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July 13, 2009

By Hand

Joel H. Peck, Clerk
State Corporation Commission
Tyler Building
1300 East Main Street
Richmond, Virginia 23219

**Re: Johnson v. Fluvanna County Board of Supervisors et al.
Case No. CLK-2009-00012**

Dear Mr. Peck:

Enclosed for filing please find an original and 15 copies of Response of James River Water Authority to Petitioner's Motion for Summary Judgment. I have also attached an extra copy of the pleading, which I would appreciate your file stamping and returning via our courier.

With best regards, I am

Very truly yours,


Robert L. Hodges

RLH/afh

Enclosures

cc: Douglas R. Johnson
Frederick W. Payne, Esq.
Greg L. Hoffman, Esq.
Jonathan B. Orne, Esq.

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
at Richmond

DOUGLAS ROBERT JOHNSON,
Petitioner,

v.

CASE NO. CLK-2009-00012

FLUVANNA COUNTY BOARD OF SUPERVISORS,
LOUISA COUNTY BOARD OF SUPERVISORS,
and
JAMES RIVER WATER AUTHORITY,
Respondents.

**RESPONSE OF JAMES RIVER WATER AUTHORITY
TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

On June 30, 2009, the Hearing Examiner in this matter entered an order calling for respondents to file their responses to petitioner's motion for summary judgment.

The James River Water Authority ("the Authority") contends that petitioner is not entitled to summary judgment in this case. Summary judgment is a procedure available when there is no material issue of fact and dispute and one party is entitled to judgment as a matter of law. *See Costner v. Lackey*, 223 Va. 377, 381, 290 S.E.2d 818, 820 (1982). Here, there are at least three obstacles to petitioner's motion for summary judgment.

The first is that the petitioner lacks standing. This has been briefed by the respondents. Since that time the Clerk has filed his response, also showing that the petitioner lacks standing. In the absence of standing in the petitioner, his action is a legal nullity. *See Harmon v. Sadiadi*, 273 Va. 184, 193, 639 S.E.2d 294, 299 (2007).

Second, the issue framed by the petitioner is not one that the Commission can decide. On page 2 of his Memorandum in Support of Motion for Summary Judgment, petitioner states that the merits issue is "Did the Fluvanna Board of Supervisors improperly disregard the citizen

petition calling for a referendum?” See Memorandum in Support of Motion for Summary Judgment at 2.

This is undoubtedly an issue that the Commission cannot address. Any challenge to the action of the Fluvanna Board of Supervisors is brought properly only in the Circuit Court of Fluvanna County, where, in fact, petitioner has challenged it. What petitioner appears to be seeking is reversal of lawful Commission action without ever having to show a sufficient factual or legal predicate for the ruling. Nevertheless, the Commission can never, at least within the bounds of its jurisdiction, rule on the action of the Fluvanna Board of Supervisors with respect to the purported petition. See *Morrisette v. McGinnis*, 246 Va. 378, 382, 436 S.E.2d 433, 435 (1993) (“*Morrisette* should have taken prompt action immediately after the public hearing to seek judicial review of those allegedly erroneous actions. . . .” taken by the Board of Supervisors).

Third, petitioner contends that there is something called “concurrent jurisdiction” that makes the Commission’s action with respect to the charter improper. There is no issue of “concurrent jurisdiction” here. The Circuit Court of Fluvanna County has jurisdiction over certain matters and the Commission has jurisdiction over other matters. It is beyond doubt after the decision of the Supreme Court in *Morrisette* that the petitioner must make a timely challenge to the actions of the Board in the Circuit Court. See *Morrisette, supra*. It is beyond dispute that petitioner did not obtain a preliminary injunction prior to the Commission’s action and, therefore, the Commission’s action was lawful and proper. Even though petitioner’s challenge to the action of the Fluvanna Board of Supervisors was pending, where the Board had acted, and its decision was not stayed through a proper injunction or otherwise, there was no barrier to the Board seeking issuance of the charter. As the Supreme Court has made clear in *Morrisette*,

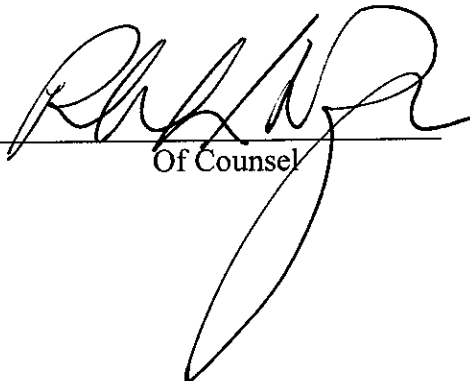
supra, once issued the charter is not subject to collateral attack.

Moreover, it was petitioner that initiated this proceeding before the Commission. Petitioner can hardly be heard to complain that there is a problem of “concurrent jurisdiction” when the proceedings that petitioner complains of were both initiated by petitioner.

In summary, the Commission cannot reach the merits without addressing the issue of standing. Moreover, petitioner’s motion for summary judgment is an attempt to obtain in summary fashion the relief which he seeks on the merits. He is not entitled to such relief. His motion stated no ground for setting aside the action of the Commission in granting the charter to the Authority. Instead, absent the supervening issue of standing, the concessions in petitioner’s motion that the relief he seeks is not relief that the Commission can grant – a ruling on the propriety of the Fluvanna Board’s action on the purported citizen petition -- should be sufficient for dismissal of the petition on that ground as well.

Were the Commission to reach the merits, the Supreme Court’s decision in *Morrisette*, 246 Va. at 382, 436 S.E.2d at 435, that “no subsequent act of the ...County Board could affect the force of the Commission and or undo the creation of the Authority once the conclusive presumption of § 15.1-1246¹ attached. ...” is wholly dispositive for the reasons set forth in the Authority’s motion to dismiss.

JAMES RIVER WATER AUTHORITY


Of Counsel

¹ The successor section is Va. Code § 15.2-2108.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2009, I caused a true and correct copy of the foregoing pleading to be sent via first class U.S. mail, postage prepaid to the following:

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A handwritten signature in black ink, appearing to read "R. L. Hodges", is written over a horizontal line. The signature is stylized and extends below the line.