VIRGINIA:

IN THE CIRCUIT COURT OF WISE COUNTY AND THE CITY OF NORTON

VIRGINIA URANIUM, INC., et al.

Plaintiffs,

v. **Case No. CL15-623**

THE COMMONWEALTH OF VIRGINIA, et al.,

Defendants.

OPINION

The case before this Court presents a unique tale, but not unheard of. The story begins in 1785, when the Coles family first settled on a large piece of property in Pittsylvania County. Fast forward almost two hundred years, to 1978, and a direct descendant of the original Coles' learned that his ancestral home and farm sit atop an immense uranium deposit.

A Canadian corporation, Marline, was interested in uranium resources up and down the east coast. At some point prior to 1978, mineral rights were leased to Marline, who discovered the presence of uranium ore on the Coles Hill property. Marline took extensive steps to develop uranium mining in Virginia, including drilling to analyze the extent of the mineral deposit found at Coles Hill. However, in 1982 and again in 1983, the Virginia General Assembly passed a temporary moratorium on uranium mining in an effort to determine how to mine uranium in

Virginia in a safe manner before allowing mining to proceed. *See* Virginia Code § 45.1-283. That moratorium, in conjunction with uranium prices tanking, caused Marline to abandon the project and caused the mineral rights to revert back to the landowners.

In 2004 and 2005, the price of uranium spiked again, causing a resurgence of interest in uranium at Coles Hill. Interested parties came from all over the globe, including Areva and Alpha Natural, among others, expressing a desire to purchase rights to the land for the mining of uranium.

The owners of all of the surface and mineral rights at the time were Walter Coles, V (a.k.a., Walter Coles, Sr.) and Sarah Coles McBrayer, having partitioned the mineral rights from the surface rights in 2005. In doing so, they caused themselves to jointly own the mineral rights while one took the surface rights to the east of State Road 690 and the other took the surface rights to the west of State Road 690.

Mr. Coles became troubled by the aggressive nature of these interested parties, particularly by one who wanted to pay a large sum of money to take all of the property rights, and dismantle and move the ancestral home. Mr. Coles chose not to pursue that lucrative offer or any others because he did not feel the interested parties would cherish the land, protect it, and be stewards of the land and its history. As a result, in 2007, Mr. Coles and his sister created Coles Hill, LLC, to which they conveyed, on March 28, 2007, all of the surface rights except for a reserved area of protected land, as well as the mineral rights of Ms. McBrayer.

That same month, Bowen Minerals, LLC ("Bowen") acquired mineral rights to their respective property. Shortly thereafter, in April of 2007, Bowen and Coles Hill, LLC leased their mineral rights to Virginia Uranium, Inc. Coles Hill, LLC also leased surface rights excluding the protected area of land.

Spurred on by the rebirth of interest in uranium mining in the Commonwealth, Virginia Uranium, Inc. ("VUI") commenced lobbying efforts to remove the moratorium, which has continuously been in effect since 1982. VUI spent a great deal of time and capital on this effort to work with the General Assembly to allay their fears regarding the safety of uranium mining within the Commonwealth, but to no avail. In one last effort to be able to utilize their property, VUI, Coles Hill, LLC, and Bowen filed suit against the Commonwealth, which brings us to today.

July 6 through 9, 2020 brought the parties before this Court over the following claims:[1]

(1) That the moratorium on uranium mining in Virginia, found in Virginia Code § 45.1-283, unconstitutionally takes Plaintiffs' private property under Article 1, Section 11 of the Virginia Constitution and the eminent domain statute, Code § 1-219.1.

(2) The moratorium on uranium mining is unnecessary to protect the public health and safety or any other compelling governmental interest, and is therefore an unconstitutional infringement on Plaintiff's fundamental right

[1] Plaintiffs also filed an inverse condemnation claim in which they sought just compensation, but that claim was dismissed, as a result of being barred by the statute of limitations, by this Court's order entered on April 8, 2016.

to the use, enjoyment, and economic benefit of private property under Article 1, Section 11 of the Virginia Constitution.

(3) Under Article 1, Section 11, the Commonwealth's reasoning for implementing the moratorium does not justify a complete and comprehensive moratorium on uranium mining. Therefore, the moratorium impermissibly takes more private property than necessary.

Plaintiffs pray for the Court to declare that Virginia's moratorium on uranium mining is an unconstitutional and invalid taking of Plaintiff's property and seek an injunction against Defendants and their employees and agents from complying with the moratorium on uranium mining, as well as an Order requiring Defendants, their employees, and agents to accept and process Plaintiffs' applications for various permits and licenses pertaining to uranium mining.

At trial, Plaintiffs bore the burden to show that Code § 45.1-283 (a) constitutes a total taking of their mineral estate, (b) constitutes a regulatory taking of the property pursuant to *Penn Central v. New York City*, 438 U.S. 104 (1978), and/or (c) constitutes a damaging of their property, within the meaning of Article 1, Section 11 of the Virginia Constitution. After presenting sufficient evidence to withstand a Motion to Strike, the burden then shifted to the Commonwealth to show that Code § 45.1-283 satisfies strict scrutiny by demonstrating that it (i) achieves a compelling governmental interest by taking or damaging property for one of the public uses identified by Code § 1-219.1(A), and (ii) is the least burdensome means available for attaining the governmental interest in

question.

During Plaintiff's case in chief, Mr. Coles first took the stand to testify as the current resident of Coles Hill and descendent of the first Coles' family to make their home on Coles Hill. He also testified, as Chairman and CEO of VUI and manager of Coles Hill, LLC, as to the particulars of the business side to this mining venture. Mr. Coles was aware of the mining moratorium when it was put in place in 1982 and 1983, as his father was the owner of the property at the time. Upon his father's death, the property passed to his mother, and in 1995 Mr. Coles and his sister became the owners upon the death of their mother. When Coles Hill, LLC, Bowen, and VUI took their respective interests in the property in 2007, all were well aware of the moratorium.

Soon after VUI took their leasehold interest in the Coles Hill, LLC and Bowen property, they, through a wholly-owned subsidiary, Southside Cattle Co., purchased around 2,000 acres around the uranium ore bodies to serve as a buffer zone. In 2007, VUI hired an appraiser to provide an appraisal of the two mineral estates. The purpose for both appraisals was for speculative investment purposes. The 142.8 acre mineral estate, as of 2007, had a value of $1,645,000.00, while the value for the 112.9 acre mineral estate was $6,806,000.00.

With these appraisals in hand, Mr. Coles conceded that the uranium ore discovered is considered a "mineral resource," which does not have demonstrated economic viability, unlike a "mineral reserve." A June 30, 2019 study, Management Discussion and Analysis, provided an analysis of the risk factors that may impact

investment in the Coles Hill project. Some of the factors include whether the moratorium will be lifted, whether there will be a decline in the market price of uranium, whether the estimated amount of the resource is accurate, and whether new regulations would make mining cost effective. The analysis stated that exploration and development is speculative.

Both Plaintiffs and Defendants presented the 2012 Preliminary Economic Assessment ("2012 PEA") into evidence, which is a preliminary analysis of the economic feasibility of a potential mining project. Some of the caveats presented in the 2012 PEA included that the extent of mineralization is not fully defined by current drilling and that numerous additional costs must be spent for development. As explained by Plaintiff's expert Nicholas Carter,[2] prior to a PEA being conducted, a scoping study is completed to see if the project could be economically viable; then, a PEA is conducted. Following a PEA, the next step is to see if the mineralization is satisfactory enough that it will support moving on to a feasibility or pre-feasibility study, which has not been completed in this project.

According to the 2012 Preliminary Economic Assessment,[3] the mineral estate at the Coles Hill site contains approximately 119.59 million tons of uranium ore. Within that ore is uranium, the weight of which is .056% of the ore, which equates

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[2] Mr. Carter works for UxC Consulting Company, LLC, an industry-leading uranium market analysis company. Mr. Carter analyzed the PEA, but explained that his analysis was based on the assumption that the mining moratorium is lifted.

[3] There was also a 2013 PEA, which corrected the 2012 PEA's reference to a mineral reserve, of which there is none thus far. Proving a mineral reserve requires additional drilling, which has not been done as of the date of the trial.

to 132.93 million pounds of uranium, the net present value of which is estimated to be $427 million.

Senator Emmett Hanger testified as to the general attitude in the General Assembly in 1983 with respect to the moratorium, as well as during the 2010-11 period and 2012-13 period. In 1983, he described a general consensus that insufficient information was available to make an informed decision about uranium mining, due to the nature of the endeavor and related hazards. Among the chief concerns was the handling of radioactive waste and its impact on the environment, and specifically water quality issues.

As time passed, there was greater information at the General Assembly's finger tips, including studies related to the economic benefits of mining as well as studies dealing with risk factors. Even with this increase in information, Senator Hanger stated that the information tended toward the conclusion that there was considerably more risk than economic benefit in the proposed mining. In 2010, numerous studies were released related to the economics of mining and some dealing with the risk factors, and in 2013, Senator Watkins felt comfortable sponsoring a bill to create a regulation system for uranium mining. However, after learning of the lack of support in committee for the bill, he decided to strike the bill. Importantly, Senator Hanger testified that mining would accomplish more risk than a common good.

The Commonwealth admitted into evidence the deposition testimony of Senator Frank Ruff, Jr. At the outset, Senator Ruff confirmed that the moratorium

is temporary. He recalled that, during the 2010-11 period, there was a study completed by the National Academy of Sciences, during which he attended one public hearing. At this hearing, which he described as being a "packed house," a large group of citizens attended "to express their opinion on the subject. Most of it dealt with their safety, the safety of their friends and neighbors."[4] The comments in support of lifting the moratorium were economic related.

Additionally, Senator Ruff described the general trepidation of the General Assembly during this same period, of which "[t]he greatest concern was public safety."[5] He also discussed concerns over the potential stigma related to uranium mining at Coles Hill, and the negative impact it would have on economic development in the region. Furthermore, Senator Ruff and several colleagues wrote a letter to the rest of their colleagues in the General Assembly detailing their specific concerns. These included the fear that, if an "accident [were to occur,] the lives, health, and economic interest of the people downstream would be very negatively impacted."[6] According to Senator Ruff, there is also a uranium deposit in the Orange/Culpeper area that, if uranium mining were allowed, would impact the secondary source of water for Fairfax County.

Senator Ruff further discussed his involvement in the Roanoke River Basin Association (now the Roanoke River Basin Bi-State Commission) since the early 1980s. He expressed that the Commission has taken a position to oppose lifting the

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[4] Deposition Tr. of Senator Frank Ruff, at 9.
[5] *Id.* at 12.
[6] *Id.* at 20.

moratorium because of the studies available and "all local governments involved and civic groups involved in the basin area were in opposition."[7]

One of these localities that would be directly impacted by radioactive leakage is Virginia Beach. The city, in fact, sponsored a study to look at the effect of contamination on their water supply, which is sourced from Lake Gaston on the Roanoke River. The results of the study showed that a catastrophic event, such as a weather event, would more than likely cause radioactive runoff to pour into the Roanoke River Basin, directly harming the water supply upon which millions rely.

Two other witnesses, Mike Pucci and Dr. Paul Locke, testified as to similar concerns, describing the environmental and human toll that uranium mining would take. Moreover, the evidence showed that the Department of Mines, Minerals, and Energy, and the Department of Environmental Quality do not have experience with uranium mining and tailing, and that the Commonwealth would face steep hurdles in order to create a regulatory system that would protect public health and the environment.

After consideration of the evidence and argument, this Court hereby rules as follows. In so doing, it is the solemn duty of this Court to weigh the fundamental right to use, enjoy, and possess private property free from taking by the government with the right of the state to make public use of a citizen's private property for the good of the whole.

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[7] *Id.* at 23.

Analysis

The Constitution of Virginia prohibits the General Assembly from passing laws "whereby private property, the right to which is fundamental, shall be damaged or taken except for public use." VA. CONST. art. 1, § 11. It is the duty of this Court to determine whether the Plaintiffs' property rights have been unconstitutionally damaged or taken, and whether an injunction will lie.

In particular, this Court must determine whether Plaintiffs offered proof showing that Virginia Code § 45.1-283: (1) constitutes a damaging of their property, within the meaning of Article 1, Section 11 of the Virginia Constitution; (2) constitutes a *Lucas*-style total taking of their mineral estate; and/or (3) constitutes a regulatory taking of the property pursuant to *Penn Central v. New York City*, 438 U.S. 104, 124 (1978).

If Plaintiffs offered sufficient proof to establish a damaging or taking within one of the above theories, then the burden shifts to the Commonwealth. Because the Constitution of Virginia specifically declares the right to private property to be fundamental, where a statute "affects a fundamental constitutional right, the presumption of [a legislative act's] constitutionality fades, and the 'strict scrutiny' test . . . applies." *Mahan v. Nat'l Conservative Political Action Comm.*, 227 Va. 330, 336 (1984). Thus, to overcome strict scrutiny, the Commonwealth must have offered proof to demonstrate that Code § 45.1-283: (1) achieves a compelling governmental interest by taking or damaging property for public use; and (2) is the least burdensome means available for attaining the governmental interest in question.

A) A taking of private property

"There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property." 2 WILLIAM BLACKSTONE, COMMENTARIES *2. Sir William Blackstone spoke of all property, real or personal; but real property, in particular, lends itself to deep pride, protection, and preservation in ways that no other property does. When faced with a stranglehold on their right to use their property, Plaintiffs fought to change the minds of those elected to represent the will of the people with the best weapons they could muster in this modern age – reason, logic, and lobbying. After those efforts failed, their last resort was to file this lawsuit based on a takings claim.

The Commonwealth argues that no taking has occurred here because Plaintiffs did not have property rights in 1982 when the moratorium was initially passed, nor did the owner in 1982 challenge the moratorium. The Commonwealth would have this Court accept the proposition that a transfer of title after a property restriction was enacted forever bars a takings claim. This Court cannot endorse such a claim; the Supreme Court of the United States so too declined to affirm such a rule. *Palazzolo v. Rhode Island*, 533 U.S. 606, 626–30 (2001). This "would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable." *Id.* at 627. Effectively, it would "put an expiration date on the Takings Clause." *Id.*

The Supreme Court of Virginia, in *City of Virginia Beach v. Bell*, appeared to make a ruling supporting the Commonwealth's assertion on this point, but the case

at hand is clearly distinguishable. In *City of Virginia Beach*, the Court addressed whether a taking occurred when the property owner acquired title after an ordinance was passed prohibiting development on that property. The Court determined that because the regulatory restriction was in the chain of title, Bell did not have the right to develop their property freely when they acquired title. *City of Virginia Beach v. Bell*, 255 Va. 395, 400–02 (1998).

There is a key, distinct difference between the ordinance in *City of Virginia Beach* and the statute currently at issue: the statute, unlike the ordinance, is temporary. During trial, the Commonwealth repeatedly referred to the mining moratorium as temporary, and indeed, multiple witnesses testified to that fact. Evidence supports this contention. Thus, this thirty-eight year old moratorium did not remove the right to mine the mineral estate from the chain of title, but instead essentially put it on hold. It is that nature of being on hold that brings the case before this Court. Plaintiffs want to access that right, whereas the Commonwealth wants to continue saying, "wait, not yet." *See Board of Supervisors of Culpeper County v. Greengael*, L.L.C., 271 Va. 266, 287 (2006) (stating that regulations in effect at time of Greengael's property acquisition did not per se preclude raising a regulatory taking claim).

The Commonwealth effectively concedes that the moratorium restricts, at least to a certain degree, the property rights of the Plaintiffs; but, does that restriction rise to the level of an unconstitutional damaging or taking? After

combing through the evidence and considering the arguments, this Court will address each of Plaintiffs' theories in turn, and rule on each.

(1) A Constitutional Damaging

A damaging of property in the constitutional sense occurs when "the governmental action adversely affects the landowner's ability to exercise a right connected to the property." *Richmeade, L.P. v. City of Richmond*, 267 Va. 598, 602 (2004). The ability to exercise such right is adversely affected when the action directly and specially affects the property, which causes a depreciation of its value. *City of Lynchburg v. Peters*, 156 Va. 40, 49 (1931).

One of the many rights connected with property ownership is the right to extract minerals that lie beneath the surface. *See Oakwood Smokeless Coal Corp. v. Meadows*, 184 Va. 168, 175 (1945) (quoting with approval *Pennsylvania Coal Co. v. Sanderson,* 113 Pa. 126, 146 (1886), "The right to mine coal is . . . a right incident to the ownership of coal property . . . ."). This idea is well-entrenched in the common law. *See* Va. Code § 1-200. As early as 1606, the judiciary in England dealt with the question of whether the King had the authority to dig for saltpeter, an essential element of gunpowder, on land belonging to his subjects. While grappling with that question, Sir Edward Coke, in reporting on the court's decision, noted importantly that "the owner of the land cannot be restrained from digging and taking saltpetre [sic]" because "the property of it is in the owner, and for that he cannot be excluded

of the commodity of his own land." *The Case of the King's Prerogative in Salt-peter*, 12 Coke R. 13, C3 (1606).

Here, Coles Hill, LLC and Bowen own mineral estates to the subsurface land which contains a uranium deposit. VUI has a leasehold interest in those mineral estates, as well as in the surface rights owned by Coles Hill, LLC. This mineral estate is a "separate and distinct freehold[ ]," with the right to mine the uranium being a right incident to ownership. *Virginia Coal & Iron Co. v. Kelly*, 93 Va. 332, 24 S.E. 1020, 1022 (1896).

Virginia Code § 45.1-283 prohibits any agency of the Commonwealth from accepting and processing uranium mining permit applications until a program for such mining is established. The Commonwealth repeatedly referred to this statute as "temporary;" that, of course, is not persuasive in itself, but multiple witnesses testified to that fact, and the Court tends to agree. Said moratorium was enacted in 1982. A thirty-eight year old prohibition on a particular act is certainly significant, even if "temporary." Thus, this statute directly affects Plaintiffs' ability to exercise their right to their ownership and leasehold interest in the mineral estate of the Coles Hill deposit. By not allowing Plaintiffs to mine uranium, Plaintiffs have plainly been "excluded of the commodity of [their] own land." *Salt-peter*, 12 Coke R. at C3.

This statute also specially affects the property of Plaintiffs in that it is a regulation done "in a manner not common to the property owner and to the public at large." *City of Lynchburg*, 156 Va. at 49. Its creation was targeted at the uranium

deposit at Coles Hill and its comprehensive nature is not one that is typically seen in statutes regulating property usage. As a result, Plaintiffs' property was specially and directly affected by § 45.1-283. This affection caused a depreciation of the value of the mineral estate, as evidenced by the fact that absent the mining moratorium, the mineral estate is estimated to be worth at least $427 million, whereas with the mining moratorium, the mineral estate is worth exponentially less. Therefore, this Court finds that Code § 45.1-283 damaged Plaintiffs' property within the meaning of Article 1, Section 11 of the Constitution of Virginia.

(2) A *Lucas*-style Total Taking

Plaintiffs further argue that the mining moratorium affected a total taking of the mineral estate, as found in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).[8] In *Lucas*, the Court held that whenever a regulation prohibits "all economically productive or beneficial uses of land" which "goes beyond what the relevant background principles[, of private nuisance or the State's power to abate nuisances,] would dictate," a total taking has occurred. *Lucas*, 505 U.S. at 1030. The Court proceeded to list various factors to consider. However, the Court also prescribed the requirement that a regulatory prohibition on land use must "do no more than duplicate the result that could have been achieved in the courts—by

[8] *Lucas v. South Carolina Coast Council* decided an issue based on the federal takings clause as found in the 5th Amendment to the United States Constitution and applied to the states via the 14th Amendment. The cause of action here does not assert a 5th or 14th Amendment takings claim, but rather asserts a claim based on Virginia's takings clause. The Supreme Court of Virginia has yet to adopt explicitly the *Lucas* test and instead has only dealt with it in the context of distinguishing the facts in an Article 1, Section 11 claim from the facts in *Lucas*. *See City of Virginia Beach v. Bell*, 255 Va. 395 (1998). However, for argument's sake, this Court will address the question.

adjacent landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." *Id.* at 1029.

Here, Coles Hill, LLC owns a considerable surface estate in addition to the immediately adjacent mineral estate. Bowen and VUI have interests only in the mineral estate, with surface rights to the extent as are incidental to customary and reasonable mining practices.[9] The statute in question prohibits the mining of uranium in those mineral estates.

The Commonwealth presented a vast amount of evidence detailing the danger of uranium mining in Virginia's wet climate. The storage of tailings is a potentially dangerous endeavor, even in a dry climate; add in a high water table, water seepage from typical rainfall in addition to significant rain events, and the Commonwealth showed that preventing the seepage and release of radioactive tailings into the water supply and terrain could never be guaranteed. No evidence was presented to rebut that fact; evidence was presented pertaining to uranium mining in dry climates with low water tables, but none to show that uranium mining is being safely conducted elsewhere around the world in a climate similar to that in Virginia. Given this, does the mining moratorium "do no more than duplicate the result that could have been achieved" under Virginia nuisance and property law? This Court finds that it does.

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[9] VUI, through a wholly-owned subsidiary, also owns a 2,000 acre tract surrounding the deposit, to act as a buffer zone.

"A public nuisance is a condition that is a danger to the public." *Taylor v. City of Charlottesville*, 240 Va. 367, 372 (1990). It "includes 'everything that endangers life or health, or obstructs the reasonable and comfortable use of property.'" *Nat'l Energy Corp. v. O'Quinn*, 223 Va. 83, 85 (1982). Uranium mining poses significant potential for the development of a nuisance. It is an inherently dangerous activity to both the miners and the surrounding populace. It is easily imaginable that absent the moratorium, a group of citizens or a locality could file a claim to abate the nuisance of the Coles Hill mining operation, effectively shutting down the endeavor. Thus, the mining moratorium does no more than duplicate the result that could be achieved under Virginia nuisance law. Accordingly, Plaintiffs' argument under *Lucas* fails.

(3) A *Penn Central* taking

Plaintiffs' final theory is that Code § 45.1-283 is a regulatory taking of their real property under the test from *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), as adopted by the Supreme Court of Virginia in *Board of Supervisors of Culpeper County v. Greengael*, L.L.C., 271 Va. 266, 287 (2006). As set out in *Greengael*, "there is no 'set formula' for such [regulatory taking] evaluations, [but] the United States Supreme Court has identified three 'significan[t]' factors: 'The economic impact of the regulation on the claimant, . . . the extent to which the regulation has interfered with distinct investment-backed expectations, . . . and the character of the governmental action.'" *Greengael*, 271 Va.

at 287 (quoting *Penn Central*, 438 U.S. at 124). In applying these factors, this Court concludes that Code § 45.1-283 affected a regulatory taking of Plaintiffs' property.

As firmly established by the evidence, the uranium mining moratorium is temporary, even though it has been in place for thirty-eight years. Indeed, even Mr. Coles agreed that the moratorium is a temporary regulation.[10] The temporary nature of the moratorium does not preclude a finding of a taking. "Delay in the regulatory process cannot give rise to takings liability unless the ban is extraordinary. . . . If the delay is extraordinary, the question of temporary regulatory takings liability is to be determined using the *Penn Central* factors." *Apollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1351 (2004). Certainly this thirty-eight year temporary moratorium is extraordinary.

By its very nature of being temporary, this moratorium has prevented Plaintiffs from their right to "the commodity in [their] own land." *Salt-peter*, 12 Coke R. at C3. That right has been all but extinguished. Not only that, but by putting a temporary hold on the right to mine their estate, the moratorium has also dramatically decreased the value of the estate. Absent the moratorium, the uranium deposit would be worth upwards of $427 million. With the moratorium in place, evidence established that prospective mining companies would likely pay at least $1.00 for the mineral rights.[11] In fact, it could be argued that the temporary nature of the moratorium is what leaves some value remaining in the mineral estate.

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[10] On cross-examination, Mr. Coles was asked the following question: "And you also agree that the uranium mining moratorium is temporary, correct?" Mr. Coles: "Yes."
[11] Testimony of Dr. Frederic Pirkle.

In addition, there has certainly been a taking of Plaintiffs' "distinct investment-backed expectations" because this temporary moratorium has and continues to preclude Plaintiffs' ability to mine their mineral interest. Plaintiffs have poured millions of dollars into the development of this mining project, under the guise from the General Assembly that this moratorium is temporary and that they will eventually be able to mine uranium. In addition, Plaintiffs have received millions of dollars from investors in the Coles Hill project. This expectation to mine is not only backed by a multitude of investments, by Plaintiffs and others, but it is also reasonable given the temporary nature of the moratorium, which does not extinguish the right to mine. To ask an owner to sit on his interest, waiting for the stop light to turn from yellow to green, without making any efforts to be prepared to make full use of his rights, is simply untenable and unreasonable.

In weighing the *Penn Central* factors, this Court concludes that Virginia Code § 45.1-283 affected a regulatory taking of Plaintiffs' property.

B) Strict Scrutiny

Given that Plaintiffs' remedy for just compensation was precluded by the running of the statute of limitations, as Ordered by this Court on April 8, 2016, this Court turns to whether the taking justifies an equitable remedy, i.e., an order declaring Code § 45.1-283 unconstitutional, enjoining the Defendants and their employees and agents from complying with § 45.1-283, and ordering Defendants

and their employees and agents to accept various mining permit and license applications.

Every legislative act is given a "presumption of constitutionality." *Mahan v. Nat'l Conservative Political Action Committee*, 227 Va. 330, 335 (1984). However, where a statute "affects a fundamental constitutional right, the presumption of constitutionality fades, and the 'strict scrutiny' test, rather than the more relaxed 'rational relationship' test, applies." *Id.* at 336.

Here, the statute in question affects private property, "the right to which is fundamental." VA. CONST. art. 1, § 11. Thus, there is no presumption of constitutionality and the statute in question must pass strict scrutiny. "In order to satisfy such an examination, the law must be a necessary element for achieving a compelling governmental interest. To be viewed as necessary, the classification or infringement must be the least burdensome means available for attaining the governmental objective in question." *Mahan*, 227 Va. at 336 (citations omitted).

Accordingly, this Court must determine whether Code § 45.1-283 passes strict scrutiny in that it (1) achieves a compelling governmental interest by taking or damaging property for public use; and (2) is the least burdensome means available for attaining the governmental interest in question.

<u>(1) A compelling governmental interest</u>

Article 1, Section 11 of the Constitution of Virginia states:

> [T]he General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for

> public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use.

VA. CONST. art. I, § 11. "Private property cannot be 'damaged or taken except for public use,' and, even then, the power can be exercised only to the extent 'necessary to achieve the stated public use.'" *AGCS Marine Ins. Co. v. Arlington Cnty.*, 293 Va. 469, 475–76 (2017) (citation omitted).

The Constitution of Virginia declares the right to private property to be "fundamental." VA. CONST. art. I, § 11. "This view presupposes that an essential 'interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.'" *AGCS*, 293 Va. at 476 (quoting *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972)).

As Justice Kelsey explained in the Supreme Court's opinion in *AGSC Marine Ins. Co. v. Arlington County*, property rights are "basic civil rights." *Id.* at 477 (quoting *Lynch*, 405 U.S. at 552).

> In a word," James Madison said, "as a man is said to have a right to his property, he may be equally said to have a property in his rights." James Madison, Property (Mar. 29, 1792), *reprinted in* 1 The Founders' Constitution 598, 598 (Philip B. Kurland & Ralph Lerner eds., 1987). Madison continued, "If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights." *Id.* at 599. It "has long been recognized," therefore, that property rights are "basic civil rights," *Lynch*, 405 U.S. at 552, 92 S.Ct. at 1122, and that a government's failure to protect private property rights puts every other civil right in doubt.

AGCS, 293 Va. at 476–77. Certainly then, the protection of property rights is essential to ordered liberty. As the Honorable James Kent put it: "Real property . .

. [is] held by grant or charter from government, and it would be a violation of contract, and repugnant to the Constitution of the United States, to interfere with private property." 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW, *340 (O.W. Holmes, Jr., ed., 12th ed. 1873). *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 138–140 (1689).

However, inherent in every right is a correlating duty. "[E]very person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community." KENT, at *340. Justice Kent further explained:

> But though property be thus protected, it is still to be understood that the lawgiver has a right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or of the public. The government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of the citizens.

Id. This idea is not new. There is an "ancient and familiar maxim: 'Sic utera tuo ut alienum non laedas,' loosely translated as, 'Enjoy your property in such manner as to not injure that of another.'" David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. Colo. L. Rev. 497, 502 (2004). This concept appeared in several legal writings in 13th Century England and France, in Henry de Bracton's writings, in Fleta, Commentarius Juris Anglicani, and in a French book written by "Britton," and began to appear in English court records in 1594. *Id.* at 503–04. This idea did not stop there; it continued through the ages to influence Blackstone and Giles Jacob, who, in his

dictionary, "not[ed] that the law precluded the use of property in a manner that would 'injure his neighbor.'" Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 Colum. L. Rev. 1630, 1635 (1988) (quoting G. Jacob, A NEW LAW DICTIONARY (10th ed. London 1782)). Indeed, even James Madison, the author of the 5th Amendment's taking clause, "incorporated the Blackstonian definition in his writing on property and specifically excluded uses of property that harmed others by not 'leav[ing] to every one [sic] else the like advantage.'" *Id.*

Accordingly, every man's right to property, while fundamental and "the highest Right a Man hath or can have to any Thing," is still subject to using it in such a manner as to not injure the property of another. G. Jacob, A NEW LAW DICTIONARY (1st ed. 1729). Whether this occurs as a result of abating a nuisance, or passing statutes or ordinances, the government has the right, authority, and the duty to prevent injury to the public. There can be no greater compelling state interest; but is such an interest achieved by this moratorium and is the moratorium a "public use"? This Court finds that it does and that it is.

There really can be no argument that a moratorium on uranium mining, which is an inherently dangerous activity with potentially dangerous indirect effects, achieves the Commonwealth's rightful duty to protect the public from injury and to protect the health, safety, and welfare of the citizenry.

(a) Public use

The question of whether the moratorium is a public use is not quite as straightforward. This Court originally ruled that the definition of public use would be defined by Code § 1-219.1. However, during argument at trial, the Commonwealth asserted that because § 1-219.1 was not enacted at the time Plaintiffs took an interest in the mineral estate, then that statute should not be the definition that the Court uses for public use.[12] Instead, they argue, either Code § 15.2-900 (the statute in effect at the time of conveyance to Plaintiffs) or Code § 15.1-276 (the statute in effect at the time of the moratorium) should provide the definition. During that same argument, the Commonwealth pointed out that the constitutional amendment effective in 2013 ("2013 amendment") removed the provision giving the General Assembly the authority to define public use. As a result, the Commonwealth asserted that the 2013 amendment provided the definition of public use. This Court does not agree because the 2013 amendment simply excludes particular uses from public use and defines it in the context of actions by "[a] public service company, public service corporation, or railroad." VA. CONST. art 1, § 11. These are but pieces of the public use pie.

This Court does find that by removing the power to define public use, this Court cannot use any of the statutes previously mentioned to define public use. "[A]ll statutes existing when such a Constitution is adopted, or which might thereafter be passed, inconsistent with its provisions, are nullified by such

[12] They also argued that it is the definition for eminent domain cases and thus should not apply.

constitutional prohibition." *Swift & Co. v. City of Newport News*, 105 Va. 108, 115 (1906). The General Assembly is the body with the authority to amend the Virginia Constitution. *See* Va. Const. art 12, § 1. This Court must "assume that the General Assembly chose the [constitutional] language with care, 'when the General Assembly has used specific language in one instance, but omits that language [later] . . . , we must presume that the difference in the choice of language was intentional." *PKO Ventures, LLC v. Norfolk Redevelopment & Hous. Auth.*, 286 Va. 174, 183 (2013) (quoting *Newberry Station Homeowners Ass'n v. Bd. of Supervisors,* 285 Va. 604, 616 (2013) (internal quotation marks omitted)). Therefore, when the General Assembly removed its authority to define public use, it did so knowingly, and it caused the previously enacted statutes defining public use to be nullified.

So what, then, is the definition of public use? "What is a 'public use' is not a matter of discretion with the courts, but is one of sound judgment, under all the facts and circumstances of the particular case." *City of Richmond v. Carneal*, 129 Va. 388, 398 (1921). Further, "whenever the remedy is applied, it should always be because there is a direct 'public use' of the property taken, and not a mere incidental or indirect public benefit." *Id.* In essence, the "more natural interpretation of public use [is] 'public purpose.'" *Kelo v. City of New London, Conn.*, 545 U.S. 469, 480 (2005).

Here, the public purpose and the governmental interest achieved by the moratorium are one and the same: prohibiting the mining of uranium in order to protect the surrounding community as well as those communities as far afield as

Virginia Beach, whose water supply would be harmed were a radioactive leak to occur.

(2) Least burdensome means

The last question before this Court is whether this moratorium is the least burdensome means available for attaining the compelling governmental interest. It is only "[i]f a less restrictive alternative would serve the Government's purpose, [that] the legislature must use that alternative." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). Such alternative must be "as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997).

Expert testimony presented by Mr. Paul Locke demonstrated that less restrictive alternatives to the comprehensive mining moratorium would not be at least as effective as the moratorium's purpose was enacted to serve. In addition, members of the General Assembly, private citizens, and experts in uranium mining all testified that uranium mining is dangerous and poses significant risks to the public and the beautiful land of this great Commonwealth. The Court found this evidence compelling. There is substantial and justifiable fear of irreparable harm if uranium mining were to be allowed in this Commonwealth.

Dr. Knapp posited that with proper regulations in place, mining and tailings storage can be done safely and effectively. These regulations are supposed to protect the health and safety of the surrounding areas for 200 to 1,000 years. However,

regulations must be complied with by man, who are fallible and imperfect. If a regulation is not complied with, then the harm done by compliance failure cannot be undone. People getting cancer from drinking tainted water cannot be undone. A corporation can be fined, but fines do not bring back health; they do not bring back life; they do not bring back safety; and they certainly do not remedy harm done to the earth.

Dr. Knapp further asserted that the Coles Hill site would be far less hazardous than the storage facility at the Yucca Mountain site or the site near Carlsbad, New Mexico. There was scant evidence that could lead this Court to believe that any other mining sites and storage facilities are located at sites with similar environmental characteristics to the Coles Hill site, specifically with respect to Virginia's wet climate and population density. In fact, the Court is not persuaded that such a mining operation, even under a yet-to-be-determined licensing and regulatory regime, could be operated safely in Pittsylvania County.

Further, with respect to the Yucca Mountain site and the site near Carlsbad, New Mexico, it is important that those states, through the will of the people, made their own decision to utilize their land for such use. As the evidence at trial showed, the will of the people here in this great Commonwealth, which is historically a great defender of property rights, finds that uranium mining is not worth the risk.[13] As a

[13] This is true, insofar as the Court is not satisfied that current technologies would permit the safe mining of uranium and storage of tailings in Virginia's climate. At some point in the future, that technology may very well exist, and the General Assembly can and should reconsider the temporary moratorium at that point, permitting Plaintiffs to realize fully the asset in their possession.

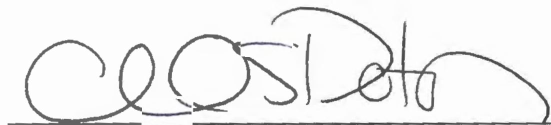
result, the people have decided that it will not be allowed for the time being until it can be determined that mining can be accomplished safely.

Accordingly, this Court cannot legislate against the will of the people as evidenced by the actions of the duly-elected General Assembly and by testimony before this Court. This decision was not made flippantly. On the contrary, this Court approached this important question with the utmost solemnity. After all, the right to property is interdependent with personal liberty. *See AGCS*, 293 Va. at 476. It is "the highest Right a Man hath or can have to any Thing." G. Jacob, A NEW LAW DICTIONARY (1st ed. 1729). This Court cannot emphasize this point strongly enough. But, even the highest rights cannot be used in a vacuum; we are not solitary creatures. Our actions impact those around us, and sometimes those actions must be hemmed in so as to protect others.[14]

Plaintiffs ask this Court to declare Code § 45.1-283 unconstitutional, and therefore substitute this Court's judgment for that of the legislature. Clearly, their property rights have been harmed, but the greater harm would be against the people. The common law supports it. Common sense supports it. To find otherwise would be untenable. This Court hereby finds in favor of Defendants.

7-30-20

Date



Judge Chadwick S. Dotson

[14] E.g., *see* Title 18.2 of the Virginia Code.