

VIRGINIA:

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  
BRIEF IN SUPPORT OF DEMURRER  
TO CITY OF FALLS CHURCH'S COUNTERCLAIM**

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July 10, 2009

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The issue presented on this motion is whether the Counterclaim by Falls Church states a valid legal claim against Fairfax Water. Because it does not, the demurrer should be sustained.

### **STATEMENT OF THE CASE**

In Counts I and II of its First Amended Complaint (Jan. 9, 2009), Fairfax Water alleges that the City of Falls Church is monopolizing water service in a portion of Fairfax County, outside the city limits, in violation of the Virginia Antitrust Act. Count IV alleges that the City has tortiously interfered with Fairfax Water's business expectancy concerning the Halstead project. Count V asserts that the City's high rates for public water service constitute an unconstitutional tax. (Count III was nonsuited.)

On March 13, 2009, the Court issued a detailed opinion overruling the City's demurrer on all grounds. Later in March, the Court set the case for trial commencing September 14, 2009.

On May 22, the City was permitted to implead Fairfax County and its Board of Supervisors and to counterclaim against Fairfax Water. The City complains in its countersuit that, when Fairfax County has rezoned certain properties to allow greater development, it has accepted "at least one" proffer that the developer will connect the property to Fairfax Water's system, thereby excluding the City from expanding its water service in Fairfax County.

### **ARGUMENT**

The Counterclaim should be dismissed on numerous, independent grounds.

#### **I. THE CITY SEEKS NO AFFIRMATIVE RELIEF AGAINST FAIRFAX WATER.**

The Court should dismiss the Counterclaim because the City does not request any relief against Fairfax Water. *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). Instead, the City directs each count against Fairfax County and the Board of Supervisors (the "County"). Counts I and II allege that *County-*

accepted proffers concerning water service are unreasonable and violate the Dillon Rule. Count III alleges that the *County* violates the Virginia Constitution’s “special law” clause in accepting them. Count IV complains that the *County’s* acceptance of water proffers violates Code § 15.2-2143 by disfavoring the City’s water service. The City wants an order barring *the County* from accepting such proffers in the future.

Fairfax Water has no power over proffers; only the Board of Supervisors does. Code § 15.2-2303(A) (empowering “governing body” to accept proffers). The only allegation against Fairfax Water is that it has provided “aid and encouragement” to the County to accept such proffers. That is not a cause of action. Because the Counterclaim seeks no relief against Fairfax Water, the Counterclaim should be dismissed.

**II. THE FIRST AMENDMENT AND *NOERR-PENNINGTON* PROTECT FAIRFAX WATER’S RIGHT TO PETITION THE FAIRFAX COUNTY GOVERNMENT.**

The Counterclaim fails, independently, because no cause of action can be based on Fairfax Water’s providing “aid and encouragement” to Fairfax County to accept proffers from developers to connect to Fairfax Water’s system. (Countercl. ¶¶ 55, 63, 73.) Fairfax Water has a protected right to petition the Fairfax County government to take such action, and the First Amendment and the *Noerr-Pennington* doctrine bar any claims against Fairfax Water for exercising that right. *Titan Am., Inc. v. Riverton Inv. Corp.*, 264 Va. 292, 301, 569 S.E.2d 57, 61-62 (2002). “[A]ctions taken to influence legislative or executive action cannot be the basis for” a cause of action. *Id.*

**III. 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’s countersuit also fails to state a claim because the conduct about which it complains is lawful. The premise of the Countersuit is that Fairfax County and its Board of

Supervisors have sought and accepted proffers from developers, as part of the rezoning process, for the “purpose of favoring Fairfax Water over the City’s water service, attempting to drive the City out of water service in the County.” (Countercl. at 2.) Even assuming that allegation to be true on demurrer, Virginia law expressly authorizes such actions.

Code § 15.2-2111 allows Fairfax County to “exercise its powers to regulate . . . water service notwithstanding any anticompetitive effect. Such regulation may *include the establishment of an exclusive service area . . . and the prohibition, restriction or regulation of competition between entities providing . . . water service.*” (Emphasis added.) Similarly, Code § 15.2-2112 enables Fairfax County and Fairfax Water (an “authority”) to “enter into agreements or contracts that create one or more exclusive service areas for the provision of . . . water service . . . and that restrict or eliminate competition between or among such entities and any other public entity for the provision . . . water service.” (Emphasis added.) Judge Thacher previously ruled (in rejecting the City’s claim that it could monopolize water service in neighboring Fairfax County) that the Virginia Code “recognizes and respects *each* local government’s right to exercise the authority granted them by the statute within their *own* geographic limits.” (Letter Op. at 5 (Mar. 13, 2009) (emphasis added).)

Thus, assuming *arguendo* that Fairfax County and Fairfax Water agreed to exclude the City from serving “all new developments” in Fairfax County (Countercl. ¶ 19), the Code allows that. As the Supreme Court of Virginia has made clear, a city’s right to sell surplus water outside its boundaries is “subject to any express limitations that are placed upon the right by the purchaser’s local governing body and by state statute.” *City of Martinsville v. Bd. of Supv’rs*, 222 Va. 505, 509, 281 S.E.2d 883, 885 (1981). Here, Code §§ 15.2-2111 and 15.2-2112 give Fairfax County plenary authority to regulate water service, including the power to make Fairfax Water the sole water provider in the locality and to exclude “any other public entity.”

This conclusion is not altered by Code § 15.2-2143, which permits a locality to operate water facilities constructed in another locality that were “in existence on July 1, 1976.” This statute allows a locality to operate water facilities “within or outside its boundaries,” but only “for the purpose of furnishing water for the use of *its inhabitants*.” *Id.* (emphasis added). The City of Virginia Beach, for instance, can continue to obtain water from its pipeline to Lake Gaston, without the consent of the localities through which the pipeline passes, because the facilities were in place before 1976. *See City of Virginia Beach v. Bd. of Supv’rs*, 246 Va. 233, 235, 435 S.E.2d 382, 383 (1993). In this case, by contrast, Falls Church is not seeking to serve its *own* inhabitants, but Fairfax County’s inhabitants.

Indeed, in *Martinsville*, the Court made clear that, despite the fact that the city had extended its pipelines into the county before 1976, the city’s right to provide water service *in the county* was still subject to any limitations imposed by the county. Henry County *could* have blocked the city from connecting to a property outside its corporate limits; it just had not yet exercised that power with regard to properties located more than 300 feet from an existing county water authority main. 222 Va. at 509-10 & n.\*, 281 S.E.2d at 885 & n.\*. Similarly, Fairfax County has clear statutory authority to determine that Fairfax Water, not the City, should provide water service to new developments within Fairfax County.

In short, all of the City’s claims are legally barred because Virginia law expressly authorizes the Board of Supervisors to require that new development projects in Fairfax County be served by Fairfax Water, not the City. There is, therefore, nothing that prohibits Fairfax County from accepting proffers from developers to connect to Fairfax Water’s system.

#### **IV. THE CITY FAILS TO STATE ANY CLAIM FOR DECLARATORY RELIEF.**

The Countersuit fails for yet another reason: declaratory relief is simply not available under the facts alleged by the City.

**A. Declaratory Relief Cannot Invalidate Proffers Already Accepted.**

When “the alleged wrongs have already been suffered, a declaratory judgment proceeding, which is intended to permit the declaration of rights before they mature, *is not an available remedy.*” *Bd. of Supv’rs v. Hylton Enters., Inc.*, 216 Va. 582, 585, 221 S.E.2d 534, 537 (1976) (emphasis added); *see also Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 421, 177 S.E.2d 519, 524 (1970) (same). This rule applies here.

Falls Church alleges that “at least one developer” proffered to Fairfax County to accept water service from Fairfax Water, and Fairfax County accepted that proffer. (Countercl. ¶¶ 23, 27.) As described in the First Amended Complaint -- which Falls Church incorporated by reference in its Counterclaim (*id.* ¶ 5) -- Fairfax County accepted the proffer from the Halstead developer in October 2007 (1st Am. Compl. ¶ 44). Because the County accepted that proffer nearly two years ago, the conduct has been completed and a declaratory judgment “is not an available remedy.” *Hylton Enters.*, 216 Va. at 585, 221 S.E.2d at 537.<sup>1</sup>

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

Having identified “at least one” proffer that Fairfax County accepted, nearly two years ago, Falls Church is concerned that there may be more. It says, in each of its four Counts: “The County, with Fairfax Water’s aid and encouragement, has sought and accepted such unlawful proffers in the past and has stated that it will continue to do so. Such conduct will be repeated absent the relief requested herein.” (Countercl. ¶¶ 55, 63, 73, 85.) Falls Church does not identify, however, *any* current development project for which Fairfax County is seeking, or the developer is offering, any proffer to obtain water service from Fairfax Water.

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<sup>1</sup> Falls Church also failed to challenge the Board of Supervisor’s October 15, 2007, acceptance of the Halstead proffer within the 30 days required by Code § 15.2-2285(F). *See* Fairfax Water’s Plea in Bar.

The City's failure to identify a pending project in which a dispute has arisen is fatal to its request for declaratory relief. *City of Fairfax v. Shanklin*, 205 Va. 227, 135 S.E.2d 773 (1964). In *Shanklin*, the plaintiff filed a declaratory judgment action to invalidate a city's zoning ordinance that empowered the board of zoning appeals to grant certain special use permits. The plaintiff claimed that the city alone had the power to issue the permits, but he did not identify any particular project for which such a permit was likely to be granted. The Supreme Court held that there was no justiciable case or controversy. In a passage apropos here, the Court explained:

Too much is here left to speculation. The board may never again be called upon to act regarding an application . . . Or, if someone does apply, and the plaintiff opposes the application, the board may decide the case in the plaintiff's favor. Or, if the board grants such a permit, the apartments may be in a location . . . which would not aggrieve the plaintiff.

Since there was, "[no] specific case . . . involved in this cause", plaintiff's case had to depend, of necessity, upon future or speculative facts, that is to say, that a special use permit might, someday, be granted by the board which might aggrieve the plaintiff. Under these circumstances, the motion for declaratory judgment, upon its face, merely sought an advisory opinion, or a decision upon a moot question, or an answer to a speculative inquiry.

*Id.* at 231, 135 S.E.2d at 776; *see also Ridgwell v. Brasco Bay Corp.*, 254 Va. 458, 462-63, 493 S.E.2d 123, 125 (1997) (holding that court could not grant "advisory opinion" that existing easement could be used as future road because future plans were too speculative).

Just as in *Shanklin*, there is no concrete case or controversy here that would allow the Court to adjudicate the City's legal claims. For example, it is entirely speculative:

- whether a future developer will proffer to connect to Fairfax Water's system;
- what the proffer might say;
- whether the Fairfax County Board of Supervisors would accept it;
- whether, if accepted, the proffer would be reasonable;
- whether Fairfax Water would claim the ability to provide water service to the property; and

- whether the project would involve a portion of Fairfax County in which the City provides water service such that the City would be “aggrieved.”

All of these things would require complete guesswork.

Compounding these uncertainties, the Court would be unable to apply the rule that a governing body’s legislative actions are “presumed to be reasonable” until overcome by “probative evidence” of unreasonableness. *Gregory v. Bd. of Supv’rs*, 257 Va. 530, 537, 514 S.E.2d 350, 354 (1999). Without a real project to consider, there would be no particular legislative action to adjudicate, much less the “quantitative and qualitative” evidence needed to support or oppose it.<sup>2</sup> *Id.*

In addition, a declaratory judgment will not be exercised “where some other mode of proceeding is provided.” *Bishop*, 211 Va. at 421, 177 S.E.2d at 524. This principle also bars the Countersuit. If a project should come along in the future that involves a water proffer to which the City objects, and in the event the Board of Supervisors accepts the proffer, the City can challenge it at that time. *See* Va. Code Ann. § 15.2-2285(F).

The City, therefore, has another “mode of proceeding” that is clearly more appropriate than the declaratory judgment case it brings here based on a hypothetical, future controversy.

**V. THE COUNTERCLAIM FAILS TO STATE A CLAIM FOR AN UNCONSTITUTIONAL, “SPECIAL LAW.”**

Count III should be also dismissed for four independent reasons. First, it fails to allege “sufficient facts to constitute a foundation in law for the judgment sought.” *Eagle Harbor, LLC v. Isle of Wight County*, 271 Va. 603, 611, 628 S.E.2d 298, 302 (2006) (citation omitted). Falls Church claims that Fairfax County’s acceptance of a proffer concerning water service, as part of

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<sup>2</sup> It is no answer that the Court could evaluate the “at least one” example of a water proffer accepted in 2007. As shown above, a declaratory judgment action cannot be used to invalidate completed conduct.

a rezoning, is somehow an unconstitutional “special law.” But Falls Church alleges no facts to enable anyone to evaluate this claim. Is *any* proffer a “special law”? We are not told.

Second, a “special law” challenge will fail if “any state of facts can be reasonably conceived . . . that would sustain” the law in question. *Jefferson Green Unit Owners Ass’n v. Gwinn*, 262 Va. 449, 551 S.E.2d 339 (2001). Numerous “conceivable” bases could support the Board’s decision to prefer water service from Fairfax Water over service from Falls Church: the Board created Fairfax Water and can prefer it in order to further its mission to provide water service to Fairfax County residents (1st Am. Compl. ¶ 1); Fairfax Water operates on a not-for-profit basis and, unlike Falls Church, does not divert water funds to purposes unrelated to the water system (*id.* ¶¶ 1, 18-23); and Fairfax Water’s commodity rates are significantly lower than the City’s, thus benefiting Fairfax County residents living in new developments (*id.* ¶¶ 14-15).

Third, the Constitution’s “special laws” provisions generally apply to laws favoring *private* persons, not public bodies. *See* Va. Const. Art. IV, § 14 (“The General Assembly shall not enact any local, special, or private law . . . (18) Granting to any private corporation, association, or individual any special or exclusive right, privilege, or immunity.”); *id.* § 15 (“No private corporation, association, or individual shall be specially exempted from the operation of any general law, nor shall a general law’s operation be suspended for the benefit of any private corporation, association, or individual.”). These provisions were enacted “to correct the perception that the General Assembly . . . devoted an excessive amount of its time to the furtherance of private interests.” *Holly Hill Farm Corp. v. Rowe*, 241 Va. 425, 430, 404 S.E.2d 48, 50 (1991) (citation omitted). Neither Fairfax Water nor Falls Church is a private entity; both are public bodies. Accordingly, the “special laws” prohibitions do not apply.<sup>3</sup>

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<sup>3</sup> The provisions of Art. IV that specifically address laws concerning public bodies -- such as laws changing a county seat or granting extra compensation to a public official, *id.* Art. IV, § 14, subdivs. 4, 10 -- obviously have no application here.

And fourth, the “special law” prohibitions address the powers only of the *General Assembly*. To be sure, the Supreme Court stated in dictum in *Gwinn* that these provisions apply to localities too. The Court cited two prior cases upholding local laws “without addressing the fact that the terms of Article IV . . . speak to the General Assembly.” *Id.* at 458 n.5, 551 S.E.2d at 344 n.5. The Court noted: “Obviously, ‘[a] municipality cannot be vested with powers which the General Assembly itself does not possess.’” *Id.* (quoting *McClintock v. Richlands Brick Corp.*, 152 Va. 1, 23, 145 S.E. 425, 431 (1928)). But the parties in *Gwinn* did not question Art. IV’s extension to localities. Accordingly, footnote 5 of *Gwinn* is non-binding dictum. It is simply not unusual or “obvious” that the framers of the Constitution intended any limitation on the legislature’s actions also to apply to localities. For instance, the “internal improvements” clause of Art. 10, § 10, restricts the powers *only* of the General Assembly, not localities. *See* 2 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 1133 (1974). The framers clearly knew how to limit the powers of one without affecting the other. Because Art. IV, §§ 14 and 15, apply only to the General Assembly, they do not restrict Fairfax County’s powers.

**VI. FAIRFAX COUNTY AND ITS BOARD OF SUPERVISORS CANNOT BE JOINED IN THIS CASE UNDER THE RULES OF THE SUPREME COURT.**

There is no procedural basis for Falls Church to have impleaded Fairfax County and the Board of Supervisors as parties to Fairfax Water’s lawsuit. In seeking to join them, Falls Church invoked Rules 3:9 (Counterclaims) and 3:13 (Third-Party Practice). Judge Alden permitted the City to add Fairfax County and its Board of Supervisors. (Order, May 22, 2009). She did not rule on the basis of Rules 3:9 and 3:13, but found instead that the County and Board were necessary parties under Rule 3:12. Fairfax Water respectfully submits that Judge Alden erred and that the demurrer should be sustained to correct that error. *See Turner v. Wexler*, 244 Va. 124, 128, 418 S.E.2d 886, 888 (1992) (holding that the “law of the case” doctrine did not prevent

the circuit court from correcting an earlier ruling by a different judge). The Virginia rules limit when a defendant can implead additional parties, and the City has failed to justify doing so here.

Rule 3:13 permits a defendant to implead third-parties *only* when the new parties would be “liable to the third-party plaintiff for all or part of the plaintiff’s claim . . . .” Rule 3:13(a). The concept of “secondary or derivative liability” is “central” to third-party practice. *Valley Landscape Co. v. Rolland*, 218 Va. 257, 263, 237 S.E.2d 120, 124 (1977) (citation omitted). Because the City does not allege that Fairfax County is liable to it if Fairfax Water should obtain a judgment against Falls Church, adding these new parties “is not proper.” *Id.*

Unlike Rule 3:13, Rule 3:9 does not permit a counterclaimant to join additional parties under *any* circumstances. While Federal Rule 13(h) permits a federal counterclaimant to join additional parties, there is no corollary in Virginia Rule 3:9. Similarly, the joinder provisions in Rule 3:12 contemplate the joinder of a new party within “21 days after service of the *complaint* . . . .” *Id.* (emphasis added). Not only did Falls Church fail to take any action within 21 days after being served with Fairfax Water’s complaint last December; Rule 3:12 says nothing about joining parties to *a counterclaim*. Other Virginia rules are consistent with this approach. Rule 3:16, for instance, permits new parties to be added only “on motion of the plaintiff,” not on the motion of the defendant. In short, the Virginia rules strictly limit when a defendant can bring in new parties, and they do not condone what Falls Church did here.

Accordingly, the Court should correct its previous ruling and dismiss the Countersuit.

## **VII. THE CITY FAILS TO STATE A CLAIM FOR ATTORNEY’S FEES.**

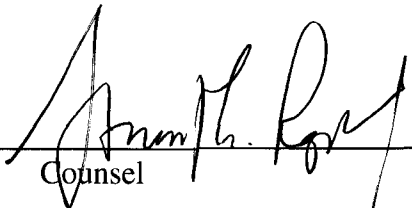
The City’s apparent request for attorney’s fees (Countercl. at 18, ¶ 6) should be dismissed because the City failed to plead “the basis upon which [it] relies in requesting attorney’s fees.” Rule 3:25(B) (effective May 1, 2009). The City has, therefore, waived its claim. Rule 3:25(C).

**CONCLUSION**

The Counterclaim should be dismissed with prejudice.

Respectfully submitted,

FAIRFAX COUNTY WATER AUTHORITY

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**CERTIFICATE OF SERVICE**

I certify that on July 10, 2009, a copy of the foregoing Brief was sent by both electronic and U.S. first-class mail to the offices of the following counsel for the City of Falls Church:

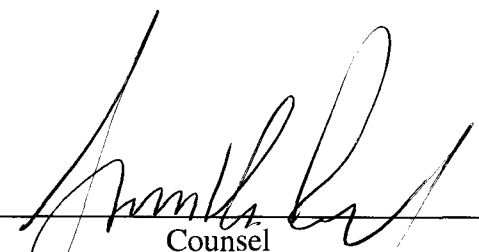
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