

## **A SYNOPSIS OF THE SUPREME COURT OF VIRGINIA'S TUNNEL TOLLS DECISION**

Here's a (very) quick synopsis of the 55-page opinion by the VSC approving the tolls:

1. On the primary appeal by Elizabeth River Crossings, the Supreme Court reversed the trial court's ruling and held that the tolls were permissible user fees and not impermissible taxes (if taxes, they would have been impermissible because of the delegation of authority to set the fees to VDOT by the General Assembly).

The court basically said that the tolls were fees not taxes because (i) only users of the tunnels/roads had to pay them (so they were paid in exchange for a "particularized benefit"), (ii) there were reasonable alternative routes b/w Norfolk and Portsmouth that drivers can take to avoid the tolls, including the Gilmerton Bridge and the High Rise Bridge (so the tolls weren't "compelled by the government") and (iii) the tolls did not go into the general fund but were specifically used to pay for the improvements/construction of the projects (so they were "collected solely to fund the Project").

2. The plaintiffs cross-appealed on the issue of whether the General Assembly improperly delegated its authority to VDOT and/or ERC. The Court rejected this argument.

First, the court rejected the argument that the ratemaking function was solely a legislative function within the exclusive jurisdiction of the State Corporation Commission because in the 1971 revision of the Virginia Constitution "transportation companies" were not included in the SCC's regulatory authority (although they had been prior to 1971).

Second, the court found that it was permissible to delegate rate making functions to VDOT because the "separation of powers is not absolute" and the General Assembly has historically been permitted to delegate some of its powers to the executive branch's administrative agencies to carry out. So long as the GA is not prohibited by the Constitution from such delegation, it's permissible. Here, the tolls aren't taxes and the SCC (as discussed above) does not have exclusive jurisdiction, so there's no constitutional prohibition against delegation to VDOT.

Third, the court found that it was okay for the General Assembly to "empower" ERC to assist VDOT in the rate-making process. If the GA had delegated ERC exclusive discretion in rate-setting, that would have been impermissible. But ERC, like other regulated industries, is

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permitted to participate in the rate-making process, so long as VDOT had the final say. The court drew a sharp line between the GA “empowering” ERC to participate in the process and actually delegating legislative power directly to a private entity like ERC. The court considered whether ERC’s involvement in the process “was so prominent” that it had “trespassed into unconstitutional delegation.” The court held that it had not, in large part because VDOT had the final say on whether to enter into the contract with ERC and could have declined to approve ERC’s input by refusing to sign the contract. The court in the process rejected the plaintiffs’ arguments that ERC’s bargaining power somehow meant that the contracting process crossed the line from empowerment to impermissible delegation.

Fourth, the court considered whether VDOT’s delegation of some rate-making authority to ERC in the contract for the project was an impermissible delegation by VDOT of its powers that had been delegated to VDOT by the General Assembly (similar to the point above, but whereas the point above dealt with delegation by the GA to ERC, this section of the opinion dealt with delegation by VDOT to ERC). Similar to the above discussion, the court found that VDOT retained sufficient control such that any delegation was mere empowerment and not unfettered delegation, in large part because the contract contained a schedule of maximum toll rates and gave VDOT certain veto powers in emergencies.

Fifth, the court considered whether all of this empowerment/delegation was constitutionally permissible in that it came with sufficiently specific policies and definite standards to guide the official, agency or board in the exercise of the power. The court rejected the plaintiffs’ argument that because a private entity was empowered as part of the GA’s actions that the policies and standards had to be more specific than usual. It looked to the terms of the Public/Private Transportation Act of 1995 and found that it contained sufficiently specific standards/guidelines to pass constitutional muster. It found that terms like “capacity” and “congestion” as used in the PPTA were “industry-specific goalposts” and that such industry standards had long been recognized as constitutionally sufficient. As part of this discussion, the Court held that because the GA’s extension of authority to ERC was merely an “empowerment” and not a “delegation,” “no requirement exists that constitutionally sufficient policies and standards must accompany ERC’s empowerment.” (Slip Op. at 46).

Finally, the court rejected the plaintiffs’ argument that the project abridged the Commonwealth’s police power, i.e., the power to promote the health, peace, morals, education and good order of the people. Essentially, the court said it was fine for agencies to enter contracts with private parties, it was assumed that anything VDOT did would not extend to an abridgement of police powers, and shot down the plaintiffs’ list of horrors.

There was no dissenting opinion, although Justice McClanahan wrote a very brief concurrence.