In the

Supreme Court of Virginia

At Richmond

Record No. 091883

FFW ENTERPRISES,

Appellant,

– v. –

FAIRFAX COUNTY, et al.,

Appellees.

Record No. 091930

FFW ENTERPRISES,

Appellant,

– v. –

FAIRFAX COUNTY ECONOMIC DEVELOPMENT AUTHORITY, et al.,

Appellees.

OPENING BRIEF OF APPELLANT

JAMES N. MARKELS, VSB #68399
JACKSON & CAMPBELL, P.C.
1120 Twentieth Street, N.W.
South Tower, Third Floor
Washington, DC 20036
T: (202) 457-1600
F: (202) 457-1678
jmarkels@jackscamp.com

Counsel for FFW Enterprises

COUNSEL PRESS • VA – (800) 275-0668

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ASSIGNMENTS OF ERROR

1. The trial court, The Honorable Jane Marum Roush presiding, erred in denying summary judgment to Petitioners FFW Enterprises and granting summary judgment to Respondents Fairfax County and the Board of Supervisors for Fairfax County based on her ruling that Va. Code §§ 58.1-3221.3 and 33.1-435 were not facially unconstitutional under the Virginia Constitution.
2. The trial court, The Honorable Stanley P. Klein presiding, erred in ruling that Va. Code § 33.1-435 was not facially unconstitutional under the Virginia Constitution.

QUESTIONS PRESENTED

1. Does Article X of the Virginia Constitution require that all real property be treated as one indivisible class for the purposes of taxation, subject only to the express exceptions in Art. X, §§ 1, 2, and 6, and if so, did the General Assembly exceed its power to classify property for taxation by enacting Va. Code §§ 58.1-3221.3 and 33.1-435, thereby rendering those taxes facially unconstitutional? (Assignments of Error #1 & 2)

2. Are Va. Code §§ 58.1-3221.3 and 33.1-435 facially unconstitutional for lack of uniformity under Art. X, § 1 of the Virginia Constitution? (Assignments of Error #1 & 2)

STATEMENT OF THE CASE

These cases by FFW Enterprises present a question of first impression: whether the General Assembly has the power to subclassify commercial and industrial real property for taxation to fund a specific public benefit in light of the structure and Uniformity Clause of the Virginia Constitution.

These cases were consolidated by this Court because both raise the same questions of law. The first case, Record No. 091883, was the lawsuit brought by FFW Enterprises against Fairfax County and its Board of Supervisors (collectively, the "County"), under Va. Code § 58.1-3984, challenging the constitutionality of two different taxes, Va. Code §§ 58.1-3221.3 and 33.1-435 (the "Tax Case"). Record No. 091930 is FFW Enterprises' appeal from a bond validation proceeding brought by the Fairfax County Economic Development Authority (the "EDA") after the Tax Case had concluded, which sought an order validating the bonds that were to be issued to pay for Phase I of the Dulles Metrorail extension (the "Bond Validation Case"). FFW Enterprises intervened in the Bond Validation Case as a statutory defendant under Va. Code § 15.2-2650, *et seq.*, because the EDA, as part of its petition, sought a determination as to the

constitutionality of Va. Code § 33.1-435—one of the taxes FFW Enterprises had already challenged in the Tax Case.

The relevant facts for both cases are the same. Petitioner FFW Enterprises is the owner of a parcel of commercial real property located in Fairfax County. In 2008, Fairfax County levied a tax upon that property pursuant to Va. Code § 58.1-3221.3. From 2006 to 2008, Fairfax County levied a tax upon that property pursuant to Va. Code § 33.1-435. FFW Enterprises thus had standing to challenge the taxes pursuant to Va. Code § 58.1-3984. In the Tax Case, FFW Enterprises challenged both taxes on the basis that both are facially unconstitutional under the Virginia Constitution.

There was no discovery conducted in the Tax Case. Instead, the parties entered into a Joint Stipulation of Admitted Facts submitted to the trial court on February 20, 2009. By order of the trial court, the parties entered into a briefing schedule in which the parties filed cross motions for summary judgment and respective reply briefs. Oral argument was heard on April 3, 2009, at the conclusion of which the trial court stated that the motions would be taken under advisement and a memorandum opinion would be issued.

In its opinion of June 5, 2009, the trial court denied FFW Enterprises' motion for summary judgment and granted the motion for summary judgment filed by the County. A Final Order to that effect was entered on June 16, 2009. FFW Enterprises timely noticed an appeal to this Court.

The EDA initiated the Bond Validation Case on July 21, 2009. On August 28, 2009, the trial court entered an Order validating the bonds, and FFW Enterprises timely noticed its appeal of that decision as it pertained to the constitutionality of Va. Code § 33.1-435.

In granting certiorari on FFW Enterprises' petitions for appeal, this Court further consolidated these cases with Record No. 092006, an appeal by Parkridge 6, LLC to the decision in the Bond Validation Case on grounds wholly separate from the constitutional tax challenge presented by FFW Enterprises.

STATEMENT OF FACTS

The parties stipulated to many of the facts underlying these causes of action.

Petitioner FFW Enterprises is the owner of a parcel of commercial real property located at 8455A Tyco Road in Fairfax County. (Appendix (hereafter "A.") at 23.) In 2008, Fairfax County levied a tax on that parcel pursuant to Va. Code § 58.1-3221.3 (the "Transportation Tax"), which FFW Enterprises timely paid. (A. at 23.) In 2006, 2007 and 2008, Fairfax County levied another tax on that same parcel pursuant to Va. Code § 33.1-435 (the "District Tax"), which FFW Enterprises timely paid. (A. at 23.)

The parties stipulated that the General Assembly duly enacted both statutes (A. at 19-20); that the County followed all applicable statutory requirements in implementing and levying the taxes, including the County's use of the revenues generated by the taxes (A. at 23); and that each tax was only levied on real property within the respective tax classes stated above, and not on, for example, residential real property within the respective taxing jurisdictions. (A. at 20, 22.) This litigation is thereby focused on the facial constitutionality of the statutes themselves.

The Transportation Tax is an *ad valorem* tax on real property that may be instituted by any local government within the Northern Virginia

Transportation Authority or the Hampton Roads Transportation Authority. With regard to the classification of the real property to be taxed, the Transportation Tax states as follows:

> [A]ll real property used for or zoned to permit commercial or industrial uses is hereby declared to be a separate class of real property for local taxation. Such classification of real property shall exclude all residential uses and all multifamily residential uses, including but not limited to single family residential units, cooperatives, condominiums, townhouses, apartments, or homes in a subdivision when leased on a unit by unit basis even though these units may be part of a larger building or parcel of real estate containing more than four residential units.

Va. Code § 58.1-3221.3(A) and (C). The Transportation Tax further requires that revenues from the tax "shall be used exclusively for transportation purposes that benefit the locality imposing the tax." Va. Code § 58.1-3221.3(B)(1), and see (D)(1).

The District Tax permits a local government with a population of more than 500,000, upon receipt of a petition signed by a majority of those landowners to be subject to the tax, to

> levy and collect an annual special improvements tax on taxable real estate zoned for commercial or industrial use or used for such purposes and upon taxable leasehold interests in that portion of the improvement district within its jurisdiction. For the purposes of this chapter, real property that is zoned to permit multiunit residential use but not yet used for that purpose and multiunit residential real property that is primarily leased or rented to

> residential tenants or other occupants by an owner who is engaged in such a business shall be deemed to be property in commercial use and therefore subject to the special improvements tax authorized by this section.

Va. Code § 33.1-435. Revenues raised by this ad valorem tax are dedicated to transportation improvements in the district, or can be paid to the Commonwealth Transportation Board. See Va. Code §§ 33.1-433 and 436. By agreement between the Board of Supervisors for Fairfax County, the EDA, and the Phase I Dulles Rail Transportation Improvement District, the monies gathered under the District Tax currently reside in the District General Fund awaiting such time as the obligations under the Bonds are to be paid. (A. at 326, Section 402.)

The parties agree that FFW Enterprises' commercial real property falls within the geographical and classification boundaries of both taxes, and that FFW Enterprises has standing to bring this constitutional challenge. However, FFW Enterprises maintains that the transportation improvements that will be funded by both taxes will benefit the owners of residential real property not subject to the taxes as much or more than the commercial and industrial real property owners that must pay the taxes.

ARGUMENT

For the first time, this Court is being asked to formally adopt the rule of universality, as implicated by the language and structure of the Virginia Constitution, and hold that the uniformity provision of Article X, § 1 mandates that all real property be deemed one indivisible subject class for the purposes of taxation, subject only to the express exceptions contained in the Virginia Constitution itself. Also, this Court is being asked to apply the benefit/burden rational basis test set forth by this Court in *City of Hampton v. Ins. Co. of North America*, 177 Va. 494, 14 S.E.2d 396 (1941), and hold that the taxes challenged herein are facially unconstitutional for failing to include residential real property in the subject tax class.

The statutes at issue in this case, Va. Code §§ 58.1-3221.3 (the "Transportation Tax") and 33.1-435 (the "District Tax"), both allow taxation of a subclass of real property—commercial and industrial real property by the former, the same as well as taxable leasehold estates by the latter—for the purpose of funding a specific public benefit: publicly accessible transportation improvements within the taxing jurisdiction. By purposefully excluding residential real property from the subject tax class of both taxes, the General Assembly has reached far beyond its constitutional authority to classify property for taxation, given the limitations on tax exemption within

the Constitution as well as the prior uniformity jurisprudence of this Court. These taxes also implicate grave tax policy concerns that the uniformity clause was crafted to prevent. For the reasons given herein, this Court should reverse the ruling of the trial court and find that the challenged taxes are facially unconstitutional.

I. Standard Of Review

This Court reviews rulings regarding the constitutionality of a statute *de novo*. *Shivaee v. Commonwealth*, 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005). When challenging a tax statute as lacking uniformity or otherwise unconstitutional, the taxpayer bears the burden of proof. Va. Code § 58.1-3984. Unless the language of the statute or constitutional provision is ambiguous, the "plain meaning" will be applied. *Bray v. Brown*, 258 Va. 618, 621, 521 S.E.2d 526, 528 (1999). When evaluating a constitutional challenge to an act of the General Assembly, every reasonable doubt must be resolved in favor of constitutionality. See, e.g., *Hunton v. Commonwealth*, 166 Va. 229, 236, 183 S.E. 873, 876 (1936). However, "Ours is a government whose powers are limited by the Constitution. Where statutory enactments and common-law rules come into conflict with constitutional principles, the latter must prevail." *Commonwealth v. Owens-Corning Fiberglass Corp.*, 238 Va. 595, 600, 385

S.E.2d 865, 868 (1989). Even though the purpose of a statute may be "altruistic and praiseworthy," this Court has reminded itself in dicta that the "impulse" to uphold such a statute "must not cause us to hesitate in the preservation of the integrity of the Constitution, which is the foundation of our structure of government." *City of Hampton*, 177 Va. at 508.

II. The General Assembly Lacked Authority To Exclude Residential Real Property From The Classes Subject To Taxation Because Art. X Of The Virginia Constitution Requires All Non-Exempt Real Property Be Treated As One Indivisible Tax Class

Whether a state's constitutional uniformity requirement mandates a "rule of universality"—i.e., prohibits the state legislature from exempting particular classes of property from taxation beyond those exemptions expressly provided in the constitution itself—can be determined by the structure and language of the subject constitution itself. WADE J. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION, § 2.03(B) (2d ed. 1984) (hereafter, "Newhouse"). Not only does Virginia's Constitution, as properly construed, mandate a rule of universality with regard to the taxation of real property by its inherent structure and language, but this Court's own precedents support such a reading. Simply put, aside from those exceptions explicitly provided in Article X, the General Assembly lacks the authority to subclassify real property for purposes of

assessing or exempting such property from taxation, and thus all non-exempt real property must be treated as a single, indivisible tax class. Therefore, the Transportation Tax and the District Tax challenged here, which both exclude residential real property from the respective tax classes, are facially unconstitutional.

A. The Rule of Universality Is Grounded in the Structure and Text of the Virginia Constitution

The provisions of Article X of the Virginia Constitution, read together, in light of history and this Court's precedent, mandates that the General Assembly's power to classify real property for the purposes of taxation be limited by the rule of universality in which "all tax exemptions are . . . [constitutionally] fixed," *Hollywood Cemetery Co. v. Commonwealth*, 123 Va. 106, 110, 96 S.E. 207, 208 (1918), and thus the General Assembly may not enact taxes that exclude classes of real property not expressly exempted under the Constitution itself.

The General Assembly is empowered by the Virginia Constitution to "define and classify taxable subjects" under Article X, § 1. "Such classifications may be with respect to the subjects of taxation generally, the kinds of property to be taxed, the rates to be levied or the amounts to be raised, or the methods of assessment, valuation and collection." *City of*

Richmond v. Commonwealth, 188 Va. 600, 605, 50 S.E.2d 654, 656 (1948) (quoting 51 Am. Jur. Taxation, § 173, pp. 230-31) (emphasis omitted). However, that power is not unlimited. A "direct tax on property," such as the taxes challenged in this case, is subject to the uniformity requirement of the Virginia Constitution. *Bradley & Co. v. Richmond*, 110 Va. 521, 525, 66 S.E. 872 (1910). That uniformity requirement in Article X, § 1 provides:

> All property, except as hereinafter provided, shall be taxed. All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, except that the General Assembly may provide for differences in the rate of taxation to be imposed upon real estate by a city or town within all or parts of areas added to its territorial limits, or by a new unit of general government, within its area, created by or encompassing two or more, or parts of two or more, existing units of general government.

In addition to that limitation on the General Assembly's power to tax, Article X, § 2 provides:

> The General Assembly may define and classify real estate devoted to agricultural, horticultural, forest, or open space uses, and may by general law authorize any county, city, town, or regional government to allow deferral of, or relief from, portions of taxes otherwise payable on such real estate if it were not so classified, provided the General Assembly shall first determine that classification of such real estate for such purpose is in the public interest for the preservation or conservative of real estate for such uses.

Finally, Article X, § 6 of the Virginia Constitution states: "Except as otherwise provided in this Constitution, the following property *and no other* shall be exempt from taxation, State and local, including inheritance taxes" (emphasis added), after which a list of certain classes of property are provided. Residential real property as a whole is not listed in the Virginia Constitution under any of these sections as a class of property that may receive a deferral of, or relief or exemption from, taxation—there is only a narrow exemption for residences owned and operated by certain disabled elderly individuals under Article X, § 6(b).

A plain reading of these provisions indicates that the Virginia Constitution has identified certain types of real property under Article X, §§ 1 and 2 that the General Assembly "may" classify for differential tax treatment, and certain types of real property the General Assembly "may" or "must" exempt from taxation under § 6. This combination of permissive and mandatory exemptions gives the strongest implication that the Constitution imposes the rule of universality. See Newhouse, § 2.03(B) ("If there are only enumeration of mandatory exemptions, there is perhaps a less stronger implication of universality then when there is enumeration of both mandatory and permissive exemptions."). Indeed, "if there is a

general prohibition on exemptions of property other than enumerated classes, we would expect a rule of universality." *Id.*, § 3.38(D)(6)(b).

This implication is even stronger in a historical context. In *Williamson v. Massey*, 33 Gratt. (74 Va.) 237 (1880), this Court was called upon to determine the constitutionality of certain bonds that were, by the terms of the statute that created them, "forever exempt from all taxation, direct or indirect by the State or by any county of corporation therein[.]" *Id.* at 239 (emphasis omitted). The petitioner argued, in part, that Article X, § 1 of the Constitution of 1869[1] prohibited such an exemption. This Court affirmed the constitutionality of the exemption. While noting that the language of the 1869 Constitution "does not forbid, but authorizes exemptions by the legislature in certain specified cases, without forbidding it in others[,]" this Court stated:

> If [the General Assembly] had intended to forbid its exempting other property, it would have been easy to add the words, "but no other;" and we think if its purpose had been to deprive the legislature of a power, the exercise of which in cases that might arise, might be so beneficial to the State, and the inhibition of which might be so hurtful,

[1] In relevant part, that section provided: "Taxation, except as hereinafter provided, whether imposed by the State, county or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of equal value."

> the above words, or their equivalent, would have been added.

Id. at 244. Thus, under the language of the Constitution of 1869, this Court reasoned that the General Assembly had the plenary power to exempt classes of property from taxation as it saw fit.

That changed with the adoption of the 1902 Constitution, in which the General Assembly adopted § 183, the precursor to today's Article X, § 6, which read, in relevant part: "Except as otherwise provided in this Constitution, the following property, *and no other*, shall be exempt from taxation, State and local" (emphasis added). The addition of the phrase "and no other" could not have been a more direct response to this Court's holding in *Massey*. The presumption that the General Assembly had the power to exempt classes of real property from taxation was conclusively rejected by the Constitution of 1902, the same language of which was incorporated into Article X, § 6 of the Constitution of 1971, and is still in effect today.

That seismic shift was acknowledged in *Hollywood Cemetery Co.*, in which this Court noted, "Under the Constitution of 1869, by section 3 of Article X, the legislature had authority to exempt certain classes of property, but since the Constitution of 1902 became effective *all tax exemptions are thereby fixed, and there can be no other such exemptions*."

123 Va. at 110 (emphasis added). Only by amending the Constitution itself could additional types of property be allowed an exemption. See *Commonwealth v. Trustees Evergreen Burial Park*, 176 Va. 9, 12, 10 S.E.2d 495, 496 (1940) (noting 1928 change in the Constitution that allowed the exemption previously struck down in the *Hollywood* decision). It was readily apparent, thereby, that "since 1902 [Virginia's] uniformity requirement has been tightened by including a rule of universality." Newhouse, § 3.46(B)(2)(a).

The rule of universality is also found by application of the principle of *expressio unius est exclusio alterius*[2]—indeed, the rule of universality is simply a shorthand term for the application of that principle to a uniformity provision. The Virginia Constitution's specification of certain types of real estate eligible for an exemption, deferral or relief from taxation, "and no other," naturally implies that types of real estate not so specified, such as residential real estate as a whole, shall not be entitled to exemption, deferral or relief. As a result, the natural reading of these constitutional provisions together is that, except for the exceptions specifically mentioned in Art. X, §§ 1, 2 and 6 of the Virginia Constitution, all real property within a

[2] "A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY 620 (8th ed. 2004).

given jurisdiction must be treated as a single, indivisible class for the purpose of taxation, and the General Assembly does not have the authority to enact a statute that taxes only a portion of the real property within a taxing jurisdiction, whether based on use or location.

This Court effectively applied the rule of universality in *City of Roanoke v. Hill*, 193 Va. 643, 70 S.E.2d 270 (1952). In that case, taxpayers brought a uniformity challenge on the basis that real property within a sanitary district annexed into the City of Richmond was assessed a tax of $1.65 per $100 of valuation, while real property already in the City was assessed a tax of $2.50 per $100. After annexation, the sanitary district's rate did not change. This Court upheld the disparity on the basis that Section 169 of the Virginia Constitution had an explicit exception to the uniformity rule in those cases where real property was annexed by a governmental authority.[3] However, the Court noted in dicta that were it not for the constitutional provision regarding annexation, "the city of Roanoke would have had to levy a tax rate of $2.50 on all the land in the annexed areas because that was the rate that was levied on all the real estate

[3] The relevant portion of that section was as follows: "The General Assembly may allow a lower rate of taxation to be imposed for a period of years by a city or town upon land added to its corporate limits, than is imposed on similar property within its limits at the time such land is added." VA. CONST. § 169 (1902). That provision was largely incorporated into Art. X, § 1 of the present Constitution.

included in the corporate limits of the city of Roanoke prior to and after the annexation of the area herein concerned." *Id.* at 648-49.

The Office of the Attorney General has also noted the role the rule of universality plays in the Virginia Constitution. In a recent analysis of *City of Roanoke v. Hill*, the Office determined that the Virginia Constitution "required one, uniform tax rate on all the real property within a jurisdiction, but for the limited constitutional exemption provided for lands annexed by a city or town." Op. of the Attorney General, no. 05-028 (August 1, 2005).

Finally, it is important to note that the rule of universality is not meant to only apply to those situations where a certain class of real property is exempt from *all* taxation, as opposed to exemptions from only a particular tax. In *Day v. Roberts*, 101 Va. 248, 43 S.E. 362 (1903), this Court struck down a statute that relieved the real property in the town of Smithfield from having to pay county taxes to the Isle of Wight.[4] That statute mandated that the town would have to, "at its own expense, provide for its poor and attend to its own streets." *Id.* at 248. Despite the fact that the real property in Smithfield was to be subjected to taxation by the town itself, this Court determined that the statute was effectively an unconstitutional exemption

[4] It is important to note that the *Day* Court construed the more permissive language of the Virginia Constitution of 1869 for that case, as the Constitution of 1902 went into effect after the challenge to the exclusionary statute was raised.

from the countywide tax. *Id.* at 253 ("The legislature . . . had, in our opinion, no power to *exempt* from such levy the persons and property assessed with state taxes in Smithfield, and impose the whole burden of the county levies on the persons and property outside of the town[.]") (emphasis added).

Thus, in Virginia, the rule of universality applies to the exemption of *any* class of real property from *any* tax, not just whether a particular class of real property is to be exempted from all taxation.

The taxes challenged here both violate the rule of universality enshrined in the Virginia Constitution and the time-honored legal doctrine of *expressio unius est exclusio alterius*. The Transportation Tax and the District Tax are largely similar in that they both only tax commercial and industrial real property for the purpose of paying for public transportation improvements. By terms both express (in the Transportation Tax) and implied (in the District Tax), both taxes exclude residential real property from the subject tax class. Residential real property as a tax class is not subject to a permissive or mandatory exemption under Article X of the Virginia Constitution. Thus, the General Assembly lacked the authority to exclude residential real property from each subject tax class, and the taxes are unconstitutional.

B. The Supreme Court of Pennsylvania Has Also Adopted the Rule of Universality under a Nearly Identical Uniformity Provision

Since 1967, the Supreme Court of Pennsylvania, in construing that commonwealth's own constitutional uniformity provision, which is largely identical to Virginia's, has embraced the rule of universality and consistently ruled that all real property be treated as a single, indivisible tax class, subject only to the express exceptions provided in the Pennsylvania Constitution. This Court should follow the Supreme Court of Pennsylvania's reasoning and find that the Transportation Tax and the District Tax violate the uniformity provision of the Virginia Constitution by failing to tax all non-exempt real property within the subject jurisdictions.

The Constitution for the Commonwealth of Pennsylvania has a uniformity provision very similar to Virginia's. See PA. CONST. Art. 8, § 1 (1968).[5] Certain permissive exemptions are contained in Article 8, §§ 2, 3, and 4.[6] And Article 8, § 5 mandates that "[a]ll laws exempting property from taxation, other than the property above enumerated, shall be void."

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[5] That provision states: "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

[6] For example, Article 8, § 2(a) states: "The General Assembly may by law exempt from taxation: [listing types of property]". Article 8, § 3 provides: "Taxation laws may grant exemptions or rebates to residents, or estates of residents, of other States which grant similar exemptions or rebates to

The Supreme Court of Pennsylvania has construed these provisions together to hold that "all real estate is a constitutionally designated class entitled to uniform treatment" for the purposes of taxation. *Westinghouse Elec. Corp. v. Bd. of Property Assessment, Appeals and Review of Allegheny County*, 539 Pa. 453, 469, 652 A.2d 1306, 1314 (1995). The sole exceptions to this rule are those specifically enumerated in the Pennsylvania Constitution. *Hess v. Montgomery County Bd. of Assessment Appeals*, 75 Pa. Commw. 69, 73, 461 A.2d 333, 335 (Pa. Commw. Ct. 1983); see also PA. CONST. Art. 8, § 2-4 (listing exceptions).

Pennsylvania originally allowed for real estate to be divided into separate classes, see, e.g., *City of Williamsport v. Brown*, 84 Pa. 438 (1877), but decided to adopt the rule of universality after a history of interpretation of the uniformity clause that was "as unpredictable and winding as Alice's road through Wonderland." *Madway v. Bd. for the Assessment and Revision of Taxes*, 427 Pa. 138, 143, 233 A.2d 273, 276 (1967). In *Madway*, the Supreme Court of Pennsylvania struck down amendments to the Commonwealth's code that "prohibit[ed] interim assessments for unconveyed or unoccupied residential structures." *Id.* at

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residents, or estates of residents, of Pennsylvania." And Article 8, § 4 provides a limited exemption from local taxation to real property held by public utilities.

142. Since “residential real property, occupied or not,” was not subject to an exemption under the Pennsylvania Constitution, *id.*, and since “real estate as a subject for taxation may not validly be divided into different classes,” those amendments treating unconveyed or unoccupied residential real estate differently from other forms of real property were not constitutionally uniform. *Id.* at 143.

Although the Supreme Court of Pennsylvania has recently moderated its approach to the rule of universality with regard to classifying real property for the purpose of assessment, see, e.g., *Clifton v. Allegheny County*, 600 Pa. 662, 969 A.2d 1197 (2009) (holding that the base year assessment system of property taxation was unconstitutional as applied, but not facially), that Court has not backed down from its original mandate that the Pennsylvania legislature is constitutionally precluded from exempting from a tax class any type of real property not given an express exemption under the Pennsylvania Constitution.

The Virginia Constitution’s mandate under Article X, § 6 that the types of real property described in Article X, “and no other,” be allowed any exemption from real property taxes, is directly analogous to the Pennsylvania Constitution’s mandate under Article 8, § 5 that exemptions other than those provided in that document “shall be void.” As

demonstrated in the previous section, the structure and language of Article X of the Virginia Constitution leads to the rule of universality that the Supreme Court of Pennsylvania has already embraced. This Court should take the next natural step and explicitly adopt the rule of universality just as Pennsylvania has done, and hold that the Transportation Tax and the District Tax are unconstitutional under Article X of the Virginia Constitution for failing to include non-exempt real property, like residential real property, in each statute's subject tax class.

C. The County's Concerns Are Unfounded

In its Brief In Opposition to Petition for Appeal in the Tax Case (hereafter, "Opposition"), the County raised some arguments in objection to FFW Enterprises' application of the rule of universality to real property. None of these arguments withstand scrutiny.

First, the County argued that applying the maxim *expressio unius est exclusio alterius* to Article X of the Virginia Constitution must necessarily result in the conclusion that all personal property, in addition to real property, must be subject to the same rule of universality. Opposition at 18-19. Although it is true that personal property is also subject to the uniformity provision in Virginia, see *Alderson v. County of Alleghany*, 266 Va. 333, 340, 585 S.E.2d 795, 798 (2003), there is no reason why the rule

of universality must be applied to it. Despite requiring that all real property be considered one indivisible tax class barring a specific constitutional exception, the Supreme Court of Pennsylvania has consistently applied a traditional rational basis test to classifications of personal property. See, e.g., *Parsowith v. Dep't of Revenue*, 555 Pa. 200, 209-10, 723 A.2d 659, 663-64 (1999) (applying rational basis scrutiny to the legislature's modification of an inheritance tax). This is because that Court typically views taxes on personal property as "use" taxes, as opposed to taxes on ownership. See generally *Jones & Laughlin Tax Assessment Case*, 405 Pa. 421, 431, 175 A.2d 856, 861 (1961). Not only is FFW Enterprises not asking that this Court apply the rule of universality to personal property, but there is simply no requirement that this Court apply the rule that broadly.

Next, the County argued that the rule of universality must not be applicable because "this honorable Court repeatedly has recognized that the General Assembly has the power to put many different kinds of personal property into different tax classes." Opposition at 19. However, none of the cases cited to by the County address the constitutional limitation on exempting a subclass of property from taxation. The cases either provided specific constitutional authority for the classification at issue, see *Virginia Elec. & Power Co. v. Commonwealth*, 169 Va. 688, 194

S.E. 775 (1938) (citing to §§ 176, 177, and 178 of the Constitution for the particular tax classification), and see *City of Richmond v. Commonwealth*, 188 Va. 600, 617, 50 S.E.2d 654, 662 (1948) ("it cannot be doubted that the framers of the Constitution of 1902 intended to and did place the real and tangible personal property of railroads in an entirely separate tax classification"), and see *City of Richmond v. Drewry-Hughes, Co.*, 122 Va. 178, 94 S.E. 989 (1918) (merchant's capital expressly made a separate tax class under § 169 of the Constitution); or only concerned the issue of rate of assessment, see *R. Cross, Inc. v. City of Newport News*, 217 Va. 202, 228 S.E.2d 113 (1976) (different methods used to determine taxable values of different types of property constitutional); or only concerned who may assess the personal property tax, see *East Coast Freight Lines v. City of Richmond*, 194 Va. 517, 74 S.E.2d 283 (1953) (whether § 169 of the Constitution gave the city authority to tax the tangible personal property of a public service corporation), and see *City of Roanoke v. James W. Michael's Bakery Corp.*, 180 Va. 132, 21 S.E.2d 788 (1942) (whether given personal property was subject to state or local taxation). None of these cases support the proposition that this Court has rejected the rule of universality, even as to personal property.

The County then marshaled a parade of horribles, citing to Va. Code §§ 58.1-3504 to -3506 as purported evidence of the kind of taxes that would have to be struck down were the rule of universality applied to personal property. Opposition at 20. What the County neglected to mention is that the Virginia Constitution already expressly allows for the exceptions in §§ 58.1-3504 and 3505. See Art. X, § 6(e). Moreover, the exceptions listed in § 58.1-3506 are set forth to allow the local taxing jurisdiction to apply "different rates" to those items of property, not to exempt those items from taxation as prohibited by the plain language of Article X, § 6. Va. Code § 58.1-3506(B). Thus, these statutes would not be unconstitutional were this Court to apply the rule of universality to limit the power of the General Assembly to exclude a subclass of personal property from a given tax, even were the Court to extend the rule that far.

Finally, the County cited to *Pine v. Commonwealth*, 121 Va. 812, 821-22, 93 S.E. 652, 654 (1917), for the premise that this Court disfavors the application of *expressio unius est exclusio alterius*. Opposition at 22. This argument is curious in that this Court has demonstrated no hesitation to apply that time-honored maxim in just the past few years. See *Va. Dep't of Health v. NRV Real Estate, LLC*, 278 Va. 181, 677 S.E.2d 276 (2009); *Martin Bros. Contrs., Inc. v. Va. Military Inst.*, 277 Va. 586, 672 S.E.2d 183

(2009); and *Belton v. Crudup*, 273 Va. 368, 641 S.E.2d 74 (2007). More importantly, the County could point to no authority for the proposition that the maxim may never apply to the Virginia Constitution, or is incompatible with interpreting the provisions of Article X.

Even taking *Pine*'s warning at face value, the language of Article X of the Virginia Constitution more than satisfies the standard *Pine* sets forth: "things expressed in such positive affirmative terms as plainly imply the negative of what is not mentioned, in view of the known policy of the state[.]" 121 Va. at 821-22. As described in the previous sections, Article X, § 6 mandates that the listed classes of real property "and no other" are allowed an exemption from taxation—language that goes far beyond mere "positive affirmative terms" to "imply the negative of what is not mentioned" by *expressly excluding* those unmentioned classes of real property. This language was a direct response to this Court's ruling in *Massey*, in which the absence of such a phrase was read to allow the General Assembly free reign to exempt property from a particular tax as it saw fit. As a result, the Constitution of 1902 signified a shift in Virginia's tax policy toward the rule of universality. Applied here, application of *expressio unius est exclusio alterius* would merely serve to lend proper weight to the plain meaning of

the provisions of Article X of the Virginia Constitution, consistent with the policy of the Commonwealth.

In sum, not only does *Pine* not preclude the use of *expressio unius est exclusio alterius* to Article X of the Virginia Constitution, but the language of that Article practically compels its application under the standard provided by this Court. This standard would not, contrary to the County's claims, require a significant change in existing law or precedent. Accordingly, this Court should apply that maxim to Article X, find that all real property is subject to the rule of universality for the purpose of classification for taxation, subject only to those exclusions provided in the Virginia Constitution, and as a result hold that the Transportation Tax and the District Tax are unconstitutional for failing to include non-exempt real property in the respective subject tax classes.

III. The Challenged Taxes Are Facially Unconstitutional Under The Uniformity Requirement Of Art. X, § 1 Of The Virginia Constitution Because The General Assembly's Tax Classifications Lacked Any Rational Basis Under The *City Of Hampton* Benefit/Burden Rational Basis Test

Even if this Court declines to adopt the rule of universality with regard to real property, the Transportation Tax and the District Tax are unconstitutional under the uniformity provision of Article X, § 1 of the Virginia Constitution because the taxes lack a rational basis under the

benefit/burden test of *City of Hampton v. Ins. Co. of North America*, 177 Va. 494, 14 S.E.2d 396 (1941). Under that test, there is no uniformity, and thus no rational basis as a matter of law, in the taxation of a subclass of real property owners to provide a public benefit to all real property owners within the taxing jurisdiction. Thus, a tax on commercial and industrial land to pay for public goods like roads and the Metrorail extension to Dulles International Airport, as the challenged taxes do, is unconstitutional.

A. The Benefit/Burden Rational Basis Test as Set Forth In *City of Hampton*

There is no question that the Transportation Tax and the District Tax are, by their terms, taxes on real property, and thus subject to the uniformity clause of Article X, § 1 of the Virginia Constitution. In determining whether a tax classification is unconstitutional for lack of uniformity under Article X, § 1, the Virginia Supreme Court has held that the classification may not be "arbitrary, discriminatory or unreasonable." *East Coast Freight Lines v. City of Richmond*, 194 Va. 517, 527, 74 S.E.2d 283, 289 (1953). This standard has been likened to "rational basis" scrutiny. *Bd. of Supervisors v. McDonald's Corp.*, 261 Va. 583, 591, 544 S.E.2d 334, 339 (2001) (using same standard for zoning ordinances), see also *Commonwealth v. Whiting Oil Co.*, 167 Va. 73, 78, 187 S.E. 498, 500

(1936). "One who assails the classification . . . must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Id.*

However, the taxes challenged in this lawsuit are unique from most other taxes previously considered by this Court because each targets a particular subclassification of real property (here, commercial and industrial real property) for the purpose of providing a specific benefit (here, publicly available transportation improvements) instead of going toward the general revenues of the taxing jurisdiction. Taxes like these that raise revenue for specified benefits are considered by this Court to be exactions founded upon a theory of benefits conferred.[7] *City of Richmond v. Eubank*, 179 Va. 70, 75, 18 S.E.2d 397, 400 (1942). This difference is critical in determining how the challenged taxes are to be analyzed under the uniformity clause.

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[7] Contrary to the County's claim, FFW Enterprises has never argued that the challenged taxes are anything but exactions based on a theory of benefits conferred. It has been maintained from the very beginning that these taxes, by their plain terms, are used exclusively to raise revenue to fund transportation improvements, and not for general revenue purposes. The County's reliance on *Marshall v. Northern Va. Transp. Authority*, 275 Va. 419, 657 S.E.2d 71 (2008) is misplaced, as that decision did not hold that either of the taxes challenged herein are not exactions based on a theory of benefits conferred—merely that the taxes challenged in that case were, indeed, taxes, and thus could not be delegated to the Northern Virginia Transportation Authority for assessment. *Id.* at 431.

The last time this Court examined a challenge to the constitutionality of the subject tax class of an exaction founded upon a theory of benefits conferred was in *City of Hampton*. In that case, this Court considered the constitutionality of sections 3144t, 3144u, 3144v, and 3144w of chapter 387 of the Acts of the General Assembly of Virginia of 1934. Pursuant to those statutes, the City of Hampton passed an ordinance levying a tax on fire insurance companies licensed to do business in Virginia, based on fire insurance policies covering property within the city's limits, for the benefit of a fireman's relief fund. The Court was asked to determine the constitutionality of the classification under the uniformity provision of the Virginia Constitution at the time,[8] given that the taxation of fire insurance premiums to raise money for firefighters was "a classification founded upon benefits bestowed." *Id.* at 499.

After determining that the uniformity provision of the Virginia Constitution applied to the challenged ordinance and statutes, Justice George L. Browning, on behalf of a unanimous Court, asked: "are there others, who are benefited as much or more than those smarting under the tax imposition, who go unwhipped of its burden?" *Id.* at 498. Under this "benefit/burden" test, the Court then reasoned:

[8] VA. CONST. § 168 (1902).

> The answer, manifestly, is that, of the persons who own property within the corporate limits of municipalities, there are those who carry no fire insurance at all. They are benefited as much or more than insurance companies by the activities of fire departments. Likewise, there are those who are insured for less than the full value of their property, and they benefit directly from the same cause. If the state, county and municipality own property within the corporate limits, they receive direct benefits. Indeed, the public generally is benefited by the protection afforded from conflagrations which damage and destroy property and subject the public itself to injury and death.

Id.

Although it was argued that it was proper for the insurance companies to bear the burden of the tax alone, since "the fire company, by its work, saves the insurance company from loss, and therefore the insurance company should compensate them," this Court rejected that proposed basis as being insufficient to uphold the taxes. *Id.* at 500 (quoting "with approval" *Aetna Fire Ins. Co. v. Jones*, 78 S.C. 445, 59 S.E. 148, 152 (1907)). This Court determined that "uniformity [under the Virginia Constitution] is nonexistent" when the classification of fire insurance premiums as a subject of taxation shifted the burden of the tax away from those with no fire insurance, who would surely benefit from fire departments. *Id.* at 499. As a result, this Court struck down the premiums tax as facially unconstitutional under the Virginia Constitution.

The lesson of *City of Hampton* is clear: when considering the constitutionality of a tax on a particular class of property to raise revenue for a specific purpose, that tax lacks a rational basis and is not uniform under Article X, § 1 of the Virginia Constitution if those not part of the taxed class benefit from the purpose of the tax as much or more than those who are taxed.

In its Memorandum Opinion, the trial court concluded that *City of Hampton* does not apply to the circumstances of this case, and that *City of Hampton* lacked the force of precedent on the basis that the unanimous opinion had not been cited in almost 70 years. (A. at 57.) As shown in the following sections, not only is the benefit/burden rational basis test of *City of Hampton* the controlling authority of this case, but the rationale used in that opinion is consistent with this Court's uniformity jurisprudence, and is still vital today.

1. The Benefit/Burden Rational Basis Test Applies In This Case

Despite the trial court's opinion that "the facts [of *City of Hampton*] are sufficiently different from the facts of this case that the court does not find it to be binding precedent" (A. at 57), the trial court provided no reasoning for why that is so. That is probably because the challenged taxes in this case

are almost identical to the unconstitutional tax considered in *City of Hampton*, as these taxes all target a specific classification of property for the purpose of raising revenue for a specific public benefit.

The *City of Hampton* tax targeted a subclass of business property within a jurisdiction for the purpose of raising revenue for a particular public benefit—a tax based on a theory of benefits conferred—that served all within the taxing jurisdiction. Similarly, the Transportation Tax and the District Tax are both taxes based on a theory of benefits conferred, wherein commercial/industrial real property within the designated jurisdiction is taxed for the purpose of raising revenue for a particular public benefit—transportation improvements—that serves all real property owners within the jurisdiction. And although the premiums tax in *City of Hampton* did not apply to real property, this Court still construed the limit on the General Assembly's classification power under the Virginia Constitution's uniformity provision, as it must here, to determine the constitutionality of that tax. Thus, the benefit/burden test of *City of Hampton* is the controlling authority for this case and applies squarely to the facts herein.

2. The Benefit/Burden Rational Basis Test Is Still Good Law

City of Hampton was a unanimous decision that has not been overturned or limited by this Court since it was handed down. In its

Memorandum Opinion, the trial court openly challenged the authoritative weight of *City of Hampton* on the bases raised by the County, citing to the case's lack of citation in other opinions. (A. at 57.) FFW Enterprises maintains that a decision of this Court is binding on the courts of the Commonwealth *only until* this Court decides to overturn it—a policy also followed by the U.S. Supreme Court. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (lower courts must leave to the highest court "the prerogative of overruling its own decisions").

The trial court also doubted the validity of *City of Hampton* because the benefit/burden test had not been used in a subsequent case, *id.*, but failed to consider the special and rare nature of the taxes that would form the basis of a similar challenge. That there have been few challenges to taxes similar to the pensions tax struck down in *City of Hampton* does not mean that the legal principles used to weigh those taxes are no longer applicable. Moreover, as demonstrated in the next section, the decision in *City of Hampton* was not an "outlier," being the natural product of previous decisions of this Court, and is well-grounded in the purpose and intent of the uniformity provision of the Virginia Constitution.

3. The Benefit/Burden Rational Basis Test Is Consistent With This Court's Uniformity Jurisprudence

City of Hampton's benefit/burden test naturally developed from previous tax opinions this Court had considered. Road taxes, which for obvious reasons bear a strong relation to the transportation taxes challenged here, have traditionally been assessed against real property abutting the roads to be improved by the revenues from the tax, as those properties would obviously stand to benefit from the road being maintained. In one such case, *Norfolk City v. Ellis*, 26 Gratt. (67 Va.) 224 (1875), this Court stated that a tax "not founded upon any idea of revenue, but upon the theory of benefits conferred," must function "according to the maxim, that he who receives the *benefit* ought to bear the *burden*; and it [should] aim[] to exact from the party assessed no more than his just share of that burden according to an equitable rule of apportionment." *Id.* at 227 (upholding road tax that was assessed against all real property abutting the roads to be improved according to the "front feet" of each property) (emphasis added).

There, as here and in *City of Hampton*, the correlation between the transportation benefit and the property taxed had to match up in order for the tax to be uniform under the Virginia Constitution. It is clear, however, that the challenged taxes here, by only taxing commercial/industrial real

property, have deviated from the traditional transportation tax upheld in *Norfolk City*, and do not share the benefit/burden aspects of that tax.

Another example is *Day v. Roberts*, discussed previously, in which the General Assembly enacted a statute that exempted the town of Smithfield within the county of the Isle of Wight from having to pay the taxes levied by the county. In striking down that tax as unconstitutional, this Court identified the aspects of uniformity that all taxes must ascribe to:

> [U]niform taxation requires uniformity, not only in the rate of taxation, and in the mode of assessment upon the taxable valuation, but that uniformity must be coextensive with the territory to which it applies. If a state tax is imposed, it must be uniform over the whole state; if by a county, city, town, or other subordinate district, the tax must be uniform throughout the territory to which it is applicable. 43 S.E. at 363.

This uniformity throughout the taxing jurisdiction was further described as follows: "A state burden is not to be imposed upon any territory smaller than the whole state, nor a county burden upon any territory smaller or greater than the county." *Id.* The Court then asked:

> If [the Commonwealth] has no power to tax a part of the state for the *benefit* of the whole, how, with the same limitations upon its powers as to county taxation, could it compel a part of the county of Isle of Wight to bear all the *burden* of taxation for county purposes, and exempt the town of Smithfield from bearing any part of it? *Id.* (emphasis added).

As a result, this Court held that the General Assembly lacked the power to classify the real estate within the town of Smithfield separately

from the rest of the Isle of Wight, and could not exempt that town from the county's real property taxes. As in *Norfolk City*, this Court held that the burden of a tax must be distributed to all who would benefit from the proceeds of the tax.

As these cases demonstrate, far from being "the ultimate outlier" as claimed by the County, *City of Hampton* merely refined a test it had been applying in challenges under the uniformity provision of the Virginia Constitution in earlier decisions and made it clearer.

The benefit/burden test is also consistent with the overall purpose of Article X, § 1. The Virginia Supreme Court has always emphasized "uniformity and equality" as being the "just and ultimate end to be attained" by that section. *Skyline Swannanoa v. Nelson County*, 186 Va. 878, 881, 44 S.E.2d 437, 439 (1947) (construing the predecessor provisions to Art. X, § 1—§§ 168 and 169). The "dominant purpose" of the uniformity provision is to "distribute the burden of taxation, so far as is practical, evenly and equitably." *Id.* By mandating that those property owners that would benefit as much or more from the benefits conferred by a tax be included in the taxpaying class, the benefit/burden test promotes the even and equitable distribution of the weight of the tax.

B. The Challenged Taxes Lack Constitutional Uniformity under the Benefit/Burden Rational Basis Test

Given that the objections to the vitality and applicability of the benefit/burden rational basis test are groundless, it is now appropriate to apply that test to the challenged taxes herein.

Under the benefit/burden test of *City of Hampton*, the trial court was required to hold that the challenged taxes were unconstitutional under Art. X, § 1 of the Virginia Constitution if there were "others, who are benefited as much or more than those smarting under the tax imposition, who go unwhipped of its burden[.]" *City of Hampton*, 177 Va. at 498. In applying the benefit/burden test, the Court did not ask whether an untaxed entity would benefit more in raw dollars than a taxed entity, or whether the benefit was worth more to the untaxed entity than those taxed, or even what the aggregate benefits were compared to the different classes. It was enough, as the County admitted, to find a uniformity violation when those subject to the tax "received no preferential treatment or heightened degree of service" from the benefit conferred, since "other properties, including uninsured or underinsured property, would get at least as good a response from the fire department." Opposition at 13, and see *City of Hampton*, 177 Va. at 498.

For the same reason that this Court logically determined in *City of Hampton* that fire departments were of a like benefit to all property owners

within the city's jurisdiction, as "the duty of a fire department is the same towards all combustible property within the municipality," *id.,* this Court should also find that transportation infrastructure, such as roads, metrorail, and bridges, also equally benefit all landowners within the relevant jurisdiction. Transportation infrastructure, like fire departments, does not confine its benefits to particular property owners in the taxing jurisdiction. A public road does not condition access based on whether the traveler is on a personal errand or a commercial delivery. The Metrorail will similarly be publicly accessible to all. Thus, it is self-evident that transportation improvements, like fire departments, will be an equal benefit to all property owners within a given jurisdiction.

This point is underscored by the fact that the language of the statutes themselves mandate that the transportation benefits apply to the entire taxing jurisdiction. The Transportation Tax specifically states that "all revenues generated from the additional real property tax imposed shall be used to benefit the locality imposing the tax[,]" and not merely those portions of the locality that happen to be subject to the tax burden. Va. Code § 58.1-3221.3(B)(1), and see § 58.1-3221.3(D)(1) (requiring that the revenue "shall be used for transportation purposes that benefit the special regional transportation tax district"). The District Tax revenues are to be

used for “transportation improvements in the district for the use and benefit of the public.” Va. Code § 33.1-433(1). By their terms, these statutes contemplate improvements of a benefit to all within the respective jurisdictions, and not of a particular benefit to those property owners that have been taxed.

In order to reach its erroneous conclusion that publicly available transportation improvements could benefit commercial/industrial property owners more than residential property owners, the trial court inappropriately relied on the “petition of affected property owners . . . [which] alleged that ‘landowners of industrially and commercially zoned property and of taxable leasehold interests . . . would *benefit specially* from the extension of rail service to Dulles Airport.’” (A. at 57) (emphasis in Opinion). The first problem with this factual determination is that it had not been stipulated *as a fact* that commercial/industrial landowners would “benefit specially” from the District Tax—it was only stipulated that the petition requesting the creation of the special transportation district “asserted” as such, not that the petition’s assertion was true. (A. at 21.) The statements made in the petition, if taken for the truth of the matter asserted, are classic hearsay. So while the parties had admitted that the petition stated certain things, the parties had not admitted to any of the

opinions presented in the petition, and it was error for the trial court to rely on those opinions.

The second problem is that even if the trial court was entitled to treat that portion of the petition's language as evidence toward the benefit/burden test, the same petition also stated that "the citizens of Fairfax County . . . and all travelers to and from the Nation's Capital would derive *extraordinary benefits* from the [expansion]." (A. at 26) (emphasis added). The petition also asserts that the extension would "significantly relieve traffic congestion, resulting in better air quality and related environmental benefits as well as an improved quality of life *for the citizens of Fairfax County*." (A. at 27) (emphasis added). By the petition's own admission, these are not benefits solely retained by commercial and industrial landowners in the Phase I District, but are benefits to *every resident* in the County. So to reach the conclusion that the only evidence provided by the parties on the benefit/burden test was the petition's assertion that commercial/industrial landowners would "benefit specially" from the transportation improvements funded by the District Tax meant the trial court had to arbitrarily ignore the other assertions made by the petition cited above that clearly supported FFW Enterprises' position.

The trial court also did not address or explain how the challenged tax statutes were not “arbitrary” given the fact that § 58.1-3221.3 taxes commercial and industrial real property, while § 33.1-435 taxes the same as well as “taxable leasehold estates,” i.e. rental apartments. There is no logical reason why taxable leasehold estates are not fit to pay for general transportation improvements, but are fit to pay for the Metrorail extension. This demonstrated the arbitrary nature of the General Assembly’s classification, yet the trial court apparently did not consider this to be relevant evidence.

Finally, the trial court erred in relying upon the supposed rational bases proffered by the County, since, as explained above, that was not the proper analysis to conduct for taxes based upon a theory of benefits conferred.

For these reasons, this Court should find that the publicly available transportation improvements funded by the Transportation Tax and the District Tax benefit residential landowners as much or more than the commercial and industrial landowners subject to the challenged taxes, and accordingly find that these taxes are unconstitutional under Art. X, § 1 of the Virginia Constitution for failing the benefit/burden test of *City of Hampton*.

IV. If Upheld, The Policy Ramifications From The Challenged Taxes Will Effectively Upend The Concept Of Uniformity In Virginia

The implications to Virginia tax policy, should the challenged taxes be upheld, are enormous, and uniformly, for lack of a better term, negative. If commercial and industrial landowners can be singled out to bear the entire burden of publicly available transportation improvements and maintenance, then there is no reason why those same landowners could not also be forced to bear the entire burden of other public goods, such as parks, sewers, government buildings, or monuments. If such public goods are not self-evidently a benefit to all, and thus need not be paid for by all within the taxing jurisdiction, then unpopular or less politically savvy property owners will inevitably be forced to bear the entire burden of paying for them.

Even worse, if it is acceptable for a subclass of real property to shoulder the entire burden of a public good, the door is then open for the General Assembly to narrow its classifications even further—perhaps to target a subset of commercial properties, like those designated as part of a regional retail commercial district; or even more narrowly, like supermarkets. The uniformity provision of Article X, § 1 would have no operative effect whatsoever to limit the classification power of the General Assembly, such as was the case in *Massey*. This is surely not the

inequitable result that the uniformity provision of Virginia Constitution was intended to create, especially given the explicit changes made to the Constitution of 1902 in reaction to the *Massey* decision, and then carried forward to today's Article X.

Given the types of abuses of the taxing power that would be possible should the General Assembly's classification power be taken to the logical end point the County desires, the challenged taxes must be deemed facially unconstitutional.

V. Tax Revenues Raised Under The Challenged Taxes Should Be Refunded To The Taxpayers

Under Va. Code § 58.1-3981 (1999), when it is determined that a tax has been "erroneously assessed" against a taxpayer, the error "shall" be corrected, and the governing body of the taxing jurisdiction "shall . . . direct the treasurer of the county . . . to refund the excess to the taxpayer, with interest if authorized pursuant to § 58.1-3918[.]" In the event the challenged taxes herein are deemed unconstitutional, this Court should order the County to so act to refund all monies collected under those taxes, with interest. With regard to the District Tax, the monies gathered under that statute currently reside in the District General Fund awaiting such time as the obligations under the Bonds are to be paid. (A. at 326, Section 402.)

A refund of those monies would not affect the general revenues of the County, and could be replenished by the institution of a constitutional tax.

CONCLUSION

For the reasons stated herein, FFW Enterprises respectfully requests that this Court rule that (1) Article X of the Virginia Constitution requires a rule of universality in that all real property must be treated as one indivisible class for the purposes of taxation, subject only to the express exceptions in Art. X, §§ 1, 2, and 6, thus rendering Va. Code §§ 58.1-3221.3 and 33.1-435 facially unconstitutional; or, alternatively, (2) that Va. Code §§ 58.1-3221.3 and 33.1-435 are facially unconstitutional for lack of uniformity under the benefit/burden rational basis test of *City of Hampton*; and under either finding (3) order that the County take all necessary action to refund all monies paid toward any tax deemed unconstitutional, plus interest as provided by statute, pursuant to Va. Code § 58.1-3981, along with any other relief this Court deems necessary.

Respectfully submitted,

FFW ENTERPRISES
By Counsel

JACKSON & CAMPBELL, P.C.

James N. Markels (VSB No. 68399)
1120 Twentieth Street, N.W.
South Tower, Third Floor
Washington, D.C. 20036
Phone: (202) 457-1600
Facsimile: (202) 457-1678
E-mail: jmarkels@jackscamp.com
Counsel for Appellant FFW Enterprises

William T. Welch (VSB No. 34322)
John A. Fraser (VSB No. 19724)
Merritt J. Green (VSB No. 50995)
General Counsel, P.C.
6862 Elm Street, Suite 800
McLean, VA 22101
Phone: (703) 556-0411
Facsimile: (703) 556-6540
Co-Counsel for Appellant FFW Enterprises

RULE 5:26(d) CERTIFICATE

I HEREBY CERTIFY that on the 1st day of June, 2010, fifteen copies of the foregoing Opening Brief of Appellant were hand-delivered to:

Patricia Harrington
Clerk of the Court
Supreme Court of Virginia
100 N. Ninth Street
Richmond, Virginia 23219

And that an electronic copy of the brief and appendix was filed via CD.

And that three copies of the foregoing Opening Brief of Appellant were sent via third party commercial carrier to:

James V. McGettrick, Esquire (VSB No. 14436)
Assistant County Attorney
12000 Government Center Parkway
Suite 549
Fairfax, VA 22035-0064
Telephone: (703) 324-2421
Facsimile: (703) 324-2665
Email: james.mcgettrick@fairfaxcounty.gov
Counsel for Appellees Fairfax County, the Fairfax County Board of Supervisors, and the Phase I Dulles Rail Transportation Improvement District

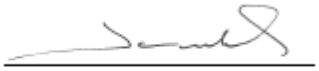
and

Christopher W. Walker, Esquire (VSB No. 35491)
10740 Parkridge Boulevard, Suite 110
Reston, Virginia 20191
Telephone: (703) 758-3807
Facsimile: (703) 391-0909
E-mail: cwalker@cwalker.com
Counsel for Appellant Parkridge 6, LLC

and

Thomas O. Lawson, Esquire (VSB No. 4975)
LAWSON & SILEK, PLC
10805 Main Street, Suite 200
Fairfax, Virginia 22030
Telephone: (703) 352-2615
Facsimile: (703) 352-4190
Email: ThomasO.Lawson@verizon.net

Peter L. Canzano, Esquire (VSB No. 76571)
Email: pcanzano@sidley.com
A. Francis Robinson, Esquire (*pro hac vice*)
Email: frobinson@sidley.com
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8350
Facsimile: (202) 736-8711
Counsel for Appellee Fairfax County Economic Development Authority



James N. Markels (VSB No. 68399)
JACKSON & CAMPBELL, P.C.
1120 Twentieth Street, N.W.
South Tower, Third Floor
Washington, D.C. 20036
Phone: (202) 457-1600
Facsimile: (202) 457-1678
jmarkels@jackscamp.com
Counsel for Appellant FFW Enterprises