

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

CITY OF FALLS CHURCH,

*Appellant,*

v.

FAIRFAX COUNTY WATER AUTHORITY,

*Appellee.*

RECORD No. 100675

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**PETITION FOR REHEARING**

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## SUBJECT INDEX

<u>Subject</u>	<u>Page</u>
INTRODUCTION.....	1
I. ALTHOUGH THE CITY’S CHARTER SPECIFICALLY AUTHORIZES IT TO EARN AND TRANSFER UTILITY PROFITS, THE TRIAL COURT HELD THAT THIS PRACTICE VIOLATED A DIFFERENT, INAPPLICABLE CHARTER PROVISION.....	2
II. THE TRIAL COURT MISAPPLIED <u>MARSHALL</u> , WHICH RECOGNIZES THE GENERAL ASSEMBLY’S CONSTITUTIONAL AUTHORITY TO SPECIALLY DELEGATE TAXING POWERS TO A CITY.....	4
III. THE TRIAL COURT ERRONEOUSLY RELIED ON A SERIES OF CASES THAT INVOLVED NEITHER THE DELEGATION OF TAXING AUTHORITY BY SPECIAL ACT NOR THE EXTRATERRITORIAL OPERATION OF A PUBLIC UTILITY, AND NONE DISCUSSED CONSENT .....	6
IV. THE TRIAL COURT’S FINDING OF TAXATION WITHOUT CONSENT WAS WRONG, BECAUSE THE GENERAL ASSEMBLY AUTHORIZED THE CITY TO EARN AND TRANSFER UTILITY PROFITS AND BECAUSE FAIRFAX WATER CHOSE TO CONNECT TO THE CITY’S WATER SYSTEM.....	8
V. FAIRFAX WATER WRONGLY ASSERTS THAT THE CITY HAS PROCEDURAL DEFECTS IN ITS APPEAL.....	9
CONCLUSION .....	10
CERTIFICATE OF COMPLIANCE.....	11
CERTIFICATE OF SERVICE.....	12

## TABLE OF CITATIONS

	<u>Page</u>
 <b><u>Cases</u></b>	
<u>Barr v. Town &amp; Country Props., Inc.</u> , 240 Va. 292, 396 S.E.2d 672 (1990) .....	4
<u>City of Charlottesville v. Marks' Shows, Inc.</u> , 179 Va. 321, 18 S.E.2d 890 (1942).....	6–7
<u>Eagle Harbor, L.L.C. v. Isle of Wight County</u> , 271 Va. 603, 628 S.E.2d 298 (2006).....	6–7
<u>Giordano v. Town of Leesburg</u> , Record No. 091455	7
<u>Helms v. Manspile</u> , 277 Va. 1, 671 S.E.2d 127 (2009) .....	9
<u>Marshall v. N. Va. Transp. Auth.</u> , 275 Va. 419, 657 S.E.2d 71 (2008) .....	passim
<u>McMahon v. City of Virginia Beach</u> , 221 Va. 102, 267 S.E.2d 130 (1980) .....	6–7
<u>Mountainview Ltd. P'ship v. City of Clifton Forge</u> , 256 Va. 304, 504 S.E.2d 371 (1998).....	6
<u>Nusbaum v. Berlin</u> , 273 Va. 385, 641 S.E.2d 494 (2007) .....	9–10
<u>Robinson v. City of Norfolk</u> , 108 Va. 14, 60 S.E. 762 (1909) .....	6–7
<u>Tidewater Ass'n of Homebuilders v. City of Virginia Beach</u> , 241 Va. 114, 400 S.E.2d 523 (1991) .....	6–7
 <b><u>Constitutions</u></b>	
Va. Const. art. I, § 6 (2008).....	1, 8
Va. Const. art. VII, § 2 (2008) .....	passim

	<u>Page</u>
<b><u>Statutes</u></b>	
Va. Code § 8.01-384 .....	9
Va. Code § 15.1-873 .....	7
Va. Code § 15.1-875 .....	6–7
Va. Code § 15.2-2119 .....	7
<b><u>Charter Provisions</u></b>	
City Charter of the City of Falls Church § 13.07 (1993) .....	passim
City Charter of the City of Falls Church § 13.09 (1995) .....	3–4
<b><u>Rules of the Supreme Court of Virginia</u></b>	
R. Sup. Ct. Va. 1:13 .....	9
R. Sup. Ct. Va. 5:6 .....	11
R. Sup. Ct. Va. 5:20A .....	11–12
R. Sup. Ct. Va. 5:25 .....	9

## **INTRODUCTION**

The City of Falls Church (“the City”) operates a water utility serving thousands of customers in Fairfax County. The utility has consistently earned a profit, which the City often transferred to its general fund.

This case—one of first impression—questions whether the City’s practice of transferring profits is prohibited by the City Charter or the Virginia Constitution. The City’s authority is Charter § 13.07, representing a delegation of power by the General Assembly. This Court has never ruled on the constitutionality of a profit-and-transfer practice in accordance with such a special act. The trial court erred when it ruled that the City’s practice violated both the Charter and the Constitution. Specifically:

1. The court concluded that the City violated its Charter even though Charter § 13.07 explicitly authorizes the transfer of water system profits to the general fund.
2. The court held that the City’s practice violated the “no taxation without representation” principle of Article I, § 6, of the Constitution based on Marshall v. N. Virginia Transp. Auth., 275 Va. 419 (2008), even though Marshall recognized that a city, unlike a transportation authority, can be delegated taxing powers by special act of the General Assembly under Article VII, § 2, of the Constitution.

3. The court also based its ruling of unconstitutionality on a series of cases that involved neither the extraterritorial operation of a utility nor a special act of the General Assembly. (R. 2705–07.)
4. The court erred in finding taxation without representation, because the General Assembly consented when it approved the Charter and Fairfax Water consented when it voluntarily requested City water.

The trial court’s threshold finding of a Charter violation infected its entire analysis and precluded it from properly adjudicating (and the City from defending) the constitutional issue. The Charter was, after all, the very means by which the General Assembly had delegated its special taxing authority to the City. The trial court compounded its error by ruling that the profit-and-transfer practice was inherently unconstitutional. The effect was to usurp the General Assembly’s authority—set out in Article VII, § 2, of the Constitution—to specially delegate its taxing power. Left uncorrected, the ruling will frustrate the legislative intent expressed in the City Charter.

**I. ALTHOUGH THE CITY’S CHARTER SPECIFICALLY AUTHORIZES IT TO EARN AND TRANSFER UTILITY PROFITS, THE TRIAL COURT HELD THAT THIS PRACTICE VIOLATED A DIFFERENT, INAPPLICABLE CHARTER PROVISION.**

The General Assembly has clearly authorized 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 . . . .

City Charter § 13.07 (emphasis added). The trial court misread this unambiguous language and ruled that another provision, § 13.09, superseded the City's authority to earn and transfer profits. (R. 2703–04.) Remarkably, § 13.09 has no application to this case.

Section 13.09 provides that “[i]f 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 [City’s] duty . . . to adopt for that utility a schedule of rates which . . . will produce receipts equal to expense.” (R. 2704). The trial court concluded that this establishes the “basic rate-making methodology” such that receipts must always equal expenses and that utility profits are prohibited. (R. 2700, 2704.) The court characterized this section as the “broader mandate of the charter,” trumping the authority to earn and transfer utility profits under § 13.07. (Id.)

But § 13.09 is not a “broader mandate.” In fact, it does not even apply here. The predicate to its “receipts equal to expense” requirement is that the utility first must have lost money over a three-year period. Rather than a prohibition on profits, § 13.09 is a check against routinely operating the system at a loss. There was absolutely no claim or evidence that the

City lost money on its water system over any three-year period, and the Charter does not require that receipts equal expenses every year.

The writing of statutes is a legislative function, and no court is free to ignore the legislature's intent or to rewrite a statute. Barr v. Town & Country Props., Inc., 240 Va. 292, 295 (1990). Yet the trial court, in effect, rewrote the Charter when it discarded § 13.07 and ignored the predicate to § 13.09. As a result, the court wrongly required the City to set its water rates to avoid a profit. If this Court does not rectify that error, the City will be forever enjoined from operating its water utility consistent with the legislative intent of the General Assembly expressed in the Charter.

**II. THE TRIAL COURT MISAPPLIED MARSHALL, WHICH RECOGNIZES THE GENERAL ASSEMBLY'S CONSTITUTIONAL AUTHORITY TO SPECIALLY DELEGATE TAXING POWERS TO A CITY.**

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Based on Marshall, the trial court held that the City's practice violated the "no taxation without representation" principle of the Constitution. (R. 2704–05.) But Marshall involved an unelected transportation authority, not a city, and this Court explicitly recognized that cities are constitutionally different because they can be delegated special taxing powers by "special act" under Art. VII, § 2, of the Virginia Constitution. 275 Va. at 434.

Although the Constitution directly prohibits "any local, special, or private law . . . [f]or the assessment and collection of taxes," this Court held

that Art. VII, § 2, is “an exception to this specific prohibition.” 275 Va. at 434. Under that provision, “[t]he General Assembly may by special act delegate the power of taxation to any county, city, town, or regional government.” Id. The City Charter is just such a delegation by special act.

Citing Marshall, the trial court noted that “the Commonwealth’s taxing power is different from other powers circumscribed by the Virginia Constitution.” (R. 2704.) Marshall hinged, however, on the fact that a transportation authority “is not a county, city, town, or regional government, and thus is not a political subdivision to which the General Assembly may constitutionally delegate its legislative taxing authority pursuant to Article VII, Section 2.” 275 Va. at 434. The trial court failed to recognize this distinction. That error led it to misapply Marshall in support of striking down the City’s practice, despite the authority delegated in Charter § 13.07.

As a political subdivision, the City is eligible to receive and exercise taxing authority from the General Assembly as long as the delegation is by special act. Marshall makes it clear that the General Assembly has broad authority to delegate its taxing power to a city. Id. Instead of recognizing this critical aspect of Marshall, the trial court erroneously relied on Marshall for the contrary proposition: that the General Assembly could not constitutionally delegate its taxing power to the City. (R. 2704–05.)

**III. THE TRIAL COURT ERRONEOUSLY RELIED ON A SERIES OF CASES THAT INVOLVED NEITHER THE DELEGATION OF TAXING AUTHORITY BY SPECIAL ACT NOR THE EXTRATERRITORIAL OPERATION OF A PUBLIC UTILITY, AND NONE DISCUSSED CONSENT.**

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The trial court was also wrong to rely on a series of cases decided by this Court that are inapposite because: (1) none involved a special act, like Charter § 13.07, granting taxing power; (2) none involved the extraterritorial operation of a utility; and (3) none discussed the issue of consent.<sup>1</sup>

Robinson and Marks' Shows are the only two cases involving extraterritorial taxation, but not in the context of a proprietary utility. And neither case involved a special act delegating the General Assembly's taxing power under a constitutional provision similar to Art. VII, § 2. Nor was there any special act delegating the taxing power in what the trial court dubbed the "McMahon line of cases" (R. 2705–07), which discussed no enabling legislation, see Mountain View, 256 Va. 304, or involved general enabling statutes. See McMahon, 221 Va. at 107 (Va. Code § 15.1-875);

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<sup>1</sup> The trial court cited Robinson v. City of Norfolk, 108 Va. 14 (1908); City of Charlottesville v. Marks' Shows, Inc., 179 Va. 321 (1942); McMahon v. City of Virginia Beach, 221 Va. 102 (1980); Tidewater Ass'n of Homebuilders, Inc. v. City of Virginia Beach, 241 Va. 114 (1991); Mountainview Ltd. P'ship v. City of Clifton Forge, 256 Va. 304 (1998); and Eagle Harbor, L.L.C. v. Isle of Wight County, 271 Va. 603 (2006). (See R. 2705–07.)

Tidewater Homebuilders, 241 Va. at 118 (Va. Code §§ 15.1-873 and -875); Eagle Harbor, 271 Va. at 616 (Va. Code § 15.2-2119).<sup>2</sup>

Because the trial court erroneously discarded Charter § 13.07 at the outset, the City was left virtually defenseless in attempting to defend its practice. The City's clear legal authority for its practice (§ 13.07) was critical in distinguishing the trial court's cited cases. Instead of relying on Robinson, McMahon and their progeny, the court should have deemed them inapplicable. Finally, while Robinson and Marks' Shows involved the unilateral imposition (i.e., without consent) of extraterritorial taxes on circuses, this case concerns a utility providing a valuable service to its County customers. If the City cannot earn a profit from serving County customers, there will be little or no incentive to continue that service.

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<sup>2</sup> The trial court also cited Giordano v. Town of Leesburg (R. 2707), a case that is presently before this Court for decision on the merits (Record No. 091455). Giordano tests the Town of Leesburg's practice of charging its nonresident water customers higher rates than residents. Here, the City charges all customers the same rates.

**IV. THE TRIAL COURT’S FINDING OF TAXATION WITHOUT CONSENT WAS WRONG, BECAUSE THE GENERAL ASSEMBLY AUTHORIZED THE CITY TO EARN AND TRANSFER UTILITY PROFITS AND BECAUSE FAIRFAX WATER CHOSE TO CONNECT TO THE CITY’S WATER SYSTEM.**

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The only constitutional provision that the trial court ruled the City had violated was Article I, § 6, which provides that “all men . . . cannot be taxed . . . without their consent, or that of their representatives duly elected.” (R. 2705.) A tax does not violate this provision if there is consent from the person being taxed or that person’s elected representatives. Here, there was consent from both the elected representatives and the taxpayer.

The General Assembly, including representatives of Fairfax County and the City, provided its consent to the City’s practices through Charter § 13.07. Fairfax Water also asserts that the County’s board of supervisors adopted an ordinance requiring all businesses and residents to connect to an existing utility system, including the City water system. (Br. Opp. 18.) Either such legislative act, state or local, would manifest consent by Fairfax Water’s “elected representatives” to the City’s profit-and-transfer practice.

Moreover, Fairfax Water itself consented to pay the City’s water rates by requesting and maintaining a connection to the City’s water system. The City did not require Fairfax Water to connect or prohibit it from disconnecting. The City simply provided a service that Fairfax Water

requested and agreed to pay for. Fairfax Water made a business decision to buy City water rather than incur the expense of extending its own lines across the street. (Tr. 500–02, 508–09, 1303–05, 1308–12.) That decision further manifested Fairfax Water’s consent to be taxed.

**V. FAIRFAX WATER WRONGLY ASSERTS THAT THE CITY HAS PROCEDURAL DEFECTS IN ITS APPEAL.**

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In its Brief in Opposition, Fairfax Water makes numerous incorrect and misleading assertions regarding the City’s preservation of its objections. None of the assertions is valid, though space permits the City to focus on only one. Citing Nusbaum v. Berlin, 273 Va. 385 (2007), Fairfax Water argues that the objection to the trial court’s disregard for Article VII, § 2, came two weeks late, not “at the time of the ruling.” (Br. Opp. 12–13.) But this is grossly misleading. The final order was entered in chambers under Rule 1:13, waiving the endorsements of counsel. (R. 2699.) The City was not present and could not have objected at that time. Under Va. Code § 8.01-384, “the absence of an objection shall not . . . prejudice [an appellant] . . . on appeal” if he had no opportunity to object at the time it was entered. This Court ruled in Helms v. Manspile, 277 Va. 1 (2009), that § 8.01-384 is controlling over Rule 5:25, and that the record must show that a party has “affirmatively abandoned” its objection. Id. at 6–7. Nevertheless, the City objected shortly after the Court issued its

order, while the case remained under the trial court’s jurisdiction. (R. 2814, 2892.) The Court was aware of the objection, and the City never abandoned it.

By contrast, in Nusbaum, the defendant in a contempt proceeding failed to object at the time of the court’s ruling and affirmatively stated on several occasions that he was not asking the court to rule on the issue. 273 Va. at 403–07. Here, the City waived nothing, consistently argued that its practices were permissible under the Charter, which was constitutional, and timely objected to the ruling. (See, e.g., R. 2892–95, 2977–78, 2991, 3415–16; Tr. 65–66, 141, 1525–26, 1540.) And because Article VII, § 2, figured prominently in Marshall, the trial court could not have ruled as it did without rejecting the provision’s applicability here. The City could not have foreseen that the court would rely on Marshall but ignore Article VII, § 2; an earlier objection would have availed nothing, in any event, given the court’s threshold ruling that the City was violating its Charter. (R. 2704.)

**CONCLUSION**

As argued above and in the City’s Petition for Appeal, the trial court erred and this Court should grant the appeal.

CITY OF FALLS CHURCH

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### **CERTIFICATE OF COMPLIANCE**

In accordance with Rule 5:20A, I certify that this Petition for Rehearing complies with Rule 5:6 and that—excluding the cover page, tables, signatures and certificates—it contains 2,288 words but does not exceed 10 pages. Based on discussions with Court staff, counsel understands this to comply with the length requirements of Rule 5:20A.

\_\_\_\_\_  
s/ J. Patrick Taves

## **CERTIFICATE OF FILING AND SERVICE**

In accordance with Rule 5:20A, I certify that on September 15, 2010, I attached a copy of this Petition for Rehearing as a PDF document to an e-mail addressed to scvpfr@courts.state.va.us, and I served a copy by e-mail to the following counsel for the Appellee, Fairfax County Water Authority:

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