

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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

CL-2008-16114

**FAIRFAX WATER'S
 BRIEF IN OPPOSITION TO THE
CITY OF FALLS CHURCH'S MOTION TO STAY**

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 Jill M. Dennis (VSB No. 43466)
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August 5, 2009

The City has not justified staying this case. First, the claims in the two proceedings are different. Only one count of the City's counterclaim/third-party complaint overlaps with its claims before the special court. More importantly, the special court has no power to grant *any* of the damages or injunctive relief sought by *Fairfax Water* against the City in this case. That is sufficient reason alone to deny the stay. Second, this case was filed first, nine months ago, and six months before the City petitioned for a special court. Discovery in this case is nearly complete. Particularly because the special court proceeding involves only a small subset of the issues here, staying this case will retard judicial economy, not promote it. Third, a stay will injure Fairfax Water and keep the Halstead project in limbo. If the case proceeds to trial on September 14, Fairfax Water can obtain injunctive relief to stop the City from blocking the project. That would moot the need for Halstead to obtain its recently-filed "proffer condition amendment" to get around the City's hindrance. If the case is stayed, however, the proffer commitment may well be canceled and Fairfax Water could lose the revenues from the project forever. Finally, denying the stay will pose no injury to the City, much less "irreparable" harm. It was *the City* that voluntarily commenced its countersuit in this Court and aggressively litigated it, promising no continuance was needed. Having promised this Court that it will be ready for trial on September 14, the City cannot claim injury when it is held to that promise.

STATEMENT OF THE CASE

In 2007 and 2008, the City lost its federal lawsuit in which it sought to exclude Fairfax Water from the market for water service in the eastern portion of Fairfax County. (*See* Am. Compl. Exs. 1 & 2.) Undeterred, the City continued to misrepresent that it had an "exclusive" service area, threatened developers with litigation if they switched to Fairfax Water, and, in the case of the Halstead project, blocked the developer from switching to Fairfax Water's system by refusing to relocate existing water lines unless the developer promised to connect only to the City's system.

Fairfax Water filed this action in December 2008. Counts I and II of the amended complaint allege that the City is monopolizing water service in Fairfax County, in violation of the Virginia

Antitrust Act. Count IV alleges that the City tortiously interfered with Fairfax Water's business expectancy concerning the Halstead project. Count V asserts that the City's high rates for water service constitute an unconstitutional tax. On March 13, Judge Thacher issued a written opinion overruling the City's demurer on all grounds. He then scheduled the trial to begin September 14.

In May 2009, the City was granted leave to file a countersuit, impleading Fairfax County and the Board of Supervisors (the "County"). The City claims that the County is requiring developers to enter into unlawful proffers by which they promise to connect to Fairfax Water's system. Although the City identifies no pending project where this is an issue, it asserts that any such water proffer would be an "unreasonable condition" under Code § 15.2-2303 (Count I), violate the Dillon Rule (Count II), constitute an unconstitutional "special law" (Count III), and deny the County's consent to expand the City's water service in violation of Code § 15.2-2143 (Count IV).

At the same time, the City petitioned the Supreme Court to appoint a special court under Code § 15.2-2143, raising the same claim found in Count IV of the countersuit, but none of the other claims. On July 13, the Supreme Court appointed the special court, but it did so "without prejudice" to the County's motion to dismiss the petition for failure to state a claim. The special court has scheduled a preliminary conference for October 2, 2009.

ARGUMENT

I. THE MOTION TO STAY DOES NOT APPLY TO COUNT V OF FAIRFAX WATER'S COMPLAINT.

The City has acknowledged that Count V of Fairfax Water's amended complaint -- which seeks to declare unconstitutional the City's practice of diverting water revenues to its general fund -- is "unrelated" to the allegations in its countersuit or before the special court. (Ex. 1 Tr. at 42 (5/22/09) (statement by City Attorney).) Accordingly, even if the Court were inclined to stay the rest of this case, Count V should proceed to trial as scheduled.

II. THE CITY CANNOT JUSTIFY STAYING ANY PORTION OF THIS CASE.

The City cites the wrong legal standard for determining whether to stay one case in favor of another. The case it cites, *Berger v. Pulte Home Corp.*, 55 Va. Cir. 36, 39 (Fairfax County 2001), involved the standard for granting a *stay pending appeal*. By contrast, the granting of a stay pending the outcome of a *different* action, as in this case, is based on the following factors: “*the identity of the parties and issues in both actions; the time of filing; promotion of judicial efficiency; and possible prejudice to a party as a result of the stay.*” *Potomac Sav. Bank, F.S.B. v. Lewis*, 25 Va. Cir. 184 (Fairfax County 1991) (emphasis added); *SettlementRoom, L.C. v. Gertified Env’ts, Inc.*, 67 Va. Cir. 69 (Fairfax County 2005) (same). In light of these factors, no stay is justified.

1. The Claims Are Different. The claims in this case are entirely different from the claims before the special court. Fairfax Water’s complaint is based on the City’s efforts to monopolize the market for water service in the eastern portion of Fairfax County (Counts I and II), the City’s refusal to permit the Halstead developer to connect to Fairfax Water’s system (Counts I, II and IV), and the unconstitutionality of the City’s water rates (Count V). The special court has no authority to adjudicate these claims, much less to award damages to Fairfax Water or to enjoin Falls Church from violating the Virginia Antitrust Act. *See also* Code § 59.1-9.8 (granting antitrust jurisdiction to “circuit courts”). The *only* area of overlap in the two cases is found in Count IV of the *City’s* Counterclaim and Third-Party Complaint. Falls Church asserts that the Board of Supervisors’ acceptance of a developer’s proffer to connect to Fairfax Water’s system is tantamount to Fairfax County’s withholding consent for the City to operate its water system in the County under Code § 15.2-2143. That is the same and only issue before the special court; the City has not raised in the special court Counts I-III of its countersuit here.

Significantly, the City recently abandoned its challenge to the Halstead proffer in this case. In response to Fairfax Water’s and Fairfax County’s argument that any challenge to the Halstead proffer was time-barred under Code § 15.2-2285(F), and not the proper subject of declaratory relief,

the City said that it is *not* challenging any past proffers in this case, only “future” proffers. (City Br. Opp. to County Demurrer at 5 (7/24/2009).) In other words, the City’s countersuit is not germane to Fairfax Water’s claims concerning the Halstead project.

2. Both the “time of filing” and “judicial efficiency” weigh against a stay. Fairfax Water filed its complaint nine months ago, in December 2008. By contrast, the City waited until May 2009 to petition for a special court, which will not convene until October 2. Discovery in this case is nearly complete, having involved more than twenty depositions, scores of discovery requests, tens of thousands of documents, and eight expert witnesses. The discovery cutoff is August 14. The “time of filing” factor unquestionably supports denying the stay. And, as noted above, the proceedings before the special court cannot even grant Fairfax Water any of the relief it seeks in this case. Thus, a stay offers no “judicial efficiency.” Indeed, it makes no sense to delay this case, which has come so far, simply because another court might adjudicate *one* of the claims raised in Falls Church’s late-added third party complaint.

3. A Stay Will Severely Prejudice Fairfax Water. Because the special court does not have the power to grant the damages and injunctive relief sought by Fairfax Water, a stay will deny Fairfax Water its day in court. That is, no doubt, why Falls Church wants it. Indeed, a stay will also help the City deprive Fairfax Water of the revenues associated with the Halstead project. As a result of the City’s obstruction of that project, the developer is currently pursuing a “proffer condition amendment” (PCA) with Fairfax County to rescind its earlier promise to connect to Fairfax Water’s system. (Ex. 2 (stating that the City’s position “has postponed approval of the site plan indefinitely”).) If this case proceeds to trial in September, Fairfax Water can obtain injunctive relief to stop that interference. That will moot the need for the PCA, allow Fairfax Water to receive the water revenues to which it is entitled, and allow the developer to start construction of a huge project that the City has now delayed for more than a year.

By contrast, a stay will keep the project in limbo and increase the need for the PCA. If the PCA is granted and rescinds the developer's commitment to Fairfax Water, Fairfax Water could well lose significant revenues. In any case, Fairfax Water's inability to obtain injunctive relief in the special court alone justifies denying the stay. *SettlementRoom*, 67 Va. Cir. at 72 (denying stay when other proceeding did not provide injunctive relief).

4. A Stay Will Not Harm Falls Church. To the contrary, the City asked for leave to pursue its purely *voluntary* countersuit here and represented that it will be ready for trial on September 14th. (Ex. 1 at 22.) The City also said that the special court proceeding would be on a "different track" and that it was "absolutely wrong" that the City was trying to delay this case. (*Id.* at 20.) Having said that, the City cannot plausibly claim to be "irreparably" harmed if the case goes forward as promised. Indeed, because the only common count is based on § 15.2-2143 -- Count IV of the City's countersuit -- the real issue is whether the court should make the City elect *where* to pursue that claim. Virginia courts require a litigant who files parallel proceedings to elect which of its pending suits it will prosecute. *Jennings v. Realty Developers, Inc.*, 210 Va. 476, 482, 171 S.E.2d 829, 834 (1970). Accordingly, the Court should order the City to elect whether to litigate its Count IV here or in the special court.

III. EVEN UNDER THE CITY'S ERRONEOUS STANDARD, NO STAY IS PROPER.

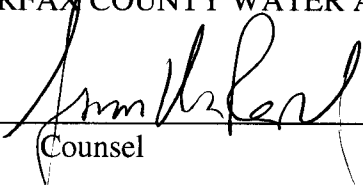
Even if the Court applied the *Berger* test, the City could not satisfy it. First, the City is not likely to prevail on the merits of its claims under § 15.2-2143 for the reasons stated in the pending demurrers and pleas in bar (which are scheduled to be heard August 14, the day after this motion). Second, the balance of hardships weighs in favor of Fairfax Water, for the reasons shown above. And finally, the public interest favors resolving Fairfax Water's complaint that Falls Church is blocking competition and that its water rates constitute an unconstitutional, extra-territorial tax.

CONCLUSION

The City's motion to stay should be denied and the City should be made to elect whether to pursue Count IV of its Counterclaim in this case or in the special court.

Respectfully submitted,

FAIRFAX COUNTY WATER AUTHORITY

By:  _____
Counsel

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CERTIFICATE OF SERVICE

I certify that on August 5, 2009, a copy of the foregoing Brief in Opposition was sent by both electronic and U.S. first-class mail to

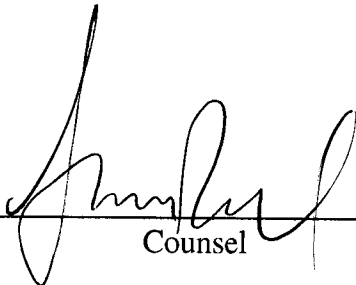
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1 joined as a party in the action. In the person's
2 absence, complete relief cannot be accorded among
3 those already parties.

4 And that is exactly the situation we
5 have here, Your Honor. Similarly, in Rule 3:16, a
6 new party may be added on motion of the plaintiff by
7 order of the court at any stage of the case as the
8 ends of justice may require.

9 Finally, Your Honor, there is no
10 prejudice to the County here. As I stated at the
11 outset of my argument, the same witnesses and
12 evidence will be presented as part of our
13 counterclaim and third-party claim that have already
14 been noticed for deposition the end of this month and
15 into June. There will be no need for any additional
16 depositions to be set. Documents have already been
17 provided by the County. This is not a complex
18 counterclaim or third-party claim.

19 THE COURT: What is the status of this
20 petition before the Supreme Court for the convening
21 of the special court?

22 MR. FOSTER: Your Honor, we had just

1 filed and served that. We have not heard anything
2 from the Supreme Court in response to that yet, and
3 that will, obviously, proceed on a different track,
4 and that leads me to my final point.

5 The County makes the argument that we
6 are really filing these counterclaims and third-party
7 claims to try and delay the case. That is absolutely
8 wrong.

9 We are filing these because we have a
10 statutory right to do so, and as we have alleged in
11 this pleading, we fundamentally and vigorously
12 believe that this proffer policy and practice is a
13 violation of Virginia law and a violation of the
14 Virginia Constitution.

15 THE COURT: Well, what happens if the
16 Supreme Court grants your petition and convenes a
17 special court? What does that do to this litigation?

18 MR. FOSTER: Your Honor, the short
19 answer is, I don't know, and that is something that
20 we will have to confront if and when they do that.

21 I am reluctant to speculate at this
22 point as to what they are going to do.

1 THE COURT: Has your client done this
2 before, sought this kind of relief from the Supreme
3 Court?

4 MR. FOSTER: No, we have not, Your
5 Honor. We have not.

6 And just on a final point, the arguments
7 made by the County that we shouldn't have waited to
8 this point to file, first of all, we were about two
9 and a half weeks after our by-right deadline, as I
10 had mentioned earlier.

11 Secondly, a lot of our time was spent in
12 March, in February and March, preparing and arguing a
13 demurrer that was ruled on by Judge Thacher in March.
14 It didn't make sense to us at that time to initiate
15 additional litigation if it turned out it was going
16 to be unnecessary, and I don't think we should be
17 penalized for trying to keep the litigation to a
18 minimum.

19 So in closing, Your Honor, I think it is
20 fundamentally unjust to the City and is certainly not
21 in furtherance of the ends of justice to require us
22 to have two trials with two judges, incur additional

1 litigation costs on a second trial that is directly
2 related to the first one, especially in this tight
3 budget environment for localities.

4 **THE COURT:** In your estimation, can this
5 case, if your motion today is granted, proceed to
6 trial on this scheduled trial date of September 13th?

7 **MR. FOSTER:** I think that it can, Your
8 Honor, for the reasons that I stated earlier.
9 Depositions of the County witnesses have already been
10 set. We do not anticipate needing to notice any
11 additional County witness depositions.

12 The documents that led to the filing of
13 our and supported our counterclaim and third-party
14 claim have already been produced for the most part,
15 and so I don't think that there is going to be a need
16 for a huge amount of additional discovery, so I think
17 it can be done.

18 One final point, Your Honor. The County
19 makes the argument that, well, by the time the
20 demurrers are all finished, we're going to be close
21 to trial.

22 The rules, as you know, in Rule 4

1 directly against what is provided in Rule 3:12 and
2 3:16.

3 Your Honor, I'm happy to answer any
4 additional questions you have on 3:13, but I do have
5 a couple of other additional points I would like to
6 make.

7 THE COURT: All right.

8 MR. FOSTER: The first is, Mr. Raphael
9 said, Well, you know, Count V on the tax issue is
10 unrelated.

11 I think that's probably true, but let's
12 talk about Counts I, II and IV. They are directly
13 related to what we are alleging.

14 THE COURT: Well, he agreed with that.

15 MR. FOSTER: So I'm batting 750 and I
16 think, given that connection, that is enough.

17 I see nothing in the rules or their
18 arguments that say there has to be a complete, 100
19 percent overlap between the two cases before you can
20 file a counterclaim and third-party claim.

21 Regarding this rush for a September
22 trial, again, I don't think that a continuance is

1 **needed.** Mr. Raphael's statement that, Well, we need
2 to have that trial because of this alleged ongoing
3 activity by the City, as Your Honor pointed out, has
4 a TRO been signed?

5 No. And if it's such an emergency, the
6 Water Authority at any time can seek a TRO, and they
7 have not.

8 Finally, the speculation about a
9 continuance, as I said earlier, by the County is
10 really premature. They are not in this case right
11 now. I renew my objection to them coming in early
12 and arguing the substance of the matter.

13 Their opportunity to come in is after
14 they have been served under Rule 3:13 at that time,
15 after they are officially in the case.

16 They can make any argument they deem
17 appropriate on a severance or a continuance. That is
18 not before the Court today, and it is premature, and
19 I would ask, therefore, that the motion for leave to
20 amend be granted.

21 Thank you.

22 THE COURT: All right. Thank you,

Exhibit 2



WALSH COLUCCI
LUBELEY EMRICH
& WALSH PC

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RECEIVED
Department of Planning & Zoning
JUN 01 2009
Zoning Evaluation Division

May 29, 2009

Regina Coyle
Director, Zoning Evaluation Division
Fairfax County Department of Planning & Zoning
12055 Government Center Parkway, Suite 801
Fairfax, Virginia 22035

Re: Application for Proffered Condition Amendment
DSF/Long Metro II, LLC and DSF/Long Metro III, LLC (the "Applicants")
Tax Map 49-1 ((16)) 14, 15, 16 and 49-2 ((1)) 18 and 19 (the "Application Property")

Dear Ms. Coyle:

This letter serves as a statement of justification for a proffered condition amendment application affecting 8.49 acres of property in the Merrifield area of Fairfax County. The Application Property was rezoned along with 5.8 acres of adjacent property to the PRM District via RZ 2007-PR-001, approved by the Board of Supervisors on October 15, 2007.

The Application Property is bordered on the northeast by the Wilton House Condominium and the Marriott Courtyard Hotel). Across Prosperity Avenue to the north lies the Dunn Loring Metro Station. Industrially-zoned properties are located to the south and west of the Application Property. Across Gallows Road to the east, property is developed with multi-family residential uses.

This application proposes no changes to the site design, uses or intensity of development. The purpose of the PCA is to amend Proffer B-44 which states:

Public Water. Water service to the Phase B Property shall be provided by the Fairfax County Water Authority (FCWA), unless the FCWA determines service from another provider is necessary or preferable.

During the processing of a site plan for the Application Property, this proffer has become problematic. The site plan provides for water service from FCWA. However, the City of Falls Church maintains a water line easement across the Application Property, the vacation of which is necessary for the approved development to proceed. The City of Falls Church would like to be the water service provider for this development and thus has declined to permit the vacation of the easement. The issue of water service has postponed approval of the site plan indefinitely. It

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is my understanding that this water service issue is the subject of litigation. The timing of the resolution is unknown. We request a revision to the proffer language that will provide greater flexibility and allow the development to proceed. Specifically, the following replacement proffer is proposed:

***Public Water.** Water service to the Phase B Property may be provided by the Fairfax County Water Authority (FCWA) or the City of Falls Church, as determined in the sole discretion of the Applicant at the time of final engineering.*

The Halstead mixed-use development is located within the Merrifield Suburban Center portion of the Area I Comprehensive Plan. The Application Property is split between Sub-units C-1, C-2 and C-3. The Comprehensive Plan text for Sub-unit C-1 recommends residential mixed-use up to an FAR of 2.25. Parcels 14 and 15 are located within planning Sub-Unit C-3 which recommends residential mixed-use up to a 1.8 FAR. Parcels 18 and 19 are located within Sub-Unit C-2 which also recommends residential mixed-use up to an FAR of 1.8, but also states that Parcel 18 may develop at a 2.25 FAR.

The Comprehensive Plan's future vision identifies Merrifield as a Suburban Center with the Dunn Loring/Merrifield Transit Station Area developed as a core area. The proposed development is located within one-quarter of a mile of the Transit Station. The proposed mixed-use development including multi-family residential is in conformance with the objectives and guidelines of the Comprehensive Plan.

To the best of our knowledge, there are no known hazardous or toxic materials on the Application Property nor are there any planned with the proposed use. Furthermore, to the best of our knowledge and belief, the proposed use will be in conformance with all applicable ordinances, regulations and adopted standards with the following exceptions previously approved:

1. Modification to allow the use of underground stormwater management in residential development, subject to Waiver #24817-WPFM-001-3, subject to the conditions dated October 2, 2007.
2. Modification to the private street standards to allow private streets to provide access to adjacent properties and to allow private streets in excess of 600 feet in length.
3. Modification of the transitional screening and barrier requirements in favor of that shown on the CDP/FDP.
4. Modification of the loading requirements to allow eight loading spaces in Phase B.
5. Modification of PFM Standard 12-0702.1B2 to permit the reduction of the minimum planting width requirement from 8 feet to 6 feet as shown on the CDP/FDP and as described in the proffers.

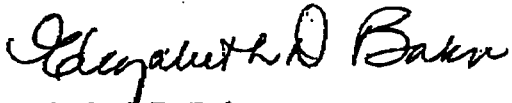
Exhibit 2

Justification
Page 3

Thank you very much for your attention to this matter. Should you require any additional information, please call me.

Very truly yours,

WALSH, COLUCCI, LUBELEY, EMRICH & WALSH, P.C.



Elizabeth D. Baker
Land Use Coordinator