

IN THE  
**SUPREME COURT OF VIRGINIA**  
AT RICHMOND

**CITY OF FALLS CHURCH,**

*Appellant,*

**v.**

**FAIRFAX COUNTY WATER AUTHORITY,**

*Appellee.*

**RECORD No. \_\_\_\_\_**

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**PETITION FOR APPEAL**

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## **PETITION FOR APPEAL**

TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE  
SUPREME COURT OF VIRGINIA:

Appellant, City of Falls Church (“the City”), by counsel, respectfully states that it is aggrieved by a Final Decree entered in favor of the Fairfax County Water Authority (“Fairfax Water”) in the Circuit Court of Fairfax County on January 6, 2010, the Honorable R. Terrence Ney presiding.

### **STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS**

On December 8, 2008, Fairfax Water sued the City over practices of the City’s water system. (R. 1.)<sup>1</sup> Fairfax Water’s First Amended Complaint (“the Amended Complaint”) added Count V, which claimed that the City’s Charter and water rates were unconstitutional. (R. 103–05.) The adjudication of Count V is the sole issue on appeal.<sup>2</sup>

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<sup>1</sup> Citations to pages of the trial court’s record appear as: “(R. \_\_\_\_.)” Citations to the transcript of the trial appear as: “(Tr. \_\_\_\_.)” Citations to any other transcript include the hearing date as follows: “(Date Tr. \_\_\_\_.)”

<sup>2</sup> A significant part of the trial court record has nothing to do with this appeal, which challenges only the trial court’s rulings on Count V. The Final Decree severed Count V from all other remaining counts. The remaining counts went to trial on February 1 to 4, 2010, and were resolved in a consent decree dated February 25, 2010. (R. 2946.) Nevertheless, the trial court declined to exclude from the record on this Count V appeal the exhibits and transcripts relating to the trial of the other counts. (See R. 3480.) The exhibits and transcripts from the February 2010 trial are not properly part of the record on appeal, having come after the trial court severed Count V and ultimately lost jurisdiction over Count V.

A trial only on Count V began on September 14, 2009. After closing its case-in-chief, Fairfax Water raised a new claim that the City had violated its Charter. (See Tr. 547–51.) Trial ended on September 23, 2009, and the court took Count V under advisement.

On January 6, 2010, the trial court issued a letter opinion and Final Decree ruling in favor of Fairfax Water. (R. 2699–2710.) The trial court concluded that the City had violated § 13.09 of its Charter<sup>3</sup> by earning a profit on its water system and transferring such profits to the City’s general fund. (R. 2703–04.) The trial court also concluded that the City had violated Article I, § 6, of the Virginia Constitution because its water system had earned profits from Fairfax County customers in violation of the constitutional principle of “no-taxation-without-representation.” (R. 2704, 2705.) The Final Decree provided, among other things, that (1) the City was enjoined from transferring any water system profits to the City’s general fund, including the transfer for Fiscal Year 2009 that had occurred

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<sup>3</sup> The trial court referred to §§ 13.07 and 13.09 of the City Charter. (R. 2703 n.6; 2704; 2704 nn.7–8.) The sections of the City Charter were renumbered in 2003, and the current Charter designates these provisions as §§ 13.02 and 13.04, respectively. For ease of reference, this Petition for Appeal will follow the trial court’s convention and refer to the prior §§ 13.07 and 13.09. The text of §§ 13.07 and 13.09 is set forth on pages 9 and 10 of this Petition. See also 1993 Va. Acts ch. 969; 1995 Va. Acts ch. 655.

three months earlier; (2) the City was required to set its water rates to “result in receipts equal to expense” and, in effect, operate its water system at cost and (3) City Charter § 13.07 was unconstitutional. (R. 2699–2700.) The trial court declined to reconsider its ruling on the Charter violation claim (R. 2715, 2720) but, at the parties’ request, suspended the injunctive relief pending a decision by this Court on appeal. (R. 2834.) Based on its rulings on Count V, the court awarded costs to Fairfax Water. (R. 2820.)

### **ASSIGNMENTS OF ERROR**

1. The trial court erred when it allowed Fairfax Water to claim, and ultimately ruled, that the City violated its Charter, because (a) this unpleaded claim was raised for the first time in the middle of trial; (b) the City Charter does not require that the City Council set rates every year so that receipts of the water system will equal expenses; and (c) there was no evidence that the water system had lost money for three straight years.

2. The trial court erred when, relying on Marshall v. N. Virginia Transp. Auth., it held unconstitutional the last sentence of § 13.07 of the City Charter and the City’s practices of earning a profit from its water system and transferring that profit to the general fund, because the City’s practices were undertaken pursuant to that Charter provision, which was

adopted by the General Assembly as authorized by Article VII, § 2, of the Constitution.

3. The trial court erred when it held that the City imposed an unconstitutional tax, in violation of Article I, § 6, of the Virginia Constitution, on Fairfax Water when it earned profits from the City's water system and transferred those profits to the City's general fund, because (a) the court erroneously relied on Marshall; (b) § 13.07 of the City Charter, which authorizes the earning and transfer of water system profits, was validly adopted pursuant to the General Assembly's authority under Article VII, § 2; (c) Fairfax Water and its elected representatives consented to the City's practices; and (d) the court erroneously found that Fairfax Water and the water system's other Fairfax County customers were "captives" to the City's water system and "have nowhere else to go" if the court meant that the City required them to connect and stay connected to its water system.

4. The trial court erred in ruling that the City's water charges to all of its Fairfax County customers are an unconstitutional tax because (a) it improperly granted representational standing to Fairfax Water on behalf of all of the City's Fairfax County customers without any statutory or other basis; and (b) the charges are not a tax at all, since the City does not

require any of its Fairfax County customers to connect to its system or penalize them if they do not.

5. The trial court erred when it granted retrospective relief that Fairfax Water never pleaded and enjoined the City from transferring any moneys from its water fund to its general fund for purposes unrelated to its water system, including the “management fee” transfer for the City’s Fiscal Year 2009, which had been made before the trial court issued its ruling.

6. The trial court erred by assessing costs against the City when it was the City that should have prevailed on the merits.

### **QUESTIONS PRESENTED**

1. Whether the trial court erred when it allowed Fairfax Water to assert an unpleaded claim, raised in the middle of trial, that the City violated its Charter. (Assignment of Error No. 1.)

2. Whether the trial court erred when it ruled that the City had violated its Charter based on the court’s conclusion that City Council was required to set water system rates so that receipts equal expenses every year, when the Charter requires such ratemaking only after three consecutive years of losses and actually permits the water system to make a profit. (Assignment of Error No. 1.)

3. Whether the trial court erred when, relying on Marshall, it ruled that the last sentence of City Charter § 13.07 is unconstitutional, despite the fact that the provision was adopted by the General Assembly pursuant to Article VII, § 2, of the Constitution, which authorizes special acts regarding the taxing power of a city. (Assignments of Error Nos. 2 and 3.)

4. Whether the trial court erred when it held that the City imposed an unconstitutional tax under Article I, § 6, of the Virginia Constitution when Fairfax Water is a customer of the City's water system by consent and its elected representatives in the General Assembly authorized Charter § 13.07 and the City's practice of annually transferring water profits to the general fund. (Assignments of Error Nos. 2, 3, and 4.)

5. Whether the trial court erred when it granted representational standing to Fairfax Water when there is no statutory or other basis for that standing, and stated that the City's water customers in Fairfax County are "captive" to the City's water system "and have nowhere else to go" even though the City does not require Fairfax Water or any other County customers to connect to its system. (Assignments of Error Nos. 3 and 4.)

6. Whether the trial court erred in ruling that the City's water charges to all of its Fairfax County customers are a tax even though the

City does not require any of its Fairfax County customers to connect to its system or penalize them if they do not. (Assignment of Error No. 4.)

7. Whether the trial court erred when it granted unrequested, retrospective relief to Fairfax Water and enjoined the City from transferring any moneys from its water fund to its general fund for purposes unrelated to its water system, including the “management fee” transfer for the City’s Fiscal Year 2009, which had been made before the trial court issued its ruling. (Assignment of Error No. 5.)

8. The trial court erred by assessing costs against the City when it was the City that should have prevailed on the merits. (Assignment of Error No. 6.)

### **STATEMENT OF FACTS**

Since the 1940s, the City has operated a public water system serving customers both in the City and in Fairfax County.<sup>4</sup> (R. 2702.) One of the City’s customers is Fairfax Water, Virginia’s largest water authority, which owns two office buildings in the Merrifield section of Fairfax County that are served by the City’s water system. (Tr. 498–99.) Established in 1957,

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<sup>4</sup> A city can operate a water supply system within or outside its limits. Va. Code Ann. § 15.2-2109(A) (2008). To operate extraterritorially, a city must have consent of the locality where the system is to be located, but no consent is required for the operation or orderly expansion of a water supply system in existence on July 1, 1976. Va. Code Ann. § 15.2-2143 (2008).

Fairfax Water operates its public water utility in parts of Fairfax County. (R. 88, 90.) In a 1959 agreement, Fairfax Water and the City identified exclusive service areas where each party would operate. (R. 89; Tr. 1303.) The agreement expired in 1989, leaving Fairfax Water free to serve all of Fairfax County, including its Merrifield offices. (R. 90; Tr. 1303.)

In 1997, Fairfax Water built a new headquarters building in Merrifield and requested—and received—City water service. (Tr. 1308–10; Def.’s Exs. 41, 41A.) In 2008, Fairfax Water considered connecting its two buildings to its own water main across the street, but it decided that the cost was too high. (R. 90; Tr. 500–02, 508-09, 1303–05, 1308–12.)

In accordance with the City’s Charter, the City’s water system has operated at a profit for many years, and the City has routinely transferred a portion of those profits to the City’s general fund. (Tr. 203–05.) In April 2008, approximately eight months before Count V was made a part of this case, the City adopted its FY 2009 budget, including the FY 2009 transfer.<sup>5</sup> (R. 3444, 3454–55.) The FY 2009 transfer of water system profits to the City’s general fund took place in the ordinary course of business in October

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<sup>5</sup> The 2009 fiscal year ran from July 1, 2008, to June 30, 2009, and the City Charter required the City Council to adopt the FY 2009 budget by its first meeting in May 2008. See City Charter § 6.09.

2009, some three months before the trial court's ruling. (R. 2754, 3444, 3454.) The City charges the same water commodity rate, \$3.03 per thousand gallons, to City and County customers. (R. 91.) While higher than Fairfax Water's rate, it falls in the midrange of rates charged in Northern Virginia and the Washington, D.C., area. (Def.'s Ex. 40.)

### **ARGUMENT**

Count V claimed that (1) the City's Charter was unconstitutional because it authorized the transfer of water system profits to the City's general fund, and (2) the City was operating its water system in violation of the Virginia Constitution by earning a profit from its water utility and transferring those profits to the general fund. (R. 104–05.) The trial court erroneously allowed Fairfax Water, for the first time at trial, to raise a new claim—that the City had violated § 13.09 of its Charter—and then misread § 13.09 in finding a violation. Charter § 13.09 provides, in pertinent part:

The rates to be charged for the . . . water . . . [utility] shall be fixed from time to time by the council . . . . If for any three consecutive fiscal years the average annual receipts of any utility shall be less than its average annual expense, it shall be the duty of the . . . council to adopt for that utility a schedule of rates which in its judgment will produce receipts equal to expense.

(R. 2704 (emphasis added).) The trial court read this provision to require the water system to have “receipts equal to expense” every year, not just after losses have occurred for three consecutive years. (R. 2700, 2704.)

But § 13.07 of the Charter unequivocally authorizes the City to earn profits on its water system and transfer them to the City’s general fund:

A return on equity that is calculated using generally accepted accounting principles for utility enterprises, when authorized by the council by the affirmative votes of a majority of council, may be transferred to the general fund . . . .

(Pl.’s Ex. 11 (emphasis added).) Despite the General Assembly’s authority under Article VII, § 2, of the Virginia Constitution to provide by special act for the powers of taxation of a city, the trial court erroneously found Charter § 13.07 unconstitutional and ruled that the City’s practices of earning a profit on its water utility and transferring that profit to the City’s general fund was also unconstitutional. (R. 2700, 2704–05.) In addition to misreading this Court’s decision in Marshall v. N. Virginia Transp. Auth., 275 Va. 419, 657 S.E.2d 71 (2008), and failing to respect the authority of the General Assembly under Art. VII, § 2, the trial court also overlooked the fact that Fairfax Water consented to the City’s practices by requesting and maintaining City water service and that its elected representatives in the General Assembly had also consented by enacting the Charter.

**I. THE TRIAL COURT ERRED IN RULING THAT THE CITY VIOLATED ITS CHARTER BY TRANSFERRING PROFITS FROM ITS WATER SYSTEM TO THE CITY’S GENERAL FUND, A PRACTICE THAT THE CHARTER EXPLICITLY AUTHORIZED.**

The trial court ruled that the City Charter prohibited the transfer of water system profits to the general fund. (R. 2703–04.) The court erred on this point for two reasons, one procedural and the other substantive. First, Fairfax Water’s claim regarding a Charter violation was not properly before the court, because it was never pleaded. (See R. 87.) Second, even if the Charter violation had been pled, the court misread the Charter.

**A. Fairfax Water’s Belated Claim Of A Charter Violation Was Not Properly Before The Court, Because It Was Never Pleaded And Was First Raised In The Middle Of Trial.**

At trial, Fairfax Water raised for the first time a claim that the City had violated its Charter. In fact, the first mention of this claim came after Fairfax Water had closed its case-in-chief.<sup>6</sup> (Tr. 555–56.) Given the Amended Complaint’s silence on any Charter violation, neither Fairfax

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<sup>6</sup> Fairfax Water argued that the Charter violation issue was “lesser included” and that “the doctrine of constitutional avoidance” allowed the court to consider it sua sponte. (Tr. 615–17.) Under that doctrine, a court should not address a constitutional issue “if the case may be determined on other points.” Klarfeld v. Salisbury, 233 Va. 277, 286, 355 S.E.2d 319, 324 (1987). But this assumes that those “other points” have been raised in the pleadings; otherwise, they are not points on which “the case may be determined.”

Water nor the court had authority to insert it in the middle of trial. The trial was limited to only constitutional issues. (R. 105.)<sup>7</sup>

In raising the Charter violation claim at trial, Fairfax Water asserted, in effect, that that claim was part of the same cause of action as its constitutional claim. “The test to determine whether claims are part of a single cause of action is whether the same evidence is necessary to prove each claim.” Brown v. Haley, 233 Va. 210, 216, 355 S.E.2d 563, 567 (1987). Similarly, “a ‘cause of action’ involves an assertion of particular legal rights.” Davis v. Marshall Homes, Inc., 265 Va. 159, 172, 576 S.E.2d 504, 510 (2003). Here, proof of the purported Charter violation would require evidence regarding the City’s running water system deficits for three straight years, see Charter § 13.09, while such evidence was unnecessary on Fairfax Water’s constitutional claim.

“It is firmly established that no court can base its judgment or decree upon facts not alleged or upon a right which has not been pleaded and claimed.” Bd. of Supervisors v. Robertson, 266 Va. 525, 587 S.E.2d 570,

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<sup>7</sup> Before the Charter violation claim was raised, the trial court stated that “[t]he issue before the Court is whether or not the current rates and the most recently set rates are violative of the constitutional issues that are asserted by the plaintiff.” (Tr. 222–23 (emphasis added).) And long after Fairfax Water raised the Charter violation issue, the trial court repeated that the “constitutional” issue “is the sole issue in this hearing.” (Tr. 1396.)

578 (2003) (citing Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp., 221 Va. 1139, 1141, 277 S.E.2d 228, 229 (1981)). A litigant's pleadings are as essential as his proof, and a court may not award relief on facts not alleged or on a right not pleaded or claimed. Ted Lansing, 221 Va. at 1141, 277 S.E.2d at 229; see also, e.g., Smith v. Sink, 247 Va. 423, 425, 442 S.E.2d 646, 647–48 (1994). Here, Fairfax Water's pleadings failed to assert any claim of a Charter violation.

Even if the “doctrine of constitutional avoidance” provided an exception to the rule that courts are bound by the pleadings, the trial court ignored this doctrine. Rather than avoiding the constitutional claims, the court ruled on them—all to the City's detriment—finding unconstitutional both the Charter and the City's practices of making a profit and transferring such profits to its general fund. (R. 2700, 2704–10.) There was no proper reason to allow Fairfax Water to raise a new claim in the middle of trial.

**B. The Charter Permits The City To Earn A Profit On Its Water System, And Does Not Require That Receipts Equal Expenses Unless The System Has Lost Money For Three Straight Years.**

The trial court also erred in ruling that “the City's rate making for its water services is plainly at odds with the mandate of its charter.” (R. 2704.) This supposed “mandate” is in Charter § 13.09, which requires “receipts equal to expense” only “if for any three consecutive fiscal years the

average annual receipts of any utility shall be less than its average annual expense.” (R. 2703–04 (emphasis added).) The trial court misunderstood § 13.09 to set out “the basic rate-making methodology” for water rates (R. 2704), and the court effectively concluded that every fiscal year, water rates must be set “with receipts equal to expense.” (R. 2700, 2704.) But this conclusion does not square with the Charter itself.

On its face, the City Charter requires that receipts must be equal to expenses only if the water system runs a deficit for three consecutive fiscal years. City Charter § 13.09. Except when this predicate is met—losses for three straight fiscal years—Charter § 13.09 allows the City to set its water rates so that receipts do not equal expenses, which is what happened in this case. The court read § 13.09 as if the “three consecutive fiscal years” predicate did not exist and, in effect, judicially amended the City’s Charter.<sup>8</sup>

“Courts are not permitted to rewrite statutes. This is a legislative function. The manifest intention of the legislature, clearly disclosed by its language, must be applied. There can be no departure from the words used where the intention is clear.” Barr v. Town & Country Props., Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990). Similarly, when a court

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<sup>8</sup> There was no claim or evidence that the City’s water system had lost money for three consecutive fiscal years.

construes a statute, it “must apply its plain meaning, and [the court is] not free to add language, nor ignore language, contained in statutes.” BBF, Inc. v. Alstom Power, Inc., 274 Va. 326, 331, 645 S.E.2d 467, 469 (2007); see also Oraee v. Breeding, 270 Va. 488, 498, 621 S.E.2d 48, 52–53 (2005) (holding that statutes should be read as a whole and examined in their entirety in order to determine the legislature’s intent). The trial court violated these principles when it applied Charter § 13.09 even though the City’s water system had not run any deficit for three straight fiscal years.

The trial court also rejected the plain language of a different Charter provision, § 13.07, which plainly provides that the City may transfer from the water system to the general fund a “return on equity.” (Pl.’s Ex. 11.) The City’s return on equity that is transferred to the general fund is comprised of the City’s profit from the water system. (Tr. 203–04, 775–76, 1006.) The trial court rejected Charter § 13.07 on the ground that it “confounds the broader mandate of the charter [i.e., the provisions of Charter § 13.09 that the court misread], namely, that the City should be operating the water company in a manner whereby receipts are to equal—not exceed—expenses.” (R. 2704; see also R. 2700.) This was clear error, because the “equality” requirement of § 13.09 is not a “broader

mandate,” but instead is an exception that only applies if the City’s water system has run deficits for three consecutive years.

**II. RELYING ON MARSHALL, THE TRIAL COURT ERRONEOUSLY HELD THAT THE CITY HAD VIOLATED ARTICLE I, § 6, OF THE VIRGINIA CONSTITUTION, DESPITE THIS COURT’S RECOGNITION IN MARSHALL THAT THE GENERAL ASSEMBLY MAY DELEGATE TAXING POWER TO ANY CITY.**

The trial court ruled that the City’s water rates and transfer constituted a tax to the extent there was a “positive difference between expenses and revenues.” (R. 2705.) Based on this finding,<sup>9</sup> the court, relying on Article I, § 6, of the Constitution and Marshall, erroneously held that the City’s water rates “violate the principle of no-taxation-without-representation and, thus, amount to an unconstitutional tax.” (R. 2704–05.)

In Marshall, this Court was faced with the question of whether it was constitutional for the General Assembly to delegate to the Northern Virginia Transportation Authority (“NVTA”) the power to impose certain specified taxes within the nine localities comprising the NVTA. 275 Va. at 424, 657S.E.2d at 73. Although the members of NVTA’s governing board reside in each of the nine localities, the localities do not elect them to the board. Id. at 425–26, 657 S.E.2d at 74. The General Assembly had delegated its

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<sup>9</sup> For purposes of the arguments in Parts I through IV, the City will assume, without conceding, that its water rates constitute a tax.

taxing authority to the NVTA, a “non-elected body,” but the Virginia Constitution requires the General Assembly to make decisions regarding the imposition of taxes. Id. at 435, 657 S.E.2d at 79–80. In other words, the NVTA was constitutionally prohibited from authorizing any tax.

This Court made it clear in Marshall that, pursuant to Article VII, § 2, of the Constitution, the General Assembly may delegate the power of taxation “to any county, city, town, or regional government.” Id. at 434, 657 S.E.2d at 79. This authority is an “exception” to the “specific prohibition” in Article IV, § 14(5), against the General Assembly’s direct enactment of a “local, special, or private law . . . [f]or the assessment and collection of taxes.” Id. But because the NVTA was not one of the political subdivisions specified in Article VII, § 2, the exception did not apply and the General Assembly could not delegate its taxing authority. Id.

Despite the trial court’s heavy reliance on Marshall, it overlooked the crucial distinction between a body such as the NVTA and a city, which may hold special taxing powers as a result of Article VII, § 2. The trial court failed to make any finding as to whether the “tax” imposed by the City on Fairfax Water through its water rates was nonetheless permitted under Article VII, § 2. Instead, the trial court effectively treated the City as if it were no different from the NVTA, even though this Court explicitly

distinguished the NVTA from cities. Marshall, 275 Va. at 434, 657 S.E.2d at 79. That failure led the trial court to commit a fundamental error in ruling that Charter § 13.07 was unconstitutional.<sup>10</sup> In the same vein, it was also error for the trial court to rule that the City violated the Constitution when it earned profits on its water system and transferred them to its general fund.

The City is a political subdivision to which the General Assembly can delegate its taxing authority. See id. In Charter § 13.07, the General Assembly delegated to the City the authority to earn a profit from its water system and transfer those profits to the City's general fund. Marshall recognized the constitutionality of such delegations, thus supporting the City's exercise of the authority given in its Charter. The trial court erred when it misapplied Marshall and failed to recognize the General Assembly's special authority under Art. VII, § 2, of the Constitution.

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<sup>10</sup> The trial court never stated the basis for its decision that Charter § 13.07 was unconstitutional. The only mention of § 13.07 in the court's letter opinion appears in the discussion of the supposed Charter violation (R. 2704), not the constitutional issue. (See R. 2704–09.) Despite the letter opinion's silence on this point, the Final Decree declared § 13.07 unconstitutional. (R. 2700.)

**III. THE CITY'S PRACTICE OF EARNING A PROFIT FROM ITS WATER UTILITY AND TRANSFERRING SUCH PROFIT TO ITS GENERAL FUND IS AUTHORIZED BY CITY CHARTER § 13.07, WHICH THE GENERAL ASSEMBLY ENACTED PURSUANT TO ARTICLE VII, § 2, OF THE VIRGINIA CONSTITUTION.**

At the very least, the City Charter implicitly authorizes the City to earn a profit on its water system and explicitly authorizes the City to transfer profits from its water system to the general fund. City Charter § 13.07. The trial court ruled that this Charter provision was unconstitutional (R. 2700), presumably based on its opinion that the City was constitutionally prohibited from earning a profit from its nonresident water sales. (See R. 2705.) This was error because Art. VII, § 2, did, in fact, empower the General Assembly, by special act, to authorize the City's practices.

The Virginia Constitution provides in Art. VII, § 2, that “[t]he General Assembly may provide by special act for the . . . powers of any . . . city . . . government, including such powers of . . . taxation and assessment as the General Assembly may determine . . . .” As this Court noted in Marshall, Article IV, § 14(5), of the Constitution prohibits local and special laws regarding the power of taxation. Marshall, 275 Va. at 434, 657 S.E.2d at 79. But this Court added that Article VII, § 2, of the Constitution carves out an exception under which “[t]he General Assembly may by special act delegate the power of taxation to any county, city, town, or regional

government.” Id. Because the NVTa was none of those entities, however, this Court did not consider this constitutional exception in Marshall. Id.

It matters not whether the City’s water rates are a tax. Article VII, § 2, of the Constitution authorizes the General Assembly, by special act, to empower the City to impose such a tax. This provision is an “exception” to the “specific prohibition” found in Article IV, § 14(5). Id. at 434, 657 S.E.2d at 79. While the provisions of Article IV, § 14(5), might appear to be in conflict with Art. VII, § 2, “the conflict is more apparent than real,” Fallon Florist, Inc. v. City of Roanoke, 190 Va. 564, 574, 58 S.E.2d 316, 320–21 (1950), and the provisions of Article IV, § 14(5), must yield to the specific authority given to the General Assembly under Art. VII, § 2. See id. The City’s acts challenged in this case—earning a profit on its water system and transferring profits to the City’s general fund—were authorized by special act of the General Assembly (i.e., Charter § 13.07). The Article VII, § 2, exception thus controls, and the trial court erred when it struck down the City’s Charter and practices.

The trial court failed to make any finding as to whether Article VII, § 2, authorizes the City to “tax” its County customers. Instead, the trial court paid lip service to the Charter’s presumption of constitutionality. “Every act of the General Assembly is presumed to be constitutional [and] [a]ny

reasonable doubt regarding the constitutionality of an enactment must be resolved in favor of the law's validity."<sup>11</sup> Holly Hill Farm Corp. v. Rowe, 241 Va. 425, 430, 404 S.E.2d 48, 50 (1991). Courts are not to find a statute unconstitutional unless "it is plainly repugnant to some constitutional provision." Id. Here, the City's Charter was not repugnant to any constitutional provision; in fact, it was wholly in conformance with the constitutional allowance provided by Article VII, § 2. If the trial court had squarely addressed Charter § 13.07, as a delegation of taxing power under Article VII, § 2, it would have been compelled to uphold the City's practices.

The trial court also ignored the fact that the operation of the City's water utility is a proprietary, not a governmental, function:

When a municipality enters into the business of operating a water plant it is acting in its proprietary, or quasi private, capacity for the private advantage of its inhabitants and of the municipality itself. It exercises business functions rather than those governmental in their nature. In the exercise of those functions the municipality is largely governed by the same rules as those applicable to private corporations or individuals engaged in the same business. Transactions touching such business should receive the same construction by the courts as like ones between private corporations or individuals.

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<sup>11</sup> Count V challenged the validity of the City's practices and Charter only on constitutional grounds, not based on the Dillon Rule. Thus, there is no question that the General Assembly authorized the City's practices.

Leonard v. Town of Waynesboro, 169 Va. 376, 383–84, 193 S.E. 503, 506 (1937) (citations omitted). Likewise, this Court has stated that “the operation of a water department for the purpose of supplying water for domestic and commercial purposes is a private or proprietary right, and for negligence in such operation a municipality is liable in like manner as a private individual.” City of Richmond v. Virginia Bonded Warehouse Corp., 148 Va. 60, 70, 138 S.E. 503, 506 (1927); see also Woods v. Marion, 245 Va. 44, 45, 425 S.E.2d 487, 488 (1993) (operation of waterworks by municipal corporation is proprietary). When the City is acting in its proprietary capacity, as a matter of law it is not exercising its police power. See Carter v. Chesterfield County Health Comm’n, 259 Va. 588, 594, 27 S.E.2d 783, 787 (2000). Similarly, a city is exercising its police powers, and therefore acting in a governmental capacity, when it is exercising its governmental powers for the benefit of its own citizens. Edwards v. City of Portsmouth, 237 Va. 167, 172, 375 S.E.2d 747, 750 (1989). In the case at bar, the City was not serving its citizens when it was providing water to Fairfax Water in Fairfax County; rather, it provided Fairfax Water with a service Fairfax Water requested and paid for.

Consistent with the City’s authority to act proprietarily, in Corporation of Mount Jackson v. Nelson, 151 Va. 396, 145 S.E. 355 (1928), this Court

validated the notion that a city can make a profit from the operation of its water system when it serves areas beyond its boundaries, because it is operating such a system as a business. Id. at 407, 145 S.E. at 358.

The foregoing principles illustrate the wisdom of the General Assembly when it provided the City with the authority to earn a profit on its water system and transfer those profits to the general fund. But for the ability to earn such a profit, the City would have little, if any, economic incentive to extend and maintain service to water customers outside the City's boundaries and thereby subject itself to an exponential expansion of its legal liability for maintenance of the system and repair of a burst pipe or catastrophic failure of the system. The effect of the trial court's ruling is to require the City to operate its entire water utility at cost and, yet, subject itself to the same rules applicable to private corporations.

In addition to Marshall, the trial court cited a number of other cases from this Court, including Robinson v. City of Norfolk, 108 Va. 14, 60 S.E. 762 (1908); City of Charlottesville v. Marks' Shows, Inc., 179 Va. 321, 18 S.E.2d 890 (1942); McMahon v. City of Virginia Beach, 221 Va. 102, 267 S.E.2d 130 (1980); Tidewater Ass'n of Homebuilders, Inc. v. City of Virginia Beach, 241 Va. 114, 400 S.E.2d 523 (1991); Mountainview Ltd. P'ship v. City of Clifton Forge, 256 Va. 304, 504 S.E.2d 371 (1998); and Eagle

Harbor, L.L.C. v. Isle of Wight County, 271 Va. 603, 628 S.E.2d 298 (2006).

(R. 2705-07.) These cases are inapposite, however, because none involved a special act of the General Assembly to delegate the legislative taxing power under Article VII, § 2, of the Virginia Constitution. To the extent that the trial court placed any reliance on them, it erred.

Nor did any of these cases involve the lawful operation of a utility by a locality outside its borders. Robinson and Marks' Shows deal with the unilateral imposition (i.e., without consent) of extraterritorial taxes imposed on circuses, Robinson, 108 Va. at 14, 60 S.E. at 762, and carnivals, Marks' Shows, 179 Va. at 324, 18 S.E.2d at 892, held in neighboring jurisdictions. By contrast, this case concerns the operation of a public utility providing a valuable service at the request of the person paying the supposed tax. Of the other cases referred to by the trial court as “the McMahon line of cases” (R. 2707), none involved the extraterritorial provision of public water or any other similar service. And, none discussed the issue of consent. In short, the cases relied upon by the trial court are wholly inapplicable here.

#### **IV. THE TRIAL COURT FAILED TO RECOGNIZE THAT FAIRFAX WATER IS A CUSTOMER OF THE CITY'S WATER SYSTEM BY CONSENT AND THAT THE GENERAL ASSEMBLY AUTHORIZED THE CITY'S CHALLENGED PRACTICES.**

The trial court jumped to the conclusion that the City's water service charges violated “the principle of no-taxation-without-representation.”

(R. 2704.) The trial court focused on the fact that the City’s nonresident customers do not elect the City Council, which sets the City’s water rates.

(R. 2705, 2709.) This fact is undisputed, but it does not support the court’s conclusion. The trial court began from the premise, borrowed from Marshall, that the Virginia Constitution—particularly Article I, § 6—“prohibits taxation of citizens without their consent or that of their elected representatives.” (R. 2704 (quoting 275 Va. at 434, 657 S.E.2d at 79).) But the court avoided any meaningful consideration of the consent issue.

The trial court disregarded whether Fairfax Water directly consented to be taxed under Article I, § 6, of the Constitution. With its undue reliance on Marshall, the trial court dealt only with the “elected representative” part of the equation, exemplified by its statement that the City’s nonresident customers were “captives to a tax that they cannot challenge by election.” (R. 2709.) But Marshall turned on a constitutionally impermissible delegation of taxing authority to an unelected body, the NVTAs; there was no issue of individual consent under Article I, § 6. See 275 Va. at 435, 657 S.E.2d at 79–80. Here, on the other hand, the trial court neglected to consider the existence of individual consent. (See R. 2704–05.)

There was no evidence that the City required Fairfax Water, or any other Fairfax County customer, to receive City water.<sup>12</sup> Nevertheless, the trial court found that Fairfax Water and all of the City's Fairfax County customers were "captives" to the City's water system because they "have nowhere else to go."<sup>13</sup> (R. 2709.) But the court's statement is misleading and inaccurate. The only "Fairfax County customer" before the court was Fairfax Water, which never asserted any basis for representational standing on behalf of other Fairfax County customers and had no right to represent others. W. S. Carnes, Inc. v. Bd. of Supervisors, 252 Va. 377, 383, 478 S.E.2d 295, 300 (1996) (holding that a party cannot act in a representational capacity by asserting the rights of others unless authorized to do so by statute). Regardless, the court's statements in this regard are plainly incorrect to the extent they suggest that the City mandated that any of its Fairfax County customers receive City water.

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<sup>12</sup> In fact, Fairfax Water has known since at least 1959 that the City "realiz[es] substantial profits on the . . . operation [of the City's water system] in Fairfax County, which profits are paid into the general fund of the" City. (See Def.'s Ex. 72 at 2-3 ¶ 10.) And, despite the proximity of one of its own water lines, Fairfax Water again obtained service from the City in 1997. (R. 500-02.) These facts, while not dispositive, are further evidence of Fairfax Water's knowing consent under Article I, § 6.

<sup>13</sup> There was also no evidence that any nonresident customer's property could not be served by a well in lieu of public water service.

This Court has stated, in the context of a city providing electricity beyond its borders, that those customers

are willing to take it and pay for it. Such service is not forced on them. At the same time that it promotes their personal convenience and business interests, it results in a benefit to the city, its inhabitants and customers, in lessening the cost per unit. . . . Such outside service is regarded as so essential, so economical, so practical, business-like and logical, that it has been approved by this court.

Light v. City of Danville, 168 Va. 181, 204, 190 S.E. 276, 285 (1937)

(emphasis added). It is particularly ironic that the plaintiff in this case is Fairfax Water, an entity that was legally authorized to provide public water service throughout Fairfax County and that owned a water main directly across the street from its headquarters building.

In Count V, Fairfax Water based its standing solely on its status as a customer with two office buildings that are served by the City's water utility. (R. 104.) The question, then, is whether Fairfax Water consented to the payment of the City's water bills and rates for the provision of water service. When Fairfax Water first connected to the City's system in the 1970s, it had consented to do so in two ways: by requesting service from the City and by entering into an agreement with the City to establish respective exclusive service areas for itself and the City. In 1997, Fairfax Water again requested City water and entered into another agreement to

receive City water at its second building. (Tr. 508, 1304, 1307–10.) At no time did the City unilaterally require Fairfax Water to use City water.

Fairfax Water made the business decision to avoid the expense involved in connecting to its own water system. (Tr. 500–02.) Having given its consent—and never having withdrawn it by discontinuing service—Fairfax Water cannot avoid the constitutional significance of its consent.

Even if Fairfax Water had not directly consented to the City’s earning and transferring water profits, its elected representatives did. It matters not that Fairfax Water (or, for that matter, County citizens generally) do not vote for the City Council. Section 2.03(n), 1950 Va. Acts ch. 323 of the City Charter provides that the City can operate its water system within and outside the City, and § 13.07 authorizes the City to transfer profits as a “return on equity” from its water utility to its general fund. The City Charter is a special act adopted by the General Assembly, Kole v. City of Chesapeake, 247 Va. 51, 56, 439 S.E.2d 405, 408 (1994), including the elected representatives of the City’s Fairfax County customers. With the passage of §§ 2.03(n) and 13.07, those “elected representatives” gave their consent to the operation of the City’s water system in Fairfax County and the City’s practices of profit and transfer. If Fairfax Water disagrees with the General Assembly, it should take the matter up with that body, not with the

courts. The trial court erred, as a matter of law, when it failed to give credence to the consent of those “elected representatives.”

The trial court wholly ignored the fact that a “citizen” can consent to a tax.<sup>14</sup> Because there was consent in this case, both from Fairfax Water itself and from Fairfax Water’s “elected representatives,” and either of which, standing alone, is enough to refute the trial court’s ruling that this is an unconstitutional tax, the trial court erred as a matter of law when it concluded that the City had imposed an unconstitutional tax.

**V. THE TRIAL COURT ERRED IN CHARACTERIZING THE CITY’S WATER CHARGES TO NONRESIDENTS AS A “TAX,” BECAUSE THE CITY DOES NOT REQUIRE THEM TO CONNECT TO ITS SYSTEM OR PENALIZE THEM IF THEY DO NOT.**

The trial court held that the City’s water charges constituted a tax because the City set its rates with the expectation that they would generate a profit. (R. 2705.) As argued above, the charges can withstand constitutional scrutiny even when viewed as a tax, but they in fact are not a tax on nonresidents. “A tax is an enforced contribution imposed by

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<sup>14</sup> This conclusion does not mean that the City could charge its customers any rate it wishes; fees and charges must be “fair and reasonable.” See Va. Code § 15.2-2143. Fairfax Water did not claim and the court did not rule that the City’s rates were unfair or unreasonable. Instead, Fairfax Water claimed and the court held that the City was constitutionally prohibited, in effect, from following its Charter and transferring even one penny of profit to its general fund. (R. 2699.)

government . . . . It is not founded upon contract or agreement."

Westbrook, Inc. v. Town of Falls Church, 185 Va. 577, 582, 39 S.E.2d 277, 280 (1946); see also Black's Law Dictionary 1457 (6th ed. 1990) ("Essential characteristics of a tax are that it is not a voluntary payment . . . , but an enforced contribution, exacted pursuant to legislative authority."). A charge is a "tax" if the charging locality requires it as a condition to (1) legally engaging in some activity (e.g., a permit fee), see Robinson, 108 Va. 14, 60 S.E. 762, or (2) receiving a mandatory service that only that locality provides. See McMahon, 221 Va. 102, 267 S.E.2d 130. In both situations, noncompliance carries the threat of sanctions by the charging locality.

Here, the City is not imposing a "tax" on its nonresident water customers, because the City does not require them to connect to its system. Fairfax Water, the only customer challenging the City's charges, is certainly no "captive" to the system. (See R. 90; Tr. 500–02, 508-09, 1303–05, 1308–12.) As the operator of its own water utility, Fairfax Water could extend its service to any part of Fairfax County. (R. 90; Tr. 500–02, 508-09, 1303–05, 1308–12.) Yet it made a business decision to connect, and remain connected, to the City's water system rather than its own. Fairfax Water is under absolutely no compunction from the City to be a customer. Absent any such City mandate, its charges cannot be a "tax."

The trial court's cited cases are consistent with this conclusion. (R. 2705–08.) None of the cases involved charges for extraterritorial utility service. And even where a service charge was applied to residents of the charging locality, this Court found it not to be a tax if the service was not mandatory. For example, the “water resource recovery fee” on all new connections to the municipal water system in Tidewater Ass'n of Homebuilders was not a tax, because it was charged only against those who chose to connect to the system. 241 Va. at 121, 400 S.E.2d at 527.

Although some of the trial court's cited cases concerned whether a fee bore a “reasonable correlation” to the benefit conferred, that test is inapplicable here for multiple reasons. First and foremost, the trial court did not decide this case on that ground. Indeed, Fairfax Water challenged not the reasonableness of the City's Water charges, but only the City's authority to earn and transfer any profit from its water system. Regardless, the “reasonable correlation” test is inapplicable because the City's provision of water to nonresidents is a proprietary function, not an exercise of its police power. See Eagle Harbor, 271 Va. at 615, 628 S.E.2d at 304 (holding that the “reasonable correlation” test determines “whether a fee enacted by a locality is a permissible exercise of its police power”).

**VI. THE TRIAL COURT ERRED WHEN IT GRANTED UNREQUESTED RETROSPECTIVE RELIEF AND ENJOINED THE CITY FROM TRANSFERRING ANY MONEYS FROM ITS WATER FUND TO ITS GENERAL FUND FOR PURPOSES UNRELATED TO THE WATER SYSTEM, INCLUDING THE “MANAGEMENT FEE” TRANSFER FOR THE CITY’S FISCAL YEAR 2009, WHICH HAD BEEN MADE BEFORE THE TRIAL COURT ISSUED ITS RULING.**

The trial court exceeded its authority—indeed, even the relief sought by Fairfax Water—when it retroactively enjoined the City’s FY 2009 transfer of profits from the water system to the general fund. In April 2008, approximately eight months before Count V was made a part of this case, the City adopted its FY 2009 budget, which included a transfer of profit from the water fund to the general fund. When Fairfax Water added Count V to its pleadings, it sought only prospective relief to prevent future wrongs, as it asked the trial court to “alter[] [the City’s custom and practice with regard to its water rates, fees and charges in the future.” (R. 105 (emphasis added).)

A court cannot grant relief on facts not alleged or on a right not pleaded. Ted Lansing, 221 Va. at 1141, 277 S.E.2d at 229. Even though the power of an equity court is broad, it cannot extend beyond those rights asserted by the parties. Smith v. Sink, 247 Va. 423, 425, 442 S.E.2d 646, 647–48 (1994). Here, Fairfax Water never made any allegation in Count V regarding the FY 2009 transfer, even though it had been a part of the City’s

budget for eight months before Count V was filed. Fairfax Water never sought a temporary or preliminary injunction before the September 2009 trial and specifically stated at trial that it was “not asking for any retrospective relief.” (Tr. 74.) In October 2009, the City made its FY 2009 transfer of water system profits to the City’s general fund in the normal course of business. (R. 2754.) Regardless, on January 6, 2010, the court entered its Final Decree enjoining the FY 2009 transfer of funds. (R. 2699.)

The trial court exceeded its authority when it tried to undo the FY 2009 transfer. Although Fairfax Water sought only prospective relief under Count V, the injunction would effectively negate the City’s budget adopted in April 2008, long before Count V was filed and almost two years before the Final Decree, and its later FY 2009 transfer. Based on Fairfax Water’s request for prospective relief only, the trial court erred in granting retrospective relief. As with all of Fairfax Water’s derivative claims, reversal of the trial court’s substantive rulings would necessarily result in a reversal of any retrospective relief. But even under those rulings, the injunction against the FY 2009 transfer was unwarranted and thus represents independently reversible error.

**VII. THE TRIAL COURT ERRED WHEN IT AWARDED COSTS TO FAIRFAX WATER.**

Based on its rulings for Fairfax Water, the trial court awarded costs to Fairfax Water. (R. 2820.) Because the trial court's underlying rulings were erroneous, so was its award of costs. The award should be reversed.

**CONCLUSION**

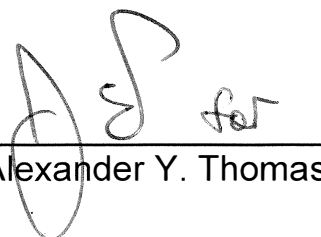
For these reasons, the City submits that the trial court erred, and this Court should reverse the court's decision and enter judgment for the City.

CITY OF FALLS CHURCH

Respectfully submitted,

By:   
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By:   
T. David Stoner

By:   
Alexander Y. Thomas

By:   
John E. Foster  
City Attorney

**CERTIFICATE REQUIRED BY RULE 5:17(E)**

(a) The names of the Appellant and the Appellee and the names, addresses and telephone numbers of counsel for each party are as follows:

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(b) Appellant hereby certifies that true and accurate copies of this Petition for Appeal were mailed, postage prepaid, this 6th day of April 2010 to counsel for Appellee, Fairfax County Water Authority, listed above.

(c) Counsel for the City desires to state orally and in person to a panel of this Court the reasons why this Petition should be granted.

  
\_\_\_\_\_  
J. Patrick Taves