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# IN THE
# SUPREME COURT OF VIRGINIA

**Record No. 160582**

CHARLES D. CHAFFINS, LINDA CHAFFINS,
BEVERLY B. McQUARY, and MICHAEL W. HUNTLEY,
*Appellants/Defendants,*

v.

ATLANTIC COAST PIPELINE, LLC,
*Appellee/Plaintiff.*

## BRIEF OF APPELLEE

From the Circuit Court for Buckingham County
Nos. CL15-66, CL15-72, and CL15-73

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## INTRODUCTION

Appellee Atlantic Coast Pipeline, LLC ("Atlantic") is a company engaged in the regulatory approval process for a new natural gas transmission line that will extend from West Virginia, through the Commonwealth of Virginia, and into North Carolina. This transmission line, if approved, will expand natural gas transmission capabilities and serve the growing demand of electric and gas public utilities in Virginia and North Carolina. Regulatory authority over this project rests primarily with the Federal Energy Regulatory Commission ("FERC"), whose regulations require Atlantic to conduct surveys and related examinations upon properties located along the proposed route of the transmission line.

The General Assembly has authorized Atlantic to conduct these surveys under Va. Code § 56-49.01. To utilize the statute, however, Atlantic must comply with several prerequisites, including, as is relevant here, providing landowners with 15 days' notice of "the date of the intended entry." Here, Atlantic complied with that requirement by notifying appellants Charles and Linda Chaffins, Beverly McQuary, and Michael Huntley (collectively, the "Landowners") that it intended to survey their properties "on or after April 27, 2015."[1] Nevertheless, the Landowners argue that this notice – the Original Notice – was insufficient under the statute.

[1] The notices with the "on or after" language are referred to in this brief as the "Original Notices."

The Landowners' argument fails for two reasons. First, the facts in this case have developed in a way that renders the Landowners' challenge to the Original Notices moot. Rather than insisting on entry pursuant to the Original Notices approved below, Atlantic responded to the Landowners' concerns by issuing new notices that specify a six-day window in which surveying will take place.[2] As a result, the Landowners' challenge to the Original Notices is now moot.

But even if the Court addresses the merits of the Landowners' argument, Atlantic's Original and Revised Notices comply with § 56-49.01(C). Under this Court's established rules of statutory construction, the statute does not require notices to provide a fixed date of entry, as urged by the Landowners. The statute merely required Atlantic to set forth its "intended" date of entry. Atlantic's Revised Notices certainly comply with this requirement by providing a bracketed six-day timeframe. The Original Notices also satisfied this requirement by notifying the Landowners that Atlantic intended to survey on or after April 27, 2015. Therefore, regardless of whether the Court examines the Original or Revised Notices, or both, it should affirm the trial court's decision.

[2] These notices are referred to in this brief as the "Revised Notices."

## STATEMENT OF FACTS AND PROCEEDINGS

In 2004, the General Assembly passed § 56-49.01, which authorizes "[a]ny firm, corporation, company, or partnership, organized for the bona fide purpose of operating as a natural gas company" to conduct "examinations, tests, hand auger borings, appraisals, and surveys for its proposed line or location of its works." *See* § 56.49.01(A). The Landowners do not dispute that Atlantic is such a company or that its surveys fell within the scope of the statute. *See* Appellants' Br. at 3. Rather, they contend that Atlantic failed to satisfy one of the conditions precedent to entry, namely, the notice of entry requirement.

### I. Atlantic's Survey Process and Original Notices

To apply for a certificate of public convenience and necessity, Atlantic must provide "all information necessary" to advise FERC about the details of its pipeline project. *See* 18 C.F.R. § 157.5(a). This information includes plans for crossing wetlands, field surveys, and the location of culturally and environmentally significant sites that might be disturbed. *See* 18 C.F.R. §§ 157.14(a), 380.12(j). Because the Landowners' properties are located along Atlantic's proposed route in Buckingham County, Atlantic had to enter their land to conduct the requisite surveys. *See* J.A. at 2.

Section 56-49.01 provides several steps that must occur before a company can enter property. First, the company must request the landowner's permission to enter

on a proposed date. § 56-49.01(A). If permission is granted, then the company can perform the surveys without taking any further steps under the statute. On the other hand, if the landowner does not grant permission by the proposed date, then the company must "give[] the owner notice of intent to enter as provided in subsection C." § 56-49.01(A). In turn, subsection C provides that "[n]otice of intent to enter shall . . . set forth the date of the intended entry." § 56-49.01(C).

In accordance with the statute, on March 6, 2015, Atlantic requested the Landowners' permission to enter their properties. *See* J.A. at 475-76, 479-80, and 490-91. Specifically, Atlantic proposed a date of March 26, 2015. *See id.* In its requests, Atlantic advised the Landowners that its surveying activities would involve several phases and crews, including a flagging crew, survey crew, environmental crew, archaeological crew, and soil resistivity crew. *See id.* None of the Landowners granted permission by the proposed date. Accordingly, on April 7, 2015, Atlantic sent notices to each of the Landowners, advising them that "[Atlantic] intends to commence surveys on your property on or after April 27, 2015." J.A. at 477, 484, and 495.

## II. Trial Court Proceedings

Based on this notice and the self-executing statute, Atlantic believed that it possessed the statutory right to enter the Landowners' properties to conduct the necessary surveys and examinations. Nevertheless, Atlantic's experience counseled

in favor of obtaining a court order to avoid possible confrontations. For that reason, in June 2015, Atlantic filed "Petitions for Declaratory Judgment" and "Motions for Entry of Order Allowing Entry on Property" in the Circuit Court for Buckingham County. *See* J.A. at 1-15, 91-105, and 135-54.

The Landowners demurred and opposed Atlantic's petitions and motions. On October 13, 2015, the trial court held a consolidated hearing on the demurrers in each of the Landowners' cases. During the hearing, Judge Blessing stated, "I find no flaw in the notification process that's taken place to date under the statute." J.A. at 236. On November 12, 2015, the trial court entered orders overruling the Landowners' demurrers. *See id.* at 73-74, 116-17, and 201-02.

The consolidated merits hearing took place on April 13, 2016. Atlantic presented the testimony of its assistant general counsel and senior land agent, as well as the notices sent to the Landowners, to prove that it had satisfied the notice requirement. *See* J.A. at 314-644. The Landowners, on the other hand, presented no evidence or testimony in their case.

Ultimately, the trial court held that the notices were sufficient, reasoning as follows:

> The dates, I feel like the dates in the letters meet the requirements of [56-49.01(B) and (C)]. Under B has to be 15 days prior to the date of the proposed inspection. When it says proposed, that indicates to me that reasonable people would think, well, that could change. And I think there were reasons given in the testimony why it could change. The easiest one for me to point out right now is weather, workloads on

> other properties or so forth. And under C, it says 15 days prior to the date of mailing of the notice, and it's the date of the intended entry. Okay? Which tells me that that's what I want to do. That's what I hope to do, but it may have to change.

J.A. at 465-66. Immediately following the hearing, the trial court entered final orders in each of the cases, granting Atlantic the right to "enter onto Respondents' Property as necessary to carry out the purposes set forth in Va. Code § 56-49.01." *Id.* at 81, 125, and 209.

## III. Appellate Proceedings

On April 15, 2016, the Landowners noticed their appeal and filed a Petition, in which they assigned error to the trial court's decisions on the merits and on demurrer. *See* J.A. at 88-90; Pet. for Appeal at 4. Specifically, the Landowners seized on the narrow issue of whether Atlantic's notices satisfied the "date of the intended entry" requirement of § 56-49.01(C). On the same day, the Landowners also moved for a stay of the trial court's final orders pending the decision on appeal, as well as an expedited decision by this Court on their Petition. Atlantic opposed the Motions to Stay and Expedite and argued that the appeal was moot because "[Atlantic] has voluntarily agreed not to survey at this time and is in the process of re-issuing notices pursuant to Code § 56-49.01." Respondent's Combined Opp. at 2.

On April 29, 2016, this Court denied the Landowners' motions but declined to rule on the mootness question. Nevertheless, the Court awarded the Landowners'

appeal on December 13, 2016. Based on the Landowners' assignments of error, the appeal is limited to the narrow issue of whether "[Atlantic] failed to satisfy the plain language requirement of Virginia Code Annotated § 56-49.01(C)." Pet. for Appeal at 4.

## IV. Atlantic's Revised Notices

While the Landowners' Petition was pending, Atlantic followed through on its representation that it would send the Revised Notices. *See* Respondent's Combined Opp. at 6-8. On June 17, 2016, Atlantic sent each of the Landowners a Revised Notice that provided a six-day window for the intended entry date – July 6 through July 11, 2016. The Revised Notices also informed the Landowners that "[a] range is given because terrain, weather, access, identification of species and other issues outside of Atlantic's control can all affect the timing of the completion of the surveys." The Revised Notices, which have not yet been made part of the record either below or in the appellate proceedings, are attached to this brief as **Exhibit A**.[3]

[3] *See Rountree v. Rountree*, 200 Va. 57, 63 (1958) ("Evidence of facts outside the record, occurring after the rendition of the judgment in the court below and affecting the proceedings of the appellate court, will, where deemed necessary, be received and considered by such court for the purpose of determining its action; thus, extrinsic evidence is competent to show that the controversy or the substance thereof, has ceased to exist, and is moot.").

## ARGUMENT

Atlantic will first explain why the Court should dismiss this appeal as moot. Next, in the alternative, it will address the merits issue by explaining why Atlantic's Original and Revised Notices satisfied § 56-49.01(C). Finally, Atlantic will explain why the Landowners' attempt to bootstrap their statutory interpretation argument with constitutional issues is unavailing.

### I. This Appeal is Moot and Should be Dismissed Because the Revised Notices Provided Dates Certain and Supplanted the Original Notices.

Since the trial court rendered its decision in April 2016, intervening events have mooted the only issue on appeal. "Our jurisprudence provides that a case is moot and must be dismissed when the case or controversy that existed between the litigants has ceased to exist[.]" *E.C. v. Virginia Dep't of Juvenile Justice*, 283 Va. 522, 530 (2012). "It is not the office of courts to give opinions on abstract propositions of law, or to decide questions upon which no rights depend, and where no relief can be afforded." *Franklin v. Peers*, 95 Va. 602 (1898). Furthermore, "when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment but will dismiss the appeal." *Hankins v. Town of Va. Beach*, 182 Va. 642, 644 (1944).

This appeal is moot because the operative notices – the Revised Notices – omitted the disputed "on or after" language and included dates certain. The issue from which this appeal arises is whether the Original Notices, which included the "on or after" language, satisfied § 56-49.01(C). The Landowners' arguments are framed around the Original Notices, including their claims that the Original Notices allowed for indefinite entry after the noticed date. *See, e.g.*, Appellants' Br. at 11 (arguing that the Original Notices provide Atlantic with "free rein" to enter the properties); *id.* at 19 (arguing that, by upholding the Original Notices, the trial court granted Atlantic "open-ended licenses").

Because Atlantic sent the Revised Notices *after* the trial court entered judgment, the Landowners never argued that the six-day window was insufficient, and the trial court never ruled on that issue. Nevertheless, since this appeal was filed, the Revised Notices have supplanted the Original Notices and have become the operative documents. Therefore, any decision by this Court involving whether the Original Notices satisfy § 56-49.01(C) would answer a question this case no longer presents. Accordingly, this appeal "is moot and must be dismissed [because] the case or controversy that existed between the litigants has ceased to exist[.]" *E.C.*, 283 Va. at 530.

While the effect of the Revised Notices is to moot the Landowners' appeal, Atlantic notes that such effect is not prejudicial to the Landowners. The appeal has

become moot because Atlantic revised its notices in a way favorable to the Landowners. The Landowners have, in effect, received from Atlantic voluntarily what they sought to receive through their demurrers and defense at trial – a more narrowed timeframe for the proposed surveying.

## II. Even if a Live Controversy Remains, Atlantic's Original and Revised Notices Satisfy § 56-49.01(C).

Even if the Court concludes that the appeal is not moot, Atlantic's Original and Revised Notices satisfied § 56-49.01(C). The Landowners contend that the trial court improperly interpreted § 56-49.01(C) and erred by holding that Atlantic's Original Notices complied with the statute. The application of a statute to a given set of facts presents a mixed question of law and fact. *See Smyth Cnty. Comty. Hosp. v. Town of Marion*, 259 Va. 328, 336 (2000). This requires the Court to view the facts in the light most favorable to Atlantic, the prevailing party below, while reviewing *de novo* the trial court's interpretation of the statute. *See Caplan v. Bogard*, 264 Va. 219, 225 (2002).

### A. Atlantic's Original and Revised Notices comport with the plain meaning of the statute and the legislative intent.

"In construing statutes, courts are charged with ascertaining and giving effect to the intent of the legislature." *Crown Cent. Petroleum Corp. v. Hill,* 254 Va. 88, 91 (1997) (citing *City of Winchester v. American Woodmark Corp.,* 250 Va. 451, 457 (1995)). In doing so, courts must "determine the legislative intent from the

words used in the statute, applying the plain meaning of the words unless they are ambiguous or would lead to an absurd result." *Wright v. Commonwealth*, 278 Va. 754, 759 (2009). The statute at issue here unambiguously states that a notice of intent to enter shall "set forth the date of the *intended* entry." § 56-49.01(C) (emphasis added).

"Pursuant to the rules of statutory construction, [undefined words in a statute] must be read in accordance with their ordinary meaning." *Laws v. McIlroy*, 283 Va. 594, 604 (2012) (internal quotation marks omitted). The ordinary use of the word "intended" is "planned," *New Webster's Dictionary and Thesaurus* 503 (1st ed. 1992), or "meant," *New World Dictionary* 732 (2d ed. 1980). Both "intended" or "planned" look forward, with the understanding that circumstances may necessitate changes in the interim. For example, Atlantic could fully intend to enter the property on April 27, 2015, but a spring snowstorm could push the date back. Because § 56-49.01(C) requires the notice to be sent at least 15 days prior to the intended date of entry, it would be highly impractical for a company such as Atlantic to have to issue a revised notice – and wait another 15 or more days – whenever intervening events require a later date of entry from the one specified in the notice.

To avoid this plain meaning, the Landowners ignore the prepositional phrase "of the intended entry" altogether, and instead focus exclusively on the preceding phrase "set forth the date." *See* Appellants' Br. at 11. However, that construction

flies in the face of the longstanding rule that courts "may not . . . ignore any of the actual statutory language." *Logan v. City Council of City of Roanoke*, 275 Va. 483, 492 (2008); *see also Halifax Corp. v. First Union Nat'l Bank*, 262 Va. 91, 100 (2001) ("When analyzing a statute, we must assume that the General Assembly chose, with care, the words it used in enacting the statute, and we are bound by those words when we apply the statute.").

Had the General Assembly meant to require the actual date of entry, it could have chosen to omit the word "intended." In fact, the Landowners point to several statutes in which the General Assembly did just that. *See* Appellants' Br. at 15-17 (citing Va. Code § 33.2-723(B) (requiring notice of a ballot measure for county assumption of highway indebtedness to "set forth the date" of the election); § 8.01-217(G) (requiring the Registrar of Vital Records to "set forth the date and place of birth" in a name change certification that does not include the individual's prior name); and § 55-370(D)(5)(b)(2) (requiring time-share estate owners' associations seeking to sell liened properties at foreclosure to "set forth the date, time, and terms" of the foreclosure sale)). In contrasting § 56-49.01(C) with statutes that do not include the word "intended," the Court "must presume that the exclusion of the language was intentional." *Hollingsworth v. Norfolk S. Ry. Co.*, 279 Va. 360, 366 (2010).

By including the word "intended" in § 56-49.01(C), the General Assembly required Atlantic to notify the Landowners of the date Atlantic "planned" to enter the properties. To that end, the Original Notices stated that "[Atlantic] intends to commence surveys on your property on or after April 27, 2015." *See* J.A. at 477, 484, and 495. Moreover, the Revised Notices specified a six-day range when the surveys would occur. In either instance, the notices clearly provided the Landowners the date that Atlantic planned to survey their properties as required by the statute.[4] Thus, the trial court properly concluded that Atlantic's Original Notices complied with § 56-49.01(C).

**B. The Landowners' proposed interpretation requires an absurd result.**

The Landowners' interpretation, which would require Atlantic to set forth a date certain for its entry, also leads to an absurd result. This Court has long avoided any "interpretation of a statute that would lead to absurd results." *Commonwealth v. Doe*, 278 Va. 223, 230 (2009). The General Assembly did not include language

[4] With the exception of the Circuit Court for Nelson County, *see Atl. Coast Pipeline, LLC v. Avery*, No. CL15000280, *et al.*, all the circuit courts in which Atlantic has filed petitions for survey access have concluded that Atlantic's Original Notices satisfied § 56-49.01(C). Since the Nelson County decision, Atlantic has stopped using "on or after" language in its notices, and, as a matter of company policy, only sends the Revised Notices with a bracketed date range. The Nelson County court approved the Revised Notices and entered declaratory judgments in favor of Atlantic.

requiring a "specific date" or "date certain" in § 56-49.01(C) for good reason. Any number of issues can affect the commencement of surveys on the "intended" date, including weather, equipment problems, and delays resulting from surveys on other properties.[5]

Although a company may intend to commence surveys on a given date, practically speaking, it may not be possible for each of the five survey crews to perform the necessary examinations. In that scenario, and against the backdrop of impending construction and regulatory deadlines, the company would have to re-issue notices, wait another 15 days, and then hope that external circumstances do not again prevent surveying activities on the specified date. Accordingly, the statute provides some flexibility for companies to conduct the surveys contemplated by § 56-49.01. This clearly promotes efficiency in providing notice and conducting the pre-condemnation surveys.

Additionally, the Landowners argue that Atlantic's notices deprived them of "the benefits of clarity, communication, and coordination" that the statute was designed to promote. Appellants' Br. at 20. But that argument is directly refuted by the record evidence. More than one month prior to the April 27, 2015 date provided

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[5] Atlantic explained this to the Landowners in the Revised Notices. *See* **Ex. A**. Atlantic's senior land agent also testified to this. *See* J.A. at 405 ("It would depend on how many resources may be found prior to getting to the subject property, weather delays, that sort of thing.").

in the Original Notices, Atlantic requested the Landowners' permission to enter their properties in accordance with § 56-49.01(B).[6] *See* J.A. at 475-76, 479-80, and 490-91. Each of the requests included the following statement in bold font: "**Please include your phone number so we may contact you prior to this activity. If you prefer to phone us, please call toll free at 1-888-895-8716 and one of our right-of-way representatives will follow up with you.**" *Id.* Likewise, Atlantic's Original Notices provided the telephone number of an Atlantic representative. *See id.* at 477, 484, and 495. Thus, the evidence flatly contradicts the Landowners' argument that they were "deprived" of the opportunity to coordinate and cooperate with Atlantic.

**C. The Landowners' contextual analysis of § 56-49.01 is unavailing.**

The Landowners also ask the Court to read § 56-49.01(C) within its context. *See* Appellants' Br. at 13-14. On this point, Atlantic agrees that the Court must "construe the words and terms at issue in the context of the other language used in the statute." *Buonocore v. Chesapeake & Potomac Tel. Co.*, 254 Va. 469, 472 (1997). In applying this principle, however, the Landowners misinterpret subsection B, and then incorrectly apply their flawed interpretation to subsection C.

Subsection A of the statute permits entry where three conditions are met: "(a) the natural gas company has requested the owner's permission to inspect the

[6] Initially, each of the Landowners refused to grant Atlantic survey access, which then triggered the notice requirement.

property as provided in subsection B, (b) the owner's written permission is not received prior to the date entry is proposed, and (c) the natural gas company has given the owner notice of intent to enter as provided in subsection C." § 56-49.01(A). Subsection B requires the company to request permission for entry by, among other things, "set[ting] forth the date such inspection is proposed to be made." § 56-49.01(B). If permission is not received by the "proposed" date, subsection C requires a notification to be sent to the landowner in which the company must "set forth the date of the intended entry." § 56-49.01(C).

The Landowners argue that the interplay between subsections A and B requires the "proposed" date to be a date certain. Specifically, they contend that a request for entry "on or after April 27, 2015" would render it "impossible to know that permission had been received prior to the date entry is proposed." Appellants' Br. at 14 (internal quotation marks omitted). But it is not impossible. Under Subsection B, a company intending to survey issues a notice requesting permission and includes a proposed date of entry. Use of "proposed" in Subsection B is sensible because that provision contemplates that the landowner may grant permission to enter. A landowner could grant permission to enter but ask that such entry be on a different date from that proposed, and, if such a new date were mutually agreeable, the statute would be satisfied. Subsection C comes into play when the landowner, as here, has not responded or refused permission to enter the property under

Subsection B. At that point, the company issues a notice of the "intended," i.e. the company's planned, date of entry given that agreement, i.e. permission, is not forthcoming.

But even if subsection B prohibited "on or after" language, subsection C's "intended" date requirement does not demand the same interpretation. The Landowners' reading of subsection B is based solely on the need for certainty to know when to take the next step in the process, i.e. notice. However, notice under subsection C is the last step in the process, and therefore the Landowners' rationale cannot apply to the notice requirement. It certainly is not applicable to the Revised Notices, nor does it call into question the Original Notices.

## III. The Landowners' Strict Construction Argument Mischaracterizes the Trial Court's Final Orders and the Narrow Issue Before the Court.

The Landowners contend that § 56-49.01 must be interpreted strictly (i.e. in their favor) because the trial court's final orders "effectively grant[] [Atlantic] open-ended licenses to enter the Landowners' properties at their whim…." Appellants' Br. at 19. However, that argument mischaracterizes the orders and the single issue on appeal. As discussed *supra*, Atlantic's petitions sought an order declaring that it had complied with § 56-49.01 and was therefore authorized to conduct surveys on the Landowners' properties. Although the order was not necessary based on the self-executing nature of § 56-49.01, Atlantic sought judicial resolution to aid in the peaceful utilization of the statute.

Atlantic never sought, nor did the trial court grant, an open-ended license to enter the Landowners' properties. Rather, the trial court's orders stated that Atlantic had the right to access the Landowners' properties for the limited purpose of performing the surveys, tests, and examinations permitted by § 56-49.01. This Court has explained that a trial court "speaks through its orders." *Waterfront Marine Const., Inc. v. N. End 49ers Sandbridge Bulkhead Grps. A, B & C*, 251 Va. 417, 427 (1996). Here, the trial court's orders authorize Atlantic to do nothing more than enter the Landowners' properties "to carry out the purposes set forth in Va. Code § 56-49.01." J.A. at 81, 125, and 209.

Still, the Landowners attempt to bolster their argument by suggesting that the "open-ended license" purportedly granted by the trial court is particularly egregious because the right to exclude is a fundamental property right deserving of heightened constitutional protection. *See* Appellants' Br. at 18-19. First, the trial court did not grant an open-ended license, as discussed *supra*. Second, the Landowners did not assign error to the trial court's rulings on the purported right to exclude or the corresponding constitutional issues. *See* Pet. for Appeal at 4. Third, this Court awarded the Landowners an appeal strictly on the notice issue. *See* Award of Appeal. Nevertheless, to the extent the Court undertakes any constitutional analysis,

Atlantic will briefly summarize why the Landowners do not have a right to exclude and why the statute is constitutional.[7]

The right to exclude authorized surveyors is not, nor has it ever been, one of the sticks in a property owner's bundle of rights. Since as early as the Eighteenth Century, Virginia law has permitted authorized surveyors to enter private land. *See* 11 William Walter Hening, *Statutes at Large* 27-28 (1823) (ch. 11) (including a 1782 law that permitted authorized surveyors to enter upon private land to survey the location of public roads). In 1905, this Court permitted a railroad company to enter upon another company's land for surveying purposes. *See S. & W. Ry. Co. v. Va. & S. E. R. Co.*, 104 Va. 323, 325-26 (1905). Most recently, in examining § 56-49.01, the United States District Court for the Western District of Virginia held that "a landowner has no constitutionally protected property right to exclude an authorized utility from entering his property for survey purposes." *Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673, 690-91 (W.D. Va. 2015), *appeal docketed*, No. 15-2338 (4th Cir. Oct. 30, 2015).

Even if the Landowners possessed the right to exclude authorized surveyors, which they do not, § 56-49.01 is not facially unconstitutional. The minimally invasive nature of the surveys allowed under § 56-49.01 is not sufficiently intrusive

[7] These issues have been fully briefed and are pending oral argument before this Court in *Palmer v. Atl. Coast Pipeline, LLC*, No. 160630.

to constitute a taking. *See Klemic*, 138 F. Supp. 3d at 691. Moreover, no courts have ever applied strict scrutiny to the deprivation of a property right under a substantive due process analysis. Therefore, because the Landowners do not have a right to exclude, and because § 56-49.01 is constitutional, the Landowners' strict construction argument is misplaced.

## CONCLUSION

For the reasons discussed, the Court should dismiss the Landowners' appeal as moot or affirm the trial court's final orders.

Dated: February 17, 2017 Respectfully submitted,

*/s Benjamin L. Hatch*

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rloftin@mcguirewoods.com

***Counsel for Atlantic Coast Pipeline, LLC***

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of Appellee Atlantic Coast Pipeline, LLC complies with Rule 5:26 and Rule 5:28 of the Rules of the Supreme Court of Virginia, and further certifies as follows:

1. The Appellee is Atlantic Coast Pipeline, LLC.

2. Counsel for the Appellee is:


Benjamin L. Hatch (VSB No. 70116)
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rloftin@mcguirewoods.com

3. The Appellants are:

   a. Charles D. Chaffins

   b. Linda Chaffins

   c. Beverly B. McQuary

   d. Michael W. Huntley

4. Counsel for the Appellants is:

Evan Johns (VSB No. 89285)
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ejohns@appalmad.org

Isak Howell (VSB No. 75011)
Appalachian Mountain Advocates
Post Office Box 507
Lewisburg, West Virginia 24901
Telephone: (540) 998-7744
Facsimile: (304) 645-9008
isak@howell-lawoffice.com

5. On this 17th day of February 2017:

   a. An electronic copy of the foregoing was delivered to the Clerk's Office of the Supreme Court of Virginia as required by Rule 5:26(e);

   b. An electronic copy of the foregoing was sent via electronic mail to all Counsel of Record; and

   c. Ten copies of the foregoing were directed to be hand-delivered to the Clerk's Office of the Supreme Court of Virginia within the time allowed by Rule 5:26 and this Court's VACES Guidelines.

*/s Robert W. Loftin*

_____

Counsel for Appellee
Atlantic Coast Pipeline, LLC

# EXHIBIT A

701 East Cary Street
Richmond, VA 23219

Atlantic Coast Pipeline

June 17, 2016

**VIA CERTIFIED MAIL**
**RETURN RECEIPT REQUESTED**

Charles D & Linda L Chaffins
c/o Isak Howell Law Office
Attn: Isak Howell
119 Norfolk Ave SW, St 330
Roanoke, VA 24011

**Re:** Atlantic Coast Pipeline, LLC ("Atlantic"); the Atlantic Coast Pipeline Project
Buckingham County, VA Parcel ID# 60--1-1
Owners: Charles D & Linda L Chaffins c/o Isak Howell Law Office Attn: Isak Howell

By letter dated 3/6/2015Atlantic requested permission to enter and perform surveys and studies on the above-referenced Property in connection with its Atlantic Coast Pipeline project. In response to this letter, you denied Atlantic permission to enter the property.

Subsequently, by letter dated 4/7/2015, Atlantic provided you notice of its intent to enter the Property on or after 4/27/2015 for the purposes set forth in Va. Code § 56-49.01. In response to this notice of intent letter you reiterated your denial of permission for Atlantic to enter the Property.

Following these denials, in an effort to keep the peace and respecting the safety of all stakeholders involved, Atlantic sought direction from the Circuit Court of Buckingham County, Virginia. After multiple hearings over the last year and receiving evidence and listening to testimony and legal arguments from both landowners and Atlantic, on April 13, 2016, the Circuit Court of Buckingham County, Virginia entered a Final Order confirming Atlantic's right, and permitting Atlantic, to enter the above-referenced Property for the purposes set forth in Va. Code § 56-49.01.

Accordingly, Atlantic intends to enter upon the above-referenced Property in order to perform studies and surveys as authorized by Va. Code § 56-49.01 on the following dates:

| Crew | Intended Date of Entry | Estimated Duration |
|---|---|---|
| Flagging | 07/06/16 - 07/11/16 | 1 day |
| Survey | 07/06/16 - 07/11/16 | 1 day |
| Archaeological | 07/06/16 - 07/11/16 | 1-5 days |
| Environmental | 07/06/16 - 07/11/16 | 1 day |
| Soil Resistivity | 07/06/16 - 07/11/16 | 1 day |

***multiple survey crews may be on the property at the same time. A range is given because terrain, weather, access, identification of species and other issues outside of Atlantic's control can all affect the timing of the completion of the surveys.**

The survey process begins with a crew that will mark or "flag" the possible center line of pipe to precisely capture the potential route using transits and other surveying equipment. The crew may need to clear brush because this process requires a clear visual path. Next will be an examination for items of historical or archeological significance; this may require that small, shallow holes be dug, which will be promptly refilled and repaired. Any artifacts discovered will be immediately catalogued onsite and delivered to you. Other crews may look for threatened or endangered species, or may study soil types. No items will be removed from your land without your permission. All access on your Property will be by foot, and no power equipment will be used. In the unlikely event of actual damage to your Property, you will be reimbursed consistent with the requirements of Va. Code §56-49.01.

Atlantic will attempt to reach you at least 24 hours prior to accessing your Property, including if the start date of any of the surveys is delayed due to weather or other unforeseen circumstances. Atlantic will make every effort to schedule the surveys so that the amount of time on your Property is minimized.

Please contact Atlantic at 1-888-895-8716 if you have any questions about the survey process or about the ACP project or if you wish to be present for the surveys on your Property.

Respectfully,

Ramona J. Kanouff

Ramona J. Kanouff
Manager – Land, Lease & Right of Way
Authorized Representative

9414 7266 9904 2959 6922 32

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|---|---|
| Postage | $ |
| Certified Fee | |
| Return Receipt Fee (Endorsement Required) | |
| Restricted Delivery Fee (Endorsement Required) | |
| **Total Postage & Fees** | $ |

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Charles D & Linda L Chaffins
c/o Isak Howell Law Office
Attn: Isak Howell
119 Norfolk Ave SW, St 330
Roanoke, VA 24011

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2

2. Article Number

9414 7266 9904 2959 6922 32

3. Service Type **CERTIFIED MAIL®**

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

1. Article Addressed to:

COMPLETE THIS SECTION ON DELIVERY

A. Received by (Please Print Clearly)

B. Date of Delivery

C. Signature

x Vicki Overton

☐ Agent
☐ Addressee

D. Is delivery address different from item 1?
If YES, enter delivery address below:

☐ Yes
☐ No

Charles D & Linda L Chaffins
c/o Isak Howell Law Office
Attn: Isak Howell
119 Norfolk Ave SW, St 330
Roanoke, VA 24011

09-001-A011

PS Form 3811, July 2005

**ATTN: JAMIE BURTON**

Domestic Return Receipt

701 East Cary Street
Richmond, VA 23219

Atlantic Coast Pipeline

June 17, 2016

**VIA CERTIFIED MAIL**
**RETURN RECEIPT REQUESTED**

Beverly B McQuary
c/o Isak Howell Law Office
Attn: Isak Howell
119 Norfolk Ave SW, St 330
Roanoke, VA 24011

**Re:** Atlantic Coast Pipeline, LLC ("Atlantic"); the Atlantic Coast Pipeline Project
Buckingham County, VA Parcel ID# 60--1-5; 60--1-4; 60--1-3
Owners: Beverly B McQuary c/o Isak Howell Law Office Attn: Isak Howell

By letter dated 3/6/2015Atlantic requested permission to enter and perform surveys and studies on the above-referenced Property in connection with its Atlantic Coast Pipeline project. In response to this letter, you denied Atlantic permission to enter the property.

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***multiple survey crews may be on the property at the same time. A range is given because terrain, weather, access, identification of species and other issues outside of Atlantic's control can all affect the timing of the completion of the surveys.**

The survey process begins with a crew that will mark or "flag" the possible center line of pipe to precisely capture the potential route using transits and other surveying equipment. The crew may need to clear brush because this process requires a clear visual path. Next will be an examination for items of historical or archeological significance; this may require that small, shallow holes be dug, which will be promptly refilled and repaired. Any artifacts discovered will be immediately catalogued onsite and delivered to you. Other crews may look for threatened or endangered species, or may study soil types. No items will be removed from your land without your permission. All access on your Property will be by foot, and no power equipment will be used. In the unlikely event of actual damage to your Property, you will be reimbursed consistent with the requirements of Va. Code §56-49.01.

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Please contact Atlantic at 1-888-895-8716 if you have any questions about the survey process or about the ACP project or if you wish to be present for the surveys on your Property.

Respectfully,

Ramona J. Kanouff

Ramona J. Kanouff
Manager – Land, Lease & Right of Way
Authorized Representative

2. Article Number

9414 7266 9904 2959 6921 88

3. Service Type **CERTIFIED MAIL®**

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

1. Article Addressed to:

COMPLETE THIS SECTION ON DELIVERY

A. Received by (Please Print Clearly) | B. Date of Delivery 6/20/10

C. Signature

X ☐ Agent ☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

Beverly B McQuary
3913 Woodland Church Rd
Buckingham, VA 23921

09-001-A007

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ATTN: JAMIE BURTON

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| Return Receipt Fee (Endorsement Required) | |
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| Total Postage & Fees | $ |

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c/o Isak Howell Law Office
Attn: Isak Howell
119 Norfolk Ave SW, St 330
Roanoke, VA 24011

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2

701 East Cary Street
Richmond, VA 23219

Atlantic Coast Pipeline

09- 001 - A010

June 17, 2016

**VIA CERTIFIED MAIL**
**RETURN RECEIPT REQUESTED**

Michael W Huntley
4127 Woodland Church Rd
Buckingham, VA 23921

**Re:** Atlantic Coast Pipeline, LLC ("Atlantic"); the Atlantic Coast Pipeline Project
Buckingham County, VA Parcel ID# 60--1-2A
Owners: Michael W Huntley

By letter dated 3/6/2015Atlantic requested permission to enter and perform surveys and studies on the above-referenced Property in connection with its Atlantic Coast Pipeline project. In response to this letter, you denied Atlantic permission to enter the property.

Subsequently, by letter dated 4/7/2015, Atlantic provided you notice of its intent to enter the Property on or after 4/27/2015 for the purposes set forth in Va. Code § 56-49.01. In response to this notice of intent letter you reiterated your denial of permission for Atlantic to enter the Property.

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Respectfully,

Ramona J. Kanouff

Ramona J. Kanouff
Manager – Land, Lease & Right of Way
Authorized Representative

2. Article Number

9414 7266 9904 2959 6922 01

3. Service Type **CERTIFIED MAIL®**

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

1. Article Addressed to:

COMPLETE THIS SECTION ON DELIVERY

A. Received by (Please Print Clearly) MICHAEL W. HUNTLEY

B. Date of Delivery 6-24-16

C. Signature X ☐ Agent ☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

Michael W Huntley
4127 Woodland Church Rd
Buckingham, VA 23921

09-001-A010

PS Form 3811, July 2005

ATTN: JAMIE BURTON

Domestic Return Receipt

9414 7266 9904 2959 6922 01

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| | |
|---|---|
| Postage | $ |
| Certified Fee | |
| Return Receipt Fee (Endorsement Required) | |
| Restricted Delivery Fee (Endorsement Required) | |
| **Total Postage & Fees** | $ |

Postmark Here

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Michael W Huntley
4127 Woodland Church Rd
Buckingham, VA 23921

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2