

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

**In re Multi-Circuit Episcopal Church Property
Litigation:**

)	Case Nos.:	CL 2007-248724,
)		CL 2007-1235,
)		CL 2007-1236,
)		CL 2007-1238,
)		CL 2007-1625,
)		CL 2007-5250,
)		CL 2007-5364,
)		CL 2007-5682,
)		CL 2007-5683,
)		CL 2007-5684, and
)		CL 2007-5902

**CHURCH OF THE APOSTLE’S REPLY BRIEF IN SUPPORT OF ITS
MOTION FOR PARTIAL STAY OF EXECUTION OF THE FINAL ORDER**

COMES NOW Church of the Apostles (“COA”) and its related Trustees, by counsel, and pursuant to Virginia Code § 8.01-676.1, and in support of its Motion for Partial Stay of Execution of the Final Order entered on March 1, 2012, replies to The Diocese’s and the Episcopal Church’s Response to Church of the Apostle’s Motion for Partial Stay of Execution of the Final Order (hereafter referred to “Diocese Response to COA”) as follows:

I. Rule 1:1 Does Not Apply And COA’s Motion Was Timely Filed

COA seeks a partial stay of execution under Virginia Code § 8.01-676.1. It does not contend that the Final Order itself should be “modified, vacated, or suspended” under Virginia Supreme Court Rule 1:1. Therefore, Rule 1:1 and its 21 day jurisdictional limitations do not apply to the COA motion. Instead, the applicable provisions are in § 8.01-676.1, which ties the timing of a motion for stay of execution--at the earliest--to the date of the filing of a notice of appeal, which can be up to 30 days after the entry of a final order.

COA only asks that the Court enter a stay such that, following the completion of the

property title transfers to the Diocese in accordance with the Final Order, the Diocese may not sell or dissipate the conveyed real and tangible personal property and that COA may retain custody of certain books and records. This stay will protect the rights of COA and will not damage the Diocese during the pendency of the appeal for reasons shown in COA's motion and further discussed below. If the appeal is unsuccessful, the stay will end, all property rights will be vested in the Diocese under the Final Order, and no further action by this Court will be required. This reinforces the fact that the stay requested will not amend or alter the Final Order, which would implicate Rule 1:1.

§ 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 provide security and that “*execution shall be suspended* upon the filing of such security and the timely prosecution of such appeal.” (Emphasis added). Thus, execution is conditional upon the provision of adequate security and the timely filing of the appeal, within 30 days from the final judgment, not within 21 days under Rule 1:1. *See also* § 8.01-676.1(F) (appeal bonds may be filed with “the clerk of the court from which appeal is sought”).

The statute also provides for seeking a stay of execution from the Virginia Supreme Court after COA's petition for appeal has been granted, § 8.01-676.1(B). This would clearly enable a stay to be entered well after the trial court's jurisdiction has lapsed under Rule 1:1. Based upon the stated position of the Diocese that it may sell or otherwise dispose of COA's property immediately after taking title on April 30, 2012, COA believes that it can only obtain meaningful relief by asking this Court for a partial stay of execution of the judgment and that waiting until its appeal is perfected with and accepted by the Virginia Supreme Court will be too late for effective relief to be afforded by a stay.

This case is unlike *Reynolds v. Commonwealth*, 2001 Va. App. LEXIS 14 (VA Ct. Appeals, January 16, 2001), in which the criminal defendant sought to withdraw his guilty pleas and mindful of Rule 1:1's jurisdictional provisions, sought but failed to obtain a stay or suspension of the sentencing order within the 21 day period after its entry. The motion to withdraw the guilty pleas, if granted, would have completely vacated the final order and clearly fell within Rule 1:1. The trial court failed to rule on either the motion to withdraw or on the motion to grant a suspension or stay of its judgment within the 21 day period stated in Rule 1:1. The Court of Appeals found the trial court had lost its jurisdiction and more importantly that its failure to rule on the motion to withdraw left the Court of Appeals found "nothing to review on appeal." In short, there was no appealable action by the trial court because it did not rule on the merits of the motion to withdraw, which was the only claim on appeal. In this case, COA does not ask that the Court suspend or alter its Final Order, which would have had to be accomplished within 21 days of its issuance. The subject of any appeal will be the merits of the previously entered Final Order, not the instant motion. Thus, *Reynolds* is inapplicable here.

It is somewhat disingenuous for the Diocese to argue that the Court lacks jurisdiction to consider the type of stay requested here under § 8.01-676.1. Its counsel had specifically argued during the hearing on the Final Order against COA's request for a provision in that order barring the Diocese from selling or disposing of the real or personal property pending appeal by asserting that the Court could consider this request only in the context of a motion for stay of execution and the posting of a bond. COA sought the stay simultaneously with filing its notice of appeal and prior to the date by which the properties in question are to be conveyed under the Final Order based on the statute's apparent linkage of filing for a stay on the day a notice of appeal is filed. Thus, COA believes the Court has jurisdiction to rule under § 8.01-676.1.

As the Diocese has asserted with regard to Rule 1:1, language cannot be read out of a statute (*see* Diocese Response to TFC and Truro at 1-2). Its proposed reading of § 8.01-676.1 would make illusory the provisions in the statute tying requests for suspension of execution to the filing of the notice of appeal and specifying what a trial court must do when a stay is requested. (*See, e.g.* § 8.01-676.1(A), seek stay “simultaneously” with the filing a notice of appeal). Moreover, the Diocese would have the Court read into § 8.01-676.1 an additional, jurisdictional requirement that any stay request must be made to the trial court within 21 days after the entry of a final judgment. If the legislature had wished to so limit the powers of the trial court, it would have done so in the very detailed procedures it set out in § 8.01-676.1.

The relationship between Rule 1:1 and a request for entry of stay of a final order was considered by the Virginia Supreme Court in its opinion in *Davidson v. Commonwealth*, 246 Va. 168 (1993), and it rejected the position taken by the Diocese. The Supreme Court stated:

We also hold that Rule 1:1 does not preclude the entry of an order staying an execution date because such an order would not modify, vacate, or suspend a capital murder conviction and sentence of death. A stay order merely postpones the date when a final judgment will be executed; it does not alter the substantive provisions of that final judgment. Thus, a stay order is distinguishable from an order suspending a previously-imposed sentence, such as that considered in *In re: Dept. of Corrections*, 222 Va. 454, 463, 281 S.E.2d 857, 862 (1981).

246 Va. at 179-80.

This is precisely COA’s argument here. Indeed, COA asks for less than the appellant in *Davidson*. It does not seek suspension of most of the Final Order. It only asks for limitations to be imposed on the Diocese’s use of the conveyed property pending appeal and for COA to be able to retain custody of its books and records even if title is conveyed to the Diocese. The Court should rule that Rule 1:1 does not bar COA’s motion for a partial stay.

It also is not correct that § 8.01-676.1(C) only applies to money awards, as the Diocese contends. This provision contains both the terms “judgment” and “award” and nowhere qualifies either with the term “money.”¹ As the Virginia Supreme Court has stated, “[t]he term *judgment* includes an equitable decree and any order from which an appeal lies.” *Comcast of Chesterfield County, Inc. v. Board of Supervisors of Chesterfield County*, 277 Va. 293, 306 (2009) (quoting Black’s Law Dictionary 858 (8th ed. 2004)). Also § 8.01-676.1(J) makes the universal applicability of the statute clear when it states that “[i]n any civil litigation *under any legal theory*, the amount of the appeal bond or irrevocable letter of credit to be furnished during the pendency of all appeals ... of any judgment granting *legal, equitable, or any other form of relief* in order to stay the execution ... shall be set in accordance with applicable laws or court rules” See § 8.01-676.1(J) (emphasis added).

II. COA Has Satisfied the Requirements for Partial Stay of the Final Judgment

The purpose of a supersedeas bond or other security is to protect the Diocese against any loss or damage it may sustain by reason of the suspension of its right to execute on its judgment against Truro. See *Jacob v. Commonwealth of Virginia*, 148 Va. 236, 242 (1927); *Tauber v. Com.*, 263 Va. 520, 545 (2002). The only condition on COA’s right to a stay of execution is the sufficiency of its proposed bond. In this case, COA respectfully suggests that no bond be required or that it be set at zero.

The Diocese seeks to impose requirements on the request for partial stay that do not exist in § 8.01-676.1. It suggests that the court impose, in Virginia, standards it says have been developed in federal courts for obtaining a stay pending appeal, requiring a showing of

¹ Virginia Code § 8.01-2(2) says that the term “decree” or “judgment” may be used “interchangeably and shall include orders or awards.”

irreparable harm, lack of harm to the appellee, likelihood of success on appeal, and that a stay is in the public interest. Diocese Response to COA at 2-4. However, COA's motion is made in a Virginia court, and nothing in the applicable statute suggests that such a showing is required.

As the Diocese concedes, the Virginia Supreme Court has never articulated any stay requirements beyond the statutory requirements to post security. Diocese Response to TFC and Truro at 2. This strongly suggests that such requirements do not exist. Moreover, the primary case cited, *Nken v. Holder*, 556 U.S. 418 (2009), involved a request to suspend an immigration deportation order pending appeal. It is completely inapposite to the current case in that it discusses criteria for issuing a stay under specialized immigration legislation, not provisions of the Federal Rules of Civil Procedure, such as Rule 62, which are comparable to the applicable Virginia statute.

The Virginia code provision conditions entry of a stay pending appeal solely upon provision of adequate security by the appellant pending appeal. It does imply the notion of irreparable harm in that entry of a stay or suspension of judgment pending appeal under § 8.01-676.1 will protect the appellant such that it may be made whole if the appeal is successful, while the security requirement will protect the appellee's rights.

On the issue of irreparable harm, with regard to the real properties, COA respectfully suggests that all real property is inherently unique and thus that payment of money, such as the amount obtained in a sale, cannot adequately compensate COA for the loss of these two properties. The Diocese suggests that site preparation studies for Braddock Road and the costs of applying for a zoning variance, which cost hundreds of thousands of dollars and took several years of work by its Vestry, special committees, staff, and consultants, is a mere "cost of doing 'business' as a church." Diocese Response to COA at 3. The point is that these sums were an

investment in Braddock Road made by COA with a view to developing it as a new church home. If COA were to win on appeal and need to purchase new property, it would have to make all of these expenditures over again, at great cost in money and time. This will involve real, not hypothetical loss for COA. COA also believes that the Diocese is well aware that there are no other 42 acre properties adjacent to an intersection like that of Braddock Road and Fairfax County Parkway for sale in Fairfax County, and that it is unlikely, as COA has been informed by bankers and real estate brokers, that a comparable property could be found.

With respect to COA's current church property on Pickett Road, its location next to a tank farm is an awkward fact, and the testimony of former member Rev. Kenneth MacGowan was directed to the fact that the property, which COA purchased from the Diocese, was not an ideal church site. Nonetheless, however awkward its location, it now has a usable church building on a busy street that thousands of cars pass on a daily basis. COA always planned to continue using the Pickett Road church until it was able to build a new campus on Braddock Road and to sell it to help pay for a new church building. The Pickett Road property has a commercial or residential resale value of \$4 million or more, and there is no continuing COA Episcopal congregation. Thus, it is highly likely that the Diocese wishes to take title to the property and sell it, possibly for a sum that is less than what COA would need to pay to purchase and build a church building on land in the City of Fairfax or elsewhere in Fairfax County. Sale of the property during the pendency of an appeal would make it difficult for COA to be made whole if successful. It might receive money, but it would have to start from scratch to find a new church home.

The Virginia statutory scheme simply envisions the posting of a bond by a non-indigent defendant and a motion for a stay without bond by an indigent defendant. In this case, COA

respectfully submits no bond is required both because it is indigent and more importantly because none is needed under the facts of this case. (*See* §8.01-676.1(N) (“No person who is an indigent shall be required to post security for an appeal bond.”) In light of the narrow nature of the stay requested and the fact that the Diocese will be able to receive rental income from the real properties during the appeal, it is probably not necessary for the Court to reach the issue of COA’s indigent status. However, COA believes that the statute in referring to a “person” includes corporations as well as individuals.

In terms of what bond should be required for a stay as to the real properties, the Diocese argues that “the best available proxy for the incalculable costs that would be incurred from a stay would be the rental values of the various properties for the period of the appeal, and an evidentiary hearing would be required to establish such values.” Diocese Response to COA at 5. In the case of Braddock Road, the property is already rented out for the sum of \$1,800 per month. Upon obtaining title, the Diocese will be entitled to receive those rents or any other, higher rents that it can obtain from another tenant during the pendency of the appeal. In the case of the church building on Pickett Road, the Diocese will also be free to rent it out during the pendency of an appeal for any sum that a willing renter will pay—COA has not sought to remain in possession. Thus, there should be no need for COA to post a bond in lieu of rent. The Diocese may obtain the rental income directly.

With regard to COA’s tangible personal property, it is true that the Diocese has agreed to let COA retain certain very important items of tangible personal property as will be reflected in an amended Exhibit L to the Final Order, and COA is very grateful for this fact. These include most of its sacramental objects and other items. We were not aware of a right of first refusal as to other tangible personal property, such as sanctuary chairs and similar items, and it is possible

that this issue may be resolved by consent. Further, COA and the Diocese have reached an agreement on documents pertaining to the Braddock Road property and likely can agree to a similar agreement on documents pertaining to Pickett Road, such as maps, architectural drawings, assessments, equipment manuals and the like, and on its bound baptismal and marriage records, which is that they will be retained by the Diocese and returned intact to COA if it succeeds on appeal. In that regard, the comments of the Diocese on page 3 of its Response to COA appear to indicate that a consensual resolution on these matters can be achieved.

The main focus of COA's motion for a stay of execution and the only apparent remaining issue for the Court with regard to its tangible personal property are the disposition of its other corporate books and records, pending appeal. These include both electronic records (a copy of its entire server and individual computer files) and many banker's boxes of financial records, Vestry records, congregational giving records, personal files of its staff and clergy, and so forth.

COA is not arguing that it needs these files for its appeal, as the Diocese suggests. It is arguing that it needs them (i) for its ongoing church operations as a matter of its obligations to the IRS and VA, as a tax exempt organization, (ii) for its ongoing obligations to its members as donors and congregational participants, (iii) for access to its leaders and staff in pursuit of their duties, etc. It will be extremely expensive for COA to have a legal review of these files and copying of the paper files completed prior to April 30. Conversely, COA can readily maintain these files intact at its own expense and have them reviewed and copied over time with a view to turning them over to the Diocese if an appeal is not successful.

Most or all of the physical files were previously made available to the Diocese for inspection during discovery in the lawsuit, and the Diocese previously copied files of interest to it. COA does not believe that the Diocese can show that it will suffer any financial damage or

other harm if it does not obtain physical custody of these records until after an appeal is resolved. In lieu of a bond, COA will undertake to retain and maintain the records intact. No monetary bond should be required.

WHEREFORE, Church of the Apostles and its Related Trustees pray that this Honorable Court enter an order partially staying the execution of the Final Order, and for such further and additional relief as this Court deems just and proper under the circumstances.

Dated: April 17, 2012

Respectfully submitted,

CHURCH OF THE APOSTLES
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of April, 2012 a copy of the foregoing CHURCH OF THE APOSTLE'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR PARTIAL STAY OF EXECUTION OF THE FINAL ORDER was sent by electronic mail to:

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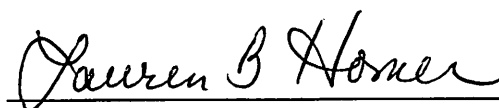
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