

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FAIRFAX COUNTY WATER AUTHORITY,)

Plaintiff/Counterclaim Defendant,)

v.)

CITY OF FALLS CHURCH,)

Defendant/Counterclaim and Third Party Plaintiff)

v.)

COUNTY OF FAIRFAX,)

and)

BOARD OF SUPERVISORS OF FAIRFAX COUNTY)

Third Party Defendants.)

Case No. 2008-16114

THE CITY OF FALLS CHURCH'S MEMORANDUM
IN SUPPORT OF ITS MOTION TO STAY

Comes now Defendant and Counterclaim/Third Party Plaintiff City of Falls Church (the “City”), by counsel, and in support of its Motion to Stay this action states as follows:

Introduction

On July 13, 2009, the Chief Justice of the Virginia Supreme Court, pursuant to a Petition filed by the City, appointed a Special Court to hear the matters that specifically encompass the allegations made and relief sought by the Plaintiff in this action now pending in the Fairfax Circuit Court (the “Circuit Court Action”) and encompassing the claims asserted by the City in its Counterclaim and Third Party claim in the Circuit Court Action. The Special Court is comprised of a three-judge panel appointed by the Chief Justice and is empowered by the Virginia Code to address the unique circumstances underlying the Circuit Court Action. There is no question that the Chief Justice’s Decree empowers the Special Court to consider and decide all of the same issues presented in the Circuit Court Action. In light of the appointment of the Special Court, this Court should stay the Circuit Court Action.

Facts

1. On May 6, 2009, and pursuant to Va. Code § 15.2-2135, the City filed its Petition with the Chief Justice of the Supreme Court of Virginia, naming Fairfax County and the Fairfax County Board of Supervisors (the “Board”) as Respondents. The City’s Petition is attached hereto as Exhibit 1. The Petition sought the convening of a Special Court to consider the issues underlying the Circuit Court Action and specifically requested that the Special Court address the Circuit Court Action. *Id.* (The Circuit Court Action is referred to in the Petition as the “FCWA Fairfax Action.”).

2. In response to the City’s Petition for the Special Court, Fairfax County, the Board, and Fairfax County Water Authority (“Fairfax Water”) all opposed the petition and requested

that the Virginia Supreme Court dismiss the Petition. Fairfax Water told the Chief Justice that it was “obviously an indispensable party to the [Petition proceedings],” and sought leave to intervene in the Petition and joined in the County and the Board’s Motion to Dismiss the Petition. On July 13, 2009, the Virginia Supreme Court denied the Motion to Dismiss. The Virginia Supreme Court’s denial is attached hereto as Exhibit. 2.

3. Also on July 13, 2009, the Chief Justice of the Supreme Court of Virginia issued a decree (the “Decree”) forming a three-judge court (the “Special Court”) pursuant to Va. Code § 15.2-2135, naming the judges of the Special Court, and identifying the Circuit Court of the City of Hampton as the venue for the Special Court. The Decree is attached hereto as Exhibit 3.

4. In its Petition and among other relief, the City asks that the Special Court, “as authorized by Va. Code § 15.2-2136, balance the equities of [the matters presented in the Petition], including the matters presented in the [Circuit Court Action], and set forth what it deems fair and reasonable.” Petition, p. 14, para. (3), Ex. 1.

5. The Petition also asks that the Special Court “issue and order declaring ... that the City has engaged in no unlawful activity as claimed in the [Circuit Court Action].” Petition, p. 15, para. 4(a)(vi), Ex. 1. Fairfax Water acknowledged in its unsuccessful Motion to Dismiss the Petition that in the Supreme Court Petition “the City seeks to nullify Fairfax Water’s pending complaint in the Circuit Court [the Circuit Court Action] through a declaration that the City has done nothing wrong.”

6. The City’s Petition to the Chief Justice also seeks specific relief from the Special Court concerning the provision of water service for the project that is at the heart of Fairfax Water’s allegations against the City in this action and the counterclaim and third party claims asserted by the City in the action. Petition, p. 15, para. 4(a)(iii) (iv) and (v), Ex. 1.

7. In this case, a specially set hearing is scheduled for August 14, 2009 on the demurrers to the Counterclaim by the County, the Board, and Fairfax Water.

8. Trial in this matter is scheduled to commence September 14, 2009.

Legal Standard

The Court has broad discretion in ordering a stay and in evaluating the motion generally should consider the following four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Berger v. Pulte Home Corp.*, 2001 WL 543787 *1 (Cir. Ct. Fairfax County March 6, 2001), attached hereto as Exhibit 4.

Argument

I. The Court Should Stay The Action In Light Of The Designation Of The Special Court.

The City asserted its statutory right to a Special Court and the Chief Justice empanelled the three-judge court to consider, among other things, the matters presented in this Circuit Court Action and determine whether the City engaged in the unlawful activity Fairfax Water alleges against it. The Court should stay this Circuit Court Action in recognition of the Special Court’s unique, statutory obligation to determine whether the City’s requested relief is “necessary or expedient,” to spare the parties (and the Court) the uncertainty of inconsistent outcomes, and avoid the inefficiency of parallel proceedings.

A. The Virginia Code Vests the Special Court with the Power to Try the Matters Raised in the Petition.

The Special Court appointed by the Chief Justice has broad powers to control the disposition of the matters presented in the Petition, including the adjudication of the matters

raised in the action before this Court. The Special Court is required to “make an appropriate order which will control the subsequent conduct of the case,” “hear the case upon the evidence introduced as evidence is introduced in civil cases,” and determine whether any part, or all, of the Petition should be granted or dismissed. Va. Code § 15.2-2136 and -2137. Further prosecution of this case at this time would interfere with the Special Court’s statutory obligations to consider the entirety of the Petition before it. The fact of the formation of the Special Court itself (and its statutory responsibilities) satisfies the requirement that the City is likely to succeed on the merits of its Petition. Fairfax Water, Fairfax County, and the Board jointly moved the Supreme Court to dismiss the Petition entirely but were not successful.

B. Absent a Stay the Parties Risk Inconsistent Outcomes and Inefficient Expenditures of Public Resources.

Beyond the fact of the Special Court’s statutory power and obligation to consider the matters raised in the Petition, including the adjudication of the matters raised in the Circuit Court Action, parallel proceedings would risk inconsistent outcomes. There is simply no reason why this case should proceed through discovery and trial while the Special Court evaluates the Petition and conducts a trial on the same dispute presented to this Court and the question of whether Fairfax County and the Board have unlawfully withheld consent for the City to operate and expand its water system in the County. Further conduct of this case at this time would surely duplicate effort on the part of the parties; the City, and for that matter, all of the parties, would be highly prejudiced by such an approach. The City would be irreparably injured absent a stay – Fairfax Water seeks a damage award in excess of \$18 million against the City in this action. By the same token, the Special Court will be called on to decide whether any such demand is justified, whether the conduct Fairfax Water complains of was lawful to begin with, and whether the County and the Board have acted unlawfully through conduct at the heart of the allegations

of the Circuit Court Action. It would be manifestly unfair to the City for this case to proceed to a jury trial on issues that are squarely before the Special Court.

A stay would in no way “substantially injure” Fairfax Water, the County, or the Board. *Berger*, at *1-2. At a minimum, those parties will have the matters asserted by and against them in this action considered by the Special Court charged to “hear the case upon the evidence introduced as evidence is introduced in civil cases.” Va. Code § 15.2-2137(A).

Finally, all parties to the Circuit Court Action and the Petition are public entities expending public resources to prosecute or defend, as the case may be, this case and the Petition. Under such circumstances it is particularly important to minimize inefficiencies occasioned by the overlap in issues presented for trial by the Special Court and this Court. For this reason, as well as those identified by this Court in *Berger*, the public interest favors a stay. *Berger*, at *3 (the Court views the question of the public interest in this case to be both a question of economy in the use of judicial resources ... Because trials of these issues may not be necessary ... it appears reasonable to stay these matters until the Virginia Supreme Court has rendered a decision before resources are expended on trials that ultimately may not be necessary.”)

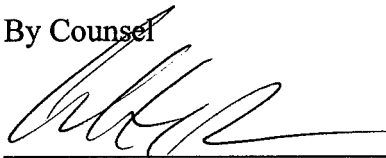
II. Conclusion

For the foregoing reasons, the City respectfully requests that the Court stay this action pending the final outcome of the Special Court proceedings contemplated by Va. Code § 15.2-2135 through -2140.

Respectfully submitted,

CITY OF FALLS CHURCH

By Counsel



Alexander Y. Thomas (VSB No. 36170)
Richard D. Holzheimer, Jr. (VSB No. 40803)
Brent R. Gary (VSB No. 66592)
REED SMITH LLP
3110 Fairview Park Drive
Suite 1400
Falls Church, Virginia 22042
Telephone (703) 641-4200
Telefax (703) 641-4340

John E. Foster (VSB No. 34376)
City Attorney
City of Falls Church
Office of the City Attorney
300 Park Avenue, 302E
Falls Church, Virginia 22046
Telephone (703) 248-5010
Telefax (703) 248-5146

*Counsel for Defendant/Counterclaim and Third
Party Plaintiff*