NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: ***In re: February 2, 2022, Decision of the Board of Zoning Appeals of Fairfax County, Virginia***
(Washington Gas Light Company v. Christine Chen Zinner, et. al.)
Case No. CL–2022–2942, -3061

OPINION LETTER

Dear Counsel:

There are two issues before the Court. First, should the Court grant a stay of its October 12, 2023, Order reversing in part a Board of Zoning Appeals determination pending appeal? Second, what amount should the Court set for a suspending bond where, as here, there is no fixed judgment amount?[1]

The Court holds it should stay its Order pending appeal if Christine Chen Zinner and the other Respondents ("Landowners") post a proper suspending bond.[2] To hold otherwise would effectively eliminate their right of appeal. What is the point of appealing an authorization to install a gas line that gets installed while the appeal proceeds? As to the amount of the bond, the Court must estimate the damages Petitioner Washington Gas Light Company ("Washington Gas") will incur because of the stay and set bond at that amount.

I. BACKGROUND.

These consolidated matters came before the Court on Landowners' Motion to Stay Pending Appeal. Briefly stated, Washington Gas Light Company wants to install a high-pressure pipeline under Virginia Department of Transportation ("VDOT") streets through Landowners' neighborhood. Landowners argued that the Fairfax County Zoning Ordinance prohibits the installation or, at least, requires the Board of Supervisors to issue a special exception that Washington Gas lacks. Washington Gas argued that the Fairfax County Zoning Ordinance permits it to install the pipeline.[3] The Court substantively agreed with Washington Gas and issued an October 12, 2023, Order and Opinion Letter. Landowners desire to appeal the Court's judgment to the Court of Appeals of Virginia and stay the judgment while they do so.

The Landowners principally seek to "maintain the status quo and prevent pipeline construction by [Washington Gas] during the appeal." (Pet'rs.' Br. at 1.) They contend that their motion should be analyzed vis-à-vis the test set forth in *Hilton v. Braunskill*, 481 U.S. 770, 776–77 (1987). (*Id.*) Under this test, Landowners argue that equity favors a stay, this case presents "serious legal issues" on appeal, and the law "generally favors a stay of zoning matters on appeal." (*Id.* at 2–5.) Further, Landowners contend that because the forthcoming appeal is "proper to protect the interest of any county of" the Commonwealth, no suspending bond should be set. (*Id.* at 5 (cleaned up).) The Board of Supervisors of Fairfax County, despite not appealing the Court's October 12, 2023, Order, joined in Landowners' motion, and effectively adopted their arguments. (*See* BOS Br.)

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[1] A "suspending bond" is often called a "*supersedeas* bond." The Court considers these terms to be synonyms of each other.

[2] The Court orally ruled immediately after the December 15, 2023, hearing that it would issue a stay for reasons it would later provide in writing. This Opinion Letter sets forth those reasons. The Court held an evidentiary hearing February 12, 2024, to determine the amount of bond it would order to support a stay.

[3] Both parties had additional arguments, all discussed in detail in the Court's October 12, 2023, Order and Opinion Letter.

Washington Gas argues that (1) the Court lacks jurisdiction to grant Landowners' Motion because it is essentially a motion for a prohibitory injunction, (2) even if viewed as a motion for a stay, the *Hilton* factors do not weigh in favor of granting a stay, and (3) a suspending bond must be set if the judgment is stayed. (*See* Washington Gas Opp'n.)

II. ANALYSIS.

Pursuant to Rule 1:1B(a)(3)(B)–(C) of the Rules of the Supreme Court of Virginia, this Court retains jurisdiction of a case after the expiration of the 21-day period prescribed by Rule 1:1 for the purposes of addressing "motions to stay the judgment pending appeal," and "motions in civil cases relating to the amount or form of an appeal or suspending bond pursuant to Code § 8.01–676.1." The Court concludes that (1) the Landowners' Motion should be construed as one for a stay and not an injunction, (2) a stay is appropriate in this case, and (3) a suspending bond must be set in this matter before the execution of the judgment can be suspended. The Court explains the bases for these conclusions below in turn.

A. The Landowners' Seek a Stay, Not a Prohibitory Injunction.

"An injunction and a stay have typically been understood to serve different purposes." *Nken v. Holder*, 556 U.S. 418, 428 (2009). An injunction, on the one hand, is "a means by which a court tells someone what to do or not do." *Id.* "By contrast, instead of directing the conduct of a particular actor, a stay operates upon the judicial proceeding itself. It does so either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability." *Nat'l Ass'n for Advancement of Colored People v. Commonwealth* ex rel. *Virginia State Water Control Bd.*, 74 Va. App. 702, 713 (2022) (quoting *id.*). In adopting the *Nken* court's analysis of the distinction between a stay and an injunction, the Virginia Court of Appeals opined:

> Although a stay "certainly has some functional overlap with an injunction" by "preventing some action before the legality of that action has been conclusively determined," "a stay achieves this result by temporarily suspending the source of authority to act—the order or judgment in question—not by directing an actor's conduct." "A stay 'simply suspend[s] judicial alteration of the status quo,' while injunctive relief 'grants judicial intervention that has been withheld by lower courts.'"

Id. (quoting *Nken*, 556 U.S. at 428–30). Thus, the Virginia Court of Appeals held that "[a]n order seeking a return of the status quo by temporarily 'setting aside' a government action 'ordinarily is not considered an injunction.'" *Id.*

Here, Landowners only seek "a stay of this Court's October 12, 2023, Order pending an appeal to the Virginia Court of Appeals" and "to maintain the status quo and prevent pipeline construction by Plaintiff Washington Gas Light Company during the appeal." (Pet'rs' Br. at 1.) The Landowners are not asking the Court to otherwise tell Washington Gas "what to do or not do" as would be the case in an injunction. *Nken*, 556 U.S. at 428.

Washington Gas argues the practical effect of the stay—that a stay bars it from completing its pipeline construction. (Pet'rs Br. at 1.) It complains the Landowners are effectively asking for an injunction within an appeal stay wrapper.

The Court understands Landowners as asking the Court to suspend the enforceability of its October 12, 2023, Order, which is plainly within the Court's power. Therefore, the Court construes Landowners' Motion as a motion for a stay pending appeal.

B. A Stay is Appropriate in this Case.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Primov v. Serco, Inc.*, 296 Va. 59, 67 (2018) (quoting *Landis v. North Am. Co.*, 299 U.S. 248, 254–55 (1936)). The decision whether to grant a motion to stay pending appeal is a matter of discretion. *Qiu v. Huang*, 77 Va. App. 304, 327 (2023).

The parties disagree as to what factors should guide the Court's decision whether to exercise this discretion. Citing *Jeffrey v. Commonwealth*, 77 Va. App. 1, 13 (2023), and *Hilton v. Braunskill*, 481 U.S. 770 (1987), Landowners argue that this Court should use the *Hilton* factors to evaluate the present motion. Meanwhile, Washington Gas cites *Winter v. NRDC*, 555 U.S. 7, 22 (2008), and *Nken v. Holder*, 556 U.S. 418, 428 (2009), for the proposition that this Court should evaluate the present motion under the *Winter* factors.

Hilton dealt with the standard for evaluating a motion to stay under then Federal Rule of Civil Procedure 62(c) and Federal Rule of Appellate Procedure 8(a). *Hilton*, 481 U.S. at 776. There, the United States Supreme Court concluded that

> the factors regulating the issuance of a stay [are] (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. Another judge of this Court adopted this test. *Berger v. Pulte Home Corporation*, 55 Va. Cir. 36, at *1 (Fairfax 2001) ("In determining whether to grant a stay, the factors enunciated in [*Hilton*] are most instructive.") (vacating an order denying a stay pending an appeal of an order directing the release of a habeas petitioner).

Winter dealt with evaluating a motion for a preliminary injunction based on alleged violations of various federal statutes. There, the court ruled that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. The Fourth Circuit subsequently adopted the *Winter* test in *Real Truth About Obama, Inc. v. Federal Election Commission*, 575 F.3d 342, 345–47 (4th Cir. 2009) (abrogating the *Blackwelder* balance of hardship test).

This is all a distinction without a difference. The *Winter* test mirrors the *Hilton* test—insofar as both tests feature the mechanical application of facts to a discrete set of remarkably similar factors—and both tests were the product of federal law. The only difference is that *Winter* directs a court to balance the equities generally; *Hilton* highlights the specific consideration of injury to others upon a stay. Arguably *Winter* makes this factor broader than *Hilton*.

The Supreme Court of Virginia has not adopted either the *Hilton* or *Winter* test despite Virginia trial courts and the bar routinely following *Winter*. *See, e.g.*, *Wings LLC v. Capitol Leather LLC*, 88 Va. Cir. 83, at **5–6 (Fairfax 2014) ("[S]everal circuit courts of this Commonwealth have adopted the standard set by the Fourth Circuit.") (denying a request for a preliminary injunction based on the *Real Truth* test). The Supreme Court of Virginia repeatedly abstains on approval of the *Winter* balancing test for evaluating preliminary injunctions. *See, e.g.*, *Campbell v. Saltville Gas Storage Co.*, Record No. 220285, at *2 (Va. June 27, 2022) (unpub. order) ("Saltville urges us to rely on [*Winter*], whereas the plaintiffs point to case law from this Court.") (vacating a preliminary judgment without using the *Winter* analysis despite being asked to do so by the parties); *Loudoun Cnty School Bd. v. Cross*, Record No. 210584, 2021 WL 9276274, at **5–6 (Va. Aug. 30, 2021) ("[T]his Court has not definitively delineated the factors that guide granting the equitable relief of a temporary injunction[.]") (affirming order granting preliminary injunction without using the *Winter* analysis despite being asked to do so by the parties); *Commonwealth* ex rel. *Bowyer v. Sweet Briar Institute*, Record No. 150619, 2015 WL 3646914, at **2–3 (Va. June 9, 2015) (relying on *Manchester Cotton Mills v. Town of Manchester*, 66 Va. (25 Gratt.) 825, 827 (1875) instead of *Winter* when evaluating a temporary injunction); *Burrito v. Norfolk City Council*, 110 Va. Cir. 507, at *2 (Norfolk 2022) ("The Supreme Court of Virginia has never adopted a particular formula for the use of the circuit courts in deciding whether to grant preliminary injunctions."). In fact, the Supreme Court has specifically stated that "[n]o single test is to be mechanically applied, and no single factor can be considered alone as dispositive." *Sweet Briar*, 2015 WL 3646914, at *2.

Given the Virginia Supreme Court's reticence in adopting the *Winter* test, it follows that this Court should not likewise adopt it or apply *Winter*'s elder sibling, the *Hilton* test. *Cf. Burrito*, 110 Va. Cir. at *3 ("I have followed *Winter* in the past, but . . . the Supreme Court of Virginia has given us adequate guidance . . . and that the federal formula need not be used."). Albeit on a noncontrolling basis, some justices espoused a Virginia version of these tests. A Virginia Court must consider: (1) the nature and circumstances of the case at bar, (2) the likelihood of irreparable harm if no stay is issued, s*ee Cross*, 2021 WL 9276274, at *5, (3) the veracity and magnitude of the asserted harms resulting from not granting a stay, and (4) consideration of where the public interest lies, *see id.*; *Campbell*, Record No. 220285, at *3. Other factors cited by the Supreme Court in the context of injunctions are likely not relevant on a motion for a stay, such as the absence of an adequate remedy at law, or a likelihood of success on the merits.

Here, a weighing of the relevant factors of all three tests balances heavily in favor of granting a stay of execution of the judgment.

1. *The nature and circumstances of the case at bar.*

The nature of this case relates to a significant dispute regarding major construction within a residential neighborhood, the Landowners' rights to peaceably enjoy their properties, the County's rights to oversee zoning matters within its jurisdiction, and Washington Gas' rights and obligation to safely supply gas to customers.

2. *The likelihood of irreparable harm if no stay is issued.*

The County and the Landowners will suffer irreparable harm through either living with a high-pressure pipeline they successfully sued to block or suffering through two bouts of major construction to install and uninstall the pipeline with the attendant noise, dust, and inconvenience. On Washington Gas' side, the utility would suffer no irreparable harm if the Court issues the stay. It persuasively set forth the monetary costs of a stay, which the Court can include in a suspending bond. It argues there are non-monetary costs of maintaining its highest risk pipeline, but Washington Gas' counsel conceded at the February 12, 2024, hearing that there is no imminent danger posed by the issuance of a stay.

3. *The veracity and magnitude of the asserted harms resulting from not granting a stay.*

Failure to grant a stay could have serious repercussions. The Court is confident in its October 12, 2023, judgment, but retains sufficient humility to recognize that reasonable judicial minds may differ. Indeed, the Court disagreed with its BZA quasi-judicial appointees in this present action. If the Court denies the stay, Washington Gas could install a high-pressure pipeline that the Court may have to order removed if reversed on appeal.

4. *Consideration of where the public interest lies.*

"The applicable public policy for a given time may be gathered from the enactments of the legislative branch, the expressions of the executive branch, and the opinions of [the Supreme Court of Virginia]." *Taylor v. Northam*, 300 Va. 230, 252 (2021). The elected Board of Supervisors is a good source for divining the public interest since Supervisors answer to the public. The Board joins the Landowners' motion for a stay even though it told the Court it opposed the Landowners on the merits of their BZA appeal at the beginning of the trial and has not appealed the Court's October 12, 2023, judgment. The Board of Supervisors recently directed its staff to investigate amending the Zoning Ordinance to possibly ban installation of high-pressure pipelines under residential streets. MEETING OF THE BOARD OF SUPERVISORS OF FAIRFAX CNTY (Va., Dec. 5, 2023, Sup. Faust motion).

Even without a zoning amendment, the public interest supports a stay. Washington Gas does not represent an imminent danger of continuing use of its legacy high-pressure gas lines while this case is considered on appeal. Meanwhile, the Landowners and their many non-party neighbors, guests, and cut-through traffic benefit from a final decision on the pipeline installation before digging.

Balancing all these factors, the Court finds it should enter a stay in this matter. It reaches the same conclusion even if it uses the *Winters* and *Hilton* tests.[4]

C. The Court Must Set a Suspending Bond in this Matter.

The Landowners contend that the suspending bond should be deemed waived because the Board of Supervisors joined their motion. (Pet'rs' Br. at 5.) To the extent that any such bond is set, the Landowners argue that it should be nominal since they lack the resources of a "large, ratepayer-funded utility company." (*Id.*) In response, Washington Gas argues that a suspending bond should be set to ensure payment of all damages that result from the suspension. (Opp'n at 5.)

The purpose of a suspending bond is to "secure payment of the full judgment amount and all damages incurred as a result of the suspension." *Henderson v. Ayres & Hartnett, P.C.*, 285 Va. 556, 562 (2013). Further, a suspending bond is "one of indemnity, the object of which is to secure to a successful litigant the ultimate fruits of his recovery, in whole or in part, and to insure him against loss from the possible insolvency of his debtor, or from other cause, pending the appeal." *Id.* (quoting *Nat'l Surety Co. v. Commonwealth*, 125 Va. 223, 228 (1919)). Thus, the Virginia Supreme Court has held that it was error for a circuit court to decline to set a suspending bond "adequate to satisfy all damages resulting from suspending execution of the judgment as *required* by Code § 8.01–676.1(C)." *Id.* (emphasis supplied).

Virginia Code § 8.01–676.1(C) provides that

> [a]n appellant who wishes execution of the judgment or award from which an appeal is sought to be suspended during the appeal *shall* . . . file a suspending bond . . . conditioned upon the performance or satisfaction of the judgment and payment of all damages incurred in consequence of such suspension, and . . . execution *shall* be suspended upon the filing of such security and the timely prosecution of such appeal.

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[4] ***Hilton***: (1) Did the Landowners make a strong showing that they are likely to succeed on the merits? The Court, satisfied in its underlying judgment, expects Washington Gas to prevail on appeal. (2) Will the Landowners be irreparably injured absent a stay? The Court finds they would be for the reasons discussed above. (3) Will the issuance of the stay substantially injure Washington Gas? The Court finds the stay would injure Washington Gas, albeit not substantially. Washington Gas has been in the process of upgrading its pipeline system for years. The Court is not convinced the appeal delay creates a substantial injury. (4) Where does the public interest lie? The Court finds the public interest supports a stay in the context of a situation where no stay and an appellate reversal will subject the community to two major construction projects—once to install the pipeline and once to remove it. Weighing these factors, the Court will issue a stay upon the posting of an appropriate suspending bond.
Winter: (1) Are the Landowners likely to succeed on the merits? The Court, satisfied in its underlying judgment, expects Washington Gas to prevail on appeal. (2) Are the Landowners likely to suffer irreparable harm in the absence of a stay? The Court finds they would be for the reasons discussed above. (3) Do the balance of equities tip in the Landowner's favor? The Court finds they do. (4) Is an injunction in the public interest? The Court finds the stay is in the public interest for the reasons discussed above. Weighing these factors, the Court will issue a stay upon the posting of an appropriate suspending bond.

Clearly, a suspending bond is necessary to effectuate the suspension of the execution of the judgment.

To the Landowners' point about the bond waiver due to the participation of the Board of Supervisors in this case, Virginia Code § 8.01–676.1(M) does provide that "[w]hen an appeal is proper to protect . . . the interest of the Commonwealth or any county, city, or town of this Commonwealth, no security for appeal shall be required." So, for example, where an appealing party was an administrative subdivision of the Commonwealth bond is waived. *Virginia Dep't of Corrections v. Compton*, 47 Va. App. 202, 214–15 (2005) ("Because VDOC is an administrative subdivision of the Commonwealth, it falls within the statutory exclusion and, therefore, is not required to post an appeal bond.").

In the present matter, however, the Board of Supervisors only joined the Landowners' Motion and not their appeal. Only Washington Gas and the Landowners have filed Notices of Appeal in this matter, on November 2 and 9, 2023, respectively. Thus, no appealing party is an arm of the Commonwealth, and therefore the appeal is not sought to protect the interests of the Commonwealth. The exemption plainly does not apply in this matter.

Even assuming, without deciding, that the failure of the Board of Supervisors to appeal the Court's decision, alone, does not neuter the exemption, the exemption only functions to waive any posting of bond by the Board of Supervisors. The Court is not requiring the Board of Supervisors to post any bond.

Even if the exemption waives bond for all appealing parties even where the Board of Supervisors is not one of them, the plain language of the statute contemplates that the appeal at issue be "proper to protect . . . the interest of the Commonwealth [and political subdivisions]." VA. CODE ANN. § 8.01–676.1(M). The Court cannot find the Landowners' appeal is sought to protect the interests of the Commonwealth.[5] Their appeal is to protect their own interests in this litigation, and therefore the exemption is inapplicable. This is not like a *qui tam* action. The Landowners want to stay the Court's ruling reversing in part the BZA's determination in case number CL-2022-2942. If the Board of Supervisors felt the Landowners' appeal was necessary to protect the interest of the Commonwealth it could have clearly communicated this fact by joining the appeal. As a party, it could have joined the appeal as a matter of right. In the absence of its appeal, it could have presented evidence proving that the appeal was proper to protect the interest of the Commonwealth. While it presented some non-evidentiary argument to this effect, and the Court made public policy findings, the Board offered no evidence that its interests needed protection. The Court finds it and the Landowners offered insufficient evidence for the Court to conclude that the Landowners' appeal is sought to protect the interests of the Commonwealth as opposed to the Landowners' own interests.

[5] The "interest of the Commonwealth" in this statute is like the "public interest" prong of the *Winter* test, but the concepts are different. The former relates to the Commonwealth as a party; the latter reflects an interest determined by the Court. If the two concepts were identical, government entities would never lose an injunction by arguing their interest is dispositive of the public interest. Occasionally, the position of a government entity is contrary to the public interest.

While the Board of Supervisors is now distancing itself from its trial support of its Zoning Administrator and the Court's ruling, it always maintained its chief interest in the litigation is to assert its right to regulate portions of the VDOT right of way in its zoning ordinance. To this point, it will be opposing Washington Gas' appeal in the declaratory judgment lawsuit in case number CL-2022-3061, wherein the Court held the issue was moot. No bond is necessary for opposing Washington Gas' appeal, of course.

Thus, the Court holds as a matter of law that the bond exemption does not apply because the Board of Supervisors is not appealing any order of this Court. Alternatively, it finds as fact that the Landowners' appeal of the Court's ruling reversing in part the BZA is not to protect the interest of the Commonwealth.

D. The Amount of the Suspending Bond is Not Limited to $2,500.

The plain language of Virginia Code § 676.1 presents a final issue to the Court: whether the suspending bond in this case must be limited to $2,500, or whether it may be set in any amount less than or equal to $25 million.

Virginia Code § 8.01-676.1 reads, in pertinent part,

> C. Security for suspension of execution. — An appellant who wishes execution of the judgment or award from which an appeal is sought to be suspended during the appeal shall, subject to the provisions of subsection J, file a suspending bond . . . . conditioned upon the performance or satisfaction of the judgment and payment of all damages incurred in consequence of such suspension, and . . . execution shall be suspended upon the filing of such security and the timely prosecution of such appeal. Such security shall be continuing and additional security shall not be necessary except as to any additional amount that may be added or to any additional requirement that may be imposed by the courts.
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> [. . .]
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> J. In any civil litigation under any legal theory, the amount of the suspending bond or irrevocable letter of credit to be furnished during the pendency of all appeals or discretionary reviews of any judgment granting legal, equitable, or any other form of relief in order to stay the execution thereon during the entire course of appellate review by any courts shall be set in accordance with applicable laws or court rules, and the amount of the suspending bond or irrevocable letter of credit shall include an amount equivalent to one year's interest calculated from the date of the notice of appeal in accordance with § 8.01–682. However, the total suspending bond or irrevocable letter of credit that is required of an appellant and all of its affiliates shall not exceed $25 million, regardless of the value of the judgment.

Relatedly, Virginia Code § 8.01–682, provides:

> When any judgment is affirmed, whether in whole or in part, damages shall be awarded to the appellee on the portion of the judgment affirmed. When the judgment

> is for the payment of money, the damages shall be the interest to which the party is legally entitled, as provided in § 6.2–302 or any other provision of law, from the date of filing the notice of appeal until the date the appellate court issues its mandate. Such interest shall be computed upon the whole amount of the recovery affirmed, including interest and costs, and such damages shall be in satisfaction of all interest during such period of time. When the judgment is not for the payment of any money, except costs, the damages shall be such specific sum as the appellate court may deem reasonable, not being more than $2,500 nor less than $150.

Thus, if a party wants to stay a judgment pending appeal, the party must post a suspending bond to satisfy the judgment and cover the cost of the damages caused by the stay. VA CODE ANN. § 8.01–676.1(C). However, the law caps the bond at $25 million, inclusive of one-year of interest calculated in accordance with Virginia Code § 8.01-682. VA. CODE ANN. § 8.01–676.1(J).

One might read these statutes backwards, starting with Virginia Code § 8.01–682, to embrace the seductive language reading "[w]hen the judgment is not for the payment of any money, except costs, the damages shall be a specific sum as the appellate court may deem reasonable, not being more than $2,500 nor less than $150." In a vacuum, one could conclude that the law caps suspending bonds at $2,500 in cases like the present one where the order on appeal lacks a specific judgment amount. However, this ignores the reference language of Virginia Code § 8.01–676.1(J), to wit: "the amount of the suspending bond or irrevocable letter of credit *shall include an amount equivalent to one year's interest* calculated from the date of the notice of appeal *in accordance with* § 8.01–682." (Emphasis supplied). Section 8.01–676.1(J) refers only to § 8.01–682 in the context of calculating interest to include within the amount of the suspending bond. Section 8.01-682 then sets forth a formula for calculating that interest—from the date of filing a notice of appeal until the final ruling, computed upon the whole amount of the final judgment, including interest and costs. Section 8.01-676.1(J) otherwise directs a court to also set the suspending bond in the amount of the judgment and the cost of the damages caused by the stay. To look at § 8.01–682 without regard to the context of § 8.01–676.1(J) improperly amends the latter statute to read, "the amount of the suspending bond or irrevocable letter of credit shall be set per § 8.01–682." The Court would have to read out of the statute the word "interest" entirely. It would have to replace the phrase, "it shall *include* an amount" to "it shall *be* an amount."

However, courts may not amend statutes. *Berry v. Bd. of Supervisors*, 884 S.E.2d 515, 523 (2023). Statutes must be constructed to avoid rendering "any part of the statute useless or superfluous." *Shoemaker v. Funkhouser*, 299 Va. 471, 487–88 (2021). "It is not to be presumed that the legislature intended any part of [a] statute to be without meaning." *Postal Tel. Cable Co. v. Norfolk & Western R. Co.*, 88 Va. 920, 926 (1892). The language "to include an amount equivalent to one year's interest" that is subject to the calculation in Code § 8.01–682 is clearly not meant to be the entire suspending bond. Otherwise, there would be no $25 million cap. Instead, the interest is merely meant to be accounted for as an item to include in the suspending bond. In the context of the present case, where there is no judgment for specific damages on

appeal, the Court does not look to the last sentence of Virginia Code § 8.01-682 because the sentence contains no formula for calculation of interest to include within the damages bond.

Little modern case law exists to guide the setting of a suspending bond in the case of a non-monetary judgment. In 1826, the Virginia Supreme Court held that a party appealing from an order dissolving an injunction can only be required to give security to perform the decree of a lower court, and to pay the costs and damages awarded in an appellate court, if the decree is affirmed. *See M'Kay v. Hite's Ex'rs*, 25 Va. 564, 564–65 (1826); *Eppes v. Thurman*, 25 Va. 384, 384–85 (1826). But these cases were decided well over a century before the modern Code § 8.01–676.1 was originally adopted by the General Assembly in 1984, and almost two centuries prior to the passage of the current version of Code § 8.01–676.1 as amended in 2022. To this point, the modern Code § 8.01–676.1 creates express provisions regarding suspending bonds in the context of cases dealing with injunctions, along with custody and support, in Code § 8.01–676.1(D). Further, Code §§ 8.01–676.1(A) and (C) authorize the setting of a suspending bond in any civil case—including, *sub silentio*, civil cases resulting in non-monetary judgments. Thus, prior case law regarding suspending bonds in cases dealing with non-monetary judgments appears to be inapposite.[6]

Ultimately, the statute provides that a suspending bond must be "conditioned upon the performance or satisfaction of the judgment and payment of all damages incurred in consequence of such suspension[.]" VA. CODE ANN. § 8.01–676.1(C). This condition is the touchstone of a court's analysis in assessing a suspending bond in any case, including a case where a non-monetary judgment was rendered. Likewise, this condition mirrors the purpose of the suspending bond, which is to "secure payment of the full judgment amount and all damages incurred as a result of the suspension of execution of the court's decree." *Tauber v. Commonwealth* ex rel. *Kilgore*, 263 Va. 520, 545 (2002); *see also Henderson*, 285 Va. at 562 ("[A suspending bond] is one of indemnity, the object of which is to secure to a successful litigant the ultimate fruits of his recovery, in whole or in part, and to insure him against loss from the possible insolvency of his debtor, or from other cause, pending the appeal." (internal quotation marks omitted)); *Seal v. Puckett*, 159 Va. 297, 301 (1932) ("It seems to me clearly it must have been the legislative intent to require the appellant, if he desired to delay the plaintiff in exercising the right established by his judgment, to give bond to protect the judgment creditor against loss on account of the delay."). While in a case featuring a non-monetary judgment the suspending bond surely cannot include the "full judgment amount," the suspending bond should certainly include the damages "incurred as a result of the suspension of execution of the court's decree." *Tauber*, 263 Va. at 545.

Therefore, the amount of the suspending bond in this case should be set considering the damages likely to be incurred because of the suspension, with one year's interest to be calculated from the date the notice of appeal was filed, in accordance with Virginia Code § 8.01–382. To

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[6] *But see Soriano v. Commonwealth*, 98 Va. Cir. 243, at **20–22 (Fairfax 2018) (Bernhard, J.) (suspending execution of judgment without requiring a suspending bond to be set because the underlying judgment was not monetary in nature).

predict the amount of damages because of the stay it was logically necessary to hold a hearing to consider reasonable estimates.

E. The Court will Set the Suspending Bond at $695,749.

The Court conducted a hearing on the amount of a suspending bond February 12, 2024. The Court finds Kevin Murphy, Washington Gas' witness, credible on the issue of cost estimating. It considered Washington Gas' Exhibit 33 ("Ex. 33") and Murphy's explanation of it. The Court finds as fact that a one-year delay due to an appeal will cost Washington Gas $695,749 more than what it would have to pay if the Court did not stay its ruling pending appeal. The cost of delay increases to $1,941,585 if the delay lasts two years. Because the judiciary retains the power to increase the appeal security, if necessary, the Court need only require bond for the one-year delay estimate. VA. CODE ANN. § 8.01-676.1(E).

The Board of Supervisors questioned the estimates in Ex. 33, arguing that any increased costs to Washington Gas due to an appeal stay should be limited to the incomplete portion of the pipeline through Pimmit Hills. However, the Court found Murphy's testimony credible that the delay to the completion of that portion of the project raises project-wide expenses. For example, a two-year delay will necessitate fresh external corrosion direct assessments and any associated excavations related to potential coding deficiencies uncovered by those assessments. The Court found Ex. 33 to be fair and conservative. It even reflected a reduction in the cost of materials to Washington Gas over time due to expected inflation reduction, benefiting the Landowners. Overall, the delay costs are a tiny fraction of the project's $50 million total price.

The Landowners did not directly challenge Ex. 33 and, instead, raised general policy arguments for a nominal bond. They argue they serve as proxy for their non-party neighbors in a laudable civic role. However, there was no credible evidence that the four individual Landowners spoke for anyone other than themselves. For example, no civic association is a party to either of these cases. However, there is a civic association in the neighborhood. Landowner Lillian Whitesell testified she learned of the Washington Gas project through her civic association's website and from conversations with neighbors who have a very strong community spirit. (Tr. at 273:2–9.) No one testified that most of the Landowners' neighbors opposed the project. The Landowners provided no evidence of a civic association resolution or neighborhood poll.

The Landowners also argue that a suspending bond for an amount other than a nominal amount would be unfairly unaffordable to them, effectively barring their ability to appeal. However, despite having had the opportunity to present evidence of an inability to post a bond in the amount Washington Gas requested at the February 12, 2024, hearing, the Landowners did not present evidence of their finances. A party alleging an inability to pay an appeal bond bears the burden of proving the inability to pay. The Board of Supervisors, who now supports a stay after having taken a trial position that the Court should agree with its Zoning Administrator as the Court ultimately did, stated in open court that nothing barred it from helping the Landowners pay for a suspending bond. Similarly, the Landowners may be able to tap the resources of their neighbors if their neighbors really do support the litigation and appeal stay as they implicitly argued without evidence.

Finally, Landowners argue any construction delay is the fault of Washington Gas because it knew routing the pipeline through Pimmit Hills instead of under Route 7 would spur the very community opposition that delayed the project since 2012.[7] However, the Court cannot conclude that Washington Gas was responsible for any construction delay. The Landowners failed to offer credible evidence that routing the pipeline down Route 7 would have been quicker than contesting the community opposition. Kevin Murphy, a Vice-President of Washington Gas, testified credibly that the space in the public right of way under Route 7 is very congested due to other users. In any event, the Landowners address the wrong time period. The Court already ruled the Fairfax County Zoning Ordinance does not bar Washington Gas' project as the Landowners assert. This is the issue they now appeal. The suspending bond is necessary to save the prevailing party at trial—Washington Gas—the cost it will incur starting *now* should it prevail again on appeal owing to the construction delay because of the stay the Landowners want. The law entitles the winning party to have protection to defray increased costs because of an unsuccessful appeal. Naturally, in the event the Landowners' appeal is successful, they would be released from their bond.

III. CONCLUSION.

The Court holds it should stay its October 12, 2023, Order pending appeal if the Landowners post a proper suspending bond in the amount of $695,749.

An appropriate Order is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

[7] Kevin Murphy testified that courts thrice delayed its project through litigation where it prevailed. There was an action before the State Corporation Commission to determine whether Washington Gas needed a certificate of need. There was a challenge to the Virginia Department of Transportation permit that went to the Court of Appeals of Virginia. Of course, there is the present zoning challenge.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

IN RE: FEBRUARY 2, 2022, DECISION OF THE BOARD OF ZONING APPEALS OF FAIRFAX COUNTY, VIRGINIA,	)	
WASHINGTON GAS LIGHT COMPANY Plaintiff,	)	
v.	)	CL-2022-2942, -3061
CHRISTINE CHEN ZINNER, *et al.*, Defendants.	)	

ORDER

THIS MATTER came before the Court February 12, 2024, on Respondents-Landowners Christine Chen Zinner, Sarah Ellis, Kurt Iselt, and Lillian Whitesell's Motion for a Stay Pending Appeal, and to set a suspending bond. For the reasons set forth in the Opinion Letter of February 14, 2024, incorporated by reference, it is

ORDERED Respondents' Motion for a Stay Pending Appeal is GRANTED. This Court's October 12, 2023, Order shall be stayed pending appeal upon the Respondents-Landowners posting of a suspending bond in the amount of $695,749.

THIS MATTER REMAINS ENDED.

[redacted]

JUDGE DAVID A. OBLON

FEB 14 2024

ENTERED

PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA, ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD IS WAIVED IN THE DISCRETION OF THE COURT. WRITTEN ENDORSEMENT OBJECTIONS ARE DUE WITHIN 10 DAYS.