

**VIRGINIA:**

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

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FAIRFAX COUNTY ECONOMIC  
DEVELOPMENT AUTHORITY,

Plaintiff,

v.

Case No. CL 2009-10487

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

Defendants.

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**STATUTORY DEFENDANT PARKRIDGE 6 LLC'S SUPPLEMENTAL  
MEMORANDUM REQUESTED BY JUDGE KLEIN**

NOW COMES Parkridge 6, LLC ("Parkridge"), representing itself and other statutory defendants, and files this pleading in support of its previous motions for demurrer, summary judgment, and appointment of a special counsel.

A. THE "FACILITY" PROPOSED TO BE FINANCED BY TH FAIRFAX EDA DOES NOT FALL WITHIN THE CLASS OF PROJECTS WHICH THE EDA HAS STATUTORY AUTHORITY TO SUPPORT

The Fairfax Economic Development Authority ("EDA") has the following language on its web site:

"In order the qualify, a facility must be one of the following (1) a non-profit 501-©(3) entity, or (2) a for-profit "manufacturing facility", as defined by the IRS Code."

The proposed borrower (The Phase I Dulles Rail Transportation Improvement District) is neither.

A review of the enabling legislation, VA. Code 15.2-4902, which catalogs the definition of

allowable and financeable “Authority Facilities” or “Facilities”, nowhere mentions the financing of urban railway systems or builders of urban railway systems.

It is true that the EDA has financed the construction of the County Office Building, two parking facilities, the Fairfax County Parkway, and various phases of the Route 28 highway construction. However:

- 1) These uses are authorized by various sections of §15.2-4902. They concern structures physically located within Fairfax County and owned by the County, or operated under contract to the County on terms the County can negotiate and control. The financing under consideration, in contrast, is owned by some other entity: either MWAA or WMATA, on land leased from the federal government in part, and Fairfax County has no control over either the initial cost, or the operating deficits that are planned into the Dulles Rail promotion. In fact, subject only to the terms of the Cooperative Agreement between MWAA and Fairfax of June 2007, which pertain almost exclusively to details of initial construction, Fairfax has no control over the use of its money, indeed no say whether the money is used in Fairfax or not.
- 2) To the extent the projects listed on Attachment E are not squarely within the definition of “Authority facilities” or “Permitted Facilities”, as defined in the Virginia Code, they were never challenged in court, so their precedential value is minimal.

It should be noted that regional transportation facilities of this type usually need voter approval. In Los Angeles, Seattle, Denver, Phoenix, and San Jose, similar projects went to referendum and are supported by regional taxes where the vote was positive. The original WMATA compact and the associated borrowing was approved in popular votes in every local jurisdiction (except for DC and Alexandria, which had no applicable procedure). A substantial WMATA extension, as here, deserves the same protection for the taxpaying public.

**B. THE FINANCING REQUESTED (\$400,000,000 PLUS AN UNDETERMINED AMOUNT OF ANCILLARY FEES AND RESERVES) IS CONSTITUTIONALLY COGNIZABLE AND REQUIRES VOTER APPROVAL UNDER THE PUBLIC FINANCE ACT AND THE VIRGINIA CONSTITUTION**

I. FAIRFAX'S COMMITMENT IS UNCONDITIONAL.

The plaintiffs have apparently conceded that a valid obligation exists directly with Fairfax County. The language of the complaint published in the newspaper says:

“The county has made a financial commitment to the expansion of the Washington Metropolitan Area Transit Authority’s transportation system, known as Metrorail, in an amount of more than \$400,000,000 for a portion of the cost of an extension of approximately 11 miles (paragraph 4 of the Complaint and Motion for Judgment).

“The County’s financial commitment is evidenced by its obligations to the Metropolitan Washington Airports Authority (:MWAA”) within the agreement to Fund the Capital Cost of Construction of Metrorail in the Dulles Corridor entered into as of July 19, 2007” (paragraph 5)

Pursuant to the Funding Agreement, MWAA has undertaken responsibility for construction of the Phase I Project and the County has agreed to provide 16.1%, or over \$400 million, towards the cost of constructing the Phase I project (paragraph 6)

The County is not only obligated to MWAA, but also indirectly to the Federal Government under the Full Funding Grant Agreement (“FFGA”) attached hereto in part as Attachment A. Accordingly, the Federal Transit Administration, (“FTA”), the grantor of \$900 million in federal money, is in effect a third party beneficiary of the County’s commitment.

It was an explicit requirement of the FFGA that Fairfax provide ironclad evidence of its full faith and credit commitment as part of the Local Funding required by the FTA. The FTA has always been nervous about the extent of local funding, rating that part of the Dulles Rail application no better than a low-medium (next to the bottom) rating for “local financial support” during various phases of the evaluation of this project.

It might be noted by the court that there is no guarantee that all the parts of the Phase I Dulles Rail Transportation Improvement District will survive intact in its present form. There are now two challenges to this District pending before the Virginia Supreme Court.

Earlier this year Parkridge, representing itself and taxpayers similarly affected, filed with

this Court an Amended Complaint challenging the propriety of the establishment of the Special Transportation District. The case number is CL 2009-2083. Following Circuit Court Judge Jane Roush's granting of a demurrer on June 26, 2009, the case is currently on appeal to the Virginia Supreme Court. The grounds for the challenge is the handing down by the Virginia Supreme Court of two cases since the establishment of the Special Tax District, the first requiring proper notice to those affected by or included in the proposed Special Tax District, and the second requiring contiguity in the composition of special districts requiring majority (more than 51% by land area or assessed value) consent to their establishment and operation. (Gas Mart Corp. vs. Board of Supervisors, 269 Va. 334 (2005)). The Dulles Rail Phase I Transportation Tax District is composed of two pods separated by 6 miles; the required 51% consent of the western pod was never obtained, despite the plain statutory language of VA. Code §33.1-431 (A) requiring 51% of owners "within the boundaries of the proposed district."

Another count in the same complaint was that the notice provisions of the Special Transportation District was defective, following the Supreme Court's ruling in Allfirst Trust Company v. County of Loudoun (Loudoun County downzoning), 268 Va. 428 (2004). If the Supreme Court agrees with plaintiffs in that suit, all subsequent procedure, including the establishment of the Special Transportation District, becomes moot, in line with the Allfirst ruling. Both cited cases were handed down after the date of establishment of the Phase I Special Tax District on February 23, 2004.

Furthermore, an unrelated group, FFW Enterprises, in CL 2009-13918, has filed suit against the Tax District on the grounds that the Virginia Constitution does not permit a differential rate of taxation on commercial and industrial properties as opposed to other classes such as retail, residential, and planned community development. (Virginia Constitution, Article X, Section 1).

Regardless of the continued validity of the taxation of the Special Transportation District, Fairfax County remains obligated to MWAA and by implication the federal government and the FTA for its 16.1% share of the capital cost of Phase I of the Dulles Rail project, about \$525,000,000 in total.

Plaintiffs mention the important precedent in Dykes v. Northern Virginia Transportation Improvement District, 242 Va. 352 (1991). However, the facts herein are distinguishable from Dykes. In addition, it must be noted that the initial Dykes decision supported the taxpayers, and it was only on a rehearing with different personnel that the Supreme Court reversed itself and voted

5-4 to allow support the bond issue without voter approval. It is a weak, inapposite, and arguably outdated precedent.

Dykes involved the issuance of Northern Virginia Transportation District Commission Fairfax County Transportation Contract Revenue bonds “in an amount not to exceed \$330,000,000.” (Compare that language with the requested authorization to issue “more than \$400,000,000” in EDA bonds—there is no stated limit in this validation other than the blue sky!)

The purpose of the bonds was to start the construction of the Fairfax County Parkway.

The important distinction between this validation and Dykes is that the latter involved the obligation of Fairfax County in effect to itself, since all the money contemplated to be spent was to be in Fairfax County and the entire length of the highway was in Fairfax County. If Fairfax did not make a bond payment, then all that would happen is that future segments of the Parkway would be delayed. (Indeed, 20 years later, the Parkway still has not been completed).

The same circumstance exists with the Fairfax County government building and the parking garages built by Fairfax. If the bonds issued by EDA were not honored, the County would simply halt construction OF ITS OWN PROJECTS until alternative financing could be secured. The same circumstance exists for the Route 28 project: the various phases are still not completed 15 years after that project was started.

Here, there are binding monetary AND SCHEDULING obligations (see Attachment A) to outside parties—parties other than Fairfax County and its agents, or quasi governmental subdivisions. MWAA, the federal government and FTA, and even Arlington County (where the extension begins) are all parties who could sue to enforce the terms of the financial AND SCHEDULING commitment of 16.1% of the total cost of the Phase I Dulles Rail extension.

Rather than quote from the Dykes opinion in this memo, we attach the entire opinion as reported by Lexis and emphasize the key point: “Was there imposed an enforceable duty or liability on the County?” In Dykes, there was none (it was a self dealing with artificially invested quasi-governmental subunits); the NVTDA had no recourse against the county if yearly appropriations were not made. Here, there are a number of affected third parties with absolutely enforceable legal rights.”

Article VII, §10 of the Virginia Constitution imposes a procedure on localities who propose to indenture future taxpayers with debt. The procedural safeguards are found in Va. Code §15.2-2606 and -2607.

In resolving the cognizability of this debt under the Virginia Constitution, the court must ask itself: Is there any more applicable set of facts that would invoke the debt constraints of the

Virginia Constitution? If these set of financings are not cognizable, what would be?

The Constitution has not been repealed and must be given continued relevance even as tax and spend politicians try to hide their profligacy behind special purpose structures in the same manner as landed Jeffery Skilling of Enron in jail. The Virginia Constitution is the most important of all the references involved in this case. These public approval requirements were put into the Constitution of Virginia and most states in the 19<sup>th</sup> Century to correct abuses which caused many debt issuing governmental entities to default with much taxpayer suffering. These provisions are just as relevant today.

The magnitude of this voter-approval evasion is staggering. The EDA is seeking authority to issue “more than \$400 million” in debt. We know that 16.1% of the official Phase I cost of \$3.2654 billion (See attachment A) is \$525,000,000. So the County is already short at \$400 million. Phase II will cost at least as much as Phase I. The County has also informally obligated itself to provide \$90 million in subsidies to a parking garage at Wiehle Avenue, the current western terminus of the Phase I extension. So the total cost to the County is more than \$1 billion upfront plus about a 40% share of the \$120 million annual operating deficits which will have to be paid under the WMATA compact by the County on account of the extension.

This is too much money to escape voter approval. Assuming that Fairfax is planning to involve EDA in the other financings mentioned in the preceding paragraph, the EDA debt obligations will double.

The “subject to appropriation” language employed in the bonds issued in Dykes, it must be recognized, is somewhat of a ruse. Regardless of the language in public sector agreements, the usual anti-deficiency laws and termination for convenience clauses prevent one session of a legislative body from foreclosing the ability of a successor to change or alter many, if not most, commitments to contractors and public agencies. When there is a specific contractual commitment to an outside third party, though, the US Constitution forbids the alteration of the terms of a contract. That is the situation with Fairfax in this proceeding. If a future Board of Supervisors reneges on the Dulles Rail Phase I Funding Agreement, the taxpayers of Fairfax County will be called upon to remedy the deficiency. That is the understanding of both MWAA and the Federal Government, and undoubtedly Bechtel, the no-bid manager of the project, and its subcontractors.

It must be noted that plaintiffs do not object to the yearly payments of the Phase I petitioning taxpayers to the County (at least in this proceeding; note the other challenges pending, listed above). Nor do plaintiffs allege a breach of the Phase I petition, which capped the contribution of the Phase I taxpayers at \$400 million. (The EDA now wants to issue \$400 million in bonds plus unspecified extra costs even though it has already collected \$120 million in taxes from 2004 to date).

The County could sit back and collect their Phase I taxes each year. By the time Phase I is operational, the County would have collected 2/3 of the \$400 million cap. That is what it should do—not securitize the debt and impose a layer of extra costs on Defendants and members of the Phase I district.

C. THE APPLICANT (THE DISTRICT COMMISSION) APPEARS NOT TO HAVE FOLLOWED THE REQUIRED PROCEDURE IN ORDER FOR THE FINANCING TO BE PROPERLY SUBJECT TO VALIDATION.

According to the web site of the Fairfax Economic Development Authority (“EDA”), any applicant for EDA funds must fill out and have approved i) a Fiscal Impact Statement and ii) a Statement of Understanding (Attachments B thru D). There is no evidence that this has occurred.

Until there is some evidentiary assurance that the standard procedures of the EDA have been followed, the complaint and motion for judgment are premature, and a demurrer must be granted.

D. IN VIEW OF THE MAGNITUDE OF THE PROPOSED FINANCING (SOON TO DOUBLE THE EDA’S BALANCE SHEET), THE SHORT TIME FRAME, THE LACK OF PROPER DOCUMENTATION BY THE APPLICANT, THE PECULIAR STATUS AND NEEDED RESEARCH ON THE FUNDING PRACTICES FOR FAIRFAX FOR WMATA (THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY), IT IS A DUE PROCESS REQUIREMENT THAT A SPECIAL COUNSEL BE APPOINTED TO REPRESENT THE INTERESTS OF THE TAXPAYER DEFENDANTS

I- THE CODE OF VIRGINIA § 15.2-2653 UNCONSTITUTIONALLY FAILS TO PROVIDE FOR REPRESENTATION OF THE PUBLIC INTEREST

In this remarkable procedure, unelected officials of a quasi-governmental organization, the EDA of Fairfax County, has sued the taxpayers, *et al*, the very people they owe a fiduciary duty to

represent. The attorneys the EDA and Fairfax County employ for this purpose are paid by the very people who are being sued. This inherent conflict of interest is not in least mitigated by any provision for the representation of the public interest by any public attorney (such as the Attorney General or Commonwealth Attorney) or a specially appointed county attorney.

The nature of this action demonstrates that this action is inherently adverse to the public's interest. While the Code of Virginia 15.2-2650 provides for an *opportunity* for individual members of the defendant class to appear and defend, this opportunity falls short of providing for *actual* representation for the general public of Fairfax County.

In *In re Petition for the Appointment of Church Trustees*, 20 Va Cir. 199, 1990 Va Cir Lexis 157 (Cir Ct Loudoun 1990) the court dismissed a petition for appointment of trustees because the public interest was implicated and no provision was made for the representation of the public in the matter before the court. The court's action was predicated upon "the need for a public representative to defend the public interest involved." Accordingly, unless and until a public representative is appointed to defend the public interest this matter should likewise be dismissed.

No one individual has a sufficient pecuniary interest in the complex issues of law and fact raised in this litigation to warrant the extraordinary expenditure of funds and time necessary to defend the public interest in this case. The undersigned defendant, while under the current circumstances of duress, has appeared, answered and defended his (and only his) interest in this matter, the public remains completely unrepresented.

The protection of due process of law is guaranteed to the citizens of this County by the Constitutions of the United States and this Commonwealth. It is axiomatic that the principles of due process require notice and an opportunity to be heard. In certain cases, due process also requires the appointment of counsel. *McNeal v. Culver*, 365 U.S. 109 (1960). Due process is generally measured under the totality of circumstances.

The undersigned defendant is only able to locate one case which require appointment of counsel in circumstances similar to the present. In On July 23, 1997 the Industrial Development Authority of Loudoun County, Virginia and the Board of Supervisors of Loudoun County, Virginia filed a motion for judgment (Law 19413) against the Taxpayers et al of Loudoun County to validate the issuance of bonds by the IDA. Numerous taxpayers appeared before the Court. Judge Carlton

Penn found that indeed the due process rights of the defendant class was implicated by the IDA's validation action and found that counsel should be appointed at public expense to defend the interests of the taxpayers, citizens and property owners of Loudoun County. While individual defendants were in discussion with the Attorney General regarding appointment of a special representative the IDA and Board of Supervisors plaintiffs filed a motion to non-suit, which was granted prior to appointment of counsel. This ruling was widely reported in the local and regional news but because of the extraordinary expense, individual taxpayers did not make provision for a court reporter.

But even setting aside the Loudoun case, it is rare that elected public officials, or unelected officials for a unit of government sue, as a named class, all the people they have a duty to represent. In such circumstances, resort to the general principles of our form of government become necessary to guide the application of the principles of due process.

Article VII § 4 of our Commonwealth's Constitution provides for the election of attorneys for each county to be "an attorney for the Commonwealth." Our Constitution makes it abundantly clear that it is the people and not the elected officials who comprise the Commonwealth. See Article I § 2: "[A]ll power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them." Also see Article I § 3 (government instituted for the common benefit). While the Code of Virginia relieves the Commonwealth Attorney from any responsibility to represent county government officials and agencies in civil matters, no statute can constitutionally relieve the Commonwealth Attorney of his duty to be the attorney *for the Commonwealth*.

It seems inherent, without the need for further argument or citation of authority, that when the "trustees and servants" of the people sue the people, it is the people, and not their trustees who are entitled to the services of the governments lawyers who are paid by and ultimately represent the people.

The failure of this statute to provide for such representation is a fatal error. Due process demands the dismissal of this suit unless and until appointment of counsel to represent the general public interest is made.

## II. THIS COURT HAS THE AUTHORITY TO APPOINT COUNSEL FOR THE PUBLIC

In extraordinary cases, when the “administration of justice and the integrity of the judicial process requires that the public interest be represented in these proceedings” the courts have the authority to direct government attorneys to appear and protect the public interest. *Harvest v. Board of Public Instruction of Manatee County, Florida*, 312 F. Supp. 269, 275 (M.D.Fla. 1970). In a similar case, the court appointed a *guardian ad litem* to represent certain parties in a bond validation procedure, *Habel v. Industrial Development Authority*, 400 S.E.2d 516 (Va 1991), although it is not clear from the appellate decision the reason for the appointment or the exact terms of such representation. However, the fact that such appointment was made, even though no such procedure is specifically authorized in the statute at hand, indicates that the trial court acted in accord with its inherent authority – an act tacitly approved by the Supreme Court of Virginia. Such was the case in Loudoun County, when Judge Carlton Penn found that the IDA’s motion against the Taxpayers, Citizens and Property Owners of Loudoun County violated their due process rights and adjourned the court pending appointment of Attorney General to defend the public’s interest.

This present motion does not require a determination that The EDA or Fairfax County acted illegally or that the agreement between Fairfax County and the Washington Municipal Airports Authority is proper and legal; all that is required is a recognition that this course of action – the Motion for Judgment by the EDA against the Taxpayers, Citizens and Property Owners of Fairfax County – seriously implicates the public interest to the extent necessary to require the appointment of counsel to independently and vigorously represent all the taxpayers, citizens and property owners of Fairfax County, funding for reasonable conduct of discovery, the employment of expert witnesses and other reasonable costs of litigation. It is inherently a violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article I § 11 of the Constitution of the Commonwealth to allow unelected officials to proceed in litigation against the citizenry of this county without proper appointed representation.

WHEREUPON, Plaintiffs request that the Court either grant their motion for demurrer or summary judgment, and appoint a special counsel to more adequately represent and investigate the many issues pertaining to the protection of taxpayers and the taxpayers of the future.

PARKRIDGE 6, LLC

WFLP-H LLC

By counsel

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of August, 2009, a true and accurate copy of the foregoing was sent via first-class mail, postage prepaid, to:

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