

**TRANSPORTATION RESEARCH BOARD COMMITTEE ON  
ENVIRONMENTAL ISSUES IN TRANSPORTATION LAW  
(AL050)**

**THE NATURAL LAWYER**

Volume 21

January, 2014

Number 2

Richard A. Christopher, Editor

HDR Engineering, Chicago

[richard.christopher@hdrinc.com](mailto:richard.christopher@hdrinc.com)

*This newsletter is available by e-mail free of charge. Anyone who wishes to be added to the circulation list or would like to change an address should send a message to the Editor at the address listed above. This newsletter is an unedited committee product that has not been subjected to peer review. The opinions and comments in these articles do not represent the views of the Transportation Research Board.*

**VIRGINIA DOT'S ABILITY TO CREATE P3 PROJECTS UPHELD**

Submitted by: Meghan P. Jones

Federal Highway Administration

[meghan.jones@dot.gov](mailto:meghan.jones@dot.gov)

On October 31, 2013, the Supreme Court of Virginia held that the General Assembly did not unconstitutionally delegate its taxation power to the Virginia Department of Transportation (VDOT) and Elizabeth River Crossings OpCo, LLC (ERC), and that the state's police power was not abridged by the comprehensive agreement entered into by VDOT and ERC under the Public-Private Transportation Act of 1995. Va. Code § 56-556. This ruling reversed the findings of the lower court.

The tunnels crossing the Elizabeth River between the Cities of Portsmouth and Norfolk, VA have a history dating back to 1952, when the Downtown Tunnel first opened. Increased congestion necessitated the addition of the Midtown Tunnel and subsequent improvements and expansion projects over the years. The most recent project in the area, which is at the center of this litigation, will construct a new Midtown Tunnel, construct the Martin Luther King Freeway Expansion (MLK Expansion), and provide for continual maintenance of the Midtown and Downtown Tunnels for 58 years. ERC submitted a proposal to finance, design, construct, operate, and maintain the project under the PPTA, which allows a public entity to accept proposals from private entities to develop and/or operate a transportation facility. It entered into a final Comprehensive Agreement with VDOT in December 2011, and the use of tolling was approved and

ratified by the Commonwealth Transportation Board as anticipated in the Comprehensive Agreement.

In July 2012, Meeks and other Portsmouth residents filed a complaint against ERC and VDOT, claiming that: (1) the General Assembly unlawfully delegated its legislative power; (2) the General Assembly unconstitutionally authorized VDOT to grant a special tax exemption to ERC; (3) the General Assembly unconstitutionally authorized VDOT to agree to diminish ERC's obligation to the Commonwealth; (4) the General Assembly unconstitutionally authorized VDOT to grant a special state and local tax refund to ERC; (5) VDOT did not have the authority to enter into the Comprehensive Agreement with ERC; and (6) the tolls, penalties, and surcharges authorized by the Comprehensive Agreement violated due process. The lower court dismissed Counts 3 through 5 without prejudice and Count 6 with prejudice, and found in favor of the plaintiff on Counts 1 and 2. Both parties petitioned for review of the lower court's decision.

Applying a test derived from *Murphy v. Massachusetts Turnpike Auth.*, the Court first found that the lower court erred when it held that that tolls are taxes rather than valid user fees because (1) the tolls are paid in exchange for a particularized benefit not shared by the general public, (2) drivers are not compelled by the government to pay the tolls or accept the benefits of the Project, and (3) the tolls collected are used solely to fund the Project. 971N.E.2d231, 236 (Mass. 2012). To demonstrate the particularized benefit, the Court pointed to improvements that will reduce congestion on the Midtown Tunnel, provide an alternate route for traffic when the Downtown Tunnel is congested, upgrade existing water supply, ventilation, electrical, and emergency response systems, and improve the integrated transportation network as a whole. The Court went on to say that toll payments are voluntary, not compelled, because reasonable alternatives such as the Gilmerton Bridge and the High Rise Bridge offer drivers non-tolled options, and drivers who choose not to pay the tolls will not have access to the benefits of the Project. Finally, citing *Mountain View Ltd. P'ship v. City of Clifton Forge*, 504 S.E.2d 371, 376 (Va. 1998), the Court found that the tolls are not an invalid revenue-generating device because there is a "reasonable correlation between the benefit conferred and the cost exacted by the ordinance" where the costs of the Project exceed the fees imposed. The opinion also noted that the record shows that any surplus generated from the toll collection would be diverted to the Transportation Trust Fund and used exclusively to fund the Project.

The Court then turned to the question of whether the General Assembly unconstitutionally delegated the authority to set toll rates to public and private entities in the PPTA. Meeks argued that setting toll rates is a wholly legislative function under the jurisdiction of the State Corporation Commission (SCC), and the PPTA impermissibly delegates that authority to VDOT. The Court did not find Meeks' argument persuasive, holding that the language of the PPTA clearly carves out an exception to the SCC's regulatory jurisdiction for transportation facility projects undertaken pursuant to the PPTA.

Next the Court addressed whether it was constitutional to extend the legislative power to impose and set rates for tolls to VDOT and ERC, and whether that extension was done properly. Because tolls are user fees and not taxes, and because PPTA carves

out a jurisdictional exception for VDOT to impose and set rates of those user fees in certain projects, the General Assembly is not prohibited from delegating its legislative power to VDOT in this instance. It next determined that the extension of legislative power to ERC was permissible because VDOT has sufficient oversight of ERC's involvement so as to limit the extension of legislative power to a mere "empowerment", rather than an impermissible delegation to a private entity. VDOT retains the ultimate power to establish the terms of a comprehensive agreement, and therefore the legislative power extended to ERC is not unconstitutional. Finally, the Court's analysis of the PPTA found that the law contains "sufficient policies and standards to govern the exercise of the legislative power", so as to support a finding that the extension of legislative power to VDOT was carried out appropriately.

The final question before the Court was whether the Comprehensive Agreement unconstitutionally abridged the Commonwealth's police power because, as Meeks argues, the terms of the agreement prevent the Commonwealth from using its discretion to respond to changing circumstances for the duration of the agreement. Pointing to a longstanding rule that the Commonwealth, through certain of its agencies, can enter into contracts with private entities, the Court found that the mere fact that VDOT entered into the Comprehensive Agreement with ERC does not abridge the Commonwealth's police power. It went on to state that the requirement that VDOT pay costs or accept liability for monetary damages in the event of a breach does not constitute a "bartering away of legislative powers." *Concerned Residents of Gloucester Cnty. v. Board of Supervisors*, 449 S.E.2d 791, 794 (1994).

The concurrence agreed with the majority in its determination that tolls are user fees and not taxes, but applied a different test. Stating that they were an improper review of issues outside the scope of any party's assignment of error, the concurrence also declined to join the majority's decision on the questions of whether the General Assembly can empower ERC to assist VDOT in imposing and setting toll rates, whether VDOT can authorize ERC's involvement in imposing and setting toll rates, and whether ERC's empowerment requires accompanying policies and standards.

*Elizabeth River Crossings OPCO v. Danny Meeks and Virginia Dept. of Transportation v. Danny Meeks*, 749 S.E.2d 176 (Va. 2013).

## **USDOT OIG ISSUES AUDIT OF FRA NEPA PROCEDURES**

Submitted by Richard A. Christopher

[Richard.christopher@hdrinc.com](mailto:Richard.christopher@hdrinc.com)

On December 5, 2013 the Office of Inspector General at USDOT issued Report #CR-2014-010 entitled "National Environmental Policy Act: FRA Coordinates as Required but Opportunities Exist to Modernize Procedures and Improve Project Delivery." The report found that FRA's implementing procedures follow USDOT guidance and sufficiently define its coordination roles with other modes such as FHWA and FTA. In addition, the report found that the authorities in Titles 23 and 49 of the U.S. Code do not appear to impact the FRA's ability to coordinate with the other modes. FRA is also assisting OST

in its efforts to improve coordination among the Department's agencies on multi-modal projects, and collaboration on the use of CEs for those projects.

The Report noted that some State officials have suggested that DOT's modes need to consider a "one U.S. DOT" approach to the NEPA process, in which they all use the same implementing procedures. These officials indicated that this approach would facilitate better departmental coordination. However, FHWA and FTA and CEQ officials cautioned against this approach, pointing out that in CEQ's regulations, departments' major subunits are encouraged to, with their departments' consent, adopt their own procedures for NEPA compliance. Additionally, a CEQ official stated that one set of implementing procedures for all modes would lack the detail necessary to assist grantees in navigating the process and could cause more confusion than clarity. Officials at FRA also indicated that this approach would not work particularly well across all modes due to their inherent differences.

The Report also noted that FRA's current NEPA procedures do not reflect an alternative method of approving the use of resources protected by Section 4(f) when the use's impact will be minor, or "de minimis." FRA has also not incorporated the CEQ's recommendations on the appropriate use of mitigation and monitoring nor has it updated its procedures for issuing and reviewing CE's. The Report finished by recommending the following:

1. Update NEPA implementing procedures to reflect applicable environmental law and requirements and CEQ guidance, including the development of processes and timelines for updating categorical exclusions according to CEQ recommendations.
2. Complete a comprehensive set of standard operating procedures for internal staff administering the Agency's NEPA process.

FRA has agreed to comply with the recommendations.

## **NOTES FROM THE CHAIR**

Submitted by Janet Myers

[Janet.Myers@dot.gov](mailto:Janet.Myers@dot.gov)

I hope this finds you all well, and ready for another challenging year. Many of us are still grappling with MAP-21 implementation, while facing the prospect of the next highway/transit reauthorization bill. This promises to be another interesting year for folks in the transportation business, regardless of your area of interest.

This edition of *The Natural Lawyer* arrives on the heels of a busy holiday season, and just in time to help you plan your participation in the 93<sup>rd</sup> Annual Meeting of the Transportation Research Board, January 12-16, in Washington, DC. This is the final year in the traditional group of hotels (Hilton, Sheraton, Marriott) before the move to the Washington Convention Center. The theme of the meeting is "Celebrating Our Legacy,

Anticipating Our Future". In keeping with this theme, the AL050 Committee is sponsoring three sessions:

- *Better Reads: Improving Quality of Environmental Documents* (Monday, January 13, 8:00 am -9:45 am) (Diana Mendes, moderator; Ralph Davis, Lamar Smith, Megan Blum, William Malley, Buddy Desai)
- *Practitioners' Tales: Recent Experiences with Section 106 of the National Historic Preservation Act and Section 4(f) of the Department of Transportation Act of 1966* (Monday, January 13, 10:15 am – 12:00 noon) (Lowell Rothschild, moderator; Elizabeth Merritt, Robert Thornton, Larry Spurgeon)
- *Toll Projects and the Environmental Process* (Tuesday, January 14, 10:15 am – 12:00 noon)(Richard Christopher, moderator; Edward Kussy, Lowell Rothschild, William Malley)

On behalf of the AL050 Committee, I would like to thank the moderators and panelists for their work in organizing and presenting these sessions. Their efforts enrich the experience for all of us.

Finally, please do not forget to attend our Environmental Issues in Transportation Law Committee (AL050) meeting. It will be held on Tuesday, January 14, 1:30-3:15, in the Marriot Park Tower, Suite 8222. It is a great networking opportunity, and a critical tool for building strong programs for next summer's Workshop on Transportation Law and the 2015 Annual Meeting.

Best wishes for a happy and healthy 2014!

**NEXT DEADLINE IS MARCH 17, 2014**

The deadline for submissions for the April, 2014 edition of this newsletter is March 17, 2014. Please send articles to Rich Christopher at [richard.christopher@hdrinc.com](mailto:richard.christopher@hdrinc.com) and use Microsoft Word.