

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

_____)
VML INSURANCE PROGRAMS,)
))
Plaintiff,)
))
v.)
))
CITY OF FALLS CHURCH,)
))
Defendant.)
_____)

Civil Action No.: 2011-00856

FILED
CLERK, CIRCUIT COURT
2011 JAN -7 PM 3:37
JONAH T. FERRELL
CLERK, FAIRFAX COUNTY

COMPLAINT

Plaintiff VML Insurance Programs ("VMLIP"), by counsel, states as follows as its Complaint against Defendant City of Falls Church.

1. This is an action for declaratory judgment pursuant to Virginia Code § 8.01-184.
2. Plaintiff VMLIP is an unincorporated association of city, town and county governments which, at all relevant times hereto, was duly authorized to provide coverages to its members as authorized under Virginia law.
3. Defendant City of Falls Church ("City") is an independent city located in the Commonwealth of Virginia.
4. On January 6, 2010, this Court decided *Fairfax County Water Authority v. City of Falls Church*, 2010 Va. Cir. LEXIS 10 (Fairfax County, Jan. 6, 2010), in which the Court held that a portion of the City's charges to nonresidents for water violated the City's Charter and amounted to unconstitutional taxation of those non-resident purchasers.

5. Citing this decision, Fairfax County, the Fairfax County School Board, Jon Luria, an individual, and, on information and belief, other persons and entities, have asserted refund claims against the City demanding tax refunds under Virginia Code § 58.1-3984, and for interest on tax overpayments under Virginia Code § 58.1-3918, and on the grounds that the City's overcharges were unlawful. The demand letters from Fairfax County, the Fairfax County School Board, and Jon Luria are attached as Exhibit A. It is expected that these claimants (and other impacted persons and individuals) will file lawsuits seeking payment by the City of the refunds they demand. These claims are collectively referred to herein as the "Refund Claims."

6. The City has requested that VMLIP provide it coverage against the Refund Claims under certain policies of insurance issued by VMLIP to the City which provide Local Government Liability Coverage (collectively and individually, the "Policy"). A true and accurate copy of policy number P-2006-2007-VML-0013, effective July 1, 2006 to July 1, 2007, issued by VMLIP to the City (as the named member) is attached hereto as Exhibit B.

7. As relevant to this Complaint, the Policy contains the following coverage agreement:

SECTION I - COVERAGES

COVERAGE A. LOCAL GOVERNMENT LIABILITY COVERAGE (OCCURRENCE FORM)

1. COVERAGE AGREEMENT

- a) Except as otherwise provided in this agreement, VMLIP will pay on behalf of the named member all sums the named member becomes legally obligated to pay as *damages* from an *occurrence* if the following conditions are met:

- i) The *occurrence* must occur during the coverage period. The date of *occurrence* is the date on which the *wrongful act* giving rise to the claim for *damages* took place or is alleged to have taken place. If *damages* are alleged to have arisen from a series of *wrongful acts*, the date of *occurrence* is the date when the first such *wrongful act* took place or is alleged to have taken place . . .
- b) VMLP will have the right and duty to defend only such *suits* or covered *occurrences* which seek *damages* as stated in Section I, Coverage A.1.a) above and not excluded under Section I, Coverage A. 2. VMLP may, at its discretion, investigate any actual or potential *claim*; and may settle any *claim* or *suit*. . . .

(Ex. B) LG 0705, p. 1 of 13.

8: As relevant to this Complaint, the Policy contains the following exclusions:

SECTION I - COVERAGES

**COVERAGE A. LOCAL GOVERNMENT LIABILITY
COVERAGE (OCCURRENCE FORM)**

* * *

2. **EXCLUSIONS** – This coverage does not apply to:

* * *

- g) Exemplary *damages*, punitive *damages*, or any *damages* other than compensatory *damages* . . .
- h) Fines or penalties imposed by law.
- i) Injunctive or other equitable relief, or quasi-judicial or administrative orders. Further we shall have no obligation to indemnify the member for any costs, fees including attorney's fees, or expenses which the member shall become obligated to pay as a result of an adverse judgment for injunctive or other equitable relief, or a quasi-judicial order or administrative order.
- j) *Claims* or *suits* arising out of the payment, repayment, assessment or collection of any tax, fee or charge including but not limited to any interest on or any other amount claimed for the loss of use of money that is or may be generated by such tax, fee or charge.

* * *

- n) *Claims or suits* based upon or attributable to the insured gaining any profit, advantage or remuneration to which the insured is not entitled.”

* * *

- p) *Damages* arising out of the willful violation of any federal, state or local statute, ordinance, rule or regulation committed by or with the knowledge and consent of any insured. Nor shall we have any obligation to indemnify the insured for any loss, cost, civil fine, penalty or expense against any insured arising from any complaint or enforcement action from any federal, state or local governmental regulatory agency.

(Ex. B) LG 0705, pp. 2-3 of 13.

Count I – Declaratory Judgment

9. An actual controversy exists between VMLIP and the City concerning whether VMLIP owes coverage as requested by the City under the Policy with respect to the Refund Claims. There is no adequate remedy, other than that requested herein, by which this controversy may be resolved.

10. VMLIP seeks a declaration pursuant to Virginia Code § 8.01-184 that VMLIP does not owe coverage as requested by the City under the Policy with respect to the Refund Claims.

11. VMLIP is entitled to a declaration to that effect:

(A) because the Refund Claims arise out of the “payment, repayment, assessment or collection of any tax, fee or charge including but not limited to any interest on or any other amount claimed for the loss of use of money that is or may be generated

by such tax, fee or charge,” and, thus, coverage for the Refund Claims is expressly and clearly excluded under exclusion 2(j) of the Policy; and/or

(B) because the Refund Claims are “based upon or attributable to the [City] gaining [a] profit, advantage or remuneration to which the [City] is not entitled,” and, thus, coverage for the Refund Claims is expressly and clearly excluded under exclusion 2(n) of the Policy

(C) to the extent the Refund Claims and/or the facts and circumstances underlying the Claims fall within and trigger exclusions 2(g), 2(h), 2(i), 2(j), and/or 2(p) of the Policy; and/or

(D) to the extent that there was no *occurrence* (as that term is defined in the Policy) which occurred during the coverage period of a Policy issued by VMLIP to the City, which is a prerequisite to coverage under the Local Government Liability Coverage Agreement; and/or

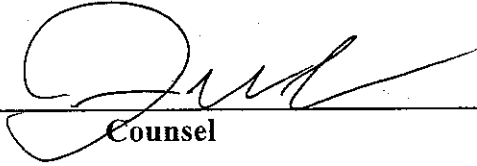
(E) to the extent that other provisions or exclusions of the Policy bar coverage for the Refund Claims or any damages awarded against the City in connection therewith.

WHEREFORE, VMLIP respectfully requests that this Court:

1. Declare that VMLIP does not owe coverage as requested by the City under the Policy with respect to the Refund Claims; and/or
2. Award such other and further relief as this Court deems just and proper.

VML INSURANCE PROGRAMS

By:



Counsel

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