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Virginia Circuit Court finds \$2.1 Billion Virginia P3 Unconstitutional.

A Virginia Circuit Court judge has ruled that the financing mechanism of the Elizabeth River Crossings project in the southeastern part of the state is unconstitutional, calling into question the future of the multi-billion dollar public-private partnership and other Virginia P3s.

Judge James A. Cales Jr. ruled from Portsmouth in *Meeks v. Virginia Department of Transportation* that the Virginia General Assembly went beyond its state constitutional authority in granting VDOT a free hand to set toll rates supporting backing the debt of the \$2.1 billion tunnel under construction beneath the Elizabeth River between Norfolk and Portsmouth. The project is supported by \$664 billion of private activity bonds and a \$422 million federal loan under the Transportation Infrastructure Finance Innovation Act.

The tunnel, scheduled for completion in 2017, is intended to help clear congestion in one of the commonwealth's major population centers, but a group of citizens brought the lawsuit last year after the project's agreement with VDOT specified that drivers would begin paying tolls in January to use an existing tunnel. That revenue is being covered by VDOT in the interim. While area residents celebrated the decision, state leaders expressed disappointment. Virginia has become a national leader for P3s under Gov. Bob McDonnell, with the ERC project as the crown jewel.

Last month, the project was honored as the 2012 North America Toll Road Deal of the Year by Project Finance Magazine.

The private company formed for the project, Elizabeth River Crossings, LLC, is to operate and maintain the tunnel for 58 years under the terms of its agreement with VDOT. The company will also take point on several other major transportation projects in the area. McDonnell vowed to contest the circuit court's decision.

"I am disappointed with the ruling made by Circuit Judge James A. Cales Jr. in Portsmouth today regarding the tolling for the critically needed Elizabeth River Crossings project, including the Midtown Tunnel, the Downtown Tunnels and the Martin Luther King Boulevard among other improvements," McDonnell said following the decision. "The existing tunnels were built with toll revenues and tolls are needed again to build a second Midtown Tunnel and make other essential improvements for the sake of safety and efficient travel. The commonwealth will seek a stay and appeal the judge's ruling to the Virginia Supreme Court because we believe the state's position is legally correct through the Virginia Constitution and state code."

Brian Gottstein, a spokesman for Virginia attorney general Ken Cuccinelli, said the decision could have grave implications for tolled projects all over the commonwealth.

"The revenues raised through the tunnel tolls were user fees to be used solely for a single transportation project," Gottstein said. "As such, we still believe the tolls cannot be considered a tax and that it is completely within VDOT's authority to set reasonable tolls to pay for the construction, operation, and maintenance of the project. Certainly, we are disappointed with the court's decision."

We expect to appeal. If this ruling stands and becomes the law of Virginia, it would threaten the commonwealth's ability to use public-private partnerships to construct major transportation projects. Many tolled projects could require legislative approval before proceeding, which would mean significantly increased costs and construction delays."

Scott Zuchorski, who rates the project's debt for Fitch Ratings, said it is not yet clear what the decision will mean for the project and its rating. Fitch and Standard & Poor's have both rated the project's debt BBB-minus, and the PAB deal came to market in April 2012 with yields ranging from 4.45% with a 4.25% coupon in 2022 to 5.5% priced at par in 2042. That was "slightly below expectations," according to a Fitch report.

"At this point we'll obviously continue to monitor it," Zuchorski said, adding that under the concession agreement VDOT would shoulder the burden to pay the bondholders.

"We think VDOT would be on the hook to pay off the ERC debt," Zuchorski said.

A panel of three judges would need to approve the appeal before it could go before the seven justices of the Virginia Supreme Court.

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The Bond Buyer