

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.

MOTION FOR THE APPOINTMENT OF SPECIAL COUNSEL

COMES NOW Parkridge 6 LLC (“Parkridge”), a statutory defendant, by counsel, and requests that this Court appoint a special public counsel to represent the interests of the statutory defendants. The reasons are as follows:

1. Fairfax County has obligated itself to provide 16.1% of the funding for Phase I of Dulles Rail (exhibit A to the Complaint and Motion for Judgment). The current budget for this project is \$3.265 billion. 16.1% of \$3.25 billion is \$525,000,000.
2. Fairfax has also obligated itself for a similar share of Phase II, whose cost estimate is similar. Accordingly, Fairfax has committed itself to more than \$1 billion in general tax revenues.
3. In all the discussions with the Federal Transit Agency, with Virginia Department of Transportation, and with the Metropolitan Washington Airports Authority, Fairfax has always represented that it will obligate itself to the fullest to its commitments, “either from general tax revenues or by a public referendum”.. See letter from Tony Griffin to Virginia Secretary of Transportation Pierce Homer dated November, 2005 (attached).
4. The imposition of the “shell” Fairfax County Economic Development Authority, at

the last minute, is a bald attempt to step back from Fairfax's prior commitments to stand behind its funding obligation with full faith and credit. This is a breach of the following agreements:

a) --Agreement to fund the Capital Cost of Construction of Metrorail in the Dulles Corridor; July, 2007.

c)--Cooperative Agreement between MWAA and the County of Fairfax, Virginia, June, 2007.

Both these agreements were signed by the "Board of Supervisors of Fairfax County, Virginia").

c) Numerous representations to the Federal Transit Administration in an effort to secure \$900 million in federal funds via a New Starts Grant. (49 USC §5309).

5. In addition, the Full Funding Grant Agreement between MWAA and the Federal Government assumes that Fairfax County will stand fully behind its obligations for local capital contributions, as stated in Section 10 of that Agreement (see www.dullescorridorusersgroup.com for a full text of that document).
6. The Public Finance Act of 1991, Va. Code 15.2-2650, requires debt of this type to be approved in a public referendum; 15.2-2607. This has not happened.
7. In order to fully and properly represent the interests of the statutory defendants, who will soon find themselves paying for \$1 billion in local debt, it is advisable, prudent, and necessary that a public advocate be appointed to ensure that proper voter and taxpayer approval of this staggering total be secured if that seems required, which is the plain implication of the Public Finance Act, Va. Code § 15.2--2067.
8. The "shell" invocation of the Fairfax County Economic Development Authority has occurred in the past six weeks, in the middle of the summer, hardly sufficient time to properly consider the serious issues of the constitutionally cognizant debt being passed off as merely an obligation of the Economic Development Authority without any obligation of Fairfax County to stand behind this debt, as it previously has agreed to do.

9. The interest rate to be paid on any Economic Development Authority bonds, being at the most moral obligation bonds, will be higher than on the statutory required general obligation bonds that would be approved in a public referendum, as required by the Public Finance Act. The difference, and hence scope of the higher tax level implied by this financing structure, needs to be explored, and this cannot happen without the gathering of evidence and the use of experts to calculate the difference. It is likely the cost to the taxpayers between a general obligation debt, which is what has been advertised, and Economic Development Authority bonds, is likely to be almost double; from the low 3% range to 5-6% range for non general obligation debt.
10. 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.
11. 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.
12. 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 156.2-2607)
13. 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.”
14. 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.

15. 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? Or the usual transportation bonds regularly put on the ballot for November elections?
16. 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.
17. 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).
18. 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.

19. 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.
20. 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.
21. 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.
22. 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.

23. 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.
24. The question as to issuance of debt in any form by Fairfax County comports with the requirements of the Virginia Constitution, Article VII, Sec. 10, is a serious one and requires proper analysis and presentation to this Court as part of the Bond Validation consideration.

WHEREFORE, Parkridge respectfully requests that this Court appoint a special counsel to represent the interests of the Statutory Defendants, who are being asked to be responsible for a massive change in the fiscal status of Fairfax County without proper analysis or counsel. It is not only statutorily and constitutionally required to obtain voter consent to the tax obligations Fairfax has provisionally committed to, it is wise public policy. Such wisdom needs to be properly summarized and presented.

Respectfully submitted,

PARKRIDGE 6, LLC

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By counsel

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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:

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