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# CURB UPDATE

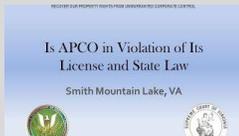


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OUR MISSION IS TO EDUCATE AND INFORM ...

VOLUME 1, NUMBER 6



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## Is the Nissen Lawsuit Lost ... far from it!

I received an email from a supporter stating a prominent Realtor at the lake "knows for a fact" that the CURB lawsuit is already lost and that the judge has gone a step further and even broadened AEP's authority over the homeowners/dock issue. Said the Judge told Nissens' to remove the dock immediately.

**What can I say other than this Realtor doesn't know what he's talking about, nor has he attended a single CURB meeting. Apparently he also has not read the Legal Update on the CURB website, which includes all public documents before the Court. Why is it the most informed think they are the most informed?**

First, the Judge has issued no order directing Nissen to remove his dock immediately ... the case has not reached trial stage. The Court is processing motions, counter-motions, pleadings and answers in preparation for trial. **The Court has not issued any final rulings on APCO's lawsuit.** The Court did issue an opinion on April 24th (which is posted on the CURB website) stating: "*Defendants' have failed to state a plausible basis on which I could declare that APCO lacks sufficient property rights to compel them to remove the dock.*" This is a provisional opinion, also known as an interlocutory, which can change as we move to trial. We have more work to do with this Court, but we are confident that the law is clear and the facts are compelling and on our side. Visit the CURB website and view the [PowerPoint on the Welcome Tab](#) entitled Easement Law 101.

The Court opinion also stated:

1. "Defendants' claim that APCO lacks a property interest sufficient to compel them to undertake re-vegetation of their property, however, is plausible on its face. There is nothing in the plain language of the easement that grants APCO such a right." **Translation -- APCO does not have the property rights to require shoreline owners to re-vegetate below the contour of 800 feet.**
2. "It is unclear at this stage in the proceedings if the portions of the road falling below 800 FMSL qualify as a structure or improvement such that APCO possesses the right to remove it. Accordingly, there is a plausible basis to support that portion of Defendants' request for declaratory relief." **Translation -- if the road is an easement improvement, APCO does not have the property rights to order its removal.**
3. "Since APCO's ability to regulate the Nissens' land is limited to its rights under the Flowage Easement, there is no basis for me to determine that the FERC License Order or the SMP deprived or interfered with the Nissens' property rights." **Translation -- APCO's Federal license and SMP cannot change property rights and APCO's regulatory authority is limited to its property rights as we've consistently advocated.**

The Court's provisional opinion did not yet address the glaring inconsistency between the 1960 original flowage easement and APCO's 2003 permit that adds restrictions and impairs deeded rights with a personal revocable license. However the Court recognized that neither APCO's license nor its SMP can change underlying property rights ... and this undercuts APCO claims they do. A landowner signing APCO's revocable use permit will create a taking without compensation.

CURB believes the Court's Memorandum of Opinion is a step in the right direction, but has still not recognized that the rights APCO obtained under the original 1960 easement agreements were limited to submerging a portion of a shoreline owner's property for "... the construction, existence, operation and/or maintenance of the aforesaid dam and/or power station." If APCO insists on imposing additional restrictions on shoreline owners, beyond rights owners retained in the original 1960 flowage easement, then APCO must pay for them, or in the alternative, stop impairing titled dock ownership through use of its "revocable use permit" by engaging local land use authorities of the counties, state and other existing federal agencies.

The following is a quick synopsis of relevant Virginia Property Law regarding easements that support Nissen's case.

1. **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)
2. **An easement may be acquired by express grant.** [As is APCO's easement.] Corbett v. Ruben, 233 Va. 468, 290 S.E.2d 847(1982).
3. **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)
4. **Purchasers of lots have an implied easement across the retained lands to access the lake.** 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).
5. **A pure easement or an easement appurtenant, which has both a dominant [APCO] and a servient [Nissen] estate, is capable of being transferred and inherited.** Lester Coal Corp. v. Lester, Va. 93, 122 S.E.2d 901 (1961), citing M.J. See Conrad v. Strickler, 215 Va. 454, 211 S.E.2d 248(1975)
6. **Easements are appurtenant to, and run with, the dominant tract if they benefit the owner in his use and enjoyment of that tract.** Russakoff v. Scruggs, 241 Va. 135, 400 S.E.2d 529 (1991).
7. **Ordinarily, when a tract of land is subjected to an easement, the servient owner [Nissen] may make any use of the land that does not unreasonably interfere with the use and enjoyment of the easement.** Preshlock v. Brenner, 234 Va. 407, 410, 362 S.E.2d 696, 698 (1987).
8. **The dominant estate [APCO] has a duty not to do any unnecessary injury to the grantor.** Greiner v. Columbia Gas Transmission Corp., 41 F. Supp. 2d 625 S.D.W. Va. (1999)
9. **The owner of the dominant estate [APCO] has a duty to maintain an easement.** Hayes v. Aquia Marina, Inc., 243 Va. 255, 414 S.E.2d 820 (1992); Anderson v. Lake Arrowhead Civic Ass'n, 253 Va. 264, 483 S.E.2d 209 (1997).
10. **The servient landowner [Nissen] retains the right to use the land in ways not inconsistent with the uses granted in the easement.** Walton v. Capital Land, Inc., 252 Va. 324, 477 S.E.2d 499 (1996), citing Thompson on Real Property.

The original 1960 flowage deed is an appurtenant easement running with the land, but critically, it does not impose recreational access restrictions. Under established Virginia easement law the landowner retains all rights that do not interfere with APCO's flowage rights. This is established property law in Virginia, as ruled upon on multiple occasions by the Virginia Supreme Court. APCO's standard practice over more than four decades was to purchase more land than needed for operation of the hydroelectric facility, and to speculate in shoreline property making millions of dollars re-selling these lands as waterfront, with no restrictions on recreational access (i.e. docks, piers, beaches, boat ramps, etc.). APCO's actions represent the true intention and meaning of the flowage easement, at the time and under the land conditions that existed in 1960.

### **CURB Scheduled Meetings**

We have reserved the meeting room at the Westlake Library in Franklin County for the following dates and times:

**June 23<sup>rd</sup> -- Tuesday Evening from 6:00PM to 7:30PM**

**July 30<sup>th</sup> -- Thursday Evening from 6:00PM to 7:30PM**

**August 20<sup>th</sup> -- Thursday Evening from 6:00PM to 7:30PM**

During these meetings we will provide updates on our legal activities and address questions and concerns. A lot is happening and it will be to your benefit to attend. If there is something specific you want to address, just send your request or questions to [contact-us@curb-ferc-aep.com](mailto:contact-us@curb-ferc-aep.com).

**Please consider making a donation to support the ongoing legal effort and education programs. CURB is a registered 501c(4) not-for-profit Virginia Corporation. Your donations to support CURB efforts are not discoverable and remain anonymous. Use the donate button on the first page of this Update.**

**Thanks for your continued support ... For Our Property Rights**

***Bill Brush***