CURB UPDATE

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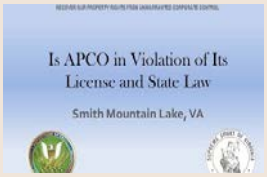

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IMPORTANT LINKS

APCO Has Not Prevailed in the Property Rights Fight

Pressl Case Status

This update is intended to be comprehensive and consequently is a bit longer. We've been busy in this fight over APCO's shoreline management and our property rights. The last CURB update was on 1 April and it's time to update. Judge Reynolds dismissed Pressls' complaint against APCO after a one hour hearing and 10 minutes of deliberation. He issued his final order on the 4 May 2017 giving his rationale and denying Pressls' the right to submit an amended complaint. This was a procedural error and highly unusual to dismiss a case this early. On 17 May 2017 Franklin Co. Circuit court was notified that Pressl would appeal this ruling to the Virginia Supreme Court. If there is one thing we've learned in this fight is that superior courts have a superior knowledge of the law.

Ruling Discussion

His ruling contains contradictory statements, procedural errors and a complete failure to recognize the supremacy of Virginia easement law over federal licensing matters. During the 11 April hearing Judge Reynolds said, *"I am very sympathetic with the plight of private property owners in cases like this. It is clear to me that when the lake was first established, that individuals were essentially allowed to build whatever structures, according to the building code. They went to the local county of their residence and those requests were almost universally granted with little to no modification, and frankly, little to no concern on behalf of Appalachian Power. ... I'm certain that, at the time it was done, there was not the expectation of federal insertion and regulation of private property rights ... but we all must recognize that the ability of Appalachian Power to operate the project in this case that created Smith Mountain Lake is pursuant to a federal license."* Judge Reynolds contradicts Virginia easement law when he says he's certain there was no expectation of federal regulation of property rights when the parties agreed to the easement, then uses Judge Moon's flawed rationale that APCO must follow its license, which was summarily rejected by the US Fourth Circuit of Appeals. The Fourth Circuit Federal Court of Appeals said this is an easement question first and foremost. *"[N]o use can be made of an easement different from that established when the easement was created, which imposes additional burdens on the servient [Pressls] estate."* Shooting Point, L.L.C. v. Wescoat, Va Supreme Ct. (2003). A federal license cannot change property rights.

In short, Judge Reynolds erred. He put the cart before the horse. No FERC license can infinitely expand and repurpose an easement. The Circuit Court must weigh the parties understanding at the time the flowage easement was created, not 40 plus years later after more restrictions were imposed under the SMP.

The written order continues: *"Because the Flowage Easement which governs the rights of the property owners in this case is so broad - it very nearly amounts to a fee interest - I cannot conceive of any amendment or any other factual scenario which would undermine the ability of Appalachian to dictate what gets built - so long as they operate under their Federal License."* Judge Reynolds failed to recognize the 1960 agreement, which does not grant APCO rights to manage shorelines. That is what rules here. Clearing was only required for the impoundment of water. APCO's 1960 License Article 21 required APCO, prior to flooding, to clear all lands in the bottom margins of the reservoirs to be submerged so that no brush or trees protrude above an elevation of 5 feet below the minimum power pools. *"An easement is a privilege to use the land of another in a particular manner and for a particular purpose."* Brown v. Haley, 233 Va. 210, 355 S.E.2d 563 (1987); Stoney Creek Resort, Inc. v. Newman, 240 Va. 461, 397 S.E.2d 878 (1990)

"Of course, the complicating factor here is the Shoreline Management Plan, which [Pressls] *note did not exist until recently. The Shoreline Management Plan is, however, merely a guidebook for how Appalachian can operate under its Federal License. It does not grant the Defendant any greater authority than the Flowage Easement - nor could it without a new agreement with each affected property owner."* Judge Reynolds again ignores that the 1960 flowage easement's purpose was for hydropower generation only. He acknowledged at the time the flowage easement was granted there were no APCO rules and APCO did not require permits or approve shoreline construction. Judge Reynolds erred by force feeding APCO's 2009 license into the 1960 flowage easement. APCO's 1960 license did not require APCO to regulate private shoreline property on SML.

The court's order re-purposes the 1960 flowage easement denying basic shoreline property rights to owners. The court has effectively re-written the easement to include a new purpose – the right to deny and even tear out docks on a whim and regulate all other landowner uses, and this is contrary to Virginia easement law. *"The use of an easement must be restricted to the terms and purposes on which the grant was based."* Nishanian v. Sirohi, 243 Va. 337, 414 S.E. 2d 604 (1992); Pizzarelle v. Dempsey, 259 Va. 521, 526 S.E.2d 260 (2000)

"What it [SMP] *can do and does do, in the Court's opinion, is provide a mechanism for property owners who wish to access the waters via dock or other improvement a means to pursue such a goal using an established process and (hopefully) well-reasoned criteria.* Judge Reynolds remarked he had not read the SMP and probably would not have understood it if he had. So how would the court know if the SMP was reasonable?

"The cardinal rule in the construction of the contracts is that the intention of the parties [at the time the contract was made] *governs. In arriving at the intention of the parties the court must bear in mind the situation of the parties, the subject matter of the contract and the purpose and intention of the parties in making it.* Worrie v. Boze, 191 Va. 916, 925; 62 S.E.2d 876, 880 (1951).

"Generally, when an easement is created by grant and the instrument creating the easement does not limit its use, the easement may be used for any purpose to which the dominant estate [APCO] may then, or in the future, reasonably be devoted. However, this general rule is subject to the qualification that no use can be made of an easement different from that established when the easement was created, which imposes additional burdens on the servient [Pressls'] *estate.* Shooting Point, L.L.C. v. Wescoat, 265 Va. 256, 265; 576 S.E.2d 497, 503 (2003). *"It is the duty of the court to construe contracts as they are made by the parties thereto and give full force and effect to the language used when it is clear, plain, simple and unambiguous and the court is not at liberty to search for its meaning beyond the instrument itself."*. Dominion Sav. Bank F.S.B. v. Costello, 257 Va. 413, 416-17; 513 S.E.2d 564, 566 (1999).

APCO has a license obligation to FERC and can only meet their obligations if APCO holds the necessary property rights. In fact, in response to a formal complaint on 1 March, FERC reaffirmed: *"If, as a result of a court's property law decision, it appears that the licensee does not have the adequate property rights necessary for project purposes, the Commission may require the licensee to obtain the necessary rights."* Hardly the threat APCO claims that FERC will take their license. FERC will do everything it can to save a licensee. We know of three power companies that worked around their lack of property rights to regulate docks, with FERC approval, [Tri-Dam, Candlewood Lake and Lake of the Ozarks]. FERC will not throw a licensee under the bus.

It is simply implausible to believe that landowners in 1960 agreed to surrender their property rights to APCO. Landowners instead relied on their ability to build docks, and APCO was part of that group, selling land with no objection to buyers building docks. No one contemplated that FERC and APCO would collaborate and publish SMP regulations forty-three years after the flowage easement was granted restricting dock construction and protection of shoreline. Over 6,400 residential docks were built prior to the SMP, and APCO never once demanded landowners sign a permit. APCO made millions of dollars in profit speculating in SLM properties, selling large tracts of waterfront to developers (with and without dock rights) without regulation, that APCo now claims they can remove.

Additionally, the Virginia Supreme Ct. in *Smith Mountain Yacht Club v. Ramaker* (2001) determined that the Code of Virginia § 62.1-164 - Erection and abatement of private wharves, piers and landings. applies to Smith Mountain Lake. *Under Code § 62.1-164, the right to construct a dock or pier for noncommercial purposes on a watercourse is subject to the restriction that the exercise of this right shall not obstruct navigation or injure the private rights of any person. See* Carr v. Kidd*, 261 Va. 889, ----, 540 S.E.2d 884, ---- (2001);* Zappulla v. Crown*, 239 Va. 566, 569, 391 S.E.2d 65, 67 (1990);* Langley*, 237 Va. at 62, 376 S.E.2d at 523.* Pressls' proposed dock is non-commercial, is built upon their fee owned land, does extend across the property of another, and does not present a navigational hazard. The federal power act does not prevent anyone from building a dock, and the flowage easement does not negate or restrict a landowner's right to construct a dock.

Other Basic Errors in the Order

Because Judge Reynolds failed to even reach Virginia easement law, contract law and Virginia doctrines affecting contracts, he failed to consider clear law and facts that dictate a victory for Pressl.

1. ***Contra Proferentem*** -- Judge Reynolds erred when he ignored 'black letter' Virginia law of contract interpretation, in this case, the 1960 flowage easement. *Contra Proferentem* requires the court to decide ambiguity strictly against the draftsman, APCO, so that the preferred meaning shall work against the interests of the party providing the wording. So APCO not bothering shore property owners for 40 plus years after the 1960 easement was obtained must be construed against APCO. The law protects the untutored against the sophisticated and powerful by this rule.

2. ***Doctrine of Laches*** -- Judge Reynolds erred when he ignored black letter Virginia law called Doctrine of Laches. This simply means if you sit on your rights for too long, you lose your rights. That is what happens when even if APCO in 1960 for forty years claimed it had shore property rights to regulate docks, but did not.

3. ***Detrimental Reliance*** -- Judge Reynolds erred when he ignored black letter Virginia law called 'detrimental reliance". That means when the first party acts in reliance on the second party's behavior after an agreement, [APCO, no interest in shore construction regulation] the second party cannot be penalized for acting [building docks, trimming trees, putting in walkways, protecting shorelines] later when the first party [APCO] tries to restrict or deny those activities.

4. ***Unclean Hands*** -- Judge Reynolds ignored Virginia law called "Unclean Hands" which means if party comes to court with bad behavior relating to his current action then the court will deny that party's enforcement request. Over 6,400 residential docks were built prior to the SMP, and APCO never once demanded landowners sign a permit. APCO made millions of dollars in profit speculating in SML properties, selling large

tracts of waterfront to developers (with and without dock rights) without regulation, that APCo now claims they can remove. Clearly, unclean hands by APCO. Clearly, short circuiting the Pressl case, Judge Reynolds failed to uphold Virginia law.

Remember FERC's Initial Gangplank Pointe Order

Obviously, the judge does not recognize the impact his dismissal potentially holds for property owners. In its second lawsuit against Nissen (now underway), APCO wrote *"APCO has decided not to remove some structures at Smith Mountain Lake."* This statement is absurd and false. There are thousands of structures and improvements, unidentified to FERC, built without an APCO permit. These improvements include: marina work buildings, marina boat slip rentals, restaurants, golf course greens and holes, the 36-unit Vista Pointe Resort, swimming pools, decks, homes and parts of homes, the causeway to Contentment Island, well-over 1.5 million linear feet of riprap, seawalls, bulkheads, beaches, access paths/roads, private boat ramps and some 6,400 residential docks. Now the judge says the flowage easement is nearly the equivalent of fee ownership and APCO can remove anything? Then every property owner has just had his property ownership and easement rights stripped away, without being compensated. Judge Reynolds' order places over $1B of improvements at the risk of changing FERC requirements and APCO's discretion. Consider the losses if APCO removed Vista Point Condo's ($10,8M), all riprap ($150M), 6,400 residential docks ($480M), these alone would amount to over $640,000,000. The loss of residential and commercial property values would be enormous.

Some say this could never happen, but remember Gangplank Pointe, August 24, 2011? FERC ordered APCO to remove their community docks: *"In this case, the Gangplank docks were documented as non-conforming docks in 2005, but were not required to conform to the SMP at that time. Now, as significant repairs were needed, the docks should be required to conform to the SMP. ... Gangplank docks, as constructed, are not consistent with the requirements of the approved SMP, and should be brought into conformity with the current requirements (e.g., length, setbacks, orientation, height, number of slips allowed per shoreline frontage, etc.) of the plan. Please [APCO] file a plan and schedule for modifying the existing Gangplank docks to bring them into conformity with the applicable requirements of the SMP. Additionally, you should include in your filing' a discussion of how you plan to prevent this issue from occurring in the future throughout the project reservoirs, so that grandfathered docks are eventually brought into conformance with the SMP."*

FERC eventually, under pressure from Gangplank owners who 'lawyered up', politicians and other pressures retreated from its order and did not require Gangplank Pointe owners to remove their docks and only rebuild half of what had existed. But the underlined sentence is ominous. And guess what APCO has been discretely doing with Realtors? During a 20 April meeting of RVAR's Lake Committee, APCO thanked Realtors for their help enforcing SMP regulations and encouraged Realtors to report and photograph possible violations, so APCO could investigate and enforce. APCO thanked the Lake Committee for helping APCO issue permits for unpermitted existing docks, and that APCO was making great progress deceiving [my word] under the pretext of federal authority, property owners to sign APCO's permits, thus imposing their license and SMP.

Every property owner, should rally to defend their constitutionally guaranteed right to own and enjoy their property. It's simply illegal to take our property without paying. Donations are needed to fund the legal expenses to defend our property. Something is radically wrong when a U.S. government agency colludes with its multi-billion-dollar licensee to steal property.

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ELIMINATE IGNORANCE – Before you agree to sign any APCO's property stealing revocable permits, at least read the permit and your flowage easement. Seek the professional advice of a competent attorney. We know several. Be patient, vigilant and stay informed. For a more in-depth understanding, we recommend viewing the following CURB videos:

Read Your Flowage Easement Read APCO's Dock Permit History of Regulation What Did APCO Permit