

# Client Alert

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## Recent Virginia Supreme Court Decision Offers Important Guidance on Projects Financed by Toll Revenues under the Public-Private Transportation Act

### Introduction

On October 31, 2013, the Virginia Supreme Court delivered a comprehensive opinion affirming the constitutionality of public-private transportation projects developed under the Public-Private Transportation Act of 1995 (the “PPTA”), Va. Code Ann. §§ 56-556 to 56-575 (2012), and financed in part by the imposition and collection of tolls. The decision in [\*Elizabeth River Crossings OpCo, LLC v. Meeks, et al., Nos. 130954, 130955 \(Va. Oct. 31, 2013\)\*](#), which confirms the constitutionality of the tolling provisions of the PPTA, provides public-private partnerships with clear guidance as to how to structure transportation projects to minimize the risk that projects that depend on tolling will run afoul of the Virginia Constitution or Code. The ruling also likely protects the provisions authorizing user fees under the Virginia Public-Private Education Facilities and Infrastructure Act of 2002, Va. Code Ann. §§ 56-575.1 through 56-575.18 (2012) (“PPEA”).

The case involved a \$2.04 billion transportation project in Portsmouth, Virginia, designed to relieve some of the worst traffic congestion found anywhere in the Commonwealth. The Virginia Department of Transportation (“VDOT”) entered into a comprehensive agreement under the PPTA with Elizabeth River Crossings OpCo, LLC (“ERC”), providing for the construction of a new tube for the Midtown Tunnel, retrofitting the existing Midtown and Downtown Tunnels and building a feeder freeway extension to connect them. The Commonwealth maintained ownership of the facilities, but the comprehensive agreement granted ERC the authority to construct, maintain and operate the facilities for a period of 58 years. Though not the only source of funding, toll revenue constituted a principal funding source and was essential to the viability of the project.

Motorists who use the existing tunnels filed suit against VDOT and ERC, challenging the project and the PPTA on numerous grounds. The Portsmouth Circuit Court invalidated the tolls, holding that the General Assembly had “exceeded its authority” by (1) “ceding the setting of toll rates and taxes ... for the use of facilities that have been bundled solely for revenue-producing purposes in violation of Article IV, § 1 of the Constitution of Virginia,” and (2) giving “unfettered power to [VDOT] to set toll rates without any real or meaningful parameters in violation of Article IV, § 1 of the Constitution of Virginia.”

On appeal, the Virginia Supreme Court reversed and entered final judgment for ERC and VDOT. The court held that: (1) the tolls were not taxes and the General Assembly did not unconstitutionally delegate its power of taxation; (2) the PPTA contained adequate guidance with regard to the setting of tolls and did not unconstitutionally delegate the General Assembly’s legislative powers; and (3) the comprehensive agreement did not surrender the Commonwealth’s police power. Here are the key aspects of the court’s opinion:

- Tolls are valid user fees, not taxes. According to the court, a tax is “an enforced contribution imposed by the government for governmental purposes or public needs,” while user fees are

“nothing more than an authorized charge for the use of a special facility.” (Quotations omitted.)  
The court listed three reasons concluding that the tolls are not taxes.

- First, motorists “pay the tolls in exchange for a particularized benefit not shared by the public.” The court rejected the motorists’ argument that the three segments of the project were unrelated, finding that, since 1942, the “project” has been a “vehicular connection” between the cities of Portsmouth and Norfolk, crossing the Elizabeth River, and that the tunnels and the connecting freeway between them were functionally related to serve that purpose.
  - Second, the government compels drivers neither to pay the tolls nor to accept the benefits of the toll roads. Reasonable alternative nontolled routes exist, and those drivers who forego using the toll roads are not forced to accept the benefit without paying the fee.
  - Third, “the tolls are collected solely to fund the project, not to raise general revenues.” Not only did the project costs exceed the projected toll revenue to be collected, but, if there had been any excess, the revenues, under Code § 33.1-23.03:1(9)(B), would have to be paid into the Transportation Trust Fund and used only for purposes benefitting the users of the project facilities.
- The State Corporation Commission does not have jurisdiction to regulate tolls under the PPTA. The court held that neither the Virginia Constitution nor the Virginia Code grants the SCC jurisdiction to set or regulate tolls for PPTA projects. Although the Constitution of 1902 “delegated regulatory authority over ‘transportation ... companies doing business’ in the Commonwealth to the SCC,” the current Virginia Constitution, enacted in 1971, does not. And while the Virginia Highway Corporation Act granted “the SCC the authority to authorize and regulate toll roads throughout the Commonwealth,” the PPTA created an exception for projects authorized under the PPTA.
  - The General Assembly may constitutionally extend its legislative power to impose and set user fees to VDOT and ERC. The court rejected the motorists’ argument that the PPTA constituted an unlawful delegation of legislative authority. The court distinguished between the delegation of legislative power to the Executive Branch and the empowerment of a private entity to assist in the exercise of that delegated power. The court upheld both (1) the delegation of the power to VDOT to set rates and impose tolls and (2) the empowerment of ERC to assist in rate setting. The court noted that the PPTA allows private entities to play a role in imposing and setting user fees, which are established in a comprehensive agreement. But the responsible public entity under the PPTA (here VDOT) holds the ultimate decision-making authority because it has the power to negotiate the terms of the comprehensive agreement and to accept or reject it. Furthermore, the terms of the comprehensive agreement with ERC ensured that VDOT retained “a pervasive role in setting the limits on, and constantly reviewing, ERC’s use of the legislative power.”
  - The General Assembly’s extension of its legislative power to impose and set user fees was appropriately accomplished. Legislative delegations of power must “establish specific policies and fix definite standards to guide the ... agency ... in the exercise of the power.” VDOT and ERC pointed to a number of provisions in the PPTA that they said satisfied the requirement to provide intelligible standards. But the court found a single provision alone to be sufficient. Virginia Code § 56-566(B) provides that “[i]n negotiating user fees under this section, the parties shall establish fees that are the same for persons using the facility under like conditions except as required by agreement between the parties to preserve capacity and prevent congestion on the qualifying transportation facility.” The court found this adequate because “VDOT’s exercise of the legislative power is guided by the directive to preserve capacity and prevent congestion.”

- The comprehensive agreement did not abridge the Commonwealth's police power in violation of Article IX, Section 6 of the Virginia Constitution. The police power generally refers to the government's ability to make laws for the general welfare of the state. Abridgment of the police power occurs when the government can no longer "use its discretion in exercising" that power. The court determined that neither the terms of the comprehensive agreement nor the possible damages against the Commonwealth from a breach of the agreement abridged the police power.
  - The court rejected the argument that the terms of the comprehensive agreement prevented the Commonwealth from responding to changing circumstances over the life of the agreement. It noted that Article IX, Section 6 does not preclude the Commonwealth and its "arms" from contracting with private entities. The court then reasoned that "[t]he comprehensive agreement must be read as a whole as the embodiment of VDOT's determination of how to exercise the Commonwealth's police power[]," adding that the exercise of this power includes the decision not to exercise it.
  - The court likewise rejected the argument that the threat of damages resulting from a hypothetical breach of the comprehensive agreement abridged the police power. Neither the costs of performance nor the damages from a breach of contract amount to a "bartering away of" the police power. The court further observed that, under the terms of the comprehensive agreement, payment of any damages was "subject to appropriation by the General Assembly," allowing the General Assembly to "decide not to appropriate the required funds if such a monetary obligation were ever to actually abridge the Commonwealth's police power."

### **Implications for Future P3 Projects**

This case was closely watched, and numerous governmental and business groups filed amicus briefs in support of upholding the PPTA and VDOT's tolling authority. Virginia has been a leader in public-private partnership ("P3") laws and projects. The trial court's ruling cast a cloud over not only the project at issue in this case, but also other PPTA and PPEA projects that have been completed or are under consideration in Virginia. Similar P3 laws are found in more than 30 other states. The National Conference of State Legislatures filed an amicus brief, joined by the American Road & Transportation Builders Association, expressing concern that if the tolling provisions of Virginia's PPTA were invalidated, it would destroy the utility of P3 laws in Virginia and elsewhere. Amicus briefs in support of the PPTA and VDOT's tolling authority were also filed by the Virginia Chamber of Commerce, the Virginia Transportation Construction Alliance, the Old Dominion Highway Contractors Association, Fairfax County and the Chesapeake Bay Bridge and Tunnel Commission.

Stuart Raphael, lead counsel for Elizabeth River Crossings, said that a "win for the Meeks plaintiffs would have deprived state and municipal governments of a key financing mechanism, hobbled Virginia's P3 law, and spawned copy-cat challenges to P3 laws in other states. The Supreme Court of Virginia got it right on the law and also avoided the very bad consequences that would have resulted if the trial court's ruling had not been reversed."

The decision in *Elizabeth River Crossings* is a landmark ruling that broadly upholds the tolling provisions of Virginia's PPTA, the constitutionality of which had not yet been tested. The ruling likely extends to protect the provisions authorizing user fees under the PPEA, whose provisions were borrowed from the PPTA.

Nonetheless, proponents of projects that rely on tolls or other types of user fees under the PPTA and PPEA would be well advised to consider how their projects would fare under a similar legal challenge, particularly if the project consists of multiple facilities and involves the imposition of user fees for one facility to finance improvements to another. Project proponents are well advised to establish a strong record showing that the facilities are functionally related to one other, benefiting all project users.

**P3 Practice at Hunton & Williams**

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