

1 V I R G I N I A:  
 2 IN THE CIRCUIT COURT FOR FAIRFAX COUNTY  
 3 - - - - - X  
 4 FAIRFAX COUNTY WATER :  
 5 AUTHORITY, :  
 6 Plaintiff, : Civil Action No.  
 7 v. : 2008-16114  
 8 CITY OF FALLS CHURCH, :  
 9 Defendant. :  
 10 - - - - - X

Falls Church, Virginia  
 Friday, August 14, 2009  
 Motion Hearing  
 Judge Terrence Ney

16 APPEARANCES:

17  
 18 On behalf of the Plaintiff:  
 19 STUART A. RAPHAEL, ESQ.  
 20 LEE MOODY, ESQ.  
 21 Hunton & Williams, LLP  
 22 1900 K Street, N.W.

1 Washi ngton, D. C. 20006-1109  
 2 (202) 419-2159

3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

-and-  
ELIZABETH TEARE, ESQ.  
Senior Assistant County Attorney  
Office of the County Attorney  
12000 Government Center Parkway, Suite 549  
Fairfax, VA 22035-0064

3

1 APPEARANCES CONTINUED:

2 On behalf of the Defendant:

3 ALEXANDER THOMAS, ESQ.  
4 Reed Smith LLP  
5 3110 Fairview Park Drive, Suite 1400  
6 Falls Church, VA 22042  
7 (703) 641-4200  
8

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

4

1 (Partial Rough Draft Proceedings)  
2 JUDGE NEY: I don't need to. Again, as I said  
3 yesterday, and I'm going to repeat it I think every  
4 time I have counsel in this case appearing an  
5 excellent job is done on both on briefs and in this  
6 case only, Mr. Thomas has been able to bring his  
7 eloquence to the attention of the bench, but the  
8 court believes that both demurrers need to be  
9 sustained with prejudice, but there is not a specific  
10 challenge to a wrongful act in this case, only really  
11 ultimately to the general statutory scheme by which  
12 Fairfax County operates and Fairfax Water operates  
13 within its creation of that statutory scheme.  
14 Very frankly, it strikes the court that

15 this is almost an issue of standing that there is not  
16 a specific interest shown by the City of Falls Church  
17 looking back nearly a century in CHK against Cohen  
18 that a specific interest has been violated than a  
19 general interest, mainly the future proffers and the  
20 future proffers again would be the context of the  
21 statutory scheme and until a specific interest namely  
22 a specific case has been shown what the city is

5

1 asking for is really an advisory opinion is well  
2 settled in the Commonwealth of Virginia that the  
3 courts do not give advisory opinions. The statutory  
4 scheme is set out in Section 1522112 enables the  
5 board to have the Board of Supervisors, Fairfax  
6 County itself to have Fairfax Water be its exclusive  
7 provider of water, although it's not the exclusive  
8 provider because of the long-standing existence of  
9 the City of Falls Church's providing water both to  
10 its own residents, to her own residents as well as  
11 residents outside the city. But to the extent those  
12 two might be bumping up against each other and I  
13 think Mr. Thomas concedes that that may be happening  
14 or may happen, it seems that the court is controlled  
15 here by City of Martinsville against Board of  
16 Supervisors 222 Virginia 505281 Southeastern second  
17 8831981 which presented an almost identical  
18 situation, except there was a very specific  
19 controversy there that the court had to address,  
20 namely the hooking up of the line or not hooking up

21 of the line. The court will observe further the  
22 board of supervisors is not engaged in competitive

6

1 procurement and Fairfax County or Fairfax Water is  
2 its water company and it was formed for that purpose  
3 and to the extent that the county wishes to have  
4 Fairfax County provide water, it's because that's the  
5 job of this particular municipal corporation. There  
6 is no relief sought against the water company by the  
7 city other than general expression of what's going on  
8 here, an expression from the court that is what's  
9 going on here is not, is not consistent with the  
10 statutes and should be the subject of a declaratory  
11 judgment finding such activity is improper or  
12 illegal. But there is no specific ruling sought. As  
13 a result there is nothing to pass through as would be  
14 the case with a third party motion for judgment,  
15 namely if the city is found liable to Fairfax Water,  
16 the county would be liable to it. For these reasons  
17 the demurrers are sustained to the counterclaim and  
18 to the third party motion for judgment with  
19 prejudice. The exception of the city to the Court's  
20 rulings is noted.

21

22