IN THE SUPREME COURT OF VIRGINIA

ADVANCED TOWING COMPANY, LLC, AND ROADRUNNER WRECKER SERVICE, INC., AND KING TOWING, INC.,

Appellants,

v. Rec. No.091180

FAIRFAX COUNTY BOARD OF SUPERVISORS,

Appellee.

BRIEF OF APPELLEE

TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:

COMES NOW, the Appellee, Fairfax County Board of Supervisors ("the County"), by counsel, and submits this Brief of Appellee in opposition to the Opening Brief of Appellants filed by the Appellants Advanced Towing Company, LLC, Roadrunner Wrecker Service, Inc., and King's Towing, Inc. ("the Tow Companies"). As set forth more fully below, the Honorable Bruce D. White of the Fairfax County Circuit properly sustained the County's Demurrer to the Appellants' Amended Complaint

because § 82-5-32(e) of the Code of the County of Fairfax ("County Code") comports with both the Equal Protection Clause of the United States and Virginia Constitutions and the Dillon Rule.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

On September 11, 2008, the Tow Companies filed a declaratory judgment action seeking to invalidate County Code § 82-5-32(e) ("the Ordinance"), which requires that trespassing vehicles be towed to a vehicle-storage site located within Fairfax County.[1] The Tow Companies alleged that they are all located outside the Fairfax County line (J.A. at 2, ¶ 3)[2] and that the Ordinance's geographical limitation "has no rational relationship to any proper governmental objective," and as such, "violates the equal protection rights of the [Tow Companies] as are secured by

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[1] County Code § 82-5-32(e) provides in relevant part that "[e]very site to which trespassing vehicles are towed shall comply with the following requirements: (1) A tow truck operator must tow each vehicle to a storage site located within the boundaries of Fairfax County."

[2] Citations to the trial court's record will be to the Joint Appendix as follows: "J.A. at [page number]".

the Fourteenth Amendment to the Constitution of the United States and Article 1 § 11 of the Constitution of Virginia." (J.A. at 3, ¶ 9.) On December 19, 2008, the Fairfax County Circuit Court, the Honorable Bruce White presiding, granted the Board's Demurrer because the Tow Companies had failed to identify any class of persons that was being treated unfairly, but gave the Tow Companies leave to amend. (J.A. at 23.)

On December 23, 2008, the Tow Companies filed an Amended Complaint, virtually identical to the original Complaint, except that they expressly specified that County Code § 82-5-32(e) "establishes an unconstitutional classification which impermissibly draws an unfair distinction between towers who have a storage facility in Fairfax County and towers who do not have a storage facility in Fairfax County." (J.A. at 26—27, ¶ 11.) On February 13, 2009, the Circuit Court sustained the Board's Demurrer to the Amended Complaint and entered a Final Order because the Circuit Court concluded that County Code § 82-5-32(e) was rationally related to the administration and enforcement of the Ordinance. (J.A. at 56, 59.)

On February 25, 2009, the Tow Companies filed a Motion to Reconsider, raising for the first time the contention that the Ordinance contravened Va. Code Ann. § 46.2-1232 and was thus in violation of the Dillon Rule. (J.A. at 63.) On March 13, 2009, after accepting briefs and hearing additional argument on this newly raised issue, the Circuit Court denied the Motion to Reconsider—properly concluding that the Ordinance did not violate Va. Code Ann. § 46.2-1232. (J.A. at 90). The Tow Companies then timely noted this appeal.

QUESTIONS PRESENTED

1. Whether the Circuit Court properly sustained the County's Demurrer because the Amended Complaint failed to state a cause of action.

2. Whether the Circuit Court properly concluded that County Code § 82-5-32(e) does not violate the Equal Protection Clause of The United States or Virginia Constitutions because it is rationally related to legitimate governmental purposes.

3. Whether the Circuit Court properly concluded that County Code § 82-5-32(e) does not violate the Dillon Rule.

I. THE CIRCUIT COURT PROPERLY SUSTAINED THE COUNTY'S DEMURRER BECAUSE THE AMENDED COMPLAINT FAILED TO STATE A CAUSE OF ACTION.

The Tow Companies' first assignment of error alleges that the Amended Complaint stated a cause of action, and as such, the Demurrer should have been overruled. It is well-settled that a demurrer tests only the legal sufficiency of the facts alleged in a complaint; legal conclusions are not deemed admitted for the purposes of demurrer. *W.S. Carnes, Inc. v. Bd. of Supervisors,* 252 Va. 377, 384, 478 S.E.2d 295, 300 (1996). Whether the facts as alleged, along with those that may be reasonably and fairly implied therefrom, are sufficient to support the cause of action to which those facts relate "is a pure question of law." *Yuzefovsky v. St. John's Wood Apartments,* 261 Va. 97, 106, 540 S.E.2d 134, 139 (2001); *Carnes,* 252 Va. at 384, 478 S.E.2d at 300.

In this case, the challenged classification at issue is not "'in County' towers [versus] 'out of County' towers" as stated in the Opening Brief of Appellants. (Appellants' Br. 12.) The Amended Complaint challenged the classification between tow companies

that have a storage facility in Fairfax County and tow companies that do not have a storage facility in Fairfax County. (J.A. at 26, ¶ 11.) Although it is arguable as to whether the Ordinance even creates this classification, it is clear that the Ordinance does not impose any kind of a residency requirement as asserted by the Tow Companies. (Appellants' Br. 13.)

Assuming, *arguendo,* that the Ordinance creates the classification alleged by the Tow Companies, the Tow Companies nonetheless confuse legal conclusions with factual allegations. Although their argument is slim, they appear to suggest that the mere allegation that the classification is improper means, for the purposes of demurrer, that it is improper. (Appellants' Br. 12.) Couching a legal conclusion as a factual allegation, however, does not convert law into fact.

Thus, for purposes of the Demurrer at issue here, the trial court accepted as true the following allegations: (1) each of the Tow Companies has storage lots located outside the jurisdictional boundary of Fairfax County, J.A. at 25—26; (2) each has contracts for towing services from clients located within the

County, *id.,* and (3) the Ordinance places these contracts in jeopardy because if the Tow Companies tow vehicles from Fairfax County to storage lots located outside the jurisdictional boundary of Fairfax County, they can be prosecuted for violations of the Ordinance. (J.A. at 26—27.) The Circuit Court, however, determined that this set of facts did not support the Appellants' *legal* conclusions, namely, that the Ordinance as applied to the Tow Companies violates their equal protection rights under the Fourteenth Amendment to the United States Constitution or Article 1, § 11 of the Constitution of Virginia, (J.A. at 27), or that the Ordinance violated the Dillon Rule.[3] (J.A. at 63.) Given that these determinations were pure questions of law, it was wholly appropriate for the Circuit Court to have ruled upon the Demurrer, and as set forth more fully below, sustaining the County's Demurrer was completely proper.

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[3] It must be noted that even the Tow Companies expressly recognized that there are not any facts in dispute that would preclude the Court from reaching the ultimate issues of law. (J.A. at 86.)

II. THE CIRCUIT COURT PROPERLY CONCLUDED THAT COUNTY CODE § 82-5-32(e) DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES OR VIRGINIA CONSTITUTIONS BECAUSE IT IS RATIONALLY RELATED TO LEGITIMATE GOVERNMENTAL PURPOSES.

The Tow Companies challenge the geographical limitation of County Code § 82-5-32(e) on equal protection grounds. The Amended Complaint specifies only that the County Code "establishes an unconstitutional classification which impermissibly draws an unfair distinction between towers who have a storage facility in Fairfax County and towers who do not have a storage facility in Fairfax County." (J.A. at 26—27.) The Tow Companies do not allege that the Ordinance involves any suspect classification or fundamental right, and thus, it is subject to the most deferential review under the "rational basis" test. *See Exxon Corp. v. Eagerton,* 462 U.S. 176, 196 (1983). This test compels judicial restraint:

> [E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor

> infringes fundamental constitutional rights must be upheld against [an] equal protection challenge if there is *any reasonably conceivable state of facts* that could provide a rational basis for the classification.
>
> . . . . [A] legislative choice is *not subject to courtroom fact finding* and may be based on *rational speculation unsupported by evidence or empirical data.*

FCC v. Beach Communications, Inc., 508 U.S. 307, 313—315 (1993) (emphasis added).

Here, the sole basis for the Tow Companies' equal protection challenge is that towing companies without a storage lot in Fairfax County suffer "adverse economic consequences" not shared by towing companies that do have a storage facility in Fairfax County. (J.A. at 27.) This allegation, even if true, does not come close to surviving the rational basis test outlined in *Beach Communications*, and the Circuit Court properly granted the Board's Demurrer. *See Beach Communications, Inc.,* 508 U.S. at 315.

A. The Tow Companies' Amended Complaint Failed To Name An Improper Classification or Articulate Harms That Rebut The Ordinance's Strong Presumption Of Constitutionality.

The Amended Complaint rests solely on the contention that the Ordinance makes an unfair distinction between towing companies that have a storage lot in Fairfax County and those that do not. (J.A. at 26—27.) A review of the actual Ordinance, however, reveals that it makes no such distinction; it merely provides that "[a] tow truck operator must tow each vehicle to a storage site located within the boundaries of Fairfax County." County Code § 82-5-32(e). The Ordinance does not preclude the Tow Companies from obtaining a tow lot in Fairfax County. Nor does the Ordinance discriminate against the Tow Companies—they are just as able as other tow truck operators to purchase or lease a tow lot in Fairfax County. *See Cavalier Vending Corp. v. State Bd. of Pharmacy,* 195 Va. 626, 634, 79 S.E.2d 636, 640 (1954) (holding that statute requiring contraceptive devices to be sold in pharmacies did not discriminate against vending machine operators because operators were still free to sell such devices within the regulatory framework).

Even assuming, *arguendo,* that the Ordinance makes a distinction among tow truck operators, this distinction, by itself, is not unconstitutional. To some extent, all laws make distinctions among persons or activities. *See Cavalier Vending Corp.,* 195 Va. at 634, 79 S.E.2d at 640 (holding that equal protection is not implicated by either legislation that is limited "in the objects to which it is directed, or by the territory within which it is to operate.")

Here, the Tow Companies contend that the Ordinance imposes upon them "adverse economic consequences" not suffered by those who do have storage lots within the County. (J.A. at 27; Am. Compl. ¶12.) This type of economic impact, even if true, does not equate to an unconstitutional burden. Indeed, even in the context of heightened scrutiny, economic burdens placed on the free exercise of religion are constitutionally permissible. *See, e.g., Lakewood Congregation of Jehovah's Witnesses v. City of Lakewood,* 699 F.2d 303, 307 (6th Cir. 1983). In short, the Tow Companies' paltry allegations fail to

overcome the strong presumption of constitutionality afforded the Ordinance.

B. The Ordinance Survives A Constitutional Challenge Even At Demurrer Because It Is Conceivable That The Ordinance Is Rationally Related To Legitimate Governmental Interests.

Under the rational basis test, it is well-settled even at the demurrer stage of proceedings that a court may engage in "rational speculation" to support the constitutionality of legislation. *Finn v. Virginia Retirement System,* 259 Va. 144, 155, 524 S.E.2d 125, 131 (2000). Indeed, the court's support of a legislative choice is not subject to "courtroom factfinding," and need not be based upon "evidence or empirical data." *Id.* at 155, 524 S.E.2d at 131.

For example, in *King v. Virginia Birth-Related Neurological Injury Compensation Program,* this Court upheld the constitutionality of a statute that established a fund that would directly benefit only obstetricians. 242 Va. 404, 406, 410 S.E.2d 656, 658 (1991). The doctors who challenged the statute were required to pay into the fund, even though they did not perform obstetrical services. *Id.* at 407, 410 S.E.2d at 659. The trial

court, in sustaining the Commonwealth's demurrer, speculated that the removal of injured infants from the tort system would decrease the cost of medical malpractice insurance for all doctors in the Commonwealth. *Id.* at 410, 410 S.E.2d at 660. On appeal, the doctors argued that the trial court erred because it based its conclusion on facts not in evidence. *King,* 242 Va. at 410, 410 S.E.2d at 660, n.3. This Court rejected that argument because under an equal protection analysis, the appropriate standard "is whether there are any *conceivable* facts . . . which would render the challenged legislation reasonable." *Id.* at 410, 410 S.E.2d at 660, n.3 (emphasis added).

Indeed, not only is a court permitted to completely speculate and theorize how legislation may be supported, but the Plaintiff has the burden to negate "'every conceivable basis which might support it.'" *Gray v. Commonwealth,* 274 Va. 290, 309, 645 S.E.2d 448, 460 (2007)(quoting *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973)). In this regard, the Tow Companies cannot succeed.

For example, it is patently obvious that the Board has a legitimate interest in ensuring that citizens whose cars have been towed are not required to travel long distances to retrieve their vehicle. Surely, the Board may properly protect a citizen whose vehicle has been towed from having to travel to West Virginia or another county to retrieve it. The Amended Complaint, however, suggests that the Ordinance is not rationally related to retrieval distances because the distances between certain points within a county that is over 400 square miles in size might arguably be a further distance than to the Tow Companies' lots, which are all located within 5½ miles from the Fairfax County boundary. (J.A. at 26, ¶¶ 2, 3, 4, 5, and 6.)

This argument necessarily fails because it concedes both the rationality of the governmental purpose and how a geographical limit is related to that purpose; it merely takes exception as to where the Board drew the line. As a matter of law, the legislature draws the lines, and it is not required to draw them with mathematical precision. *Gallagher v. Crown Kosher Super Market, Inc.,* 366 U.S. 617, 624 (1961). Under a rational

basis analysis, it does not matter if the legislation is not the most effective, the least restrictive means to a permissible end, or if it works an unfair hardship in a particular case. *Lowrie v. Goldenhersh,* 716 F.2d 401, 409 (7th Cir. 1983). As long as there exists a rational nexus between the legislation and the governmental purpose, the legislation survives an equal protection challenge. *See Gallagher,* 366 U.S. at 623-24.

Similarly, it is certainly *conceivable* that the Ordinance's geographical limitation is rationally related to the County's ability to administer and enforce its various towing regulations. *See* County Code § 82-5-32(e) (setting forth a variety of regulations regarding vehicle storage facilities, such as illumination requirements and posted signage, among others). Although Va. Code Ann. § 46.2-1232 (Supp. 2009) provides that the County's regulations would be applied in the locality to which the vehicle is towed, the statute does not give Fairfax County officials the authority to enforce any of its towing regulations outside the jurisdictional limits of the County.

This issue is not a "red herring" as alleged by the Tow Companies. (Appellants' Br. 14.) The County simply has no authority to enforce its regulations governing vehicle-storage facilities in other localities. *See, e.g.,* Va. Code Ann. § 15.2-1724 (Supp. 2009) (setting forth the limited circumstances when a locality's police officers may go beyond the territorial limits of that locality; enforcement of towing ordinance is not among the enumerated circumstances). Rather, the enforcement of Fairfax County's ordinances in this arena will be essentially left up to the discretion of enforcement officials in the localities to which the vehicle is towed. The Tow Companies' assertion that interjurisdictional agreements could be drafted to resolve this problem actually underscores the rationality of the Ordinance: there is no assurance that another jurisdiction would enter into such an agreement. Moreover, Fairfax County should not be burdened with negotiating and executing such agreements merely to ensure that its properly enacted Ordinance will be enforced.[4]

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[4] It is also likely that the average citizen or consumer is not aware of Va. Code Ann. § 46.2-1232 and would not know that the

(Footnote continued on next page)

The Tow Companies further contend that the newly established Board of Towing and Recovery Operators ("BTRO") "provides a comprehensive scheme for the enforcement of all local towing ordinances" is simply wrong. (Appellants' Br. 15.) The Board has no such authority. *See* Va. Code Ann. § 46.2-2805 (Supp. 2009) (setting forth the powers of the BTRO, which relate primarily to the licensure of towing operators). In fact, Va. Code Ann. § 46.2-2828 (Supp. 2009) expressly provides that the BTRO has limited authority over local ordinances. *See* Va. Code. Ann. § 46.2-2828 (providing that "[i]n the event of a conflict between an action of the Board and any ordinance adopted by [a locality], . . . the *provisions of such local ordinance shall be controlling*" (emphasis added)).

Finally, there is no merit to the Tow Companies' assertion that this case is "factually indistinguishable" from the *Verzi* decision. (Appellants' Br. 13.) *See Verzi v. Baltimore*

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regulations of the locality from where the vehicle was towed would apply when he retrieves the vehicle. As such, it is certainly conceivable that the Ordinance negates any such confusion among consumers.

County, 635 A.2d 967, 975 (Md. 1994). Although Maryland may have a "statewide law with comprehensive powers" such that it is able to "supervise and administer the towing companies," as set forth above, that regime has not been replicated in Virginia. (Appellants' Br. 15—16.) In short, the Ordinance at issue in this case is entirely different than the Baltimore County ordinance invalidated under the Maryland Constitution in the *Verzi* decision.[5] Not only was the Baltimore County ordinance a residency requirement, which the Ordinance here is not, but the Court of Appeals of Maryland expressly held that Baltimore County officials had regulatory and criminal enforcement power that extended beyond county boundaries. *Id.* at 974. Fairfax County officials simply do not have similar enforcement power.

Because enforcement of this Ordinance in jurisdictions other than Fairfax County would fall to officials over whom the Board has no authority or control, it is, as a matter of law, *conceivable* that the geographical limitation is rationally related to

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[5] The Court of Appeals of Maryland expressly held that its decision was not based on any federal constitutional claims. *Verzi v. Baltimore County*, 635 A.2d 967, 975 n.4 (Md. 1994).

the administration and enforcement of its regulatory scheme–a legitimate governmental purpose. Accordingly, it was entirely proper for the Circuit Court to have sustained the Board's Demurrer to the Amended Complaint.

III. THE TRIAL COURT PROPERLY CONCLUDED THAT COUNTY CODE § 82-5-32(e) DOES NOT VIOLATE THE DILLON RULE.

Although the Tow Companies accurately observe that local governments in Virginia have only those powers that are "granted in express words; those necessarily or fairly implied in or incident to the powers expressly granted; and those essential to the declared object and purposes of the grant," they erroneously conclude that the geographic limitation of the Ordinance violates this premise. (Appellants' Br. 16.) The Tow Companies summarily conclude that because Va. Code Ann. § 46.2-1232 "envisioned a situation where cars would be towed from one locality to another," this statute operates as a prohibition against a geographic limitation with respect to towing and storage. (Appellants' Br. 17.) A simple review of this statute, however, compels the opposite conclusion.

Va. Code Ann. § 46.2-1232(A) (Supp. 2009) provides that:

> The governing body of any county, city, or town may by ordinance regulate the removal of trespassing vehicles from property by or at the direction of the owner, operator, lessee, or authorized agent in charge of the property. In the event that a vehicle is towed from one locality and stored in or released from a location in another locality, the local ordinance, if any, of the locality from which the vehicle was towed shall apply.

The power conferred is broad and expansive: a locality may regulate towing. The second sentence is just a clarification as to which locality's ordinance applies "[i]n the event that" a vehicle is towed to another jurisdiction. *Id.* This language is telling. It necessarily contemplates two regulatory scenarios: one in which vehicles may be towed outside a jurisdiction, and one, like Fairfax County's, where the vehicles must remain within the jurisdiction. If, as urged by the Tow Companies, only the former was intended, the General Assembly would have employed other language to prohibit geographical limitations or to create such a prohibition.

Indeed, paragraph (B) of the statute sets forth the only expressed prohibition. *See* Va. Code Ann. 46.2-1232(B) (Supp. 2009) (precluding any regulation that requires a towing operator to also operate as a filling station or auto body repair shop). Thus, because the General Assembly knew how to expressly prohibit certain kinds of regulations, and it did not prohibit the geographic limitation at issue here, the second sentence of paragraph (A) cannot be read as a prohibition or anything that limits a locality's authority. *See Halifax Corp. v. Wachovia Bank*, 268 Va. 641, 654, 604 S.E.2d 403, 408 (2004) (stating the rule that "'when the General Assembly includes specific language in one section of a statute, but omits that language from another section of the statute, we must presume that the exclusion of the language was intentional'") (quoting *Halifax Corp. v. First Union Nat'l Bank*, 262 Va. 91, 100, 546 S.E2d 696,702 (2001)).

Moreover, the General Assembly's recent establishment of a statewide Board for Towing and Recovery Operators to license and regulate towing operators within the Commonwealth underscores the broad grant of authority conferred upon

localities. Va. Code Ann. § 46.2-2828 provides that local ordinances shall govern over regulations imposed by the BTRO as long as those ordinances are no less stringent than those imposed by the BTRO. Clearly, the General Assembly intended that local authority and governance over towing was paramount, and the Ordinance in this case is in no way contrary to the legislative intent.

Nor can the Tow Companies seriously argue that the Ordinance is outside the ambit of the authority granted by the General Assembly. *City of Virginia Beach v. Hay,* 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999). The Dillon Rule is not so narrowly construed such that every particular provision of an ordinance requires an express grant of power. When a local government has the power to do something but the General Assembly does not specifically direct the method of implementing that power, "'the choice made by the local government as to how to implement the conferred power will be upheld as long as the method selected is *reasonable*.'" *Arlington County v. White*, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000) (quoting *City of*

Virginia Beach v. Hay, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999) (emphasis added)). "'Any doubt in the reasonableness of the method selected is resolved in favor of the locality.'" *Id.*

As set forth above, the Ordinance is patently reasonable: it promotes shorter retrieval distances for those whose cars have been towed, and it facilitates the administration and enforcement of the County's towing regulations. These regulations provide, among other things, that facilities be properly illuminated at night and that towed vehicles be properly secured. *See, e.g.,* County Code § 82-5-32(e). The requirement that storage facilities be located within Fairfax County facilitates both the enforcement and administration of these regulations because the County has no authority to enforce these regulations in other localities. Accordingly, the Tow Companies cannot prevail on their claim that the Ordinance runs afoul of Va. Code Ann. § 46.2-1232. As a matter of law, this statute does not prohibit geographical limitations, and the Board's imposition of such a geographical limitation is a reasonable exercise of the power conferred. *See White,* 259 Va. at 712, 528 S.E.2d at 708.

CONCLUSION

The Fairfax County Circuit Court properly concluded that County Code § 82-5-32(e) was a proper exercise of the Board's authority. The requirement that trespassing vehicles towed be towed to storage lots located within the boundaries of Fairfax County does not run afoul of Va. Code Ann. § 46.2-1232 or the Equal Protection Clauses of the Virginia or United States Constitutions. The Board has broad authority to regulate towing, and this particular ordinance is rationally related to legitimate governmental objectives. There being no error in the Circuit Court's decision, the Board respectfully requests that the Circuit Court's decision be affirmed.

Respectfully submitted,

BOARD OF SUPERVISORS OF
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RULE 5:26(d) CERTIFICATE

I certify that on this 2nd day of November 2009, three copies of the foregoing Brief were served via regular mail and that one copy was faxed to Robert L. Tomlinson II, Esquire, Counsel for the Tow Companies, 2009 14th Street North Suite 509, Arlington, Virginia, 22201, facsimile no. 703-524-8533. I further certify that fifteen copies and an electronic copy of this Brief were filed in this Court.

_____
Cynthia A. Bailey