IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

FFW ENTERPRISES,

Appellant,

v.

FAIRFAX COUNTY ECONOMIC DEVELOPMENT AUTHORITY, FAIRFAX COUNTY, THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY, and THE PHASE I DULLES RAIL TRANSPORTATION IMPROVEMENT DISTRICT,

Appellees.

Record Nos. 091883 & 091930

BRIEF OF APPELLEES

Thomas O. Lawson, Esq. (VSB No. 4975)
Lawson and Silek, PLC
10805 Main Street
Suite 200
Fairfax, Virginia 22030
(703) 352-2615
(703) 352-4190 (facsimile)
ThomasO.Lawson@Verizon.net

Peter L. Canzano, Esq. (VSB No. 76571)
A. Francis Robinson, Esq. (*Pro Hac Vice*)
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8350
(202) 736-8711 (facsimile)
pcanzano@sidley.com
frobinson@sidley.com

Counsel for Fairfax County Economic Development Authority

David P. Bobzien (VSB No. 12027)
County Attorney

Michael H. Long (VSB No. 23112)
Deputy County Attorney

James V. McGettrick (VSB No. 14436)

12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035-0064
(703) 324-2421
(703) 324-2665 (facsimile)
james.mcgettrick@fairfaxcounty.gov

Counsel for Fairfax County, Board of Supervisors of Fairfax County, and Phase I Dulles Rail Transportation Improvement District

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

The Fairfax County Economic Development Authority ("EDA"), Fairfax County ("County"), and the Phase I Dulles Rail Transportation Improvement District ("District"), appellees in Record No. 091930, and the County and its Board of Supervisors ("Board"), appellees in Record No. 091883, by counsel (collectively the "Local Entities"), file this brief in support of the decisions of the Circuit Court of Fairfax County challenged in these consolidated appeals by FFW Enterprises ("FFW"). The appeals should be denied because in Record No. 091883 the circuit court correctly held that FFW failed to meet its burden to provide evidence to overcome multiple presumptions in favor of the correctness of tax assessments and the constitutionality of legislative tax classifications and thus in Record No. 091930 the circuit court correctly ruled that the statute setting out a tax classification at issue complied with relevant constitutional requirements.

STATEMENT OF THE CASE

A. Record No. 091883 (the "Uniformity Case")

FFW sued for refunds of taxes paid pursuant to Va. Code Ann. § 33.1-435 (2005) and Va. Code Ann. § 58.1-3221.3 (2009) solely on the ground that each of the two statutes on its face allegedly violates the requirement for tax uniformity in Article X, § 1 of the Constitution of Virginia

(the "Uniformity Requirement"), which in pertinent part provides that "[a]ll taxes . . . shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax" and further that "[t]he General Assembly may define and classify taxable subjects."

The parties agreed that the matter should proceed on cross motions for summary judgment and asked for an order requiring submission of a Joint Stipulation of Admitted Facts ("Joint Stipulation" or "J. Stip.") to include "all material facts that the parties agree are necessary for this matter to be resolved on summary judgment." (Joint Appendix ("J. App.") at 16.)[1] The Joint Stipulation was submitted on February 20, 2009. (J. App. at 19-50.) Thereafter each side moved for summary judgment and filed two legal memoranda each in support of their motion and in opposition to the other side's motion. The circuit court heard oral argument on the motions on April 3, 2009, and issued an opinion letter on June 5, 2009 (J. App. at 51-59), finding that FFW's motion should be denied and the motion of the

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[1] By orders entered on April 21, 2010, these appeals were "paired" with *Parkridge Six, LLC v. Fairfax County Economic Development Authority, et al.,* Record No. 092006, "for the purpose of oral argument" and a single appendix was ordered to be filed for all three cases. However, since the evidentiary record for Record Nos. 091883 and 091930 is completely different than the evidentiary record for Record No. 092006, the parties agreed to structure the Joint Appendix so that all of the evidence in Record Nos. 091883 and 091930 is in Volume One of the Joint Appendix, while all of the evidence in Record No. 092006 is in Volumes Two and Three.

County and Board granted. The Final Order (J. App. at 60-61) was entered on June 17, 2009.

B. Record No. 091930 (the "Bond Validation Case")

On July 21, 2009, EDA (later joined by the County and District as parties-plaintiff) brought an action pursuant to Va. Code Ann. §§ 15.2-2650 to -2658 (2008) seeking validation of EDA bonds (the "Bonds") to finance up to $400 million of the cost of constructing an extension of the Metrorail public transit system known as Phase I of the Dulles Rail Project, to be repaid by a tax on property in the District pursuant to § 33.1-435, subject to annual appropriation. Per § 15.2-2651, such a proceeding may validate, *inter alia,* "the tax or other means provided for the payment of the bonds," so EDA sought a ruling that a tax per § 33.1-435 is constitutional. On August 28, 2009, the circuit court entered a Final Order granting all the relief requested by the EDA in the Bond Validation Case, including the requested ruling on the constitutionality of § 33.1-435 (J. App. at 921-33).

C. Consolidated Appeals in Record Nos. 091883 and 091930

By order entered November 17, 2009, upon the joint motion of the parties, this Court consolidated these appeals (the "FFW Appeals"). As FFW represented to this Court, it intervened in the Bond Validation Case solely to ensure that it would not be found to have waived its right to appeal

the decision in the Uniformity Case. FFW proffered no evidence in the Bond Validation Case and made no argument regarding any substantive issue. Thus, the entire evidentiary basis for the FFW Appeals is the Joint Stipulation in the Uniformity Case (J. App. at 19-50).

STATEMENT OF THE FACTS

Each of the two statutes at issue defines and classifies as the subject for the assessment and levy of a particular tax certain real property meeting specified statutory criteria, essentially property that is commercial or industrial in nature.[2] FFW did not claim that the County failed to follow any statutory requirement in assessing, levying, or collecting any tax, or in any other way had failed to apply any statute correctly as provided by its terms. J. Stip. ¶¶ 6, 22, 26 (J. App. at 20, 23).

Va. Code Ann. § 58.1-3221.3(A) (2009) permits certain localities, including the County, to raise revenue to be used exclusively for

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[2] The classifications in the two statutes are not identical. A rental apartment building, which from a tenant's perspective is a residential use but from a landlord's perspective is a commercial use, generally is classified for taxation per § 33.1-435 but not § 58.1-3221.3. Similarly, property zoned to permit commercial or industrial use but actually used as a residence, which therefore could be considered either residential or commercial or industrial in nature, is included in the tax class of § 33.1-435 but not that of § 58.1-3221.3. Also, § 33.1-435 includes "taxable leasehold interests" in the tax class. A leasehold interest may be taxable to a lessee if the underlying fee is exempt from taxation to the owner. Va. Code Ann. §§ 58.1-3200 and -3203 (2009).

transportation improvements by imposing a special tax on real property defined as being used for or zoned to permit commercial or industrial uses. On September 10, 2007, the Board duly exercised the authority granted by § 58.1-3221.3(B) and implemented that tax on real property in the County within the statutory classification set forth in § 58.1-3221.3(A) and not on any other property. J. Stip. ¶¶ 1, 5 (J. App. at 19-20).

Va. Code Ann. §§ 33.1-430 to -446 (2005) (the "District Act"), and in particular § 33.1-431, authorizes boards of supervisors of certain counties, including the Board, to create transportation improvement districts to provide specified transportation improvements if requested by petition of the owners of at least 51 percent of the real property within the proposed district that would be included in the tax class for the levy of a district special improvements tax pursuant to § 33.1-435. Such a petition was submitted to the Board on December 19, 2003 (the "Petition"), asking it to create the District to fund up to $400 million of the cost of constructing an extension of the Metrorail public transit system within the District from Falls Church through the Tysons Corner area to Reston, part of an overall plan to extend Metrorail service to and beyond Dulles Airport in Loudoun County (the "Dulles Rail Project"). J. Stip. ¶¶ 8-11 and Ex. 2 (J. App. at 20-21, 26-40). The commercial and industrial landowners who submitted the

Petition and whose property would be subject to taxation in accordance with § 33.1-435 expressly represented therein that they "would benefit *specially* from the extension of rail service to Dulles Airport" and cited in particular "increased densities and intensities of use anticipated as a result of the transportation benefits." J. Stip. Ex. 2 at 3-4 (J. App. at 28-29 (emphasis added)); *see also* J. Stip. ¶ 13 (J. App. at 21).

On February 23, 2004, the Board created the District exactly as requested by commercial and industrial property owners in the Petition. J. Stip. ¶ 14 and Exs. 3, 4 (J. App. at 21, 41-50). Each year since, a tax has been levied on property within the District classified for such taxation by § 33.1-435 (the "District Tax"). J. Stip. ¶¶ 15-21 (J. App. at 21-22).

QUESTION PRESENTED

Did the circuit court correctly rule that FFW failed to meet its burden of proving that no reasonable basis for either of the tax classifications in Va. Code Ann. § 33.1-435 or § 58.1-3221.3 can be conceived, given the absence of facts in the record to support FFW's claims, the presumption of correctness of tax assessments generally, the presumption of constitutionality of legislative acts generally, and in particular, the strong presumption of constitutionality afforded to tax classifications made by the General Assembly?

ARGUMENT

FFW's Argument in its Opening Brief is set forth in five parts. Part I purports to state the applicable standard of review but does so incompletely and misleadingly. It also purports to describe some of the legal principles that apply in evaluating the constitutionality of a legislative act but omits discussion of other applicable legal principles. Part III addresses the *only* issue FFW raised in its memoranda to the circuit court, i.e., whether a reasonable basis can be conceived for the legislative tax classifications at issue. As the circuit court correctly concluded with respect to both statutes, FFW's evidence does not satisfy that legal standard.

In Part II, FFW argues for the first time ever that a so-called "rule of universality" (a concept FFW never mentioned to the circuit court or in its Petition for Appeal) should be inferred to find the challenged tax classifications unconstitutional. A more accurate term for FFW's new claim is an implied limitation theory, wherein FFW purports to find an implied limitation on the power of the General Assembly to define and classify taxable subjects based on a hodgepodge of three distinct arguments FFW makes to this Court, one of which was never made to the circuit court.

Part IV of FFW's Argument presents a dubious policy argument, while Part V is inconsistent with Virginia law regarding tax refunds.

Accordingly, in Part I of our Argument, the Local Entities set forth the correct standard of review. Parts II and III(A) of our Argument demonstrate that the applicable legal principles support the ruling of the circuit court. Parts III(B) and III(C) of our Argument address Part III of FFW's Argument and show that the circuit court correctly ruled that FFW's evidence failed to prove that either challenged tax classification is unconstitutional.

Part IV(A) of our Argument shows that Rule 5:25 of this Court (as well as Va. Code Ann. § 8.01-384(A) (2007)) bars consideration on appeal of FFW's new "rule of universality" theory as well as its argument in support of that theory based on Article X, § 6 of the Constitution, because neither was presented to the circuit court. Part IV(B) of our Argument shows that even if everything in Part II of FFW's Argument nonetheless is considered, it fails to prove that either challenged tax classification is unconstitutional.

Part V of our Argument responds to Parts IV and V of FFW's Argument. It describes how FFW's speculation regarding the consequences of affirming the circuit court is unrealistic and how FFW ignores the likely catastrophic consequences of reversing the circuit court.

Since FFW did not challenge the constitutionality of §§ 33.1-435 and 58.1-3221.3 in the case appealed in Record No. 091930, references below

to the circuit court and to the evidence are to the court and evidence in the case appealed in Record No. 091883 (the Uniformity Case).

I. The Applicable Standard Of Review Demonstrates That The Circuit Court's Judgment Should Not Be Disturbed.

FFW asserts that this Court reviews rulings regarding the constitutionality of a statute *de novo.* But that is only true with respect to pure questions of law. *E.g., Shivaee v. Commonwealth,* 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005). The facts must be considered in the light most favorable to the parties who prevailed below, and the judgments of the circuit court are presumptively correct. *E.g., Ravindranathan v. Va. Commonwealth Univ.,* 258 Va. 269, 519 S.E.2d 618 (1999) (affirming circuit court's judgment upon finding that it was not plainly wrong); *Bottoms v. Bottoms,* 249 Va. 410, 419, 457 S.E.2d 102, 105 (1995) (absent clear record evidence to the contrary, presumed that trial court correctly applied the law to the facts, which must be viewed in light most favorable to prevailing party). Accordingly, it is FFW's burden to provide this Court with a sufficient record from which it can determine that the circuit court erred. Since FFW fails to do so because it never presented some arguments made in these consolidated appeals to the circuit court and it did not provide evidence to support the arguments that it did make to the circuit

court, the judgment of the circuit court should not be disturbed. *E.g., White v. Morano,* 249 Va. 27, 30, 452 S.E.2d 856, 858 (1995).

II. Applicable Legal Principles Support The Circuit Court's Ruling That FFW Failed To Prove That Either Challenged Statutory Tax Classification Is Unconstitutional.

A. Sections 33.1-435 And 58.1-3221.3 Of The Code Of Virginia Are Presumed To Be Constitutional.

There is a strong presumption in favor of the constitutionality of statutes, including statutes concerning taxation. Any reasonable doubt must be resolved in favor of constitutionality. *E.g., Town of Ashland v. Bd. of Supervisors,* 202 Va. 409, 416, 117 S.E.2d 679, 684 (1961); *Hunton v. Commonwealth,* 166 Va. 229, 236, 183 S.E. 873, 876 (1936). "Only where it is plainly in violation of the Constitution may the court so decide." *Almond v. Gilmer,* 188 Va. 822, 834, 51 S.E.2d 272, 276 (1949). "There is no stronger presumption known to the law than that which is made by the courts with respect to the constitutionality of an act of Legislature." *Whitlock v. Hawkins,* 105 Va. 242, ___, 53 S.E. 401, 403 (1906); *accord Harrison v. Day,* 200 Va. 764, 770, 107 S.E.2d 594, 598 (1959).

B. Tax Assessments Are Presumed To Be Correct; FFW Has The Burden Of Proving Them Erroneous.

FFW brought this case pursuant to Va. Code Ann. § 58.1-3984 (2009), which provides that in a suit challenging a tax assessment on the

ground that it violates the Uniformity Requirement, "the burden of proof shall be upon the taxpayer to show . . . that the assessment is not uniform in its application." There is a clear presumption in favor of the validity of a challenged tax assessment. *E.g., City of Richmond v. Gordon,* 224 Va. 103, 110, 294 S.E.2d 846, 850 (1982).

C. Imposing A Tax Only On Property Classified As Subjects Of The Tax By § 33.1-435 Or § 58.1-3221.3 Does Not Violate The Uniformity Requirement Because Uniformity Is Required Only Within A Tax Class.

On its face, the Uniformity Requirement mandates uniformity only within a particular class of taxable subjects, and the General Assembly is given the power to define and classify subjects of taxation. *See, e.g., R. Cross, Inc. v. City of Newport News,* 217 Va. 202, 206, 228 S.E.2d 113, 116 (1976); *E. Coast Freight Lines v. City of Richmond,* 194 Va. 517, 526-27, 74 S.E.2d 283, 289 (1953); *City of Richmond v. Commonwealth,* 188 Va. 600, 605-07, 50 S.E.2d 654, 656-57 (1948). "'Such classifications may be made 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. at 605, 50 S.E.2d at 656 (quoting 51 Am. Jur., Taxation, § 173, pp. 230-31) (emphasis omitted).

When the General Assembly enacted §§ 33.1-435 and 58.1-3221.3, it classified certain kinds of real property as the subjects of the particular tax authorized by each statute. The Uniformity Requirement does not provide that those taxes must be imposed on property that the General Assembly chose not to include within the class of property identified as subjects of taxation by each of the two statutes, nor is there any constitutional requirement that the subjects of different taxes be identical.

III. The Facts In Evidence Fail To Prove That There Can Be No Reasonable Bases For The Challenged Tax Classifications.

A. The General Assembly Has Broad Power To Classify The Subjects Of Taxation; A Tax Classification Must Be Sustained If It Rests On Any Reasonable Basis.

The General Assembly has extraordinarily broad power to define and classify the subjects of taxation. It is subject only to a requirement that such classifications be reasonable. This is true both for purposes of satisfying the Uniformity Requirement and generally also for compliance with the federal Equal Protection Clause (although FFW pled no equal protection claim in this case).[3] As one authoritative commentator has observed, the reasonable (or rational) basis test is a generous test,

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[3] U.S. Const. amend. XIV, § 1. Equal protection cases usually use the term "rational" rather than "reasonable," but the analysis is the same. The rational basis test applies unless "heightened scrutiny" is required because of an inherently suspect classification. *See, e.g., Van Der Linde Housing, Inc. v. Rivanna Solid Waste Auth.,* 507 F.3d 290, 293 (4th Cir. 2007).

and it is rare that a court will find that a legislative body acted unreasonably in adopting tax classifications. 2 A. E. Dick Howard, *Commentaries on the Constitution of Virginia* 1043-45 (1974). "[N]either the Virginia nor the Federal Constitution is a marked inhibition on the power of the Legislature to classify subjects for taxation." *Id.* at 1044-45.

A legislative classification must be sustained if it rests on *any* reasonable basis. "One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. . . . 'Classification, unless essentially arbitrary, rests in the judgment of the legislature.'" *Commonwealth v. Whiting Oil Co.,* 167 Va. 73, 78, 187 S.E. 498, 500 (1936) (quoting another source). The United States Supreme Court describes the rational basis test as "a paradigm of judicial restraint," *F.C.C. v. Beach Commc'ns, Inc.,* 508 U.S. 307, 314 (1993), and has held that a tax classification should be upheld "if any state of facts reasonably can be conceived that would sustain it," *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 528 (1959).[4]

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[4] "'It is not the function of this court in cases like the present to consider the propriety or justness of the tax, to seek for the motives, or to criticize the public policy which prompted the adoption of the legislation.'" *Richmond Linen Supply Co. v. City of Lynchburg,* 160 Va. 644, 648, 169 S.E. 554, 555 (1933) (quoting *State Bd. v. Jackson,* 283 U.S. 527 (1931)).

Thus, FFW bears the heavy burden of negating every basis that might reasonably support the General Assembly's presumptively constitutional decisions to classify specified kinds of real property as objects of taxation in §§ 33.1-435 and 58.1-3221.3. But FFW's evidence did not come close to meeting its burden.

B. There Is No Evidence That Either Challenged Classification Is Unreasonable.

There is no evidence in the record that the classification made in either statute is arbitrary or otherwise unreasonable. The lack of such evidence is fatal to any claim that tax classifications are unreasonable. *E. Coast Freight Lines,* 194 Va. at 527, 74 S.E.2d at 289.

It is undisputed that taxes authorized by §§ 33.1-435 and 58.1-3221.3 have been levied at uniform rates on all properties classified for such taxation in the District per § 33.1-435 or in the County as a whole per § 58.1-3221.3. FFW's property simply is one among many such properties having similar characteristics for commercial or industrial use that make them all subject to taxation at the same rate pursuant to §§ 33.1-435 or 58.1-3221.3. A classification for taxation that omits other properties not sharing like characteristics does not violate uniformity. *E. Coast Freight Lines,* 194 Va. at 527, 74 S.E.2d at 289; *see also Griffin v. Norfolk County,* 170 Va. 370, 376, 196 S.E. 698, 700 (1938) ("[b]eyond doubt the State may

impose a uniform tax and to that end may impose a uniform assessment on like properties"); *cf. Lee Gardens Arlington L.P. v. Arlington County Bd.,* 250 Va. 534, 538-39, 463 S.E.2d 646, 648 (1995) (uniformity required only in assessing properties having like characteristics and qualities).

Distinctions between things that are treated differently in legislative classifications need not be great. *E.g., Va. Elec. & Power Co. v. Commonwealth,* 169 Va. 688, 705, 194 S.E. 775, 781 (1938) (tax on gross receipts of company operating both electric railway and motor bus services did not violate equal protection, despite fact that gross receipts from certain "stand alone" bus services were not subject to that tax). The General Assembly has taken abundant advantage of its discretion to make fine distinctions in the classification of property for taxation. Va. Code Ann. §§ 58.1-3504 to -3506 (2009) establish some 60 or more separate tax classifications for various kinds of tangible personal property, including at least a dozen classifications for various motor vehicles and six each for watercraft and animals, with no requirement for uniformity across those classifications. *See R. Cross, Inc.,* 217 Va. at 206, 228 S.E.2d at 116.

East Coast Freight Lines illustrates the broad extent of the General Assembly's "well settled" discretion to adopt tax classifications and how finely the legislature is permitted to draw distinctions in doing so. Ruling

that a statute did not violate the Uniformity Requirement, this Court stated that "[t]he legislature has in its discretion classified the rolling stock of motor vehicle carriers which operate over fixed routes under certificates of convenience and necessity issued by the State Corporation Commission, in one group, and those which operate differently in another." 194 Va. at 526, 74 S.E.2d at 289. Observing that "[n]o evidence [was] presented to show that the classification made is arbitrary, discriminatory or unreasonable," the Court held that "'[i]n order to render the classification illegal, the party assailing it must show that the business discriminated against *is precisely the same* as that included in the class which is alleged to be favored.'" 194 Va. at 527, 74 S.E.2d at 289 (quoting *Fredericksburg v. Sanitary Grocery Co.,* 168 Va. 57, 66, 190 S.E. 318, 322 (1937)) (emphasis added).

Here, FFW presented no evidence that any real property not included in either challenged tax classification "is precisely the same" or even at all similar to property that the General Assembly did choose to classify as subjects of each tax. Accordingly, the evidence in this case does not satisfy the requirement of *East Coast Freight Lines*.

While it is not the burden of the County to suggest reasonable bases for the tax classifications in the two challenged statutes, as the circuit court in the Uniformity Case made clear in its opinion letter at page 8 (J. App. at

58) (quoting from a memorandum submitted by the County and Board), any number of such reasonable bases can be conceived:

> 'For example, the General Assembly may have believed that commercial and industrial property would benefit disproportionately from the transportation improvements to be made using tax revenues (as the landowners requesting creation of the Phase I District asserted in their Petition), perhaps because such improvement might enable more intense commercial and industrial uses than otherwise would be possible and thus potentially could result in more significantly increased commercial and industrial property values. The General Assembly may have believed that residents would share indirectly in the costs of transportation improvements by a tax levied only on commercial and industrial property, in that they would pay higher prices for goods and services because the owners of such properties likely would attempt to recover the cost of the additional tax burden from customers and tenants, and thus to impose the tax on residential properties would result in a form of undesirable double taxation of residents. The General Assembly may have believed that because of the potential opportunity for owners of commercial and industrial properties to pass at least some of the cost of the additional tax burden on to others, such properties could more easily, fairly, and equitably bear that burden.'[5]

Other reasonable bases for the legislative classifications at issue can be conceived. The significant point is that the undisputed facts in evidence

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[5] When the question is whether there are any conceivable facts that could render a reasonable basis for a challenged legislative classification, a court properly may engage in reasonable speculation, even if not based on facts in evidence or empirical data. *Finn v. Va. Ret. Sys.,* 259 Va. 144, 155, 524 S.E.2d 125, 131 (2000); *King v. Va. Birth-Related Neurological Injury Comp. Program,* 242 Va. 404, 410 n.3, 410 S.E.2d 656, 660 n.3 (1991).

did not negate *any* possible reasonable bases for the tax classifications challenged in this case, much less *all* possible reasonable bases as required to prove a lack of uniformity under the applicable legal standard.

C. The Case FFW Relies On Requires Proof That Others Are Benefited At Least As Much Or More Than Members Of A Tax Class, But There Is No Evidence To Meet That Standard.

The case central to FFW's argument to the circuit court was *City of Hampton v. Ins. Co. of N. America,* 177 Va. 494, 14 S.E.2d 396 (1941). But even assuming *arguendo* that the reasoning of *City of Hampton* was sound[6] and that it applies here, FFW's evidence does not satisfy the legal standard set forth in that case, which requires proof that those not included in a tax class would enjoy at least as much benefit from the tax as those who are included in the class.

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[6] In interpreting the Uniformity Requirement in *City of Hampton*, the Court relied on a quote in a treatise from *Adams v. Mississippi State Bank,* 23 So. 395, 397 (Miss. 1897). 177 Va. at 499, 14 S.E.2d at 398. But the quoted language had nothing to do with any uniformity requirement. Instead, it concerned a separate requirement of Mississippi's constitution for tax *equality*. In 1897 when *Adams* was decided, Virginia's Constitution also required both tax uniformity and tax equality. But the equality requirement was deleted from Virginia's Constitution in 1902, because it was seen as an undesirable hindrance on the General Assembly's ability to create tax classes. *Report of the Proceedings and Debates of the [1901-02 Virginia] Constitutional Convention* at 2632-41, 2717 (1906). Thus, the quote relied upon in *City of Hampton* was unrelated to uniformity or any other requirement of Virginia's Constitution existing after 1902.

The unusual facts of *City of Hampton* demonstrate the narrowness of its holding. It was based on such a unique set of facts that the circuit court found no instance where it has been cited by this Court on any point of law. (J. App. at 57.) Thus, if *City of Hampton* has any relevance, it is as a unique exception that proves the rule that a legislative tax classification is to be accorded the highest possible deference and is not to be overturned unless compelled by the facts in evidence.

City of Hampton involved an ordinance based on an authorizing statute that empowered some cities to impose a tax only on certain kinds of companies writing fire insurance policies covering property in the city. The tax was not imposed on other property insurers or on uninsured or underinsured individuals.[7] The only purpose of the tax was to provide for the relief of injured or disabled city firemen and their dependents.

The issue in *City of Hampton* was whether there are "others, who are benefited *as much or more* than those smarting under the tax imposition, who go unwhipped of its burden?" 177 Va. at 498, 14 S.E.2d at 397 (emphasis added). Thus, the test was not whether someone not in the tax class might enjoy some benefit from the tax, but rather was whether such

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[7] "[T]he tax here is upon certain stock fire insurance companies which are admitted to do business in Virginia [and not on] non-admitted companies, mutual companies, reciprocals, and property owners who insure in such companies . . . ." 177 Va. at 504, 14 S.E.2d at 400.

persons would enjoy a benefit that was at least equal in magnitude to that enjoyed by those in the tax class.

In *City of Hampton*, the evidence was that properties insured by insurance companies in the tax class received no preferential treatment or heightened degree of service from the municipal fire department. Other properties, including uninsured or underinsured property, would get at least as good a response. Thus, the Court found that there was no justification for differential treatment based only on whether a particular kind of insurance company had insured the property, especially given the fact that other kinds of property insurers were not included in the tax class.

The *City of Hampton* decision, never cited by this Court, vividly illustrates that facts so compelling as to prove that no possible reasonable basis at all can be conceived to support a tax classification are unusual indeed. Here, such facts are completely absent from the Joint Stipulation. While it is possible that properties not in the tax classes of §§ 33.1-435 or 58.1-3221.3 might receive some benefit from transportation improvements that could be provided by those taxes, the evidentiary record is devoid of facts proving that any such benefits would meet the quantitative test of *City of Hampton.* In other words, there is no evidence regarding the relative magnitude of benefits that would be enjoyed by any particular property from

any transportation improvements that could be paid for with taxes authorized by § 33.1-435 or § 58.2-3221.3.

Note also that FFW only pled (and assigned error regarding) a challenge to the constitutionality of the two classification statutes on their face, not as applied by the County. (J. App. at 3, 5, 7-8, 62.) Accordingly, had FFW provided any evidence to meet the *City of Hampton* standard, that evidence would have needed to prove that no possible application of the statutory authority could result in transportation improvements that did not benefit residential properties at least as much or more than commercial and industrial properties, not merely that a particular application of that statutory authority by the County had an unconstitutional result. Thus, FFW's focus on arguing to this Court (albeit without any supporting evidence) that residential properties in the District would be benefitted as much as commercial and industrial properties in the District is misplaced, because that addresses an issue not pled by FFW, i.e., the constitutionality of the authority in § 33.1-435 as applied by the County.

In any case, the absence of any evidence regarding the relative benefits that would be enjoyed by any kind of property, particularly the lack of proof that properties not in a challenged tax class necessarily would

benefit as much or more than properties in the class as required by *City of Hampton,* shows that *City of Hampton* cannot support FFW's claims.

Ignoring its failure to meet its burden of proof, FFW mischaracterizes the circuit court's opinion in several ways. For example, FFW suggests that the court reached a factual conclusion regarding relative benefits that would be enjoyed from District transportation improvements by commercial, industrial, and residential properties. (Opening Br. at 42.) But there was no need for any such finding, because the court simply was observing that FFW had failed to meet its burden to prove that residential properties would enjoy at least equal benefits from the proceeds of taxes levied pursuant to the challenged statutes and failed to prove that no reasonable basis for the tax classifications in the challenged statutes can be conceived. (J. App. at 57-58.) Thus, FFW is inaccurate in asserting that the circuit court's reference to the Petition constituted a "factual determination," because the court merely was engaging in reasonable speculation to demonstrate that FFW's evidence had failed to negate a possible reasonable basis for a challenged tax classification, i.e., the unequivocal assertion by commercial and industrial property owners in the Petition that such properties would be specially benefitted by transportation improvements paid for with District Tax revenues. As shown above, *supra* note 5, it is perfectly proper for a

court to engage in precisely this kind of speculation when considering whether there could be any reasonable basis for a legislative classification.

FFW also claims to be unable to discern any reason why the circuit court could have concluded that the facts in *City of Hampton* are different from the facts in this case. (Opening Br. at 34.) But the distinction is obvious. In *City of Hampton,* the facts showed that those not in the tax class would receive exactly the same benefits as those included, while here there is no evidence at all regarding the relative benefits that would be enjoyed by anyone (apart from the uncontested assertion by commercial and industrial landowners in the Petition that such properties would be specially benefitted by District transportation improvements).

Turning now particularly to a tax levied pursuant to § 58.1-3221.3, another problem for FFW is that *City of Hampton* concerned only one kind of tax classification, i.e., "a classification founded upon benefits bestowed." 177 Va. at 499, 14 S.E.2d at 397. But this Court has observed that local taxes founded principally for the purpose of generating revenue are different than exactions founded upon a theory of benefits conferred. *City of Richmond v. Eubank,* 179 Va. 70, 18 S.E.2d 397 (1942). Other cases cited by FFW where benefits were considered by this Court also involved exactions that properly are considered assessments for specific benefits

conferred rather than taxes imposed for the purpose of raising revenue. *E.g., Norfolk City v. Ellis,* 67 Va. (26 Gratt.) 224, 227 (1875) (proposition that "he who receives the benefit ought to bear the burden" applies not to "taxation for purposes of revenue" but instead to "assessments . . . not founded upon any idea of revenue, but upon the theory of benefits conferred"). *See also Eagle Harbor, L.L.C. v. Isle of Wight County,* 271 Va. 603, 615, 628 S.E.2d 298, 304 (2006) ("reasonable correlation" between benefit conferred and cost exacted not independent test of reasonableness of water and sewer fees but instead used to distinguish between exaction to provide particular benefit versus revenue-generating measure).

This Court recently held that the principal purpose of 2007 Va. Acts ch. 896, the enactment that created § 58.1-3221.3, was to raise revenue. *Marshall v. N. Va. Transp. Auth.,* 275 Va. 419, 431, 657 S.E.2d 71, 77 (2008). FFW admitted in its first memorandum to the circuit court that those challenged taxes are used exclusively to raise revenue. Thus, even assuming *arguendo* that *City of Hampton's* quantitative benefit/burden analysis has any relevance to a tax imposed in a special improvement district like that authorized by § 33.1-435, it would not apply to the classification in § 58.1-3221.3(B).

FFW also has asserted (Pet. for App. at 24-25) that the "traditional rational basis test" does not apply to taxes levied for a particular public purpose rather than to fund unspecified general governmental operations, and essentially reiterates this argument in its Opening Brief at 31. But FFW cites no support for this contention. *City of Hampton* does not say it, nor are the Local Entities aware of any decision of this Court so limiting the reasonable basis test. Furthermore, such an assertion is inconsistent with decisions of this Court that have construed local taxes levied for specific public purposes, such as schools or roads. *E.g., Brunswick County v. Peebles & Purdy Co.,* 138 Va. 348, 122 S.E. 424 (1924); *Moss v. Tazewell County,* 112 Va. 878, 72 S.E. 945 (1911).

IV. FFW's "Rule of Universality" Theory Is Inconsistent With Applicable Law And Does Not Demonstrate That Any Challenged Classification Violates The Uniformity Requirement.

In apparent recognition that its evidence is inadequate to satisfy the reasonable basis standard that always has been used by this Court to judge the constitutionality of legislative enactments, FFW for the first time urges this Court to abandon that standard and instead apply FFW's new "rule of universality" theory to conclude that the challenged tax classifications are unconstitutional, even though FFW failed to meet its evidentiary burden. But even assuming *arguendo* that this Court would be

inclined to abandon the reasonable basis standard, FFW's "rule of universality" provides no grounds to rule in FFW's favor in this case.

A. FFW's Theory And Its Argument Based On Article X, § 6, Should Not Be Considered Because They Never Were Presented To The Circuit Court.

Because FFW never presented its "rule of universality" theory to the circuit court and never argued to the circuit court that any challenged classification created tax exemptions unauthorized by Article X, § 6 of the Constitution of Virginia, it cannot now do so for the first time on appeal.

Part II of the Opening Brief's Argument sets forth for the first time ever in this case FFW's new "rule of universality" theory. It was never mentioned to the circuit court (or even in FFW's Petition for Appeal). FFW presents three distinct arguments in support of this new theory. One, based on language in Article X, §§ 1 and 2 of the Constitution of Virginia ("Section 1" and "Section 2," respectively), argues that since those sections do not explicitly mention commercial and industrial real property, implicitly a classification consisting of such property is prohibited (the "Exception Argument"). Second, FFW argues that Pennsylvania jurisprudence should be adopted insofar as Pennsylvania courts require all real property to be taxed as a single class (the "Pennsylvania Argument"). Third, FFW argues that the challenged tax classifications create tax exempt property

unauthorized by Article X, § 6 of the Constitution of Virginia ("Section 6") because every kind of real property was not included as a subject of the particular taxes authorized by the two statutes (the "Section 6 Argument").

The claim of unconstitutionality pled by FFW in its Amended Complaint explicitly was based solely on the Uniformity Requirement of Article X, § 1 of the Constitution of Virginia. (J. App. at 2-5.) No other constitutional provision is mentioned in the Amended Complaint. A court cannot base its judgment upon facts not alleged or upon a right that has not been pled or claimed. *Ted Lansing Supply Co. v. Royal Aluminum and Const. Corp.,* 221 Va. 1139, 1141, 277 S.E.2d 228, 229 (1981). Thus, FFW cannot now rely upon entirely new claims never pled below, nor contend that the trial court erred by not basing its judgment on such claims.

Thereafter, FFW submitted two legal memoranda to the circuit court supporting its motion for summary judgment and opposing the cross-motion of the County and Board. However, FFW did not make any of the arguments in Part II of the Opening Brief's Argument in any of its written submissions to the circuit court. The only theory FFW presented to the circuit court in its written memoranda is the one set out in Part III of the Opening Brief's Argument, i.e., that there is no reasonable basis for the challenged tax classifications.

After submission of FFW's legal memoranda, the circuit court heard oral argument on the cross-motions for summary judgment. At that hearing, for the first time FFW did mention some elements of its Exception Argument and Pennsylvania Argument but did not suggest that they should be considered parts of any overarching theory. FFW also did not mention Section 6 at all and made no Section 6 Argument to the circuit court.

When the circuit court entered its Final Order on June 17, 2009, FFW endorsed it "Seen and objected to for the reasons stated in Plaintiff's briefs and in the hearing on April 3, 2009." (J. App. at 61.) Thus, the only grounds for FFW's objection were what it had argued to the circuit court orally and in writing. Since FFW never raised any "rule of universality" theory or made any Section 6 Argument to the circuit court, the grounds for its objection to the Final Order did not include any such claims.

Supreme Court Rule 5:25 states in pertinent part that "[e]rror will not be sustained to any ruling of the trial court . . . unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." Va. Code Ann. § 8.01-384(A) (2007), applicable to civil trials, states that for a party to preserve its objection to a ruling or order of a court, "it shall be sufficient that a party, at the time the ruling or order of the court is made or

sought, makes known to the court . . . his objections to the action of the court *and his grounds therefor* . . . ." (Emphasis added.)

"Rule 5:25 exists to protect the trial court from appeals based on undisclosed grounds, to prevent the setting of traps on appeal, to enable the trial judge to rule intelligently, and to avoid unnecessary reversals and mistrials." *Fisher v. Commonwealth,* 236 Va. 403, 414, 374 S.E.2d 46, 52 (1988). "The primary purpose of requiring timely and specific objections is to allow the trial court an opportunity to rule intelligently on the issues presented, thereby avoiding unnecessary appeals and reversals." *Shelton v. Commonwealth,* 274 Va. 121, 126, 645 S.E.2d 914, 916 (2007). "'If [the] opportunity [to address an issue] is not presented to the trial court, there is no ruling by the trial court on the issue, and thus no basis for review or action by this Court on appeal.'" *Scialdone v. Commonwealth,* 279 Va. 422, 437, 689 S.E.2d 716, 724 (2010) (citation omitted).[8] Rule 5:25 often is invoked to bar consideration of arguments, including constitutional arguments, raised for the first time on appeal. *E.g., Townsend v.*

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[8] FFW's plea and argument alleging violations of the Uniformity Requirement were insufficient to preserve for appeal any and every argument that might support that claim, because this Court only considers specific arguments presented to the circuit court. *E.g., Wood v. Henry County Pub. Sch.,* 255 Va. 85, 93 n.5, 495 S.E.2d 255, 260 n.5 (1998). Any other approach would be inconsistent with the very purpose of Rule 5:25 and § 8.01-384(A).

Commonwealth, 270 Va. 325, 332-33, 619 S.E. 2d 71, 75 (2005); *Riner v. Commonwealth,* 268 Va. 296, 325, 601 S.E.2d 555, 572 n.11 (2004); *Wolfe v. Bd. of Zoning Appeals,* 260 Va. 7, 14, 532 S.E.2d 621, 624 (2000); *Buck v. Jordan,* 256 Va. 535, 545-46, 508 S.E.2d 880, 885-86 (1998).

B. Even If Considered In Full, Part II Of FFW's Argument Fails To Demonstrate That Any Challenged Classification Violates The Uniformity Requirement.

1. FFW Ignores Constitutional Language, Presumptions In Favor Of Constitutionality, And Precedents Of This Court In Arguing That Sections 1 And 2 Compel The Conclusion That The General Assembly Violated The Uniformity Requirement.

FFW's Exception Argument posits that despite the broad language of the Uniformity Requirement giving the General Assembly the power to "define and classify taxable subjects," the maxim *"expressio unius est exclusio alterius"* should be applied to compel the conclusion that the General Assembly cannot define and classify real property unless something elsewhere in the Constitution specifically authorizes a separate tax class for a particular kind of real property. That argument is based on the fact that Article X, § 1 of the Constitution ("Section 1") permits municipalities to impose different rates of taxation on real property in annexed, merged, or consolidated areas and Article X, § 2 ("Section 2") allows partial deferral or relief from taxes on certain real property devoted

to agricultural, horticultural, forest, or open space uses. FFW claims that since there is no similar Constitutional language specifically excepting commercial or industrial real property from the Uniformity Requirement, the General Assembly lacks the power to separately classify such property.

A fundamental problem with FFW's argument, however, is that there is only one Uniformity Requirement, applicable to both real and personal property. Accordingly, FFW's reasoning, if it applies at all, necessarily must apply not only to real property but also equally to personal property. Thus, if, as FFW contends, the General Assembly needs additional Constitutional language to separately classify different kinds of real property, then it must follow that such additional authority also is needed to separately classify different kinds of personal property.

In fact, there is additional Constitutional language specifically applicable to personal property. Section 1 provides that the General Assembly may authorize localities to tax tangible personal property owned by persons at least 65 years old or permanently and totally disabled at different rates than such property owned by others. Accordingly, FFW's argument necessarily leads to the proposition that the General Assembly has no Constitutional authority to classify different kinds of personal property other than personal property owned by the elderly or disabled as

specifically described in Section 1. Thus, since all property is either real or personal, FFW's argument would negate the General Assembly's express constitutional power to define and classify taxable subjects.

But this Court repeatedly has recognized that the General Assembly has the power to put many different kinds of personal property into different tax classes. *E.g., R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976)*; *E. Coast Freight Lines v. City of Richmond, 194 Va. 517, 74 S.E.2d 283 (1953)*; *City of Roanoke v. Michael's Bakery, 180 Va. 132, 21 S.E.2d 788 (1942)*; *City of Richmond v. Drewry-Hughes Co., 122 Va. 178, 94 S.E. 989 (1918).* As noted above, the General Assembly has taken abundant advantage of that power to establish some 60 different classes of tangible personal property.

FFW's Exception Argument would make the language of the Uniformity Requirement granting broad power to the General Assembly to define and classify taxable subjects mere surplusage. That explicit grant of constitutional authority would have no purpose if the General Assembly cannot classify the subjects of taxation absent a specific exception to the Uniformity Requirement somewhere else in the Constitution, because it would be the exception that would provide the authority to define and

classify, not the general grant of power. Accordingly, that grant of power would be meaningless if FFW's argument is accepted.[9]

Furthermore, FFW cites no evidence that the provisions of Sections 1 and 2 that it relies upon were inserted into the Constitution for the purpose of so drastically restricting the power of the General Assembly to define and classify taxable subjects. Indeed, FFW ignores reasonable explanations of why that language was put into the Constitution that do not require a finding that any statute is unconstitutional.

The obvious explanation for the provision of Section 1 cited by FFW is that it serves to overcome the prohibition on differential taxation of the same kinds of properties within a single taxing jurisdiction based on their geographic location within that jurisdiction, a prohibition that exists because of the explicit language of the Uniformity Requirement requiring uniformity "within the territorial limits of the authority levying the tax." *E.g., Moss v. County of Tazewell,* 112 Va. 878, 72 S.E. 945 (1911); *Day v. Roberts,* 101

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[9] FFW's argument also is inconsistent with rulings of this Court that uniformity is only required with respect to tax assessments of "properties having like characteristics and qualities," not with respect to all real property in an area. *Lee Gardens Arlington L. P. v. Arlington County Bd.,* 250 Va. 534, 538, 463 S.E.2d 646, 648 (1995); *accord Smith v. City of Covington,* 205 Va. 104, 108, 135 S.E.2d 220, 223 (1964).

Va. 248, 43 S.E. 362 (1903).[10] The cited language of Section 1 does this by authorizing differential taxation of the same kinds of properties located in a single locality, depending only on whether or not the properties are in an annexed, merged, or consolidated portion of the locality. This exception to the otherwise applicable explicit requirement for territorial uniformity was added "to encourage voluntary mergers or consolidations by removing . . . a practical obstacle," i.e., the fear of people in a rural area that a merger with a more urbanized jurisdiction could cause their taxes to increase to pay for urbanized improvements, such as paved streets and street lights, that they would not enjoy (at least not immediately) in their area. 2 A. E. Dick Howard, *Commentaries on the Constitution of Virginia* 1045 (1974).

The cited language of Section 2 permits different tax treatment of physically similar parcels of agricultural, horticultural, forest, and open space property located within a single locality, depending on whether specified additional conditions are met. That language was added to the

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[10] Paragraphs 5 and 21 of the Joint Stipulation provide that taxes authorized by §§ 58.1-3221.3 and 33.1-435 are imposed on commercial and industrial properties throughout the County and the District, respectively (J. App. at 20, 22), and thus show that the issue of territorial uniformity in *Day* is not at issue here. Note with respect to the District Tax that a tax imposed only within the territory of a particular taxing district for the benefit of that district, even if the district constitutes only a portion of a larger political subdivision, does not violate the Uniformity Requirement. *See, e.g., Watkins v. Barrow,* 121 Va. 236, 92 S.E.2d 908 (1917).

Constitution to enable such properties to be taxed not on the basis of their fair market value as otherwise explicitly required by Section 2, but rather on the value of such property for a particular (e.g., agrarian) use. Howard, *supra*, at 1053-57.

Thus, there is no indication that language relied upon by FFW was added to the Constitution for the purpose of limiting the power of the General Assembly in any way. To the contrary, it was added to create exceptions to existing explicit constitutional limitations on the power of the General Assembly (i.e., requiring territorial uniformity and taxation at fair market value) that have no relevance to the issue in this case.

Nothing cited by FFW in Section 1 or Section 2 *expressly* limits the power of the General Assembly to define and classify the subjects of taxation. Thus, FFW can only argue that the cited language *implicitly* limits that power. But arguments based on alleged constitutional limitations on the legislative power of the General Assembly that are merely implied rather than stated expressly are particularly disfavored. "If there be any restraints by implication, the restraint must be so necessary and so plainly manifest as to require the implication in order to enforce the restraints expressly imposed." *Breckenbridge v. County Sch. Bd.,* 146 Va. 1, 5-6, 135 S.E. 693, 695 (1926). In light of the reasonable and accepted explanations

for why the language cited by FFW exists and the fact that it does not expressly impose *any* restraints on the General Assembly but instead creates exceptions to restraints not relevant here, nothing suggests that any restraint on legislative power FFW purports to divine is necessary and plainly manifest as required by *Breckenbridge*.

Finally, this Court long ago warned of the danger of applying *"expressio unius est exclusio alterius,"* a maxim of *statutory* construction, to the construction of Virginia's Constitution, especially when it is used in an attempt to limit the power of the legislative branch "The principle of the maxim should be applied with great caution to those provisions of the Constitution which relate to the legislative department, and the exclusion should not be made unless it appears to be a plainly necessary result of the language used." *Pine v. Commonwealth,* 121 Va. 812, ___, 93 S.E. 652, 654 (1917). This holding is rooted in the essential nature of our government:

> In determining whether an act of the Legislature is forbidden by the state Constitution, it must be borne in mind that the Constitution is not a grant of power, but a restriction upon an otherwise practically unlimited power; that the Constitution is to be looked to not to ascertain whether a power has been conferred, but whether it has been taken away; . . . that every act is presumed to be constitutional until the contrary is made plainly to appear; and that all doubts on the subject are to be solved in favor of its validity.

121 Va. at ___, 93 S.E. at 654-55; *accord Harrison v. Day,* 200 Va. 764, 770, 107 S.E.2d 594, 598 (1959); *Breckenbridge,* 146 Va. at 5-6, 135 S.E. at 695.

Attempting to negate the significance of *Pine,* FFW cites three cases in which this Court recently applied the maxim *expressio unius est exclusio alterius*. (Opening Brief at 27-28.) However, none of those cases applied the maxim to interpret Virginia's Constitution. In each case this Court applied the maxim solely to interpret a statute.[11]

Thus, FFW's novel constitutional interpretation is not persuasive. It is contrary to settled precedents of this Court, contrary to the presumption of constitutionality afforded to statutes, is not supported by any evidence that the result urged by FFW ever was intended, is inconsistent with reasonable explanations for the addition of cited language to the Constitution that do not compel a finding that any statute is unconstitutional, and relies on a disfavored application of a maxim of statutory construction.[12]

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[11] *Va. Dep't of Health v. NRV Real Estate, LLC,* 278 Va. 181, 187-88, 677 S.E.2d 276, 279 (2009); *Martin Bros. Contractors, Inc. v. Virginia Military Inst.,* 277 Va. 586, 589-90, 675 S.E.2d 183, 185 (2009); *Belton v. Crudup,* 273 Va. 367, 373, 641 S.E.2d 74, 77 (2007).

[12] FFW also cites Op. Va. Att'y Gen. 05-028 (Aug. 1, 2005) (Opening Br. at 19), but that opinion had nothing to do with the constitutionality of a tax classification. It concerned only a tax for which the General Assembly had not created separate tax classes. Absent separate classification or an

2. Virginia's Uniformity Requirement Should Not Be Interpreted Based On Pennsylvania Law Because That Approach Is Inconsistent With The Language Of The Uniformity Requirement, Inconsistent With Precedents Of This Court, And Is Recognized As Problematic Even In Pennsylvania.

Given the lack of support for its position in Virginia law, FFW urges this Court to adopt Pennsylvania law and apply the holding in *Westinghouse Elec. Corp. v. Bd. of Prop. Assessment,* 652 A.2d 1306, 1314 (Pa. 1995), based on an implied requirement in Pennsylvania to treat all real estate as a single class of property. But there are many reasons not to apply that interpretation of Pennsylvania's constitution to Virginia's Uniformity Requirement.

First, the finding of an implied requirement to treat all real estate as a single class of property is directly contradicted by precedents of this Court. *E.g., Breckenbridge v. County Sch. Bd.,* 146 Va. 1, 5-6, 135 S.E. 693, 695 (1926) (alleged constitutional restraints on legislative power not stated expressly but merely implied must be so necessary and plainly manifest as to require the implication to enforce restraints expressly imposed).

Second, Pennsylvania's approach makes no sense when the actual language of Virginia's Uniformity Requirement and precedents of this Court

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applicable constitutional exception, the Attorney General correctly opined that a locality could only impose a single uniform tax rate on property in the one class. But that is not relevant to the issue in this case.

are considered. As noted above, there is only one Uniformity Requirement in Virginia's Constitution. There are not two separate requirements, one applicable to personal property and a different one applicable to real property. The single Uniformity Requirement must be applied consistently to both real and personal property. As also noted above, this Court has affirmed the power of the General Assembly to separately classify different items of personal property for taxation, even when distinctions between properties classified differently have been very slight, absent proof that no reasonable basis at all for the different classification can be conceived. It would be inconsistent to adopt an absolute rule that different kinds of real property can never be put into different tax classes no matter how profound the differences in the nature and use of various kinds of real estate, based on the same Constitutional language that permits myriad different classifications of personal property. Such a ruling would contradict the plain language of the Constitution and the deference that this Court shows to acts of the General Assembly.

Third, FFW does not suggest that Pennsylvania's finding of an implied requirement to tax all real property in a single class has been adopted generally elsewhere, and a review of citing authorities indicates that the holdings of Pennsylvania's leading cases on the subject have not

been followed in other states. Accordingly, nothing in the Opening Brief indicates that such an implied limitation is common.[13]

Fourth, Pennsylvania's approach was developed in cases that had nothing to do with any legislative tax classification or other legislative act and did not apply any reasonable basis analysis. The seminal case, *Del., Lackawana & W. Ry. Co.'s Tax Assessment*, 73 A. 429 (Pa. 1909) ("*Delaware Railroad*"), merely concerned an error in valuation methodology that had the practical result of assessing certain land with coal deposits at a higher ratio to market value than other real property.[14] Since there was no separate legislative classification of coal lands, the court reasoned that coal lands had to be taxed uniformly with all other kinds of real estate in the single class. 73 A. at 432.

Similarly, *Westinghouse* had nothing to do with any legislative tax classification. The issue there was whether a determination of the ratio of

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[13] Some courts elsewhere have overruled separate classifications of real property only because of explicit constitutional language prohibiting such separate classification. *E.g., Storedahl Props., LLC v. Clark County,* 178 P.3d 377, 381 (Wash. 2008) (express constitutional provision that "'[a]ll real estate shall constitute one class'"); *Griggs v. Greene*, 197 S.E.2d 116, 120 (Ga. 1973) (express constitutional provision that all real and personal tangible property (except motor vehicles) comprised only one tax class). No such express language is present in Virginia's Constitution.

[14] The error was caused by including certain items of personal property that did not belong in the same class of subjects in determining the ratio as applied to other parcels of real property. 73 A. at 431.

assessed value to market value applied in certain assessments was arbitrary and not supported by the evidence. 652 A.2d at 1314-15. The court based its decision on *Delaware Railroad's* conclusion that all real estate was a single class of property. There was no need for discussion or analysis of whether there could be any reasonable basis for a legislative tax classification since, as in *Delaware Railroad*, none was at issue.

Fifth, many years after *Delaware Railroad*, when the Pennsylvania Supreme Court finally was faced with distinctions between different kinds of real property originating in a legislative tax classification in cases such as *In re Lower Merion Twp.*, 233 A.2d 273 (Pa. 1967) (cited by FFW as "*Madway v. Bd. for the Assessment and Revision of Taxes*"), the court still failed to engage in a meaningful reasonable basis analysis. Instead, it simply found *Delaware Railroad* and its progeny to be dispositive based on *stare decisis* considerations, 233 A.2d at 276-77, although in doing so it appears to have misconstrued the holding in *Delaware Railroad*.[15] Thus, the court did not

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[15] As noted above, *Delaware Railroad* did not involve any legislative tax classification. Absent a legislative act separately classifying the coal lands at issue in *Delaware Railroad*, the conclusion reached in that case was factually accurate, i.e., real estate in the taxing jurisdiction indeed was all one class of property (because the legislature had not provided otherwise) and so had to be taxed uniformly. But that holding did not mandate the entirely different proposition that Pennsylvania's legislature has no power to separately classify different kinds of real property. Nothing in *Delaware Railroad* compelled that overbroad interpretation.

examine whether any reasonable basis might exist for a challenged legislative tax classification, but applied a rule originating in a case that did not construe a legislative act. Such an approach is antithetical to Virginia's jurisprudence regarding legislative classifications because, as explained above, in Virginia a classification must be affirmed unless the taxpayer proves that no reasonable basis for the classification can be conceived.

Sixth, despite the "absolutist"[16] language of *Delaware Railroad,* as construed in *Lower Merion* and *Westinghouse*, Pennsylvania has not in fact consistently treated real estate as one class of property. Since 1913, Pennsylvania has treated land and improvements to land as two different classes of taxable property, by authorizing certain localities to tax land at one rate and improvements to land at a different rate. Act of May 15, 1913, § 1, 1913 Pa. Laws 209, 211, codified as amended at 53 Pa. Stat. Ann. § 25894 (West 1998). The Pennsylvania Supreme Court has acquiesced in this legislative classification despite its patent inconsistency with its "one tax class" jurisprudence. *See, e.g., Dietch Co. v. Bd. of Prop. Assessment*,

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[16] The term is the Pennsylvania Supreme Court's own characterization. *Clifton v. Allegheny County,* 969 A.2d 1197, 1212 (Pa. 2009).

209 A.2d 397 (Pa. 1965); *N. Park Village, Inc. v. Bd. of Prop. Assessments*, 184 A.2d 253 (Pa. 1962).[17]

Seventh, the Pennsylvania Supreme Court recently recognized that it is evolving a less draconian approach to uniformity than its holding in *Delaware Railroad* as construed in *Lower Merion* and *Westinghouse*:

> Previously, this Court has suggested an absolutist approach when describing the uniformity requirement, holding that "real estate as a subject for taxation may not validly be divided into different classes." Although we have consistently recognized that . . . [Pennsylvania's] Uniformity Clause precludes "real property from being divided into different classes for purposes of systematic property tax assessment," *we have since retreated from such an absolutist approach*.

Clifton, 969 A.2d at 1212-13 (quoting *Lower Merion,* 233 A.2d at 276, and *Downington Area Sch. Dist. v. Bd. of Assessment Appeals,* 913 A.2d 194, 200 (Pa. 2006)) (emphasis added). This Court should not adopt that "absolutist" interpretation, developed without any meaningful reasonable basis analysis, to determine the constitutionality of Virginia statutes at the very time that Pennsylvania is reconsidering it.

3. FFW's Section 6 Argument Is Inconsistent With Constitutional Language And Applicable Precedents.

FFW's Section 6 Argument necessarily assumes an implied limitation on the General Assembly's power to classify property for

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[17] A Virginia statute gives similar authority to the Cities of Fairfax and Roanoke. Va. Code Ann. § 58.1-3221.1 (2009).

taxation (i.e., its power to select the kinds of property classified as the subjects of a particular tax if the classification does not include all possible kinds of real property). According to FFW, any real property not selected as the subject of any possible tax thereby becomes tax exempt property that must be authorized by Section 6 for the classification to be constitutional. But there are a number of shortcomings with this argument, particularly when considered with the evidence in this case.

Section 6, titled "[e]xempt property," explicitly applies to property "exempt from taxation, State and local, including inheritance taxes," and so it lists the kinds of property that can (or must) be free of all such taxation. But FFW provided no evidence that any property meets this constitutional description, because there is no evidence of any failure to impose taxes, such as the County's regular *ad valorem* real property tax, on any property. Thus, FFW's Section 6 Argument requires the conclusion that if any particular possible tax is not levied on a piece of real property, it becomes "exempt property" within the meaning of Section 6 even if it otherwise is subject to taxation and thus literally is not "exempt from taxation, State and local, including inheritance taxes." But that is incorrect for several reasons.

First, such a reading is inconsistent with the language of Section 6. Second, that interpretation necessarily implies a limitation contrary to this

Court's conclusion in *City of Richmond v. Commonwealth,* 188 Va. at 605, 50 S.E.2d at 656, that the power of the General Assembly to define and classify property includes the selection of the kinds of property to be the subjects of a particular tax. If FFW is right, then that power to classify becomes meaningless, because the power to select the subjects of a particular tax necessarily includes the power to select less than all possible subjects of every possible tax or it is no power at all.

Third, FFW's Section 6 Argument, like its Exception Argument, is inconsistent with the jurisprudence of this Court that disfavors alleged constitutional limitations on the General Assembly's power that merely are implied rather than stated expressly, as described above. Accordingly, when FFW tries to find support for its position in *Day v. Roberts,* 101 Va. 248, 43 S.E. 362 (1903), it ignores the fact that the ruling in *Day* was based on an *explicit* Constitutional limitation on the power of the General Assembly discussed above, *supra* note 10, i.e., the requirement in Section 1 for uniformity "within the territorial limits of the authority levying the tax," not merely an implied limitation as urged by FFW here.

Thus, FFW never contended to the circuit court that that § 33.1-435 or § 58.1-3221.3 makes any property tax exempt and so cannot do so for the first time on appeal. Even if its Section 6 Argument is not barred by

Rule 5:25 and § 8.01-384(A), it is inconsistent with the language of Section 6 and applicable precedents of this Court.

V. Adverse Consequences Are Reasonably Foreseeable If FFW Prevails In This Case; The Scenario Envisioned By FFW If It Does Not Prevail Is Unrealistic.

A number of statutory tax classifications consisting of commercial and industrial real property have been enacted in Virginia, beginning in 1987 with the Multicounty Transportation Improvement Districts Act (the "Multicounty Act"), 1987 Va. Acts ch. 646, later amended and recodified as Va. Code §§ 15.2-4600 to -4616 (not set out in Virginia Code Annotated), which contains a statutory tax classification similar to that of § 33.1-435. In 1988, the Multicounty Act was used to create the Route 28 Highway Transportation Improvement District (the "Route 28 District") upon the petition of affected commercial and industrial landowners. The Route 28 District has been used since then to pay for improvements that have transformed Route 28 in Fairfax and Loudoun Counties from a two-lane road to a six-lane limited access highway with 13 interchanges.

It is a matter of public record that approximately $300 million in bonds (including some $120 million in Commonwealth Transportation Board bonds) issued for that purpose are outstanding, repayable from the Route 28 District tax on commercial and industrial real property. If FFW prevails

here, then the constitutionality of that tax instantly would be in doubt and the ability to repay existing bondholders put in jeopardy. If they cannot be repaid, the potential for a catastrophic impact on the credit ratings of the Commonwealth and the two Counties is obvious.

FFW alleges that there would be no impact on the general revenues of the County if the District Tax is declared unconstitutional because previously collected District Tax revenue that FFW claims must be refunded "could be replenished by the institution of a constitutional tax." (Opening Br. at 47.) The fact that construction of the Dulles Rail Project is well underway is readily observable. Obviously there could not have been a financing to pay for the County's share of the cost of Phase I of that Project because appeals of the Bond Validation Case are still pending. Given this massive ongoing construction project and no current ability to borrow funds to pay for it, the conclusion is inescapable that District Tax revenues are not just sitting in a fund as assumed by FFW but are being expended to meet cash flow requirements. If unexpended District Tax revenues are insufficient to pay required refunds, other money will be needed to make up any shortfall.

Furthermore, the idea that some other tax could be seamlessly substituted for the District Tax to pay for the Dulles Rail Project defies

common sense. First, only commercial and industrial property owners petitioned to create the District in order to pay for specific transportation improvements requested by those petitioners. The idea that a tax on all kinds of real property easily could be substituted for the District Tax ignores difficulties that proposal might encounter in the legislative process and the problem of imposing such a tax on residential property owners who never petitioned to create the District or build the Dulles Rail Project.

Even assuming such a process could happen at all, FFW also ignores the fact that nothing could be resolved immediately, and likely resulting delays in construction would trigger huge cost increases from penalty payments to contractors and the effects of inflation of construction costs. It is not unreasonable on a project of this magnitude to anticipate such additional costs in excess of a billion dollars. FFW provides no insight regarding a realistic source for this immense sum of additional money.

Finally, FFW ignores the incredibly complex web of interrelationships and agreements at the federal, state, and local level behind the Dulles Rail Project. If the County suddenly cannot use District Tax revenues as well as revenues from a similar tax levied in a second transportation improvement district west of the District to pay $720 million of the construction cost per existing arrangements, then it is not unlikely that many agreements will

have to be renegotiated (if that is even possible), inevitably leading to further delays in and impediments to construction.

Thus, if FFW prevails, it would put at risk repayment of outstanding bonds payable from taxes on commercial and industrial property and could cause extensive delays and huge cost increases for the Dulles Rail Project or possibly even its abandonment after expenditures of hundreds of millions of dollars to date.

In contrast, the result FFW envisions if the circuit court is affirmed is unrealistic. FFW asserts that if it does not prevail here, then the Uniformity Requirement "would have no operative effect whatsoever to limit the classification power of the General Assembly." (Opening Br. at 45.) But in making such an extravagant claim, FFW ignores the fact that the Uniformity Requirement will continue to restrain the General Assembly's power in precisely the way that it has since 1902 – by requiring a reasonable basis for any tax classification. That restraint is consistent with the proper relationship between the elected legislative representatives of the people of Virginia and the courts of the Commonwealth recognized by this Court in *Pine v. Commonwealth* nearly a century ago.

CONCLUSION

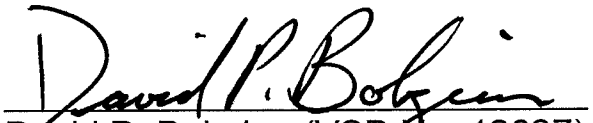
For the reasons set forth above, there is no evidence that the circuit court in Record No. 091883 committed reversible error in granting the County's motion for summary judgment and denying FFW's motion for summary judgment, nor is there any evidence that the circuit court in Record No. 091930 committed reversible error in ruling that the provisions of § 33.1-435 meet constitutional requirements. Accordingly, this Court should affirm those rulings.

Respectfully submitted,

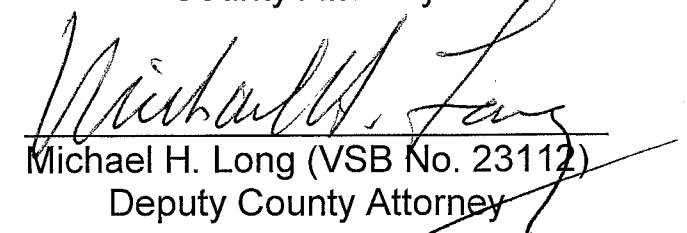
FAIRFAX COUNTY, VIRGINIA

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA

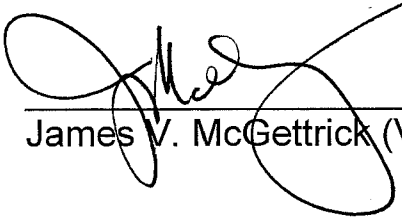
PHASE I DULLES RAIL TRANSPORTATION IMPROVEMENT DISTRICT



David P. Bobzien (VSB No. 12027)
County Attorney

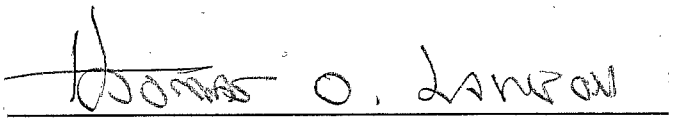


Michael H. Long (VSB No. 23112)
Deputy County Attorney

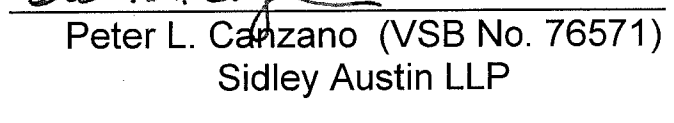


James V. McGettrick (VSB No. 14436)

FAIRFAX COUNTY ECONOMIC DEVELOPMENT AUTHORITY



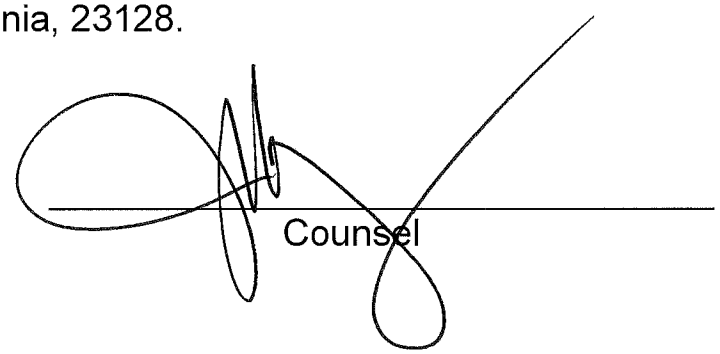
Thomas O. Lawson. (VSB No. 4975)
Lawson & Silek, PC



Peter L. Canzano (VSB No. 76571)
Sidley Austin LLP

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with Rule 5:26(d), on June 24, 2010, fifteen copies of the foregoing Brief of Appellees were mailed by certified mail, postage prepaid, return receipt requested, to Patricia Herrington, Clerk, Supreme Court of Virginia, 100 N. Ninth Street, Richmond, Virginia 23219; and on the same day an electronic copy of the same was filed via e-mail to scvbriefs@courts.state.va.us; and on the same day three copies of the same were mailed, first class postage prepaid, to James N. Markels, Esq., Jackson & Campbell, P.C., One Lafayette Centre, South Tower, 1120 20th Street, N.W., Washington, D.C. 20036-3437, and to William T. Welch, Esq., John A. Fraser, Esq., and Merritt J. Green, Esq., GENERAL COUNSEL, P.C., 6862 Elm Street, Suite 800, McLean, Virginia 22101, and to Patrick M. McSweeney, Esq., McSweeney, Crump, Childress & Temple, P.C., 11 South Twelfth Street, P.O. Box 1463, Richmond, Virginia, 23128.



Counsel