V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FAIRFAX COUNTY WATER AUTHORITY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CITY OF FALLS CHURCH,	)	CL-2008-16114
	)	
Defendant/Third-Party Plaintiff,	)	
	)	
FAIRFAX COUNTY and BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VA.,	)	
	)	
Third-Party Defendants.	)	

FAIRFAX WATER'S REPLY BRIEF IN SUPPORT OF DEMURRER TO
CITY OF FALLS CHURCH'S COUNTERCLAIM/THIRD-PARTY COMPLAINT

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Fairfax Water disputes the City's factual assertions, but the demurrer assumes them to be true. Even so, the following four arguments are dispositive.[1]

I. NO COUNT STATES ANY CLAIM FOR DECLARATORY RELIEF.

A. The City Abandons Its Challenge to the Halstead Proffer.

Fairfax Water and the County have now pointed out that any challenge to the 2007 Halstead proffer is barred because (1) the City failed to file suit within the 30-day window provided by Code § 15.2-2285(F), and (2) declaratory relief is not available to contest a proffer that has *already* been accepted. Faced with these twin, insurmountable hurdles, the City retreats, asserting that it is *not* attacking past proffers in this proceeding but challenging only "*future*" proffers. (City Br. Opp. to County Demurrer at 5).

That concession requires the dismissal of the City's challenge to the Halstead proffer.

B. Declaratory Relief Concerning Future Proffers is Unavailable Because the Court Lacks Jurisdiction to Render Advisory Opinions.

The City fails to identify *any pending project* where the Board of Supervisors is considering a water proffer. The absence of any concrete case in which to evaluate the City's claims prevents the issuance of declaratory relief. Indeed, *City of Fairfax v. Shanklin*, 205 Va. 227, 231, 135 S.E.2d 773, 776 (1964) is spot on. In response, the City conspicuously fails to answer *any* of the problems identified at pages 6-7 of Fairfax Water's opening brief that would confront the Court in issuing an advisory opinion about hypothetical, future proffers.

II. BECAUSE VIRGINIA LAW PERMITS THE BOARD OF SUPERVISORS TO EXCLUDE FALLS CHURCH FROM PROVIDING WATER SERVICE IN FAIRFAX COUNTY, THE CITY HAS FAILED TO STATE A CLAIM THAT SUCH EXCLUSION IS UNLAWFUL.

The City runs away from the plain language of Code §§ 15.2-2111 and 15.2-2112. Section 15.2-2111 allows the Board of Supervisors to establish "an exclusive service area" for water service

[1] Fairfax Water stands on its earlier arguments, though not covered in this 5-page brief, and it also

in any portion of Fairfax County and to "prohibit[]" or "restrict[] . . . competition between entities providing . . . water service." Section 15.2-2112 enables the Board and Fairfax Water to agree that the latter will be the exclusive service provider in those areas and to "restrict or eliminate competition" with "any other public entity." There is nothing in these provisions that remotely suggests that if a county once permits a neighboring city to provide water service in a portion of the county, the county forever loses the ability to change its mind. Thus, the fact that Falls Church once had an exclusive service area in a portion of Fairfax County during the term of the 1959 Agreement does not mean that the agreement continues in perpetuity (and contrary to its expiration).

The plain language of these statutes controls over the City's weak argument based on Code § 15.2-2143. Indeed, in *City of Martinsville v. Bd. of Supv'rs*, 222 Va. 505, 281 S.E.2d 883 (1981), Martinsville already had its service lines in place in Henry County by 1963. *Id.* at 507, 281 S.E.2d at 883. Under Falls Church's interpretation of § 15.2-2143, that fact alone would have conclusively established Martinsville's right to connect to the disputed property, which was located only eight feet away from the city's line. But the Supreme Court ruled that the statute [then § 15.1-875] was "not applicable." *Id.* at 509 n.*, 281 S.E.2d at 885 n.* Despite the fact that Martinsville's lines were already in place before 1976, the Court said that Henry County *could still have blocked the city* from connecting to a property outside its corporate limits; the county had just not *yet* exercised that power. The county required a connection only for properties 300-feet away from an existing county line, while the property in question was 430-feet away. *Id.* at 509-10, 281 S.E.2d at 885 ("Having the power . . . to make the distance greater, the County decided to limit it to 300 feet").

The City's forced reading of § 15.2-2143 would bring it into conflict with §§ 15.2-2111 and -2112. "[W]hen two statutes . . . conflict, and one statute speaks to a subject generally and another deals with an element of that subject specifically, the more specific statute is controlling." *Viking*

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joins the arguments raised by the County and the Board of Supervisors.

Enter., Inc. v. County of Chesterfield, 277 Va. 104, 110, 670 S.E.2d 741, 744 (2009) (citation and quotation omitted). Here, §§ 15.2-2111 and -2112 speak directly to Fairfax County's power to exclude the City. Accordingly, they control over the City's strained interpretation of § 15.2-2143.[2]

III. THE "MARKET PARTICIPANT" EXCEPTION TO *NOERR-PENNINGTON* DOES NOT APPLY BECAUSE THE BOARD OF SUPERVISORS IS NOT PROCURING GOODS OR SERVICES FOR ITSELF.

Falls Church misapplies the "market participant" doctrine and fails to mention that its cited cases are limited to the context of efforts to improperly influence the government in *public procurement transactions*. In *Whitten v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970), a pool equipment company used false statements and threats of litigation to pressure the architects employed by governmental bodies to adopt procurement specifications for public swimming pools that excluded competitors' equipment. *Id.* at 28. The court ruled that *Noerr-Pennington* did not shield those actions because "the immunity for efforts to influence public officials . . . does not extend to efforts to sell products to public officials acting under competitive bidding statutes." *Id.* at 33. Other courts, including the First Circuit that decided *Whitten*, have recognized that its holding is limited to the situation where one competitor is attempting to coerce the government when procuring goods or services during *competitive procurement*.[3]

The Supreme Court of Virginia agreed with *Whitten* in *Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc.*, 259 Va. 92, 524 S.E.2d 420 (2000). There, the Virginia Department of Social

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[2] The City's argument that §§ 15.2-2111 and -2112 do not apply because "the Board points to no County ordinance . . . that provides for the 'exclusive service area'" (City Br. Opp. to Board's Demurrer at 2) contradicts its own pleadings. The City alleges in its countersuit that the supposed "standard proffer" requiring a connection to Fairfax Water's system has been "enacted as a legislative amendment to the County Zoning Ordinance." (Countercl. ¶ 24). Moreover, the City falsely suggests that the Supreme Court has ruled on this question. It expressly did not.

[3] *See Council for Employment & Economic Energy Use v. WHDH Corp.*, 580 F.2d 9, 12 n.11 (1st Cir. 1978) (stating that *Whitten* "involved direct commercial competitors attempting to sell their products to public bodies under competitive bidding procedures"); *In re Airport Car Rental Antitrust*

Services (DSS) was procuring services to privatize two child support offices. Lockheed argued that the First Amendment protected its use of false statements and threats of litigation that induced DSS to cancel the contract it had previously awarded to Maximus. Following *Whitten*, the Court concluded that *Noerr-Pennington* "was not intended to shield false, misleading, or otherwise improper conduct *by bidders for government contracts*, particularly when the governmental body is acting as a private commercial entity." *Id.* at 105, 524 S.E.2d at 427 (emphasis added). When the government is not procuring goods or services for itself, however, *Noerr-Pennington* immunity fully applies. *Titan Am., LLC v. Riverton Inv. Corp.*, 264 Va. 292, 301-02, 569 S.E.2d 57, 62 (2002).

Apart from the fact that the City identifies no "improper conduct" by Fairfax Water, the City's cases do not apply because the Board of Supervisors is not engaged in competitive procurement when it rezones land in Fairfax County. Instead, the City admits that this is "legislative action." (Countercl. ¶ 25.) *See Jefferson Green Unit Owners Ass'n v. Gwinn*, 262 Va. 449, 458, 551 S.E.2d 339, 344 (2001) ("proffers . . . are legislative enactments"). *Noerr-Pennington* protects any efforts to lobby the Board in its legislative capacity. Indeed, the Supreme Court of the United States has squarely held that the doctrine protects the actions of one competitor to lobby city officials to adopt a zoning ordinance that *blocks* another competitor's access to the market. *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 381-84 (1991). Accordingly, it squarely protects any request by Fairfax Water that the County prefer its water service during rezoning proceedings.

IV. THE COUNTERCLAIM STATES NO "CLAIM" AGAINST FAIRFAX WATER AND THE THIRD PARTY COMPLAINT SHOULD BE DISMISSED OR SEVERED.

Falls Church confuses Fairfax Water's status as a *Counterclaim-defendant* with whether it is a proper party to the *Third Party Complaint* against Fairfax County and the Board of Supervisors (the "County"). Fairfax Water concedes that it would be proper party to any otherwise viable

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Litig., 521 F. Supp. 568, 578 (N.D. Cal. 1981) ("*Whitten* . . . was limited to efforts to influence officials acting under competitive bidding statutes."), *aff'd*, 693 F.2d 84 (9th Cir. 1982).

lawsuit that seeks to bar the County from accepting proffers to connect to Fairfax Water's system. Because such relief could adversely affect Fairfax Water's interests, it is a "person to be joined if feasible." Rule 3:12.

But that does not mean that *the Counterclaim* can stand on its own. To the contrary, Fairfax Water is *not* a proper Counterclaim-defendant because the Counterclaim seeks no relief against it. The City does not dispute that *only* the Board of Supervisors -- not Fairfax Water -- has the power to accept water proffers from developers. Accordingly, the *Counterclaim* should be dismissed, even if the Third Party Complaint could survive demurrer. *Norfolk & W. Ry. Co. v. Obenchain*, 107 Va. 596, 598, 59 S.E. 604, 604-05 (1907) (holding that trial court properly sustained defendant's demurrer because the complaint sought no relief against him).

This is no mere technicality. If the Counterclaim is dismissed, the Third Party Complaint can be severed and allowed to proceed on an independent track. More fundamentally, the Third Party Complaint is simply not authorized under Rule 3:13 because Falls Church is not seeking to pass through any liability it has to Fairfax County. Either way, however, the claims in the Third Party Complaint do not belong here.[4]

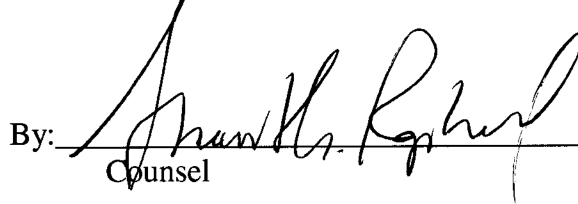
CONCLUSION

The Counterclaim should be dismissed with prejudice and the Third Party Complaint should be dismissed or severed.

[4] Fairfax Water is not asking this Court to "reconsider" Judge Alden's decision granting the City leave to file its countersuit. Leave to amend is "liberally granted." Rule 1:8. The issue, instead, is whether the Third Party Complaint states a claim. As the Court made clear in *Valley Landscape Co. v. Rolland*, 218 Va. 257, 263, 237 S.E.2d 120, 124 (1977), a demurrer should be sustained when, as in this case, a third party complaint does not seek to impose derivative liability on the third party defendant. Thus, the issue is properly raised by demurrer.

Respectfully submitted,

FAIRFAX COUNTY WATER AUTHORITY



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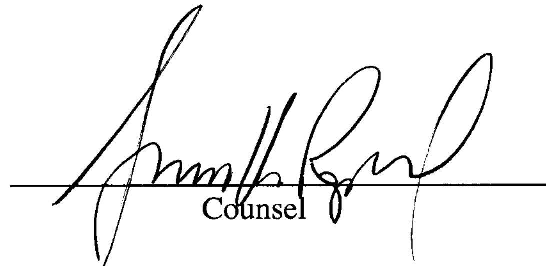

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