

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

DANNY MEEKS et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 740-CL-12001705-00
)	
VIRGINIA DEPARTMENT OF)	
TRANSPORTATION et al.,)	
)	
Defendants.)	

PLAINTIFFS’ OPPOSITION TO MOTION TO STAY

On May 14, 2013, Defendants filed a motion for a stay pending appeal of this Court’s May 1, 2013, ruling. Plaintiffs oppose that motion for reasons stated in this memorandum.

PRELIMINARY STATEMENT

Defendants have failed to establish grounds for the grant of a stay of the Court’s ruling pending appeal. Before applying the four-factor test, which the parties agree is appropriate in these circumstances, the Court must determine whether the stay would prevent or reduce the injuries that Defendants claim would otherwise be experienced. There has been no demonstration of such a result. Under the four-factor test, they have not established that there is a strong likelihood of success on appeal on the case-dispositive issue of the unconstitutional delegation of the power to set toll rates without adequate standards or guidelines. Defendants address the likelihood of success only on the other aspect of the Court’s ruling, which is the toll-is-a-tax issue. To prevail on

appeal, Defendants must succeed on both issues. Defendants also mischaracterize the public interest here and assume erroneously that their interests and the public interest are coterminous. The true public interest is that of the people of the Commonwealth, not that of a state agency or even the General Assembly. The harm that Defendants claim they will experience without a stay is principally a monetary injury, which is identical in amount to the monetary harm that the users of the Project would experience if a stay is granted. Financial injury alone is not grounds for a stay, particularly when the injuries are of their own making. Defendants argue further that, without a stay, this Court's ruling will cast a shadow over the DT/MT/MLK Extension Project and other Public-Private Transportation Act projects. A stay would not eliminate that shadow. Only a reversal on appeal of this Court's ruling in all of its aspects would eliminate the shadow, but Plaintiffs demonstrate below that there is no reasonable prospect that this Court's invalidation of the tolls in this case and the statutory provision authorizing those tolls would be set aside by the Virginia Supreme Court.

STANDARD FOR DECIDING A MOTION FOR A STAY

Plaintiffs accept Defendants' statement of the legal standard applicable to deciding whether to grant or deny a motion for a stay pending appeal. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). More recently, the United States Supreme Court has stated: "A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 427 (2009). There is a precondition to the grant

of a stay that is not addressed in the four-factor test: applicants first must show that the stay will prevent or minimize the injuries they claim would otherwise occur.

ARGUMENT

There is ample time for the appeal to be resolved before February 1, 2104, when tolls are scheduled to be imposed. Defendants have failed to demonstrate that the harm they assert will not be experienced if a stay is granted. This alone is grounds to deny their motion.

Applying the four factors that must be considered in acting on Defendants' motion for a stay pending appeal, the Court should deny the motion. Defendants have not shown a strong likelihood of success on appeal. The plain language of the Public-Private Transportation Act (PPTA) and other statutes cited by Defendants in briefs and at the May 1, 2013, hearing establishes no limitation on the amount of the toll rate that a responsible public entity and a private entity can set by agreement. The pertinent statutory provision, Va. Code § 56-566(B), contains no adequate standard to guide the public and private parties as they negotiate the amount of the toll that will be imposed as provided in a comprehensive agreement between the parties. No other state statute supplies such a limitation or adequate standards to guide the Department of Transportation (VDOT) as it establishes the maximum toll rate. Defendants ignore this aspect of the Court's ruling and focus on that part of the ruling that the toll in this case constitutes a tax. It is important to note that the tolls set by the Comprehensive Agreement would be invalid if either aspect of the Court's ruling were to be upheld on

appeal. Defendants must demonstrate a substantial or strong likelihood that it will prevail on both aspects. *See Hilton*, 481 U.S. at 778 (“a substantial likelihood”); *United States v. Fourteen Various Firearms*, 897 F.Supp. 271, 273 (E.D. Va. 1995)(“a strong likelihood”).

The harm that Defendants contend they will experience is principally monetary and of their own making, which is not grounds for a stay. *Long v. Robinson*, 432 F.2d 977, 980-81 (4th Cir. 1970). Any financial harm is the consequence of the terms of the Comprehensive Agreement that the Defendants negotiated. Defendants also point to the harm that they assert the Commonwealth will experience in its sovereign capacity, but they fail in that connection to address what the people will suffer. Under the Virginia Constitution, the people of Virginia are the true sovereign, not VDOT or the Virginia General Assembly. Va. Const., art. I, § 2. Where the law and the record clearly establish that public officials have violated the Constitution of Virginia, the overriding interest is the people’s interest in assuring compliance with and respect for the Constitution because it is the compact under which the people have consented to be governed.

A. Likelihood of Success

Defendants have no reasonable prospect of success on appeal on the issue of whether the PPTA delegates power to set toll rates without adequate standards in violation of Article I, § 6 and Article IV, § 1 of the Constitution. If that part of this Court’s ruling is upheld by the Supreme Court, the tolls will be invalid regardless of the outcome of the appeal on the toll-is-a-tax issue. But Defendants ignore the Court’s

standardless delegation ruling in their memorandum in support of the motion for a stay. They focus exclusively on the toll-is-a-tax ruling as if that were the sole basis for the Court's invalidation of the tolls in this case.

The toll-is-a-tax issue is an issue of first impression, but the standardless delegation issue is not. The law in Virginia is well-established and the parties agree that a delegation of power without adequate standards to guide its exercise is unconstitutional. *Ames v. Town of Painter*, 239 Va. 343, 349, 389 S.E.2d 702, 703 (1990); *Chapel v. Com.*, 197 Va. 406, 410, 89 S.E.2d 337, 343 (1955); *Thompson v. Smith*, 155 Va. 367, 381, 154 S.E. 579, 384 (1930). There must be adequate standards to guide the exercise of the specific power delegated, which in this case is the power to set toll rates. There are no statutory restrictions, policies or standards to guide negotiators of comprehensive agreements under the PPTA regarding the amount of tolls. In briefs and at the May 1, 2013, hearing, Defendants relied on policies established in the PPTA that have nothing to do with the establishment of the amount of tolls or user fees, but instead deal with selecting and approving the construction project. Va. Code § 56-560. Counsel for each Defendant was asked to point the Court to any limitation or guidance provided by the General Assembly to restrict the exercise of delegated discretion in fixing the *amount* of the toll. Tr. at 134. Neither was able to do so. Tr. at 134-142 (attached as Exhibit 1). The other statutes cited by Defendants, Va. Code §§ 33.1-12, 33.1-223.2:12, 33.1-269(5) and 56-560 contain no standards regarding the amount of the toll.

In light of the well-established law on this issue and Defendants' inability to show any standard to control their power to set the amount of toll rates, the Court's ruling on the standardless delegation issue is unassailable. There is simply no reasonable basis for a conclusion that this ruling would be reversed on appeal, much less a "strong showing" that the appeal is likely to be successful. *United States v. Fourteen Various Firearms*, 897 F.Supp. at 273.

B. Irreparable Harm to Defendants

Defendants fail to show how a stay will avert any of the injuries that they claim the Court's ruling has caused or will cause. The "cloud" or "shadow" that they contend the ruling has created will be eliminated only by a reversal on appeal. A stay will not lift any legal uncertainty affecting this and other projects. The ruling, which does not address construction, has no effect on, or relationship to, the amount of damages the Commonwealth may be obligated to pay if construction continues.

Defendants' discussion of the irreparable injury factor improperly combines the second and fourth factors – injury to Defendants and the public interest. This is inappropriate because the interests of VDOT and ERCO are not coterminous with the public interest. Similarly, the interests of the Virginia General Assembly are not necessarily the interests of the people of Virginia, particularly when the legislature has violated the Constitution. *See, e.g., Marshall v. No. Va. Transp. Auth.*, 275 Va. 419, 657 S.E.2d 71 (2008)(invalidated as a violation of Article IV, § 1 a statutory provision delegating the power to impose taxes and fees to unelected individuals); *Terry v. Mazur*, 234 Va. 442, 362 S.E.2d 904 (1987)(invalidated as a violation of Article X, § 9

a statute authorizing the issuance of debt for which payments from the state treasury were committed to retire the debt). For that reason, Plaintiffs will address the harm to Defendants and the public interest separately.

Even if a stay would prevent or reduce the damages that the Commonwealth may have to pay, the monetary injury that Defendants claim would result without a stay does not warrant the grant of their motion. The ruling addresses tolling only. If a decision on appeal is not rendered in Defendants' favor by February 1, 2014, Defendants may not collect tolls for a time. Financial harm in itself is not a basis for a stay. *See Long v. Robinson*, 432 F.2d at 980 (“mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough”).

The appeal may be resolved before the tolls are scheduled to be imposed on February 1, 2014. Defendants have not demonstrated that a stay is needed at all; furthermore, any financial injury that VDOT might experience is the consequence of the terms of the Comprehensive Agreement that it negotiated with ERCO. They should not be allowed to support their motion for a stay with an injury that is brought on by their own voluntary actions. *Long v. Robinson*, 432 F.2d at 981 (“It would seem elementary that a party may not claim equity in his own defaults.”) In *Long*, the applicants were denied a stay because “[the] injury [was] of their own making.” *Id.*

Defendants suggest that “numerous” other PPTA projects would be affected, but acknowledge that only two are currently tolled and two others are expected to be tolled over the next several years. Defs’ Mem. at 9 n. 2. They do not describe how those

projects would be affected by a stay. Without a description of the effect a stay would have on these other PPTA projects, the Court should disregard this portion of Defendants' argument.

Likewise, the Court should disregard Defendants' assertion that "the public perception of the soundness of the Commonwealth's finances" without some demonstration that a stay could or would have a positive effect on the public's perception. It is difficult to imagine that any event other than a reversal of the Court's ruling would positively affect the public's perception. Even if such a reversal were likely, a stay would not eliminate the legal uncertainty in the meantime.

There is no looming crisis. The Supreme Court will undoubtedly decide any appeal before the tolls are due to be imposed on February 1, 2014. Defendants treated the amount of tolls that would be collected if the appeal is not resolved by that date to be relatively trivial when they describe the injury to Plaintiffs should Plaintiffs be required to pay tolls after February 1, 2014, and until the appeal is decided. Defs' Mem. at 10.

Defendants' stated desire to "reduc[e] the drain on the Commonwealth's treasury" (*id.* at 9) rings hollow because they are continuing construction and thereby adding to the potential damages that will be claimed. A stay, however, will have no effect on the amount of damages that might be claimed. To the contrary, it will encourage Defendants to continue on their present course rather than postpone further construction to reduce the claims.

C. Harm to Plaintiffs

One potential injury to Plaintiffs if a stay is granted is financial, just as the monetary injury that Defendants claim will befall them without a stay is potential. The monetary burden on Plaintiffs would be the imposition of tolls for the use of the Project. The appeal may be resolved before the tolls are scheduled to be imposed on February 1, 2014. If a stay were to be granted and tolls are collected by ERCO, the users of the Project, including Plaintiffs, would have no remedy to make them whole should the Supreme Court decide after February 1, 2014, that the collection is unconstitutional.

Another injury to Plaintiffs is not financial. They asserted their right in this Court to have the PPTA and the Comprehensive Agreement declared unconstitutional to the extent there has been a delegation of power in violation of Article I, § 6 and Article IV, § 1 of the Virginia Constitution. The Constitution was adopted to protect the interests of individuals and minorities, not simply to assure majoritarian rule. Plaintiffs have an interest in assuring that the Constitution is faithfully observed. They will suffer actual, albeit intangible, injury if a clear and obvious violation of the Constitution is allowed to persist.

D. The Public Interest

The public interest is not the interest of VDOT or even the General Assembly. The public interest certainly would not be served by allowing the continuation of a constitutional violation when there is an indisputable delegation of power without adequate standards in contravention of Article IV, § 1 and Article I, § 6 of the Virginia Constitution.

Virginia is a Commonwealth, as Article IV, § 1 of the Constitution declares (“The legislative power of the Commonwealth shall be vested in a General Assembly....”). The word “commonwealth” is not synonymous with the apparatus of state government, state officials or state agencies. It means a state “founded on law and united by compact or tacit agreement of the people for the common good.” *Merriam-Webster OnLine* (<http://www.m-w.com/dictionary/commonwealth>). See *Coal & Coke Ry. Co. v. Conley*, 67 W.Va. 129, 142, 67 S.E. 613, 619 (1910) (“The state and the government of the state are two different things, the former being an ideal person, intangible, invisible, immutable; the latter a mere agent....”). In a commonwealth, sovereignty ultimately derives from the people. The Virginia Declaration of Rights contains the following statement, unchanged since its initial adoption in 1776:

That all Power is vested in, and consequently derived from, the People; that Magistrates are their Trustees and Servants, and at all Times amenable to them.

Va. Const., art. I, § 2 (1971); see *Com. v. City of Newport News*, 158 Va. 521, 544, 164 S.E. 689, 696 (1932) (“[T]he Constitution was ordained by the people collectively in their sovereign capacity.”). The limitations contained in the Constitution are binding on all state officials and agencies, including the General Assembly, unless these “mere creatures of the Constitution [are] invested with authority paramount to that of the Constitution itself, unless, indeed, the representatives and mere servants of the people have become their masters.” *City of Norfolk v. Chamberlain*, 89 Va. 196, 204, 16 S.E. 730, 732 (1892).

The Constitution is “the charter by which the people have consented to be governed; it sets forth the basic rights and principles sought to be maintained and preserved in a free society....” *Coleman v. Pross*, 219 Va. 143, 152, 246 S.E.2d 613, 618 (1978). The interests of VDOT and the General Assembly are subordinate to the interests of the people in maintaining and preserving the principles established in the Constitution. Defendants argue that if the Court’s ruling is not stayed, it will cast a shadow on the perception of the soundness of the Commonwealth’s finances, but they overlook the far more important perception of the Commonwealth’s respect for its Constitution in a situation in which that fundamental law indisputably has been violated.¹ It would not serve the public interest to exalt a concern about the Commonwealth’s finances over its faithfulness to the Constitution. The public interest, therefore, will not be served by a grant of Defendants’ motion for a stay.

As noted above, any shadow over the Commonwealth’s finances would not be eliminated by a stay. That shadow has been cast by the concern about the legality of the PPTA and VDOT’s implementation of that statute. Even if a stay is granted, the shadow will continue to be cast and would not be lifted unless the ruling is reversed on appeal, which is a result that reasonably cannot be anticipated because there is no

¹ Plaintiffs object to Defendants’ resort to newspaper reports (Defs’ Mem. at 8), which are obvious hearsay and prone to inaccuracies, as was the quotation in *The Virginian-Pilot* on page 8 of Defendants’ memorandum in support of their motion for stay. That quotation from a May 2 article attributes to the undersigned counsel for Plaintiffs a statement that he did not make. Defendants fail to alert the Court to the correction made in a May 3 article by the same reporter in the same newspaper, which Defendants cite on page 8 of their memorandum.

likelihood that the Court's ruling on the standardless delegation issue would be reversed.

Finally, the financial injury to the public if a stay is granted, which Defendants ignore, would be identical in severity to the financial injury to Defendants if the stay is not granted. Put another way, Defendants ask the Court to benefit them at the expense of the public. Because the financial injuries to the public and Defendants would have identical impacts, those injuries cancel each other out in the balancing of the four factors. What are not equivalent are the other injuries to Defendants and to the public. The shadow on Virginia's financial reputation, which Plaintiffs contend would not be affected by the grant of a stay, is far less compelling than the harm to the Commonwealth's fidelity to constitutional principles if the stay is granted in the face of an obvious violation.

CONCLUSION

The Court should deny Defendants' motion for a stay pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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