

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX**

---

FAIRFAX COUNTY ECONOMIC  
DEVELOPMENT AUTHORITY,

Plaintiff,

v.

Case no. CL09-10487

STATUTORY DEFENDANTS PURSUANT  
TO VA. CODE § 15.2-2650, ET SEQ.,

Defendants.

**DEFENDANT’S DEMURRER/MOTION FOR SUMMARY JUDGMENT**

COMES NOW Parkridge 6 LLC (“Parkridge”), a statutory defendant, by counsel, and requests that this Court grant in the alternative a demurrer to the Complaint and Motion for Judgment, or Summary Judgment for Defendants:

1. Fairfax County for the past five years has publicly represented, in numerous documents, that it will offer full faith and credit to its obligation to fund 16.1% of the capital cost of Phase I of the proposed Dulles Rail extension.
2. Suddenly, in the past six weeks, the County has proposed that the Fairfax Economic Development Authority issue bonds to finance a portion of its obligations under the various agreements confirming its 16.1% obligation.
3. The idea generated by the County is complex, unwarranted by law, and is simply a subterfuge to try to avoid full faith and credit (constitutionally obligated)( debt and therefore the obligation to have such debt approved by the public in a referendum (Public Finance Act, Va. Code 156.2-26 07)
4. The complicated procedure suggested by the County in its effort to avoid its previously agreed level of commitment is outlined in paragraph 27 of the Complaint. It requires a complicated interplay between the County, the Economic

Development Authority, and the Transportation District, including a “loan” from the EDA to the District, and “the District’s undertaking to repay its loan from EDA by requesting the County to make payments from the Special Tax Revenues collected, in an amount sufficient to pay debt service on EDA’s Bonds, directly to the Trustee.”

5. This Rube Goldberg structure is nowhere authorized by the Industrial Development and Revenue Bond Act, Va. Code 15.2-4902. That law describes in the definition of “authority facilities” a long list of project types that can be supported by industrial revenue bonds. Urban heavy rail systems are not among the permitted “facilities” that can be so financed.
6. The county relies on paragraph 13 of §15.2-4905 for its ability to accomplish the run-around of the Public Finance Act’s requirement for a local referendum. However, it is apparent that the loan structure of paragraph 13 is a technicality and cannot be used to subvert the fact that only permitted “authority facilities” can be financed with Economic Development Authority type limited credit bonds. Furthermore, loans of this type are only permitted for facilities which are owned by the debtor. In this case, the financed facilities are owned by MWAA, WMATA, or some other judgment-free outsider. The EDA act does not permit a “loan” back and forth between itself and this “District Commission” inasmuch as the end result is the financing of a project which ultimately has nothing to do with Fairfax County in its ownership and operation. This is not what the EDA was set up to do. Maybe the EDA should be the issuer of school or park bonds?
7. In any event, the money sought to be raised is maxed out at \$400,000,000, while as shown above, the obligation by Fairfax County stands currently at \$525,000,000 and rising. That’s only for Phase I; phase II of Dulles Rail will likely cost a similar amount, in that no federal money will be involved.
8. Furthermore, the County has obligated itself to provide another \$90 million to build an underground parking garage at Wiehle Avenue, presumably financed by EDA. In this case, we have a locally owned facility but now the County’s obligation to various portions of Dulles Rail, Phase One, currently stand at \$615,000,000. This is

twice the amount sought for the Fairfax County Parkway in the Dykes series of cases from the early 1990's. (Dykes v. Northern Va. Transp. District Commission, 242 Va. 357).

9. In view of the fact that a transportation district is not one of the permitted facilities which can be financed by via Industrial Development and Revenue Bond Act, defendants asked that either a demurrer be granted to the Complaint and Motion for Judgment, or that summary judgment be granted in favor of the statutory defendants.
10. A powerful reason for granting summary judgment for the statutory defendants is that, as general taxpayers, they will be subjected to a tax burden far greater than that advertised to date. So far we have been promised general obligation financing, which currently costs in the 3% range. By packaging the same amount of debt as money not constitutionally obligated, the interest rate will be more in the 5-6% range, plus the cost of bond insurance, if required. This almost doubles the actual tax burden on the statutory defendants.
11. As an illustration of how much more tax burden taxpayers will be forced to endure, assume that the total taxable base of commercial and industrial property for Phase I is \$6 billion. At a full faith and credit obligation, the annual interest required to serve \$400 million in bonds is about 3% or \$12 million per year. This would be a tax of \$.20 per \$100 on the tax base of the Transportation District. As a security without full faith and credit of Fairfax County, as previously promised, the required interest, including debt service coverage and insurance, will be approximately 6%, requiring \$24 million annually to serve the debt. This is \$.40 per \$100 annually on the tax base. This is not what the petitioners signed up for in their petition for a Phase I Dulles Rail Transportation Improvement District. Accordingly, there is a breach between the promotion now being carried on by the Economic Development Authority and the statutory defendants.
12. In addition, there is inconsistency in the numbers. The complaint and motion for judgment call for issuance of bonds "not to exceed the sum of \$400 million plus the amount of any debt service reserves." by the EDA. This is not an explicit amount as

required by the Industrial Development and Revenue Bond Act. The total amount of the bonds could exceed the \$400 million by 25-50% if “required” by the underwriters. Also, the explicit terms of the Petition forming the Tax District called for an absolute limit of \$400 million.

13. Of this \$400 million, approximately \$130 million has already been collected and sits in county Fund 121. Accordingly, by the terms of the Petition, the County cannot legally assess the Transportation Improvement District for more than an additional \$270 million. This fact is inconsistent with the 2004 Petition, and should serve as sufficient to grant a demurrer or summary judgment against the Plaintiffs.
14. The 2004 petitioners did not envision nor agree to the currently proposed arrangement. What was promised by the County, and embedded in the language of the Petition, was that members of the Transportation Improvement District would pay taxes annually, at the lowest possible rate, until a maximum of \$400 million in the aggregate has been collected. There was no contemplation of the securitization of this tax and the markup in the form of a constitutionally non cognizable debt with its considerable markups with bond fees, trustee fees, insurance, debt service coverage requirements, higher interest rates, and all the extra costs implicit in the scheme proposed by the County.
15. In the event that the Court wishes to hear more argument on this important issue, defendants suggest that a Special Public Advocate be appointed, to fully flesh out these arguments and properly consider, among other issues, whether the Public Finance Act, and its requirement for local voter approval under Va. Code §15.2-2650, and the Virginia Constitution, Article VII, § 10, moots the entire Complaint.

PARKRIDGE 6, LLC

WFLP-H LLC

---

Christopher W. Walker

10740 Parkridge Blvd., S. 110

Reston, Virginia 20191

Phone (703) 758 3807

FAX (703) 391-0909

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of August, 2009, a true and accurate copy of the foregoing was sent via first-class mail, postage prepaid, to:

Thomas O. Lawson, Esq. Lawson & Silek, PLC  
10805 Main Street, Suite 200  
Fairfax, VA 22030 (Facsimile sent also)

Peter L. Canzano, Esq. Sidley Austin LLP  
1501 K St., N.W.  
Washington, DC 20005 (Facsimile sent also)

James V. McGettrick, Esq., Assistant County Attorney  
12000 Government Center Parkway, Suite 549  
Fairfax, VA 22035

Philip G. Sunderland, Esq  
Joseph E. Kalet, Esq.  
Office of General Counsel  
1 Aviation Circle  
Washington, D.C. 20001-6000

James N. Markels (VSB #68399)  
William T. Welch (VSB #34322)  
General Counsel, P.C.  
6862 Elm Street, Suite 800  
McLean, VA 22101

---

Christopher W. Walker