IN THE SUPERIOR COURT OF BIBB COUNTY
STATE OF GEORGIA

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| LINDSAY D. HOLLIDAY, | ) | |
| | ) | |
| PLAINTIFF, | ) | |
| | ) | |
| V. | ) | CIVIL ACTION FILE NO. |
| | ) | 12-CV-58472 |
| GEORGIA DEPARTMENT OF TRANSPORTATION and PROJECT ENGINEER CLINTON FORD, P.E. | ) | |
| | ) | |
| DEFENDANTS. | ) | |

**DEFENDANTS' SPECIAL APPEARANCE BRIEF IN OPPOSITION TO COMPLAINT FOR INJUNCTION AND TEMPORARY RESTRAINING ORDER**

COME NOW Defendants, the Georgia Department of Transportation ("GDOT") and Clinton Ford, by and through the Attorney General, State of Georgia, and files their Special Appearance Brief in Opposition to the Complaint for Injunction and Temporary Restraining Order.

## FACTUAL BACKGROUND

Contemporaneously with this Brief, Defendants have also filed their Special Appearance Answer and Special Appearance Motion to Dismiss Pursuant to O.C.G.A. § 9-11-12(b)(6) and O.C.G.A. § 9-11-12(b)(1). As the factual background for this action are set forth in Defendants' Brief in Support of its Motion to Dismiss, Defendants will not re-state them here.

## A.

## STANDARDS OF REVIEW FOR TEMPORARY RESTRAINING ORDERS AND INTERLOCUTORY INJUNCTIONS

It is well established that "[t]he granting and continuing of injunctions shall always rest in the sound discretion of the judge, according to the circumstances of each

case. This power shall be prudently and cautiously exercised and, except in clear and urgent cases, should not be resorted to." O.C.G.A. § 9-5-8; R.D. Brown Contractors, Inc. v. Board of Educ. of Columbia County, 280 Ga. 211-212 (2006).

A trial court may grant an interlocutory injunction "to maintain the status quo until a final hearing if, by balancing the relative equities of the parties, it would appear that the equities favor the party seeking the injunction." Id. (quoting Garden Hills Civic Assn. v. MARTA, 273 Ga. 280, 281 (2000)). The merits of the case are not controlling; however, they are proper criteria for the trial court to consider in balancing the equities. Id. If the trial court determines that the law and facts are so adverse to a plaintiff's position that a final order in his favor is unlikely, it may be justified in denying the temporary injunction because of the inconvenience and harm to the defendant if the injunction were granted. Id.

An injunction should be refused where its grant would operate oppressively on the defendant's rights, especially in such a case that the denial of the temporary injunction would not work "irreparable injury" to the plaintiff or leave the plaintiff "practically remediless" in the event it "should thereafter establish the truth of (its) contention." Garden Hills Civic Ass'n v. MARTA, 273 Ga. 280, 281-282 (2000) (citing McKinnon v. Neugent, 226 Ga. 331, 332 (1970)).

Finally, it is well settled that equity follows the law. Hopkins v. Virginia Highland Associates, L.P., 247 Ga. App. 243, 249 (2000) (citing Dolinger v. Driver, 269 Ga. 141, 143 (1998)). "[A] court of equity has no more right than a court of law to act on its own notion of what is right in a particular case. Where rights are defined and established by existing legal principles, they may not be changed or unsettled in equity.

Although equity does seek to do complete justice, it must do so within the parameters of the law." Id.

**B.**

**A TEMPORARY RESTRAINING ORDER IS IMPROPER WHERE THERE IS NO LIKELIHOOD OF SUCCESS ON THE MERITS OF PLAINTIFF'S CLAIMS.**

As part of the balancing of equities, the court may consider the movant's likelihood of success on the merits. Garden Hills Civ. Assn, Inc. v. MARTA, supra at 281. In Defendants' Motion to Dismiss, Defendants show the Court that this lawsuit must be dismissed because it is barred by Defendants' sovereign immunity from suit. Therefore, the Court should deny Plaintiff's request for a temporary restraining order or injunction because he has no likelihood of success on the merits. See R.D. Brown Contractors, Inc. supra at 212 (citing Garden Hills Civic Assn. v. MARTA, supra (if the court finds that the law and facts are so adverse to a plaintiff's position that a final order in his favor is unlikely, it may be justified in denying the temporary injunction because of the inconvenience and harm to the defendant if the injunction were granted.)

Here, the law and facts are so adverse to Plaintiff's position that a final order in his favor is unlikely. First, GDOT has not been properly served, therefore, the Court lacks personal jurisdiction over it. Moreover, although Defendant Ford was served, any injunction against Defendant Ford would not result in the relief sought by Plaintiff because Defendant Ford does not have the authority to start or stop a road construction project. Second, the long-standing doctrine of sovereign immunity precludes Plaintiff's claims against both GDOT and Defendant Ford. Third, because none of the alleged

environmental harm has occurred as of this date, Plaintiff's claims of environmental harm are not ripe for adjudication.

I.

BECAUSE GDOT HAS NOT BEEN SERVED PURSUANT TO O.C.G.A. § 32-2-5(B), THIS COURT DOES NOT HAVE PERSONAL JURISDICTION OVER GDOT.

In order to obtain jurisdiction over GDOT, Plaintiff must have complied with either O.C.G.A. § 9-11-4 or O.C.G.A. § 32-2-5(b). See Dep't of Transp. v. Marks, 219 Ga. App. 738, 739 (1995)("In the absence of service in conformity with [the statutory] rules, or the waiver thereof, no jurisdiction over the defendant is obtained by the court, and any judgment adverse to the defendant is absolutely void.") Here, the only service that has occurred is that Clinton Ford was served with a copy of the Complaint at his office in Macon. There has been no service on GDOT via service of a second original process upon the commissioner personally or by leaving a copy in the Commissioner's office in Atlanta by personally serving a person other than the commissioner who is authorized or otherwise qualified to receive service on behalf of GDOT. Id. at 739 (citing O.C.G.A. § 32-2-5(b)). Therefore, any TRO or injunction against GDOT would be void as a matter of law.

With regard to service upon Defendant Ford, although Defendant Ford was properly served, any injunction against him would not affect the Project whatsoever since Defendant Ford is simply an Assistant Project Manager for GDOT and has no authority over a decision to begin or to continue a construction project. Affidavit of Thomas Howell, ¶¶ 5 & 6. Service on Defendant Ford fails to implicate the statutory authority of GDOT in any form or manner; therefore, an injunction or TRO should be denied because

the Court does not have jurisdiction over GDOT and Plaintiff does not have a likelihood of prevailing on the merits.

II.

THE COURT MAY NOT INTERFERE WITH OR SUBSTITUTE ITS JUDGMENT FOR GDOT'S JUDGMENT ON WHETHER TO USE THE CURRENT PROJECT PLANS OR PLAINTIFF'S ALTERNATIVE PLANS.

Plaintiff also does not have a likelihood of success on the merits of his claim that the Court should enjoin GDOT because he has "an expertly produced alternative plan for this road project and expert opinion of the safety and environmental consequences of the Project." Complaint ¶ 2. As discussed more fully in Defendants' Brief in Support of Motion to Dismiss, whether Plaintiff has a valid "alternative plan" for the Project is irrelevant because the current plan is not arbitrary, unlawful or unreasonable as a matter of law. See State Hwy. Dep't v. Strickland, 213 Ga. 785 (1958); Benton v. State Hwy. Dep't, 111 Ga. App. 86 (1965)(a court cannot interfere with the discretionary action of the GDOT in locating, grading, or improving a state-aid highway, within the area of its legally designated powers, unless such action is arbitrary.) Simply put, the Court may not substitute its judgment for that of the state or its employees.

The evidence before the Court is that GDOT has oversight, review, and approval authority for all aspects of a project that has state or federal funding and works directly with FHWA to obtain its approval. Etheridge Affid. ¶ 15. Here, GDOT's established guidelines, policies, and procedures have been followed. Id. The Plan Development Process ("PDP") has been fully complied with; thus ensuring that the proper level of public participation was maintained and that there was public disclosure of environmental

impacts before project decisions are made. Etheridge Affid. ¶ 17. Environmental resources were identified and given consideration throughout the Project's development and the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, (NEPA) was followed. Etheridge Affid. ¶ 19. A "Finding of No Significant Impact" or FONSI was issued. Id. Ultimately, FHWA approved all environmental documents. Etheridge Affid. ¶ 20. Because the Project's plans went through the PDP and were approved by the FHWA pursuant to the requirements of a federally-funded road project, Plaintiff's alternative plan is irrelevant as a matter of law and Plaintiff has no likelihood of success on the merits. Therefore, Plaintiff's request for a TRO or injunction should be denied.

III.

SOVEREIGN IMMUNITY BARS AN INJUNCTION AGAINST THE STATE WHERE GDOT HAS NOT ACTED OUTSIDE OF ITS DISCRETIONARY AUTHORITY.

Another reason that Plaintiff cannot succeed on the merits of the Complaint is that GDOT cannot be reached by injunction where it is exercising functions in which it has discretionary powers. Evans v. Just Open Government, 242 Ga. 834, 839 (1979). In fact, a court may interfere with an exercise of the State's statutory and regulatory authority only where the state has acted wholly outside its authority; has acted arbitrarily and capriciously in its decision-making; has rendered a decision that is clearly erroneous; or has acted in violation of constitutional rights. IBM v. Georgia Dept. of Admin. Servs., 265 Ga. 215, 217 (1995); see also Bentley v. Chastain, 242 Ga. 348, 352 (1978).

More specifically, a court of equity may not interfere with the discretionary action of the GDOT in locating, grading, or improving a state-aid highway, within the area of its

legally designated powers, unless such action is arbitrary. State Hwy. Dep't v. Strickland, 213 Ga. 785, 787 (1958); Benton v. State Hwy. Dep't, 111 Ga. App. 86 (1965).

In Strickland, the plaintiffs were owners of property abutting GDOT's right-of-way who challenged GDOT's proposed installation of concrete curbs. Id. at 786. The trial court enjoined GDOT from installing the curbs. Id. The Supreme Court reversed because the proposed curbs were to be located in the highway right-of-way and GDOT had the right to appropriate the entire width of the right-of-way for highway purposes for the public interest. Id. at 788. Although the Court further held that the owners stated a valid claim for injunctive relief to restrain GDOT from trespassing on or taking their property for public use, because it *conclusively appeared* from the evidence before the Court that GDOT's actions would not involve a taking or trespass on any part of the plaintiffs' property, it was error for the trial court to enjoin GDOT from installing the curbs in the highway right-of-way. Id. at 787-788.

In Evans, supra at 834-835, the plaintiff, Just and Open Government, an unincorporated association of citizens, taxpayers, voters, and property owners in Henry County, brought suit against the Georgia Department of Offender Rehabilitation, among others, to enjoin the construction of two state prisons in the county. Id. The Supreme Court reversed the trial court's entry of a TRO, holding that the Department of Offender Rehabilitation did not abuse its discretion or breach its authority in locating the prisons in Henry County because (i) the record affirmatively showed that there was no breach of authority and (ii) the courts will not by injunction interfere with state executive officials in the exercise of their discretionary powers. Id. at 838-839. The court also found that (i) "a prison is not, in a legal sense, a nuisance, and equity will not enjoin construction of a

prison on that ground" and (ii) the plaintiffs had not been damaged in any legally cognizable sense. Id. at 837. In fact, the Supreme Court has stated that a court of equity cannot, at the instance of citizens and taxpayers, interfere to restrain or control the discretionary powers of government officials unless "it appears that the act is ultra vires or fraudulent and corrupt." Department of Transp. v. Brooks, 254 Ga. 303, 314 (1985). GDOT's actions regarding this Project are neither. Therefore, Plaintiff's request for a TRO or injunction should be denied because Plaintiff is not likely to prevail on the merits of the action.

IV.

PLAINTIFF'S CLAIMS THAT THE PROJECT WILL RESULT IN VIOLATIONS OF STATE AND FEDERAL ENVIRONMENTAL LAW ARE NOT RIPE FOR ADJUDICATION.

In the Complaint, Plaintiff contends that the Project, "if implemented" will negatively impact the community and environment." Complaint, ¶ 2. Plaintiff further contends that "[s]afety and environmental issues, *if proven and existing*, would violate state and federal law and best management practices of various governmental agencies." Complaint, ¶ 2. Because none of the alleged harm has occurred as of this date, Plaintiff's claims are not ripe for adjudication. See Dep't of Transp. v. Bonnett, 257 Ga. 189, 191 (1987).

Dep't of Transp. v. Bonnett is directly on point. There, the plaintiff sued to enjoin the construction of a road adjacent to her property in anticipation of the noise, vibrations, and dust, which she believed would be caused by traffic on a new road. The Court held that an injunction was improper because there had not been an invasion of Bonnett's property rights at that point. It stated: "While Bonnett argues that an invasion

planned, no such injury or taking exists at this time." Id. at 190. Compare, Baranan v. Fulton County, 232 Ga. 852; 209 (1974)(injunction upheld where trial court made finding of fact that it was reasonably certain that the result of county's change in the drainage system would cause more water to flow across plaintiff's property.) Because it cannot be reasonably certain that the construction of the Project under the current plans will violate state and federal environmental laws, Plaintiff cannot support a claim for injunctive relief.

**C.**

**A TRO OR INJUNCTION WOULD BE OPPRESSIVE TO GDOT'S AND MACON-BIBB COUNTY'S RIGHTS TO IMPROVE THE LOCAL TRANSPORTATION SYSTEM.**

An injunction should be refused where its grant would operate oppressively on the defendant's rights, especially in such a case that the denial of the temporary injunction would not work "irreparable injury" to the plaintiff or leave the plaintiff "practically remediless" in the event it "should thereafter establish the truth of (its) contention." Garden Hills Civic Ass'n v. MARTA, 273 Ga. 280, 281-282 (2000)(citing McKinnon v. Neugent, 226 Ga. 331, 332 (1970)).

The evidence before the Court is that, in 1983, George Israel, Mayor of Macon, asked GDOT for help with improving Forest Hill Road, which has remained unchanged for the last 30 years. Affidavit of Van Etheridge ¶ 5. Approximately ten years later, in November of 1994, the citizens of Macon and Bibb County passed a referendum to increase the local sales tax by one cent on the dollar in order to improve the roads in the city and county.[1] Etheridge Affid. ¶ 6. Projects selected for the referendum came from

[1] Prior to the referendum in November of 1994, ten community public information meetings were held during the months of September and October. The meetings were

the Macon-Bibb County Transportation Improvement Program (TIP), which is a local-level comprehensive transportation plan incorporated into GDOT's State Transportation Improvement Plan ("STIP"). Many of the projects in the TIP had been proposed in the early 1980s. Id. With the passage of this referendum, the Macon-Bibb County Road Improvement Program ("RIP") was born, the purpose and goal of which has been to improve safety on roadways, provide new sidewalks, improve traffic flow, and provide connectivity between routes. Etheridge Affid. ¶ 8.

The City of Macon's and Bibb County's interests are equally represented on an Executive Committee that governs the RIP. Etheridge Affid. ¶ 10. A Citizens Oversight Committee ("COC"), composed of 13 citizens, monitored and reviewed the overall progress of the RIP to determine whether or not the program was proceeding in a manner consistent with the public commitments made to the citizens of the City and County. Etheridge Affid. ¶ 12. There have also been numerous citizen-requested modifications to the Forest Hill Road Project at issue here. The basic concept approved by all parties consists of four lanes with a raised, landscaped median from Forsyth Road to Wimbish Road and three lanes from Wimbish Road to Northside Drive. In 2002, the plans were further modified to meet citizen concerns regarding landscaping, lighting, sidewalks, flat driveway entrances, reduced lane widths, entrance design, etc. Etheridge Affid. ¶ 27.

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held at ten different public schools and covered the projects that were in the referendum. The community had the opportunity to look at various maps, hear about the changes that would affect their neighborhood, and ask questions about each project. Engineers and planners from both the City and County governments and Moreland Altobelli Associates ("Moreland"), an engineering consultant firm that was hired by Bibb County to manage all of the projects, were present to answer any questions. Also, comment sheets were provided to submit questions in writing, and a tape recorder was available for verbal comments. Id.

The opposition to the Project was even the subject of a six-month mediation with former Court of Appeals' Judge Dorothy Beasley. Etheridge Affid. ¶ 32. City, county, and GDOT officials have bent over backwards to try to satisfy the community's concerns. The Plaintiff, apparently, just will not be satisfied until the Project is either completely thwarted or his alternative plans are used. What about the citizens of Macon who have been heard and responded to? It is noteworthy that the Plaintiff is the only person seeking to stop the Project at this time.

An injunction at this point in time would operate oppressively on GDOT's rights, as well as the rights of the citizens of Macon, Bibb County and the State of Georgia. As of this date, 120 parcels of required right-of-way have been purchased at a cost of $1.2 million and GDOT has let to contract the three-lane section of Forest Hill Road, Project No, 8, at a cost of $8.4 million. Etheridge Affid. ¶¶ 36 & 38. RIP has expended $1.9 million on design of the projects so far. Etheridge Affid. ¶ 35.

Even putting aside the public funds at issue, an injunction would mainly harm the citizens of Macon and Bibb County because the purpose of this project is to provide additional capacity to the roadway from Forsyth Road to Northside Drive, to improve the traffic mobility for the entire section, and to provide safer access to street intersections and private driveways. Etheridge Affid. ¶ 34. Although the Plaintiff contends that the construction of the Project will create safety issues, safety is already a major issue. There were 404 accidents along the road from 2004 through 2010 — 64% were from rear-end collisions and left turns. Etheridge Affid. ¶ 35.

Given the evidence before the Court that the Project has been completely vetted under state and federal law, and that the Plaintiff cannot show any present harm to his

property rights, the denial of the temporary injunction would not work irreparable injury on him. If he is specially damaged by the Project, then he has remedies at law; he has no standing to bring an action on behalf of the community at large. State Hwy. Dep't v. Strickland, 213 Ga. 785 (1958). Plaintiff's request for a TRO or injunction should be denied because it would operate oppressively on the rights of not only GDOT but, most importantly, the citizens of Macon and Bibb County.

**CONCLUSION**

For the foregoing reasons, GDOT respectfully requests that the Court deny Plaintiff's request for an injunction and/or temporary restraining order, dismiss the Complaint, cast all costs against Plaintiff, award GDOT its reasonable attorney's fees and expenses, and for such other and further relief the Court may deem appropriate.

Respectfully submitted this the 17th day of January, 2013.

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## CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing:

**DEFENDANTS' SPECIAL APPEARANCE BRIEF IN OPPOSITION TO COMPLAINT FOR INJUNCTION AND TEMPORARY RESTRAINING ORDER**

by U.S. Postal Service upon the following:

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This the 17th day of January, 2013.

MARY JO VOLKERT
Senior Assistant Attorney General

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