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# Is 'McDonnell's Folly' Virginia's future?

Outgoing Gov. Bob McDonnell's tunnel project in Hampton Roads—known locally as “McDonnell's Folly”—has major implications for transportation projects across the Commonwealth. Negotiated in secret by McDonnell appointees, with few details available to local and state legislators until after it was signed, the comprehensive agreement for the project is expected to cost Hampton Roads residents over \$22 billion in tolls and fees. That is more than ten times the \$2.1 billion the new tunnel and other elements of the project will actually cost, according to *The Virginian-Pilot*, May 16, 2013 edition; Hampton Roads section; page number B3.

Similar contracts in the works across the state could redirect equally vast amounts of public money to companies like Elizabeth River Crossings (ERC), the private foreign consor-

tium working with VDOT on the tunnel project. ERC anticipates an average return of 13.5% (pre-revenue sharing) on its investment. To ensure that return, the company can raise toll and fee rates 3.5% or more annually until the contract ends in 2070, based on information from *The Virginian-Pilot*, May 16, 2013 edition; Hampton Roads section; page number B3.

The 1995 Public-Private Transportation Act (PPTA) cut local authorities and the state legislature itself from the negotiating table, effectively transferring governmental powers to corporations. Citizens are subject to decisions made by private corporate partners and unelected officials. City councils are powerless, state legislators are uninvolved.

Frustrated residents and business leaders in Hampton Roads filed a lawsuit in July 2012 that challenged the constitutionality of the

VDOT/ERC contract and of the PPTA itself. The lawsuit succeeded in the Circuit Court, where Judge James A. Cales called the comprehensive agreement a “Faustian contract.” Cales, who lives in Portsmouth and is familiar with the geography of the region, agreed with former Secretary of Transportation, Pierce Homer, who said that the tunnel project “does not provide for free travel alternatives.”

The lack of alternatives is what makes the project so attractive to investors. “This is precisely the situation that global financial companies like Macquarie [a partner in ERC] look for when investing,” said Attorney Patrick McSweeney. “It guarantees investors a revenue stream.” A non-compete clause in the contract further ensures that ERC's investment will pay off—if the state should build any facilities that divert traffic from the tolled

tunnels, Virginia taxpayers will pay ERC to make up for lost revenue.

Unfortunately, the Supreme Court of Virginia, whose members do not include anyone familiar with Hampton Roads (or, apparently, a map), overturned Judge Cales. In a rambling 58-page decision, the Court declared that free alternatives to the tunnels do exist despite all evidence to the contrary. The majority of justices also saw fit to expand the power of unelected officials and private corporations to set rates for public services where private profit—in this case, a whopping 13.5% rate of return in a depressed economy—is at issue. The power to set such rates has been limited to the legislature and the SCC until now.

The Supreme Court has been petitioned to rehear the case. Meanwhile, tolls on existing tunnels are scheduled to begin on February 1 this year. This

means that drivers will be paying tolls on existing, paid-for facilities while battling additional congestion caused by project construction years before a single new element of the project is completed.

For drivers without an E-ZPass discount, tolls will start at \$10.04/round trip for automobiles and \$17.90 for trucks, many of which make multiple trips per day to and from the ports. Even with the E-ZPass discount, drivers who make a daily round trip in an automobile will pay almost \$1,400/year to start, not including additional account maintenance and monthly statement fees. Alan Laufman, a Portsmouth resident who drives throughout the region for the American Red Cross, estimated that his bill for a typical year will start at \$4,465 at the E-ZPass discounted rate. A representative of leading warehouse distribution company Giv-

ens, Inc., said in a recent newspaper interview that a distribution center could end up paying \$150,000 in tolls a year, a significant addition to the cost of doing business in Hampton Roads.

Additional cost is a significant factor in PPTA deals and will have an impact on whether companies and individuals choose to locate in Virginia. The need to generate a significant profit for the private partner in order to attract investors can add billions of dollars in project costs, costs which are passed along to the public through ever-increasing taxes and tolls.

The question now is, will Virginians demand more transparency and authority by reforming the PPTA this year, or will “McDonnell's Folly” become a statewide phenomenon? (Ask your legislators.)

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## Concerned citizens seek to reform Public-Private Transportation Act

Citizens for Accountability in Politics (CAPPAC) is a political action committee established to help fund the lawsuit against the contract for the Downtown/Midtown Tunnel project in Hampton Roads. CAPPAC is also involved in reforming the Public-Private Transportation Act and seeks transparency and accountability in government. The following is excerpted from a NoTollsHR interview with Terry Danaher, founder of CAPPAC, and Nettie Fischer of Tidewater Against Unfair Tolls.

**NoTollsHR:** Terry Danaher and Nettie Fischer, thank you for talking with us today about the campaign challenging the public-private partnership deal between the Virginia Department of Transportation and Elizabeth River Crossings (also known as “ERC”). It's been quite an adventure—you won a lawsuit in circuit court, lost the appeal by VDOT and ERC to the state supreme court, and are now awaiting final word on a rehearing by the state supreme court. How do you feel?

**Terry Danaher:** Frustrated that we had to go to court in the first place because the Public-Private Transportation Act (PPTA) removed citizens' representatives from the negotiating table. So we had no choice but to go to court, which is expensive.

**Nettie Fischer:** Exactly—no one at the negotiating table on this contract had to answer to voters. There was no one there for us.

**NTHR:** The governor is an elected official. He was at the table—or at least his appointees and staff were.

**Fischer:** The governor of Virginia serves one term. He or she doesn't have to worry about voters, and political appointees aren't accountable to anyone but the person who appoints them.

**NTHR:** What about the legislature?

**Fischer:** They weren't involved. The PPTA means that deals like this bypass the state and local legislators. There's no recourse for citizens.

**NTHR:** What about the public hearings?

**Danaher:** The dog-and-pony shows we saw, with no comprehensive presentation and no public microphones, were not the same as public hearings. There were several VDOT/ERC events that the public was invited to, with charts and graphs and individuals there to answer questions if you could figure out what questions to ask, but nothing comprehensive. Public comment was taken down individually by a transcription company, and there was never any response to those comments. It was like being presented with pieces of a

puzzle with no place to assemble them or any clue what the final picture might look like.

**NTHR:** So how did the anti-toll campaign start?

**Fischer:** Concerned citizens in Hampton Roads nagged their representatives. That's what people need to do. The representatives—in this case Johnny Joannou and Kenneth Alexander, who were both delegates at the time—began pressuring the administration and VDOT for information. It all snowballed from there when details of the contract, which was negotiated behind closed doors, were finally made public.

**NTHR:** Why did you object to the contract in the first place?

**Fischer:** The terms of the contract are outrageous—we will pay \$22 billion dollars for a project that should only cost \$2.1 billion at most, and parts of the project aren't even necessary now because they are out of date. There's no light rail or dedicated bus lane through the new tube, and the MLK extension is no longer necessary—most truckers use alternate routes already.

**Danaher:** Frankly, none of the project as designed is going to do anything to lessen congestion in the region. The new Midtown Tunnel tube will just dump two lanes instead of one on the same old roads in Norfolk, and there will be no additional capacity in the Downtown Tunnels. The extension of the Martin Luther King Freeway—well, it used to be a freeway, but now it's going to be tolled too—just creates a bypass to our downtown, which will kill our businesses there. The extension was planned over 30 years ago, like the new tunnel tube. Neither one will do what is necessary to fix traffic jams in the region.

**NTHR:** So it's not just the tolls, it's the project itself?

**Danaher:** It's everything—a project that doesn't include mass transit or additional road capacity, how the contract was negotiated, the exorbitant cost in tolls and tax subsidies—everything! But most important is probably how the contract was negotiated since that affected everything else. The public and our legislators were presented with no options, just a “done deal” by the governor. That's crazy!

**NTHR:** What about the decision by the Supreme Court of Virginia to overturn Circuit Court Judge Cales' ruling in your favor?

**Danaher:** That was truly depressing. First of all, we thought Justice Mims had at least five conflicts of interest and shouldn't have been at the hearing at all which calls into question the integrity of the whole Court. Second, the justices are obviously unfamiliar

with the Hampton Roads region and must not have looked at documents or the map that would have shown that the “alternate routes” to the tunnels aren't realistic alternatives at all. Finally, the decision didn't address the fact that ERC has a free hand setting toll rates that directly affect its profit. That is like allowing Dominion Virginia Power to set its rates without state oversight. This is not a traditional tolling situation, but the Court treated it as if it were. They bought the opposition's argument, which I guess isn't surprising since the law firm representing the opposition was Justice Mims' old firm.

**NTHR:** That seems like quite a conflict—what were some others?

**Danaher:** He voted for the PPTA in 1994, and for the altered version that took out local authority and legislative oversight in 1995, when he was a delegate. As a state senator, he supported the creation of the Office of Public-Private Partnerships in VDOT. As Chief Deputy Attorney General and later Attorney General, he defended the PPTA in other legal actions. His involvement in any one of those things should have made him recuse himself according to the Canons of Judicial Conduct. I cannot believe that he didn't, and it's shaken my belief in the system to the core.

**NTHR:** Is there any recourse?

**Danaher:** We've submitted a complaint to the Judicial Inquiry and Review Commission about Justice Mims, and Charles Greenwood, another plaintiff, has sent a complaint to the entire Virginia legislature. We'll follow up on both.

**NTHR:** What's next on the agenda?

**Fischer:** We're waiting to hear if the Court will consider a rehearing based on our petition. It's a long shot, but there's a lot at stake—billions of public dollars are on the table and will be on other projects, too.

**Danaher:** We're also working to get the legislature to change the PPTA so situations like this don't arise in the future. With 22 projects in the pipeline right now, we're looking at catastrophic consequences for localities all over the state if we don't change the law.

**Fischer:** We need to make sure we the people have a voice. If this grossly bad contract can be inflicted on us in Portsmouth and Norfolk, another equally bad contract can be applied to anywhere in the state.

For more information about CAPPAC, visit [www.citizensforaccountabilityinpolitics.org](http://www.citizensforaccountabilityinpolitics.org) or CAPPAC on Facebook. *Tidewater Against Unfair Tolls* is also on Facebook.

## An invitation to the Honorable Justices of the Supreme Court of Virginia

Citizens for Accountability in Politics (CAPPAC) would like to extend an invitation for a tour of the Hampton Roads Region, to include travel on the “alternate routes” described by the Virginia Department of Transportation and Elizabeth River Crossings in court filings.

The trip will include lunch as

it is expected to take most of the day to cross the region via the “alternate routes,” especially during peak toll hours—5:30 to 9 a.m. and 2:30 to 7 p.m.

Please contact CAPPAC at [info@citizensforaccountabilityinpolitics.org](mailto:info@citizensforaccountabilityinpolitics.org) for further details and a map of the region.

## McAuliffe pledges swift action on tolls in H.R.

Gov.-elect Terry McAuliffe has pledged once again to do his best to mitigate toll troubles on the Downtown and Midtown tunnels in Hampton Roads. Reluctant to issue any specifics before taking office at the end of this week, he promised during a January 7 interview with WAVY TV's Andy Fox “to have an announcement on tolls very quickly” after his inauguration.

Residents of the Hampton Roads region have been lobbying for relief from tolls on the two tunnels since the details of the comprehensive agreement between VDOT and Elizabeth River Crossings (ERC) were released two years ago. “There are no reasonable alternative routes if you're traveling between downtown Nor-

folk and Portsmouth,” said Terry Danaher, a spokesperson for the plaintiff group that filed a lawsuit against the VDOT/ERC contract in July 2012. “The Gilmerton and High Rise bridges are 7 to 13 miles in the opposite direction and were not built to handle the amount of traffic a shift in routes would generate. Judge Cales lives in Portsmouth and understood that immediately. It's one of the reasons he ruled in our favor in circuit court.”

Under the Public-Private Transportation Act of 1995, comprehensive agreements like the one between VDOT and ERC can be negotiated privately by political appointees without oversight by any legislative body.

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## The project has to go



By Paul Danaher

“The project has to go on—it would be too expensive to back out at this point!”

[According to Danaher] This is the line a shady investment advisor uses to persuade you to stick with a failing investment. In that case, however, there's at least the potential of a future profit. With Elizabeth River Crossings (ERC), we're looking at a long and certain future of ongoing and increasing expense instead.

So what would it cost to back out of the contract now?

[According to Danaher] We don't actually know what it would cost to “terminate for convenience” at this point because of the secrecy and vagueness surrounding this Royal Governor's award of a monopoly (non-competing clauses and all). But we can make an educated guess at what it will cost us if it's allowed to continue as it stands:

We being with the tunnel tolls, starting at \$5.02 peak/\$4.77 off-peak for light vehicles and \$10.54/\$7.95 for heavy vehicles; E-ZPass discounted prices are \$1.84/\$1.59 and \$7.36/\$4.77. Toll rates will rise 3.5% or more each year, depending on the rate of inflation. (When agreeing price adjustments, you're supposed to get a lower rate of increase if inflation is lower—but not under this contract.) The tolls will go to pay off low-interest public sector loans used to

partially finance the project. (Keep in mind that the money for the loans comes from our federal and state taxes, so we're lending taxpayer money at a special low rate to foreign contractors like SKANSKA, enabling them to offer the lowest construction bids.) After 20 years, all the money goes to the foreign investors. ERC is basically guaranteed at least 13.5% ROI on its monopoly since any competing project will have to buy ERC off.

Then we look 56 years into the future (2070), when the ERC monopoly will have taken something like \$18 billion directly out of the region after paying back the public loans. This is money which won't be spent in Hampton Roads or Virginia, so the tolls and fees suck out regional buying power to feed foreign investors. Using the usual regional economic multipliers, we can estimate that close to \$50 billion in local spending will have disappeared—along with local businesses hit by increasing tolls and a decreasing customer base.

The bottom line is that we're looking at a six-decade deal with nothing to show for it at the end but a huge pay-out to foreign investors, a 56-year-old “new” Midtown Tunnel tube to nowhere (with no new road capacity in Norfolk, congestion will remain), and a reeling regional economy. Backing out now could be a much better deal.

Paul Danaher is a graduate of London School of Economics and co-owns an independent international translation business.