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January 13, 2010

Via Hand-Delivery

The Honorable R. Terrence Ney
Circuit Court of Fairfax County
4110 Chain Bridge Road
Fairfax, VA 22030

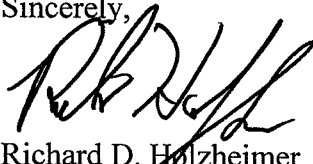
**RE: Fairfax County Water Auth. v. City of Falls Church
Case No. 2008-16114**

Dear Judge Ney:

Pursuant to Fairfax Local Procedures Manual, section 7.00 (Motions for Reconsideration), please find attached a courtesy copy of the City of Falls Church's (the "City") Motion For Reconsideration Of Section I Of The Court's Opinion Dated January 6, 2010 and Memorandum in Support. I have filed the original motion with the Clerk's Office.

In accordance with section 7.01 of the Fairfax Manual, the City has not noticed this motion for reconsideration for a hearing. If the Court would like further briefing on this issue or would like oral argument, please do not hesitate to let me know.

Sincerely,



Richard D. Holzheimer

Enclosures

cc: Alexander Y. Thomas, Esq.
Brent R. Gary, Esq.
Stuart Raphael, Esq.
John E. Foster, City Attorney for the City of Falls Church

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FAIRFAX COUNTY WATER AUTHORITY,)

Plaintiff,)

v.)

CITY OF FALLS CHURCH,)

Defendant.)

Case No. 2008-16114

CITY OF FALLS CHURCH'S
MOTION FOR RECONSIDERATION OF SECTION I
OF THE COURT'S OPINION DATED JANUARY 6, 2010
AND MEMORANDUM IN SUPPORT

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Counsel for Defendant City of Falls Church

Pursuant to Fairfax Circuit Court Procedure 7.00 (Motions for Reconsideration), the City of Falls Church (the "City"), by counsel and without waiver of any further objection to the Court's January 6, 2010 Opinion Letter (the "Opinion Letter") and Final Decree on Count V Concerning the City's Water Rates and Water Fund Transfers (the "Final Decree"), moves the Court to reconsider Section I of the Opinion Letter and corresponding rulings in the Final Decree. *See* Fairfax Manual, page E-19 to E-20. In support of this motion for reconsideration, the City states as follows:

In Section I of the Opinion Letter, the Court finds that the City's practice of setting its water rates to include a management fee for transfer to the City's general fund is "plainly at odds with the mandate of its charter" because "receipts with a profit do not equal expenses." Opinion Letter at 4. The Court's finding in this Section is based on a finding that § 13.09 of the City Charter requires – and has required for more than 50 years – that "the [City's] water rates are to be set with 'receipts equal to expense,' without building any surplus or 'return on equity' into the rates themselves." Opinion Letter at 4. The Court should reconsider this ruling.

Section 13.09 of the City Charter only mandates that "if" average *expenses* exceed average *receipts* for three consecutive years (*i.e.* the water system runs in the red), the director of public utilities and the city manager must recommend to the counsel a schedule of rates designed to produce "receipts equal to expense." *See*, 1995 Va. Acts. ch. 655, § 13.09. There was no evidence at trial that the receipts of the utility were less than its expenses for three consecutive fiscal years. Therefore, the "three year" trigger of § 13.09 had never been met.

Moreover, § 13.09 does not require or even suggest a similar "three year reckoning" in the event that *receipts* consistently exceed *expenses* – it does not speak to such a scenario, much less condemn it. If anything, the absence of a "mirror" requirement when receipts consistently

have exceeded expenses suggests an acceptance of such a result. In any event, any finding of a "broader mandate" to operate "the water company in a manner whereby receipts are to equal – not exceed – expenses," Opinion Letter at 4, can be reached only by reading well beyond the plain language of § 13.09. Neither § 13.09 nor any other section of the City Charter says anything to discourage setting rates such that receipts exceed expenses.

At the same time, the Court's expanded reading of § 13.09 renders certain of the General Assembly's 1993 amendments to § 13.07 of the City Charter effectively meaningless. In 1993, § 13.07 of the City Charter was amended to add language explicitly providing for a "return on equity" to be transferred to the City's general fund. *See* 1993 Va. Acts. ch. 969, § 13.07. Effect should be given to every provision of a statute and one statute should not be interpreted to negate another, *Harris v. Commonwealth*, 142 Va. 620, 623 (1925), and reading beyond the plain language of § 13.09 to find a requirement that rates must be set with "receipts equal to expenses" would effectively negate the "return on equity" provision of § 13.07. As the Court observed, under its reading of § 13.09, "[t]here should not be a 'surplus' profit to transfer to any fund, by a two thirds vote or otherwise." Opinion Letter at 4. The difficulty is, of course, that § 13.07 expressly provides for one and permits the City to transfer it to the general fund.

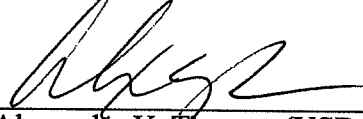
Far from prohibiting the setting of rates to produce receipts that exceed expenses, the plain language of §§ 13.07 and 13.09 of the City Charter clearly authorizes – if not endorses – such a practice.

WHEREFORE, for the reasons stated above and for the reasons stated at oral argument, if requested by the Court, the City respectfully requests that the Court reconsider its ruling at Section I of the Opinion letter dated January 6, 2010, and grant such other and further relief as the Court deems appropriate.

Respectfully submitted,

CITY OF FALLS CHURCH

By Counsel



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CERTIFICATE OF SERVICE

I certify that on the 13th day of January 2010, a true copy of the foregoing was emailed and mailed, first-class postage prepaid, to:

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