



APR 21 2009

COMMONWEALTH of VIRGINIA

Office of the Attorney General

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April 21, 2009

The Honorable Paul C. Garrett, Clerk
Circuit Court for the City of Charlottesville
315 East High Street
Charlottesville, Virginia 22902

VIA HAND DELIVERY

Re: *Coalition to Preserve McIntire Park, et al., v.
City of Charlottesville and Commonwealth of Virginia, Department of
Transportation*
CL09000084-00

Dear Mr. Garrett:

Enclosed for filing please find the Commonwealth of Virginia, Department of Transportation's Affirmative Defenses, Demurrer, and Answer filed in the above-referenced matter. A copy of the same has been hand-delivered, this day, to counsel of record.

Should you have any questions, please contact me at (804) 786-1968.

I remain

Very truly yours,

A handwritten signature in black ink, appearing to read 'Lori L. Pound', with a large, stylized flourish at the end.

Lori L. Pound
Assistant Attorney General

Enclosure

Defendant Virginia Department of Transportation Affirmative Defenses, Demurrer, and Answer to Plaintiffs' Amended Complaint

cc: Jennifer L. McKeever, Esquire [with enclosure] [via hand delivery]
The Honorable S. Craig Brown, City Attorney [with enclosure] [via hand delivery]

2. The Plaintiffs lack standing to seek judicial relief from the Department for the alleged violation of the *Constitution of Virginia*, by the Council of the City of Charlottesville, Virginia (hereinafter referred to as the “Council”), in that there is no actual controversy between the Plaintiffs and the Department.

3. As a matter of law, the $\frac{3}{4}$ ths supermajority vote by the Council was not required to convey a permanent easement to the Department for the construction of a public road.

4. Further, the Plaintiffs are barred from proceeding with their claim by the equitable doctrine of laches. The Plaintiffs waited nine (9) months after the occurrence of conduct that they allege to be unconstitutional, the vote of the Council to convey property to the Department on June 2, 2008, to file the current action. The Department has been prejudiced by this delay, in that during the time of the Plaintiffs’ delay, the Department awarded a contract to Faulconer Construction Company, Inc. (hereinafter referred to as “Faulconer”), for the construction of the Meadow Creek Parkway on December 18, 2008. Construction commenced prior to the initiation of the current action, and the Department will suffer significant financial penalties should it be forced to halt construction activities.

5. It is a well established principle that sovereign immunity bars actions against the Commonwealth and its agencies, and “only the legislature acting in its policy-making capacity can abrogate the Commonwealth’s sovereign immunity.” *Afzall v. Commonwealth*, 273 Va. 226, 230; 639 S.E.2d 279, 281 (2007), citing *Commonwealth v. Luzik*, 259 Va. 198, 206, 524 S.E.2d 871, 876 (2000). A “waiver of sovereign immunity cannot be implied from general statutory language” but must be “explicitly and expressly announced” in the statute. *Afzall* at 230, 527 S.E.2d at 876, citing *Hinchey v. Ogden*, 226 Va. 234, 241, 307 S.E.2d 891, 895 (1983), citing *Elizabeth River Tunnel Dist. V. Beecher*, 202 Ca. 452, 457, 117 S.E.2d 685, 689 (1961). The legislature had made no

policy, as evidenced by the *Code of Virginia*, which would permit the Plaintiffs to file the current action against the Department.

ANSWER

COMES NOW, Defendant Commonwealth of Virginia, Department of Transportation (hereinafter referred to as the “Department”), by counsel, and for its Answer to the Amended Complaint filed herein states as follows:

1. The Department is without information or belief to either admit or deny the allegation contained in Paragraph 1 of the Amended Complaint (hereinafter referred to as the “Complaint”). To the extent a response is required, the Department denies the allegation contained in Paragraph 1 of the Complaint.

2. The Department is without information or belief to either admit or deny the allegation contained in Paragraph 2 of the Complaint. To the extent a response is required, the Department denies the allegation contained in Paragraph 2 of the Complaint.

3. The Department is without information or belief to either admit or deny the allegation contained in Paragraph 3 of the Complaint. To the extent a response is required, the Department denies the allegation contained in Paragraph 3 of the Complaint.

4. The Department is without information or belief to either admit or deny the allegation contained in Paragraph 4 of the Complaint. To the extent a response is required, the Department denies the allegation contained in Paragraph 4 of the Complaint.

5. The Department is without information or belief to either admit or deny the allegation contained in Paragraph 5 of the Complaint. To the extent a response is required, the Department denies the allegation contained in Paragraph 5 of the Complaint.

6. The Department is without information or belief to either admit or deny the allegation contained in Paragraph 6 of the Complaint. To the extent a response is required, the Department denies the allegation contained in Paragraph 6 of the Complaint.

7. The Department is without information or belief to either admit or deny the allegation contained in Paragraph 7 of the Complaint. To the extent a response is required, the Department denies the allegation contained in Paragraph 7 of the Complaint.

8. The Department is without information or belief to either admit or deny the allegation contained in Paragraph 8 of the Complaint. To the extent a response is required, the Department denies the allegation contained in Paragraph 8 of the Complaint.

9. The Department is without information or belief to either admit or deny the allegation contained in Paragraph 9 of the Complaint. To the extent a response is required, the Department denies the allegation contained in Paragraph 9 of the Complaint.

10. The Department is without information or belief to either admit or deny the allegation contained in Paragraph 10 of the Complaint. To the extent a response is required, the Department denies the allegation contained in Paragraph 10 of the Complaint.

11. The Department is without information or belief to either admit or deny the allegation contained in Paragraph 11 of the Complaint. To the extent a response is required, the Department denies the allegation contained in Paragraph 11 of the Complaint.

12. The Department is without information or belief to either admit or deny the allegation contained in Paragraph 12 of the Complaint. To the extent a response is required, the Department denies the allegation contained in Paragraph 12 of the Complaint.

13. The Department is without information or belief to either admit or deny the allegation contained in Paragraph 13 of the Complaint. To the extent a response is required, the Department denies the allegation contained in Paragraph 13 of the Complaint.

14. The Department is without information or belief to either admit or deny the allegation contained in Paragraph 14 of the Complaint. To the extent a response is required, the Department denies the allegation contained in Paragraph 14 of the Complaint.

15. The Department is without information or belief to either admit or deny the allegation contained in Paragraph 15 of the Complaint. To the extent a response is required, the Department denies the allegation contained in Paragraph 15 of the Complaint.

16. The Department admits the truth of the allegation contained in Paragraph 16 of the Complaint.

17. The Department admits the truth of the allegation contained in Paragraph 17 of the Complaint.

18. The Department admits the truth of the allegation contained in Paragraph 18 of the Complaint, but states that the allegation is not a comprehensive list of the Department's duties and responsibilities.

19. The Department denies the allegation contained in Paragraph 19 of the Complaint.

20. The Department denies the allegation contained in Paragraph 20 of the Complaint.

21. The Department denies the allegation contained in Paragraph 21 of the Complaint.

22. The Department is without information or belief to either admit or deny the allegation contained in Paragraph 22 of the Complaint. To the extent a response is required, the Department admits that the public record indicates that Council of the City of Charlottesville (hereinafter referred to as the "Council") was presented with an ordinance authorizing permanent

and temporary easements across property in the County of Albemarle to the Commonwealth of Virginia, but to the extent that the allegation contained in Paragraph 22 of the Complaint implies that the City had unencumbered ownership of the property that is the subject of this matter (hereinafter referred to as the "Subject Property," the Department denies the allegation.

23. The Department is without information or belief to either admit or deny the allegation contained in Paragraph 23 of the Complaint. To the extent a response is required, the Department admits the allegation contained in Paragraph 23 of the Complaint.

24. The Department admits the truth of the allegation contained in Paragraph 24 of the Complaint to the extent that a deed conveying temporary and permanent easements across the subject property to the Virginia Department of Transportation was recorded in the Clerk's Office of the County of Albemarle; however, the Department states that the deed was dated October 21, 2008, and acknowledged December 5, 2008; and further, that to the extent that the allegation implies that the Defendant City had sole or unilateral authority to convey an interest in the subject property, the Department denies the allegation.

25. The Department is without information or belief to either admit or deny the allegation contained in Paragraph 25 of the Complaint. To the extent a response is required, the Department denies the allegation contained in Paragraph 25 of the Complaint.

26. The Department admits that a portion of the conveyed land was used as a ball field for the high school of the City of Charlottesville. The Department is without information or belief to either admit or deny the remainder of the allegation contained in Paragraph 26 of the Complaint, and thus denies the remainder of the allegation.

27. The Department admits the truth of the allegation contained in Paragraph 27 of the Complaint.

28. The Department admits the truth of the allegation contained in Paragraph 28 of the Complaint.

29. The Department denies the truth of the allegation contained in Paragraph 29 of the Complaint.

30. The Department admits the truth of the allegation contained in Paragraph 30 of the Complaint, but states that the allegation is not a comprehensive list of the Department's activities on the subject property.

31. The Department is without knowledge regarding the meaning of the allegation contained in Paragraph 31 of the Complaint that "[u]pon completion of the Parkway, the entire road... will be turned over to [the Department] permanently;" and therefore denies the same.

32. The Department admits the truth of the allegation contained in Paragraph 32 of the Complaint, but affirmatively denies that the cited provision of the *Constitution of Virginia* has any application in this case.

33. The Department denies the truth of the allegation contained in Paragraph 33 of the Complaint.

34. The Department denies the allegation contained in Paragraph 34 of the Complaint as it is based on the erroneous assumption that a supermajority vote was required.

35. The Department denies the truth of the allegation contained in Paragraph 35 of the Complaint.

36. The Department denies the truth of the allegation contained in Paragraph 36 of the Complaint.


37. No response required as it states a legal conclusion. To the extent a response is required, the Department denies the truth of the allegation contained in Paragraph 37 of the Complaint.

CONCLUSION

For the reasons set forth herein, the Commonwealth of Virginia, Department of Transportation, denies that the Plaintiffs are entitled to the declaratory relief requested in the Amended Complaint, denies that the Plaintiffs are entitled to the injunctive relief requested in the Amended Complaint, denies that Plaintiffs are entitled to attorney's fees or any other relief, and having answered the allegations in the Amended Complaint, the Department respectfully requests that the Amended Complaint by the Coalition to Preserve McIntire Park be dismissed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
DEPT. OF TRANSPORTATION


Of Counsel

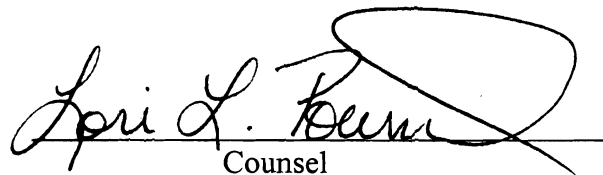
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CERTIFICATION OF SERVICE

I hereby certify that a true and exact copy of the foregoing Commonwealth of Virginia, Department of Transportation's Affirmative Defenses, Demurrer, and Answer to Plaintiffs' Amended Complaint was hand delivered, this 21st day of April, 2009, to:

Jennifer L. McKeever, Esquire
Jones & Green, LLP
917 East Jefferson Street
Charlottesville, Virginia 22902
Facsimile: (434) 296-1209
Counsel for Plaintiff Coalition to Preserve McIntire Park

The Honorable S. Craig Brown, City Attorney
Office of the City Attorney for the City of Charlottesville
Post Office Box 911
605 East Main Street
Charlottesville, Virginia 22902
Facsimile: (434) 970-3022
Counsel for Defendant City of Charlottesville


Counsel