

18. WVDEP records show that, on or about April 8, 1986, Exxon filed a Notification of Underground Storage Tanks with the WVDEP, indicating Exxon's ownership of the USTs on the Property. (*Id.*)

19. In or about August 1991, Exxon retained Groundwater Technology, Inc. to conduct an environmental analysis of the Property. In its Environmental Assessment report,

⁴ For the Court's reference, a copy of the August 2, 2012 Appraisal Report from the record below but which was not contained in the Appendix is submitted with Respondent's Response to Petitioner's Motion for Leave to Include Documents Not Contained in the Record, attached thereto as Exhibit C.

dated August 15, 1991, Groundwater Technology, Inc., concluded that underground concentrations of hydrocarbons were present at the Property. (*Id.*)

20. Upon information and belief, monitoring wells were placed on the Property at that time and continue to be monitored today. (AR 065.)

21. By a Special Warranty Deed, dated November 27, 1991, Exxon conveyed the Property to H.C. Lewis. (*Id.*)

22. WVDEP records show that, on or about March 16, 1992, H.C. Lewis filed its Notification of Underground Storage Tanks with the WVDEP, identifying H.C. Lewis as the “new owner” and indicating its ownership of the USTs on the Property. (*Id.*)

23. In or about October 1996, H.C. Lewis retained REIC Laboratory to analyze certain samples taken from the Property site. In its report dated November 5, 1996, REIC Laboratory reported a finding of underground petroleum hydrocarbons at the Property. (*Id.*)

24. In or about November 2003, the site entered into voluntary remediation program.

25. The WVDEP records show that, in May 2006, while H.C. Lewis owned the USTs, a second confirmed release occurred at the Property. (*Id.*)

26. Upon information and belief, H.C. Lewis retained REI Consultants, Inc. to perform an analysis in May 2006, which confirmed soil contamination at the Property. (*Id.*)

27. By letter dated September 15, 2006, the WVDEP, Office of Environmental Remediation, determined that “[t]he responsible party for remediation of petroleum contamination associated with the confirmed release is the owner(s) of the underground storage tanks at the time of the confirmed release.” (AR 092.)

28. On or about January 5, 2007, H.C. Lewis sold the Property to Chrite Properties, 1, LLC (“Borrower”). (AR 089-90.)

29. To purchase the Property, Borrower obtained financing from MCNB in the principal amount of \$1,150,000 (the "Loan"). (AR 105.)

30. On or about August 2, 2012, MCNB obtained an updated appraisal completed by Leslie O. Stanley, valuing the Property's market value at \$1,294,100. (AR 033.)

31. After Borrower defaulted on Loan, MCNB foreclosed on the Property. The Property was conveyed by Deed to MCNB from James G. Anderson, III, Substitute Trustee, by deed dated October 10, 2013, and was recorded in the Raleigh County land records. Consideration listed was \$1,000,000. MCNB remains the current Property owner. (AR 085-86.)

32. Since Petitioner initiated its condemnation action in May 2014 to take the Property for public use, MCNB has paid property taxes and incurred costs and expenses to upkeep the Property, which due to the imminence of the Project, remains vacant and un-rentable to any prospective tenant in the marketplace.

SUMMARY OF ARGUMENT

As discussed below, the Petition should be denied because the extraordinary writ of prohibition does not lie in this case. The matter is clear-cut: all five factors considered in determining whether prohibition should issue strongly weigh against the discretionary grant of a writ in this case. *See* Syl. Pts. 1, 2, *State ex rel. Weirton Med. Ctr. v. Mazzone*, 214 W. Va. 146, 147-48, 587 S.E. 2d 122, 123-24 (2002). The Petition thus fails on its merits:

1. *Petitioner has adequate means to obtain the desired relief, i.e., to determine the amount of just compensation, by report of commissioners, jury trial, and ultimately, by direct appeal.* Rather than following the statutory procedures for determining the amount of just compensation, Petitioner attempts to short-circuit those procedures by seeking a premature and unnecessary writ of prohibition. Through the ordinary channels, W. Va. Code § 54-2-9 provides

for the determination of just compensation by report of commissioners, and W. Va. Code § 54-2-10, allows proceedings to occur on the report, or if timely objection is made, the question of just compensation may be ascertained by jury trial. W. Va. Code § 54-2-11 provides that the commissioners' report may be set aside for "good cause" shown. If no exceptions are filed within 10 days of the report, and neither party demands a trial by jury, the court "shall confirm such report and order it to be recorded in the proper order book of the court." W. Va. Code. 54-2-10. Ultimately, as with all final orders, the Rules of Appellate Procedure afford Petitioner the right of direct appeal to obtain the desired relief. The fact that, in this case, Petitioner seeks to circumvent the established statutory procedures does not entitle it to the drastic remedy of prohibition. A writ of prohibition is thus wholly unnecessary in this case, and its issuance will likely only create bad precedent and waste scarce judicial resources.

2. *Petitioner will not be damaged or prejudiced in a way that is not correctable on appeal.* Petitioner cannot reasonably claim prejudice from the Circuit Court's ruling that, at this stage of the proceedings, Petitioner is granted right of entry upon deposit of the fair value of the Property as determined by its own appraiser. Even after a final determination of the amount of just compensation is made by report of commissioners or upon verdict of the jury, Petitioner will have the right of direct appeal. Furthermore, because Petitioner may pursue its environmental cost-recovery, if any, from the party actually responsible, no "incurable damage" could possibly arise to Petitioner based on the Circuit Court's Order.

3. *The Order is not clearly erroneous as a matter of law.* Most importantly, issuance of a writ is improper because there is no clear-cut legal error to prohibit. The conclusions of law presented in the Order involved a straightforward application of West Virginia's eminent domain statute in accordance with the constitutional mandate of just compensation. Petitioner's primary

argument on appeal is that merely because Petitioner has authority to determine just compensation, it can affix any valuation it wishes, simply because it says so. For all the reasons discussed below, Petitioner's grand assertion of its power was properly rejected by the Circuit Court. Petitioner has no authority to arbitrarily estimate the Property value, because its authority is subject to both West Virginia and federal law protecting the constitutional right of "just compensation." In ascertaining the value of property, the "guiding principle of just compensation is reimbursement to the owner for the property taken and he is entitled to be put in as good a position pecuniarily as if his property had not been taken" and the "proper measure of the value of the property taken is the owner's loss, not the taker's gain." *State Rd. Comm'n v. Bd. of Park Comm'rs of City of Huntington*, 154 W. Va. 159, 167, 173 S.E.2d 919, 925 (1970).

There is no merit at all to Petitioner's claim that the Circuit Court's non-final Order was "clearly erroneous" for not deducting dollar-for-dollar its *estimated* costs of *potential* remediation from the established fair market value of the Property. As discussed below, not only does valuing property "as contaminated" present intractable appraisal problems, but also, the governing Appraisals Standards Board has expressly warned that it is inappropriate to simply deduct estimated cleanup costs from the market value of the property—the exact approach taken by Petitioner here. See Appraisal Standards Board, *Uniform Standards of Professional Appraisal Practice* (The Appraisal Foundation, 2000) AO-09.

Against this background and without proper authority, Petitioner improperly injected remediation costs into the determination of just compensation and then simply deducted its unproven and highly-contested estimates from the fair value of the Property, despite the fact that doing so was clearly inappropriate in this case and not in accordance with accepted appraisal practice. *Id.*; see also *State by State Road Comm'n v. Prof'l Realty Co.*, 144 W. Va. 652, 658,

110 S.E.2d 616, 620 (1959) (holding that “[o]bviously, under the statute, it is a judicial function . . . to ascertain the compensation for the property taken or damaged.”). When the Circuit Court declined to endorse this approach, Petitioner pursued a writ of prohibition against the lower tribunal, allegedly for exceeding its “legitimate powers.” However, no abuse of the tribunal’s legitimate powers occurred. Instead, the Circuit Court properly interpreted W. Va. Code § 54-2-14a by giving effect to its plain language and its intended purpose. While Petitioner argues that it is the “sole entity charged with responsibility for determining just compensation” (Pet. at 21), Petitioner disregards the fact that the amount ascertained through the exercise of its authority may not be arbitrary, but rather must satisfy the constitutional mandate of “just compensation.” As more fully discussed below, there is no “clear cut” legal error that warrants the extraordinary remedy of prohibition.

4. *The Order is not an oft repeated error and does not manifest persistent disregard for either procedural or substantive law.* It is Petitioner, not Judge Burnside, who seeks to disregard well-established eminent domain law and the constitutional mandates of just compensation and due process. The Circuit Court Order is merely a straightforward application of the initial determination of “fair value” at the right-of-entry stage of a condemnation proceeding. To the extent that Petitioner seeks to attack the Order, it is only because the Order applies the law, not disregards it.

5. *The Order does not raise new and important problems or issues of law of first impression.* Although Petitioner may wish to create a novelty in the law that grants a procedural exception just for it, the reality is that nothing in the Order presents a new or important legal problem or issue of first impression at the right-of-entry stage of an eminent domain proceeding. Although Petitioner’s approach to devalue the fair market value of the Property with a dollar-for-

dollar deduction of estimated remediation costs, if accepted, would violate long-standing just compensation jurisprudence, the Circuit Court properly declined the invitation to do so, and the issue presented here does not raise an important problem of first impression.

Accordingly, in consideration of the *Hoover* factors, Respondent respectfully asks this Court to refuse the Petition because this is clearly *not* a case of usurpation or abuse of legitimate power warranting a writ of prohibition.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent contends that no issue exists in this case to base a finding that the Circuit Court exceeded its legitimate powers and/or abused its discretion, and accordingly, the Petition should be denied. If, however, the Court grants the Petition, Respondent respectfully requests the opportunity to present oral argument in accordance with Rule 20.

ARGUMENT

I. THE EXTRAORDINARY WRIT OF PROHIBITION DOES NOT LIE IN THIS CASE.

A. Legal Standard

By its nature, a writ of prohibition is an “extraordinary” and “drastic” remedy that is reserved for only the most exceptional cases where there is no other adequate remedy at law. It cannot be allowed to short-circuit the ordinary course of litigation or usurp the function of an appeal. It is clear that issuance of a writ is a rare remedy: “Though the power is curative, it is strong medicine and its use must therefore be restricted to the most serious and critical ills. Use of the power is thus not unfettered. On the contrary, its reparative function is to be sparingly employed.” *U.S. v. Boe*, 543 F.2d 151, 158 (CCPA 1976). The decisions by this Court are in accord. *E.g.*, *State ex rel. Williams v. Narwick*, 164 W. Va. 632, 635, 264 S.E.2d 851, 854 (1980) (“Traditionally, the writ of prohibition . . . was not designed to correct errors which are

correctable upon appeal.”). Indeed, this Court has specifically stated that “the writ does not lie to correct ‘mere errors’ and that *it cannot serve as a substitute for appeal*, writ of error or certiorari.” *Id.*, 164 W. Va. at 635, 264 S.E.2d at 854 (emphasis added); *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953).

As this Court has recognized, the standard for issuance of a writ of prohibition is high: “[r]emedies of this nature, being extraordinary in nature, are generally ‘reserved for really extraordinary causes.’” *State ex rel. Brooks v. Zakaib*, 214 W. Va. 253, 259, 588 S.E.2d 418, 424 (2003) (quoting *State ex rel. Suriano v. Gaughan*, 198 W. Va. 339, 345, 480 S.E.2d 548, 554 (1996)). When, as in this case, the petitioner avers “not that the lower tribunal lacks jurisdiction but that the presiding judge has exceeded the bounds of his/her authority, the writ of ‘prohibition [is used] . . . *to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.*’ Syllabus point 1, [in part], *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979) (emphasis added) [superseded by statute on other grounds]” Syl. Pt. 1, in part, *State ex rel. DeFrances v. Bedell*, 191 W. Va. 513, 446 S.E.2d 906 (1994).

This Court has articulated the standard for determining whether to entertain and issue a writ of prohibition in cases not involving an absence of jurisdiction but where only it is claimed that the trial court exceeded its legitimate powers. *See State ex rel. Weirton Med. Ctr.*, Syl. Pts. 1 and 2, 214 W. Va. at 147-48, 587 S.E. 2d at 123-24. The following five factors are considered:

- (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief;

- (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
- (3) whether the lower tribunal's order is clearly erroneous as a matter of law;
- (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and
- (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

While all five *Hoover* factors are considered to be “general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition” should be issued, the third factor, “the existence of clear error,” should be given “substantial weight.” *Id.*; see also *State ex rel. Shelton v. Burnside*, 212 W. Va. 514, 517, 575 S.E.2d 124, 127 (2002). Thus, a writ of prohibition should not issue if there is no “clear-cut error that needs resolution.” See *State ex rel. U.S. Fidelity & Guar. Co. v. Canady*, 194 W. Va. 431, 437, 460 S.E.2d 677, 683 (1995). Furthermore, the “preventative purpose” of a writ of prohibition is best served in cases “where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.” *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W. Va. 358, 365, 508 S.E.2d 75, 82 (1998) (emphasis added). Moreover, “where a statute specifically addresses the particular issue at hand, it is that authority, not these general guidelines, that is controlling.” *Id.*, 199 W. Va. at 21, 483 S.E.2d at 21.

B. Petitioner Is Incorrect that the *Hoover* Test for Issuance of a Writ of Prohibition Is Met in this Case.

Nothing about this case falls within the ambit of prohibition. As reflected in the “particular facts of this case,” Petitioner has had—and continues to have at its disposal—

adequate alternative “remed[ies] in the ordinary course of law” for the relief it seeks; no substantial, clear-cut legal error plainly in contravention of statutory, constitutional or common-law mandate occurred; and here, there is no “preventative function” to be served where the final ascertainment of “just compensation” by report of commissioners or jury trial has not yet occurred, and even if error were to occur, it would be reparable by direct appeal in the ordinary course. *Hoover*, 199 W. Va. at 12, 21, 483 S.E.2d at 12, 21. As discussed below, each factor weighs heavily against the issuance of a writ of prohibition:

1. **Petitioner Has Other Adequate Means to Obtain the Desired Relief, both within the Condemnation Proceeding Itself and by Direct Appeal after Entry of a Final Order or Jury Verdict.**

The first factor for consideration is whether the party seeking the writ has “no other adequate means.” in the ordinary course of litigation or by direct appeal, “to obtain the desired relief.” Syl. Pt. 4, in part, *Hoover*, 199 W. Va. at 12, 483 S.E.2d at 12; *State ex rel. Gordon Mem’l Hosp. v. W. Va. State Bd. of Examiners for Reg. Nurses*, 136 W. Va. 88, 105, 66 S.E.2d 1, 10 (1951) (holding that “[p]rohibition is an extraordinary remedy for use only in cases of necessity . . . and should be invoked only when the relief sought is not available through ordinary channels”). This Court has emphasized that where the challenge goes “only to abuse of legitimate powers, we ‘will review each case on its own particular facts to determine whether *a remedy at law*’ makes a writ of prohibition inappropriate.” *Hoover*, 199 W. Va. at 21, 483 S.E.2d at 21 (quoting *State ex rel. Evans v. Robinson*, 197 W. Va. 482, 475 S.E.2d 858 (1996) (emphasis added).)

In applying the first prong of the *Hoover* test, this Court has expressly held that an extraordinary writ, such as the one sought by Petitioner here, “is not to be used as a substitute for an appeal:”

Under the first prong of syllabus point 4 of *Hoover*, the Court must examine whether the party seeking the writ has any other adequate means, including a direct appeal, to obtain the desired relief. We find that inasmuch as the order of the circuit court is *not a final order*, Owners would have *an opportunity to appeal the decision of the lower court upon entry of a final order*.

State ex rel. Owners Inc. v. McGraw, 233 W. Va. 776, 780, 760 S.E.2d 590, 594 (2014) (emphasis added). Accordingly, when a writ of prohibition challenges a lower court's non-final, interlocutory order that is subject to review through the ordinary course of litigation or by appeal, the petitioner generally has "other adequate means to obtain the desired relief," and the necessity requirement of *Hoover* is not met. *Id.*

Applying these principles here, Petitioner cannot satisfy the first *Hoover* requirement for two basic reasons. First, through the ordinary channels, West Virginia statutory law provides the procedure for ascertaining just compensation and affords adequate opportunity to correct any error within the condemnation proceeding itself. W. Va. Code § 54-2-9 provides for the determination of just compensation by "report of commissioners," as follows:

The commissioners, after viewing the property, if a view is demanded, and hearing any proper evidence which is offered *shall ascertain what will be a just compensation* to the person entitled thereto for so much thereof as is proposed to be taken, or for the interest therein, if less than a fee, and for damage to the residue of the tract beyond all benefits to be derived

W. Va. Code § 54-2-9, in part (emphasis added).

After the report of commissioners is made, W. Va. Code § 54-2-10 allows proceedings to occur on the report, or if timely objection is made, affords both the condemnor and the condemnee the right to have the question of just compensation ascertained by jury trial, as follows:

Within ten days after the report required by the provisions of section nine of this article is returned and filed, either party may

file exceptions thereto, and demand that the question of the compensation, and any damages to be paid, be ascertained by a jury, in which case a jury of twelve freeholders shall be selected and impaneled for the purpose, as juries are selected in civil actions. But no person shall sit on such jury who would not be eligible to serve as a condemnation commissioner in the proceeding. The cause shall be tried as other causes in such court, except that any person who served as a condemnation commissioner in the proceeding shall not be examined as a witness in regard to just compensation or any damages. The jury, ascertaining the damages or compensation to which the owner of the property, or interest or right therein, proposed to be taken is entitled, shall be governed by sections nine and nine-a of this article except that a view of the property proposed to be taken shall not be required

W. Va. Code § 54-2-10, in part (emphasis added).

W. Va. Code § 54-2-11 provides that the procedure by which the commissioners' report may be set aside for "good cause" shown:

If good cause be shown against the report, or if it be defective or erroneous on its face, the court or judge thereof in vacation, as may seem to be proper, *may set it aside or recommit it to the same commissioners for further report*; or other commissioners may be appointed in the manner hereinbefore provided, with or without further notice, as the court or judge may order. If the commissioners report their disagreement, or fail to report in reasonable time, other commissioners may in like manner be appointed. And so again, for time to time, as often as may be necessary.

W. Va. Code § 54-2-11 (emphasis added). If no exceptions are filed within 10 days of the commissioners' report, and neither party demands a trial by jury, the statute provides that the Circuit Court shall enter its final Order confirming the report:

If no exceptions be filed to such report, and neither party demand[s] a trial by jury as aforesaid, *the court, or the judge thereof in vacation, unless good cause be shown against it, or it be defective or erroneous on its face, shall confirm such report, and order it to be recorded in the proper order book of the court.*

Id., in part (emphasis added).

Accordingly, the substantive rights and procedural mechanisms for obtaining the relief Petitioner seeks (here, by way of writ of prohibition) is established with particularity by the governing statute for condemnation proceedings. Judge Burnside explicitly held that the initial determination of fair market value based on the Petitioner's own appraisal would be subject to a final determination, either by the commissioners or a jury to ascertain the amount of just compensation for the Property. (A.R. 004.) By the plain terms of the statute, Petitioner is afforded ample opportunity to present its case to the commissioners and, if need be, to file objections and even demand a jury trial. W. Va. Code §§ 54-2-9, -10, -11. Under these circumstances, Petitioner has full access to a panoply of remedies to obtain the relief it seeks within the condemnation proceeding itself, and as such, this case does not present the scenario contemplated by *Hoover* where the petitioner "has no other adequate remedy" to prohibition. Syl. Pt. 4, in part, *Hoover*, 199 W. Va. at 12, 483 S.E.2d at 12.

Second, even if an error occurs and is not corrected within the condemnation proceeding, Petitioner would still have yet another adequate remedy at its disposal: direct appeal of the jury verdict or the final Order of the Circuit Court confirming the commissioners' report. It is a basic tenant that relief from a final order is available in the ordinary course of the appellate process, and in accordance with the appellate rules. *See Durm v. Heck's, Inc.*, 184 W. Va. 562, 566, 401 S.E.2d 908, 912 (1991); W. Va. R. App. P. 5. The right to an appeal is governed by W. Va. Code § 58-5-1, which provides in relevant part:

A party to a civil action may appeal to the supreme court of appeals from a final judgment of any circuit court or from an order of any circuit court constituting a final judgment as to one or more but fewer than all claims or parties upon an express determination by the circuit court that there is no just reason for delay and upon an express direction for the entry of judgment as to such claims or parties.

W. Va. Code § 58-5-1, in part.

The statutory requirement of a *final* judgment is important. To avoid the hazards of piecemeal litigation and the potential for “litigants to wear down their opponents by repeated expensive appellate proceedings,” this Court has applied W. Va. Code § 58-5-1 and held that “appeals only may be taken from final decisions of a circuit court. A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution of what has been determined.” Syl. Pt. 3, *James MB v. Carolyn M.*, 193 W. Va. 289, n.2, 456 S.E.2d 16 (1995).

Here, because the Circuit Court’s ruling that Petitioner seeks to “prohibit” is only a preliminary determination of the Property’s market value (in the amount determined by Petitioner’s appraisal), it neither terminates this litigation as to any of the parties nor is it “final,” but instead is “subject to revision at any time before the entry of judgment adjudicating all of the claims and the rights and liabilities of all of the parties.” W. Va. R. Civ. P. 54. Perhaps because Petitioner has no immediate right to appeal, it has proceeded instead with the extraordinary writ of prohibition. By doing so, Petitioner asks this Court to halt the proceedings midstream so that it can bypass the statutory process for ascertaining the amount of just compensation, i.e., report of commissioners, jury verdict, and if necessary, direct appeal. Rather than pursuing relief in the ordinary channels, Petitioner attempts to short-circuit the established statutory procedures by seeking a premature and unnecessary writ of prohibition. At this stage, the Petition should be rejected because it is an impermissible “substitute for appeal,” whereby Petitioner seeks to “prohibit” a non-final, interlocutory order that could not be appealed directly. West Virginia law does not permit the writ of prohibition to usurp the function of an appeal, and thus, the Petition should be denied. *See Hinkle*, 164 W. Va. at 119, 262 S.E.2d at 748 (holding that “[w]henver

the Court believes that a prohibition petition is interposed for the purpose of delay or to confuse and confound the legitimate workings of the criminal or civil process in the lower courts, a rule will be denied”).

If the Court were to entertain this petition for prohibition, it would effectively extend to Petitioner the privilege of an interlocutory appeal and possibly even provide a mechanism for future parties to bypass the proper statutory procedures and appellate procedures in condemnation cases. On balance, the mere fact that Petitioner desires immediate review does not entitle it to the drastic remedy of a writ of prohibition against the Circuit Court. *State ex rel. Tucker Co. Solid Waste Auth. v. W. Va. Div. of Labor*, 222 W. Va. 588, 593, 668 S.E.2d 217, 222 (2008) (holding that “[p]rohibition . . . against judges [is a] drastic and extraordinary remed[y],” and as such, it is “reserved for really extraordinary causes”). On the record presented, Petitioner has ample opportunity for the relief it seeks, both through the ordinary course of the condemnation proceeding and, after the entry of a final order, by appeal. Accordingly, Petitioner cannot establish “necessity,” and the first factor weighs decidedly against the issuance of a writ in this case.

2. **Petitioner Will Not Be Damaged or Prejudiced In a Way that Is Not Correctable on Appeal, and Mere Delay until a Determination Is Ripe for Appeal Is Not “Prejudice.”**

For similar reasons, the second factor, i.e., whether Petitioner “will be damaged or prejudiced in a way that is not correctable on appeal,” is easily disposed of. Syl. Pt. 4, in part, *Hoover*, 199 W. Va. at 12, 483 S.E.2d at 12. In applying the second *Hoover* factor, the *Owners* Court found no indication that error in the lower court’s interlocutory rulings would be irreparable on appeal, and held that “[u]nder prong two of *Hoover*, [the petitioner] is not prejudiced by waiting to appeal a final order.” *State ex rel. Owners Inc.*, 233 W. Va. at 780, 760

S.E.2d at 594. Thus, mere delay resulting from awaiting a final decision and appeal does not constitute “prejudice” justifying a writ of prohibition.

The same reasoning applies here. Not only is Petitioner “not prejudiced” by waiting for direct appeal, but in this case, no delay will result because Petitioner is also afforded rights by the governing statute (as discussed above), which provide that *within 10 days* after the report of commissioners is filed, objections may be made or a trial by jury demanded. In other words, the relief Petitioner seeks is readily available in the condemnation proceeding itself. Because the ultimate determination of just compensation will be immediately subject to review and challenge in the lower tribunal, Petitioner cannot reasonably claim prejudice from the Circuit Court’s non-final ruling that, at this early stage of the proceedings, the fair value of the Property is the amount determined *by its own appraiser*. (AR 003-04.)⁵ As clearly stated in the Order, the “ultimate award of just compensation” will be ascertained in accordance with statute, in the ordinary course of the condemnation proceeding. (AR 004.) Accordingly, no “incurable damage” could possibly arise to Petitioner due to the Circuit Court’s non-final Order, and mere delay until a final determination is ripe for appeal is not “prejudice,” and thus, the second factor also clearly militates against the issuance of a writ of prohibition.

3. The Circuit Court’s Order Is Not “Clearly Erroneous” as a Matter of Law.

With regard to the third factor, the absence of any “clear cut” legal error is fatal to Petitioner’s writ. *See* Syl. Pt. 1, *Hinkle*, 164 W. Va. at 112, 262 S.E.2d at 744. As this Court has

⁵ In its Order, the Circuit Court found that “Petitioner’s appraiser, Kent Kesecker, calculated fair market value of the property to be taken, along with damages to the residue, to be \$1,012,500 The Defendant has obtained an appraisal which establishes the fair market value of the entirety of the property before any taking at \$1,294,100.” The Circuit Court concluded that “[a]t this stage of the proceedings, the Court finds that the report of Petitioner’s appraiser, Kent Kesecker, represents the Petitioner’s estimate of ‘fair value’ of the property to be taken and damages to the residue at \$1,012,500.” (AR 003-04.)

consistently held, the third and most significant factor is whether the circuit court's order is clearly erroneous as a matter of law. This Court has defined “clearly erroneous” as follows:

A finding is “clearly erroneous” when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court’s account of the evidence is plausible in light of the record viewed in its entirety.

Syl. pt. 1, in part, *In the interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996); *State ex rel. Owners Ins. Co.*, 233 W. Va. at 780-81, 760 S.E.2d at 594-95.

When this Court examines a circuit court’s order, “[t]he general rule is that there is a presumption of regularity of court proceedings; it remains until the contrary appears and the burden is on the person who alleges such irregularity to affirmatively show it.” Syl. Pt. 1, *Evans v. Robinson*, 197 W. Va. 482, 483, 475 S.E.2d 858, 859 (1996). This general principle “is particularly true when a party, who has failed to appeal a final order, brings an extraordinary writ to challenge that final order, given that on appeal “[a]n appellant must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment.” *Id.* 197 W. Va. at 486, 475 S.E.2d at 862 (citing Syl. Pt. 5, *Morgan v. Price*, 151 W. Va. 158, 150 S.E.2d 897 (1966)). As discussed below, Petitioner fails to carry its burden to demonstrate that the Circuit Court’s Order is “clearly erroneous” as a matter of law.

a. The Circuit Court’s Order Comports with the “Just Compensation” Mandate of the Governing Statutes and Constitutional Law.

Petitioner’s principal argument is that the Circuit Court’s decision was clearly wrong in its application of W. Va. Code § 54-2-14a because, in essence, the Circuit Court did not “defer[]

to the near-absolute authority of the Petitioner to establish fair value, also known as just compensation.” (Pet. at 19.) Petitioner further argues that “the Circuit Court impermissibly substituted its judgment for that of the Petitioner and failed to perform its mandatory, non-discretionary duty to grant the Petitioner right of entry on the subject property.” (*Id.*) This latter argument is easily disposed of by the plain terms of the Order, which in fact, *grant* Petitioner right-of-entry access to the Property, immediately upon its deposit of the funds fairly representing the Property’s market value as estimated by Petitioner’s own appraiser. (AR 005.) For the reasons discussed below, both of Petitioner’s arguments are fundamentally wrong—on the law and facts—because the Circuit Court properly interpreted W. Va. Code § 54-2-14a by giving effect to its plain language and intended purpose, for each of the following reasons.

i. Petitioner has no authority to arbitrarily estimate the Property value, because Petitioner’s power is subject to state and federal law protecting the constitutional right of “just compensation.”

Petitioner takes too simplistic an approach. According to Petitioner, it “possesses exclusive authority to determine just compensation,” and so it should be able to affix any value of “just compensation” it wishes, simply because it says so. (Pet. at 19.) Petitioner’s grand assertion of its power is defeated by the plain terms of the governing West Virginia and federal statutes, as well as the entire body of “just compensation” jurisprudence. After all, the Fifth Amendment is a guaranty to the owner, not to the state.

Under West Virginia law, “just” compensation means “the fair market value as of the date of the taking determined by what a willing buyer and a willing seller, neither being under any compulsion to act, would agree to,” but fair market value “is *not* an absolute standard or an exclusive method of valuation.” *State Rd. Comm’n*, 154 W. Va. at 167, 173 S.E.2d at 925. This Court has long recognized that the “guiding principle of just compensation is reimbursement to

the owner for the property taken and he is entitled to be put in as good a position pecuniarily as if his property had not been taken. The rule is well established that in an eminent domain proceeding the proper measure of the value of the property taken is *the owner's loss, not the taker's gain.*" *Id.* (internal citations omitted) (emphasis added). The question of what is "just" compensation is thus an equitable one rather than a strictly legal or technical question, with the paramount concern being that the condemnee shall be put in as good a condition as had the taking not occurred. *Id.* 154 W. Va. at 166, 173 S.E.2d at 924 (holding that "the primary purpose of an eminent domain proceeding is to determine the amount which the condemnor shall be required to pay the defendant as just compensation for the property taken"); *State by State Rd. Comm'n* 144 W. Va. at 658, 110 S.E.2d at 620 (holding that "[o]bviously, under the statute, it is a judicial function . . . to ascertain the compensation for the property taken or damaged.").

In ascertaining the amount of just compensation, the United States Supreme Court has held that "full indemnity" is the principle that satisfies the constitutional mandate of "just compensation," and that "market value" is merely a "working rule." The Fifth Amendment "conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs." *U.S. v. General Motors Corp.*, 323 U.S. 373, 377 (1945). "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity.'" *U.S. v. Virginia Elec. & Power Co.*, 365 U.S. 624, 631 (1961). This means that the owner must be fully indemnified for his loss, and thus, the touchstone of the Fifth Amendment is not market value, but rather it is the principles of fairness and indemnity. *U.S. v. 564.54 Acres of Land*, 441 U.S. 506, 510-11 (1979). This is the standard against which all methods of valuation must be measured, and "market value" is not the only measuring stick.

The United States Supreme Court precedents are clear that, in some cases, the “working rule” of market value is inappropriate, such as where it “would be impracticable” or where “an award of market value would diverge so substantially from the indemnity principle as to violate the Fifth Amendment.” *Id.* at 513. Even when market value is used, the Fifth Amendment’s ultimate end of “fairness” may mean the exclusion of elements that technically affect market value:

[Respondents] . . . insist that no element which goes to make up value . . . is to be discarded or eliminated. We think the proposition is too broadly stated [S]trict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must in fairness be eliminated in a condemnation case . . .

U.S. v. Miller, 317 U.S. 369, 374-75 (1943).

The Circuit Court gave proper effect to these fundamental principles of law in its common-sense application of the governing statutes. By their plain terms, the state and federal eminent domain laws require the condemning agency to establish not an *arbitrary* value for the property, but rather to appraise the property and establish its “*fair* value.” W. Va. Code § 54-2-14a (emphasis added). The West Virginia statute provides, in part, that:

Before entry, taking possession, appropriation, or use, the applicant shall pay into court such sum as it shall estimate to be *the fair value of the property*, or estate, right, or interest therein, sought to be condemned, including, where applicable, the damages, if any, to the residue beyond the benefits, if any, to such residue, by reason of the taking.

W. Va. Code § 54-2-14a (emphasis added). As Petitioner admits, this Project is a federally-funded construction project subject to the Uniform Assistance and Real Property Acquisition Policies Act (42 U.S.C.A. § 4601 *et. seq.*), and Petitioner must also comply with the federal real

property acquisition policies. (Pet. at 20.) The federal policy with respect to the fair appraisal and valuation of property is clear:

(2) *Real property shall be appraised* before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property,

(3) Before the initiation of negotiations for real property, the [condemnor] *shall establish an amount which he believes to be just compensation* thereof and shall make a prompt offer to acquire the property for the full amount so established. *In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property*

(4) No owner shall be required to surrender possession of real property before the [condemnor] . . . deposits with the court . . . for the benefit of the owner, *an amount not less than the agency's approved appraisal of the fair market value of such property*, or the amount of the award of compensation in the condemnation proceeding for such property.

42 U.S.C.A. § 4651, in part (emphasis added); *accord* 49 C.F.R. § 24.102(d) (“Establishment and offer of just compensation. Before the initiation of negotiations, the Agency shall establish an amount which it believes is just compensation for the real property. *The amount shall not be less than the approved appraisal of the fair market value of the property*”) (emphasis added). Accordingly, the governing state and federal statutes require the condemning agency to appraise the property and establish its “fair” value, in an “amount not less than the agency’s approved appraisal.” 42 U.S.C.A. § 4651.

Furthermore, given the vital importance of the property appraisal in ascertaining just compensation, federal law articulates specific “criteria for appraisals.” These criteria place the burden on Petitioner to assure that its appraisal “reflect[s] established and commonly accepted Federal and federally-assisted program appraisal practice, and as a minimum, complies with the definition of appraisal in § 24.2(a)(3) and five additional requirements,” which include among

others (i) “*an analysis of highest and best use.*” and (ii) “[*all relevant and reliable approaches to value consistent with established Federal and federally-assisted program appraisal practices.*” 49 C.F.R. § 24.103, in part (emphasis added). In addition, 49 C.F.R. § 24.103 provides that the requirements “are intended to be consistent with the Uniform Standards of Professional Appraisal Practice (USPAP).” As discussed below, the disfavored valuation approach taken by Petitioner is neither “relevant [nor] reliable” and is inconsistent with the uniform appraisal practices, which do not permit a dollar-for-dollar deduction of estimated remediation costs, as Petitioner has done here. *Id.*

- ii. **The Circuit Court properly rejected Petitioner’s method of deducting dollar-for-dollar its estimated cost of cleanup from the fair market value of the Property, which method is improper even if environmental contamination is considered in the “just compensation” analysis.**

At the outset, it merits attention that the West Virginia eminent domain statute is completely silent as to the prospect of environmental contamination and its effect on the condemnation process. Similarly, this Court has never held that a condemnor’s *estimated* cost of *estimated* remediation against an innocent landowner *who is not otherwise liable* for the cleanup must (or, for that matter, should ever) be automatically deducted from the established fair market value of the property to be taken, and Petitioner has presented no such authority. Several errors in Petitioner’s argument, i.e., that the Circuit Court’s non-final Order was “clearly erroneous” for not deducting those costs, are readily apparent.

To begin, valuing property “as contaminated” presents intractable appraisal problems. At a minimum, such a valuation would violate the specific “criteria for appraisals” by injecting sheer speculation into the just compensation determination. See Jack R. Sperber, *A Clean Look at Dirty Property: Emerging Issues and Common Problems when Valuing Contaminated*

Properties in Eminent Domain Proceedings, SS035 ALI-ABA 705, 720 (Feb. 2011) (“Using the condemnor’s remediation costs will often violate multiple valuation rules, including the project influence rule, highest and best use, market value, and date of value considerations.”). Also, the extent of contamination is usually not known until the cleanup is completed. The difficulties of appraising environmental contamination issues in the context of condemnation are widely recognized. “[E]ven the experts find it difficult to appraise contamination . . . [s]ince the conditions and circumstances of each case are unique and environmental testing is fallible.” 7A Nichols on Eminent Domain (Dec. 2001) § 13B.04(1)(a). “Estimates of the value of contaminated property are necessarily speculative.” *Id.* at 9. Not only is the process of adequately identifying and analyzing contamination and planning for the cleanup time-consuming (which defeats the speed and efficiency that are the hallmark of eminent domain proceedings), but comparable properties that are comparably contaminated are unlikely to be available, and here, Petitioner has identified none. *Id.* at § 13.10.

In fact, these issues are so difficult that the Appraisals Standards Board has issued an advisory opinion warning appraisers not to assume competency they might not have in appraising contaminated property and *warning them that it is inappropriate to simply deduct estimated cleanup costs from the market value of the property* (the exact approach taken by Petitioner here). See Appraisal Standards Board, *Uniform Standards of Professional Appraisal Practice* (The Appraisal Foundation, 2000) AO-09. Courts and commentators alike frequently observe that the “dollar-for-dollar discounting” approach to valuing contaminated property has only the “advantage of simplicity, [and] has little else to commend it. *And it rarely captures the property’s true value.*” See Sperber, SS035 ALI-ABA at 719 (emphasis added).

As applied here, the method is especially inappropriate because, absent the taking, no remediation *at all* was likely to be required as the 20-year monitoring period was nearly complete. Furthermore, as discussed in greater detail below, even assuming *arguendo* that remediation costs would actually be incurred in the private marketplace, none of the liability is MCNB's, a lender who acquired the Property by foreclosure from an owner *subsequent* to the "party responsible," i.e., the "owner" or "operator" of the underground storage tanks at the time of the confirmed release. In this case, deducting cleanup costs that are not the responsibility of MCNB (especially where, as here, a solvent responsible party is known) diverges so substantially from the basic requirement that the valuation method used actually be relevant, reliable, and consistent with established federal appraisal practices as to violate the "just compensation" principle.

Two additional factors, which also arise when remediation costs are injected into condemnation proceedings, are even more problematic. First, the type (and therefore cost) of environmental remediation depends on the *condemning agency's intended future use of the property*, and thus, the actual remediation needed (if at all) can vastly differ depending on the urgency of the construction project and the nature of the *condemnor's use*, not the landowner's or even a third-party purchaser in the marketplace. This analysis deviates from the relevant and reliable valuation methods and criteria established by law, because in the condemnation setting compensation is not based upon the value to the government for its intended use; the price set is based upon what the private market would use the property for.

The relevant question for valuation purposes in a condemnation case is as follows: as of the date of value *and without any consideration of the project for which the property is being condemned*, how would the *private marketplace* have treated the environmental issues in setting

a purchase price. *See* Sperber, *supra*, SS035 ALI-ABA at 722 (emphasis added).⁶ The potential for “a real disconnect between the type and measure of remediation costs necessary before and after a taking” is widely-recognized, as one authority aptly illustrates with the following analogous scenario:

For example, a landowner using an old gas station site with historical hydrocarbon contamination may incur only minor remediation costs associated with bioremediation and ground water monitoring that have little effect on the property’s use or the income stream generated from it. Remediation expenses might even be reimbursed from a government fund associated with leaking underground storage tanks. When the condemnor acquires the property for a below grade highway underpass project, however, it encounters heavily contaminated soil. Because of the project’s construction timeliness, the condemnor carts away several hundred truck loads of dirt in a short period, treating it all as hazardous material and incurring several million dollars in cleanup costs. These are real costs, but who should bear the brunt of them? Should the entire cost be reduced from the just compensation owed for the property? As will be discussed below, *a proper application of the ‘project influence rule’ suggests doing so would be improper in a condemnation case.*

Id. at 711 (emphasis added).

Here too, if Petitioner’s approach were followed by the Circuit Court, the valuation of the Property would impermissibly reflect the value of the property to the State, but not the *loss to MCNB*, as law requires. Further, it is undisputed that the estimated remediation costs impermissibly reflect *the Petitioner’s use* related to *this Project*. At the hearing, counsel for Petitioner admitted that “these exact numbers [for remediation] . . . arise from an estimate that

⁶ In this context, because condemnation is a “forced sale,” condemnation “deprives the owner of opportunities otherwise available to it in the private market to control environmental risk and maximize value. Examples of such techniques include: 1) offering the property for sale when market conditions are best (due to favorable regulatory regimes, availability of financing, market demand for the property, industry insurance products, etc.), 2) selling only to certain users to lessen or eliminate remediation costs based upon that use; 3) conducting long term remediation in a manner allowing existing uses to continue and reducing cost; and 4) entering into indemnity agreements, purchasing cost cap insurance, or using other industry products to control risk. All of these enter into a normal transaction between sophisticated parties, and may result in little or no reduction in the property’s fair market value.” *Id.*

was done by an expert—a consultant retained by the Division of Highways—*for this specific project.*” (Hearing Tr. at 9 (emphasis added).) In other words, but for the Project, there is no indication at all that the \$595,400 estimate for remediation would be actually incurred by anyone in the private marketplace.

Simply put, MCNB has no liability for the environmental remediation at issue, and absent Petitioner’s unjust taking, MCNB would never have incurred any of the alleged remediation costs. Its loss is clear. As reflected in the record below, on or about January 2007, MCNB loaned \$1,150,000 to Chrite Properties, 1, LLC (“borrower”), for its purchase of the Property from H.C. Lewis. MCNB’s loan to its borrower was based on a standard 80% loan-to-value ratio. Eventually, after borrower defaulted on the Loan, MCNB foreclosed on the Property and remains the current Property owner. (A.R. 105.) Any valuation that strips property owners of the Fifth Amendment’s protection is not consistent with the constitutional mandate of “just compensation,” and is inconsistent with the federal “criteria for appraisals,” as discussed above. As such, the Circuit Court was correct to reject the Petitioner’s discredited method of dollar-for-dollar deduction, which is based exclusively on Petitioner’s intended use, not the “highest and best use” of the Property in the private market. On these grounds alone, the Petition should be rejected.

b. The Circuit Court’s Order Comports with Constitutional “Due Process” where MCNB Has No Liability for the Environmental Cleanup and Is Not Afforded Its Defenses in the Condemnation Proceeding.

Perhaps the most troubling aspect that arises when remediation costs are injected into just compensation valuation is when, as here, the current owner is not the party responsible for the contamination costs under the environmental laws. Basic logic dictates that it is fundamentally unfair to force an innocent landowner to pay the tab for cleaning up someone else’s mess, while

at the same time denying him access to the substantive defenses and third-party procedural mechanisms that are afforded in every environmental cost-recovery action. In short, deducting remediation costs against an innocent landowner, like MCNB, is not only inconsistent with the traditional notion that the landowner be placed in as good a condition as it would have been had the taking not occurred, but also it robs MCNB of its procedural due process rights:

On the contrary, dealing with environmental issues in the cost-recovery proceeding makes sense. Such a proceeding allows for third-party claims against insurers, title companies, and prior owners, none of whom have a place at the condemnation table. More importantly, the cost-recovery proceeding makes available to the condemnee Spill Act defenses (for example, war, sabotage, Act of God, or a combination thereof, and non-responsibility in fact) that are not relevant to an Eminent Domain proceeding. Admission of environmental issues into a condemnation trial circumvents those statutory defenses as well as the possible joinder of third parties

Housing Auth. of City of New Brunswick v. Suydam Investors, L.L.C., 177 N.J. 2, 24, 826 A.2d 673, 687 (N.J. 2003).

The inequities are equally apparent here. Petitioner cannot show a “clear cut legal error” in the Circuit Court’s finding that its own appraisal of the Property’s fair market value, without an arbitrary and speculative deduction for liabilities MNCB does not owe, is erroneous as a matter of law at the right-of-entry stage of the proceedings. *See* Syl. Pt. 1, *Hinkle*, 164 W. Va. at 112, 262 S.E.2d at 744; *see also State ex rel. Owners Ins. Co.*, 233 W. Va. at 780-81, 760 S.E.2d at 594-95. As this Court held in *Owners*, for prohibition to issue, the Circuit Court’s resolution of the issues must be such as “to leave this Court with a definite and firm conviction that the lower court made a mistake” of such nature that the “matter cannot proceed to a resolution before the circuit court and then be part of an appeal by one of the parties.” *Id.* Because the determinations by the Circuit Court were neither erroneous nor final, the issues presented, if any,

“may be further developed in the circuit court and subsequently appealed,” and thus, there are no issues presented that are ripe for extraordinary remedy.

c. The Circuit Court’s Order Does Not Place Public Funds at “Unnecessary Risk.”

Petitioner’s final argument, that the Circuit Court’s Order “disregards conflicts in state law regarding the Petitioner’s right to recover an excess deposit and places public funds at unnecessary risk” (Pet. at 23) creates confusion where none exists and perceives a “risk” that could not actually exist in this case. This is so for two reasons.

First, Petitioner itself resolves the professed “state law conflict” in favor of W. Va. Code § 54-2-14a, which is exactly the same result as the Circuit Court’s finding. After raising, and discussing at length, a potential conflict with W. Va. Code § 54-3-4, Petitioner concluded that “[u]nder the rules of statutory construction, WV Code 54-2-14a is given controlling effect.” (Pet. at 26 (citing Syl. Pt. 2, *State ex. rel. WV DHHR v. WV PERS*, 393 S.E.2d 677, 183 W. Va. 39 (1990) (“As a general rule of statutory construction, if several statutory provisions cannot be harmonized, controlling effect must be given to the last enactment of the Legislature.”)). As Petitioner notes, W. Va. Code § 54-2-14a was “reenacted in 1981 [and] [t]he reenactment *retained the language authorizing recovery of an excess deposit* without amendment.” (Pet. at 26 (citing Acts of Legislature, Reg. Sess. 1981, Ch. 109.)) Accordingly, the Circuit Court was correct when it concluded that after the final determination of “just compensation” is made by the commissioners or jury, the statute provides that if Petitioner paid more than the amount allowed, “the excess shall be repaid” to Petitioner. W. Va. Code § 54-2-14a.

Second, this Court should not lose sight of another safeguard that Petitioner has at its disposal to protect the “public funds” (i.e., its \$595,400 estimate to remediate the Property for its own use), which is following the proper procedures to recover any necessary remediation, if any,

from the known, solvent responsible party. The state and federal environmental laws are suited to handle precisely that task; a condemnation proceeding is not (as indicated by the fact that the third-party defendants MCNB brought in with respect to the environmental liability, Exxon and H.C. Lewis, were dismissed due to the limited scope of the condemnation proceeding).

Accordingly, given the statutory relief available to Petitioner in the condemnation proceeding and the additional protections afforded by direct appeal, as well as the agency's ability to collect remediation costs from the known, solvent responsible party, there is no credible basis at all for Petitioner's claim that public funds are "placed at unnecessary risk." Petitioner has thus failed to demonstrate any "clear cut" legal error that "may be resolved independently of any disputed facts," and for this reason the third and "most significant" of the *Hoover* factors also requires that the Petition be denied.

4. **The Circuit Court's Order Is Not an Often-Repeated Error and Does Not Manifest Persistent Disregard for Either Procedural or Substantive Law.**

The inapplicability of the fourth prong of the *Hoover* test, i.e., whether the lower court's order is an often-repeated error or that it manifests persistent disregard for established procedure or substantive law, also supports denial of Petitioner's writ in this case. Considering this factor, this Court has previously found that a writ of prohibition arising from an interlocutory, non-final order is not the proper mechanism for this Court to decide, or even clarify, existing law:

Owners argues that this case presents an opportunity to clarify our holding in *Marlin* and to provide guidance to circuit courts on the issue and legal effect of certificates of insurance. We decline to address those questions in this proceeding prior to an appeal of the final order of the circuit court.

State ex rel. Owners Ins. Co., 233 W. Va. at 781, 760 S.E.2d at 595. The Court then concluded that "it is premature to issue the requested writ of prohibition based upon the interlocutory order

herein. The matters raised by Owners in this petition should be resolved in the lower court. An appeal may then be taken from any final order.” *Id.*

Here too, considering the entire record presented, the Circuit Court’s Order simply does not display the type of “persistent error or blatant disregard for [West Virginia] jurisprudence and procedure” that is sought to be addressed by the fourth *Hoover* factor. *Id.* Instead, Judge Burnside’s ruling is a straightforward application of the governing statute for right of entry prior to the final determination of the amount of just compensation in an eminent domain proceeding. As discussed above, its ruling (unlike Petitioner’s position) comports with the constitutional mandate of “just compensation.” The Order itself expressly contemplates that the determination is not final, but rather that further proceedings to ascertain the amount of just compensation will occur in accordance with the statute. (AR 004.) The Order further notes that although MCNB presented its appraisal of the fair market value of the Property in the amount of \$1,294,100, the Court accepted the Petitioner’s appraisal in the amount of \$ 1,012,500. (*Id.*) As such, the Petition fails to present any often-repeated error or persistent disregard for law by the Circuit Court, of which there was none, that requires the immediate issuance of a writ of prohibition by this Court. Accordingly, the fourth factor cannot support the drastic remedy Petitioner seeks.

5. The Circuit Court’s Order Does Not Raise New and Important Problems or Issues of Law of First Impression.

Considering the fifth factor, whether the Circuit Court’s Order raises new or important problems or issues of law of first impression, it is clear that there are no new or novel theories proffered by Petitioner. Fairly considered, the issue presented to Judge Burnside is about whether the fair value of the Property taken from MCNB by Petitioner for public use should be determined under the plain terms of the West Virginia eminent domain statute and in accordance with the West Virginia and United States Constitutions. In other words, this is a typical just

compensation case at the right-of-entry stage. There are sufficient substantive and procedural protections accorded to the Petitioner and that Petitioner should be required to follow in the ordinary course. Accordingly, Respondents respectfully ask this Court to refuse the Petition because this is clearly not a case of usurpation or abuse of power. The extraordinary remedy of prohibition does not lie in this case.

CONCLUSION

For all the foregoing reasons, and based upon the record, Respondents respectfully request that this Court deny the Petition for Writ of Prohibition in its entirety.

Respectfully submitted,

MCNB BANK AND TRUST CO.

By Counsel



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IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

**ON A PETITION FOR A WRIT OF PROHIBITION
FROM AN ORDER OF THE CIRCUIT COURT OF RALEIGH COUNTY
CIVIL ACTION NO. 14-C-506**

**STATE OF WEST VIRGINIA, ex rel.
DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS, a state agency,**

Petitioner,

v.

No. 15-1112

**HONORABLE ROBERT A. BURNSIDE, Jr.,
Judge, Circuit Court of Raleigh County, West Virginia,
MCNB BANK AND TRUST CO., a West Virginia
corporation, and the Sheriff of Raleigh County,
West Virginia,**

Respondents.

CERTIFICATE OF SERVICE

I, David Allen Barnette, counsel for Respondent, MCNB Bank and Trust Co., hereby certify that on this 21st day December, 2015, I served via First Class Mail a true and exact copy of the foregoing *Respondent MCNB Bank and Trust Co.'s Brief in Opposition to Petition for Writ of Prohibition* to Petitioner and parties of record at the following addresses:

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