

TWENTY-SECOND JUDICIAL CIRCUIT  
OF VIRGINIA



JOSEPH W. MILAM, JR., JUDGE  
JAMES J. REYNOLDS, JUDGE  
COURTS AND JAIL BUILDING  
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COMMONWEALTH OF VIRGINIA

CIRCUIT COURT OF THE CITY OF DANVILLE  
CIRCUIT COURT OF THE COUNTY OF FRANKLIN  
CIRCUIT COURT OF THE COUNTY OF PITTSYLVANIA

May 4, 2017

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RE: Richard A. Pressl and Theresa M. Pressl v. Appalachian Power Company  
Franklin County Circuit Court Case No. CL15-631

Dear Counsel,

I apologize for not getting this decision out sooner and I appreciate again the clarity with which each side has presented the relevant Orders for the Court's consideration. Having sustained the Demurrer filed by Appalachian, the only remaining issue for the Court to decide is whether or not to grant the Plaintiffs leave to Amend their Complaint. That request is denied.

As noted in the Defendant's opposition to the request to Amend, generally speaking, Amendment should be permitted to further the ends of justice. Here, the Court does not believe that the ends of justice require such Amendment, nor can the Court anticipate any Amendment which would put the issue before the Court generally – whether Appalachian can control what gets built below the 800 foot line – in any different light. 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.

Of course, the complicating factor here is the Shoreline Management Plan, which Plaintiffs note did not exist until recently. The Shoreline Management Plan is, however, merely

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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. What it 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. Such an approach is preferred as a means to avoid, as the Court noted, economic waste and undue delay. (Delay is a funny word in this case, considering the case at hand was filed over two years ago.)

The case is dismissed with prejudice and will constitute a final order allowing the Plaintiffs to appeal. The Court will enter the dismissal Order prepared by Mr. Pritts. Objections to that Order are preserved and endorsement by counsel is waived pursuant to Rule 1:13.

Sincerely,



James J. Reynolds, Judge

JJR/jve

C: Teresa J. Brown, Clerk

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FRANKLIN

RICHARD A. PRESSL	)	
	)	
and	)	
	)	
THERESA M. PRESSL,	)	
	)	
Plaintiffs,	)	Case No. CL 15-631
	)	
v.	)	
	)	
APPALACHIAN POWER COMPANY,	)	
	)	
Defendant.	)	

**FINAL ORDER**

On April 11, 2017, the parties appeared by counsel to be heard on Defendant Appalachian Power Company's ("APCO") Demurrer to Plaintiffs Richard A. Pressl and Theresa M. Pressl's (together, the "Pressls") Complaint for Declaratory Judgment, and on the Pressls' Motion to Amend. After reviewing the pleadings, exhibits, and other written submissions of the parties, hearing the arguments of counsel, and taking judicial notice (without objection) of APCO's December 15, 2009 Federal Energy Regulatory Commission ("FERC") license and January 30, 2014 Shoreline Management Plan ("SMP"), the Court reached the following conclusions:

1. The language of the April 18, 1960 Flowage Right and Easement Deed ("Flowage Easement"), which the Pressls agree applies to their property on Smith Mountain Lake, is plain and unambiguous;
2. The Flowage Easement grants APCO the right to overflow and/or affect the Pressls' property below the 800-foot elevation contour continuously or from time to time in any

manner whatsoever, as a result of the construction, existence, operation and/or maintenance of the lake's dam and power station;

3. The Flowage Easement also grants APCO the right to enter onto the Pressls' property at any time from time to time and, at its discretion, cut, burn, and/or remove (among other things) any and all structures and objects located below the 800-foot elevation contour.

4. APCO's rights, including the right to remove any and all structures and other things below the 800-foot elevation contour on the Pressls' property, includes the right to regulate (among other things) the construction of and occupancy of the premises by any and all structures, including docks, on that portion of the property;

5. The Pressls' reserved right under the Flowage Easement to cross the portion of their property below the 800-foot elevation contour to reach the water of Smith Mountain Lake for recreational purposes does not include the right to construct any structures, including docks, on that portion.

6. The grant of rights to APCO in the flowage easement is broad and is applicable to provide APCO the rights to regulate the various activities raised by the Pressls in the Complaint, such as the ability to build docks, stabilize the shoreline, and dredge the property;

7. APCO is required to operate the project pursuant to its FERC license, which incorporates the SMP, and these documents require APCO to manage the occupancy and use of project property in a manner that minimizes harm to environmentally sensitive areas, such as the wetlands on the Pressls' property where they propose to build a dock and stabilize the shoreline and dredge in a manner without complying with the SMP;

8. The application of the SMP through the flowage easement is a reasonable restriction on the Pressls' property rights for the portion of their property located below the 800-foot elevation contour; and

9. APCO's right to remove structures and improvements below the 800-foot elevation contour at its discretion encompasses the right to permit and approve on a pre-construction basis structures and improvements that would comply with its FERC license and SMP; such process provides an efficient economic process for the use of the property in question.

Based on the foregoing and the other reasons stated on the record during the hearing, the Court SUSTAINS APCO's Demurrer on all grounds. The Court further DENIES the Pressls' Motion to Amend for the reasons stated in the Court's letter addressing the Motion to Amend. Accordingly, the Court DISMISSES this case WITH PREJUDICE.

AND IT IS SO ORDERED.

The Clerk of Court is directed to strike this matter from the docket and to furnish a copy of this Final Order to all counsel of record.

ENTERED this 4<sup>th</sup> of May 2017.

  
Circuit Judge

WE ASK FOR THIS:

*Waived per Rule 1:13*

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SEEN AND OBJECTED TO: *See attached 2 pages*

*Waived per Rule 1:13*

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*Counsel for Plaintiffs Richard A. Pressl and  
Theresa M. Pressl*

SEEN AND OBJECTED TO FOR THE REASONS STATED IN THE PLAINTIFFS' MEMORANDUM OF LAW, ARGUMENTS SET FORTH IN THE TRANSCRIPT OF THE PROCEEDINGS DATED APRIL 11, 20017 AND AS SET FORTH ON THE FOLLOWING PAGE.

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**SEEN AND OBJECTED TO** on the basis that the order ignores, and is inconsistent with, the plain language of the Flowage Easement, impermissibly expands the scope of APCO's easement rights, and impermissibly expands the burden on the Pressl's property interests. Specifically, the Court erroneously concluded that the Flowage Easement conveyed to APCO the right to regulate (among other things) the construction of and occupancy of the premises by any and all structures below the 800-foot elevation contour; that the Pressls' lack the right to construct any structures, including docks, below the 800-foot elevation contour; that the grant of rights to APCO in the flowage easement is broad and is applicable to provide APCO the rights to regulate the various items raised by the Pressls in the Complaint, such as the ability to build docks, stabilize the shoreline, and dredge the property; that the Flowage Easement conveyed to APCO sufficient property rights to permit APCO to manage the occupancy and use of the Pressl's property in a manner that allegedly minimizes harm to environmentally sensitive areas, such as the alleged wetlands on the Pressls' property where they propose to build a dock and stabilize the shoreline and dredge in a manner without complying with the SMP; that the application of the SMP through the flowage easement is a reasonable restriction on the Pressls' property rights for the portion of their property located below the 800-foot elevation contour; that APCO's right to remove structures and improvements below the 800-foot elevation contour, at its discretion, encompasses the right to permit and approve on a pre-construction basis structures and improvements that would comply with its FERC license and SMP; and that the Flowage Easement grants to APCO rights beyond those expressly provided by the plain language of the Flowage Easement; and that APCO's discretionary right to remove structures amounts to the absolute right to grant or deny permission for the construction of structures.

Your plaintiffs object to the Court's findings and conclusions of law to the extent that the Court's ruling relies upon APCO's current license. Specifically as argued in the plaintiffs' memorandum of law APCO was not required to regulate shoreline uses until 1998 approximately 38 years after the Flowage Easement was executed and was not within the contemplation of the parties at the time the Flowage Easement was granted to APCO.

Your plaintiffs further object to the Court's denial of their request to amend their pleadings.