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

AMICUS CURIAE BRIEF OF THE COUNTY OF LOUDOUN, VIRGINIA, IN SUPPORT OF APPELLEES

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BRIEF *AMICUS CURIAE* OF THE COUNTY OF LOUDOUN, VIRGINIA IN SUPPORT OF THE APPELLEES

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

The County of Loudoun, Virginia ("Loudoun County"), by counsel, submits this brief *amicus curiae* in support of the Appellees in this matter, the Fairfax County Economic Development Authority ("EDA"), the County of Fairfax ("Fairfax County"), the Phase I Dulles Rail Transportation Improvement District (the "Phase I District"), and the Board of Supervisors of Fairfax County.

INTEREST OF LOUDOUN COUNTY

The Appellant in these consolidated cases, FFW Enterprises ("FFW"), claims that Va. Code Ann. § 33.1-435 (2005) and Va. Code Ann. § 58.1-3221.3 (2009), on their face, violate the requirement in Article X, § 1 of the Constitution of Virginia that taxes are to be uniform upon the same class of subjects. These statutes classify real property of a commercial and industrial nature as the subject of a particular tax, in each case to fund transportation improvements. FFW contends that these statutory tax classifications violate the uniformity requirement because they do not include other kinds of real property. Loudoun County has a significant, substantive interest in this issue for several reasons.

First, a ruling against the EDA, Fairfax County, the Phase I District and the Board of Supervisors of Fairfax County in this case would call into question a similar statutory tax classification used in Loudoun County for over two decades. Since 1988, Loudoun County, together with Fairfax County and the Commonwealth of Virginia, has relied on such a commercial and industrial property classification, established by the General Assembly, to finance substantial improvements to State Primary Highway Route 28 ("Route 28"). This project has been instrumental in fostering commercial and industrial development in the corridor. The project is now nearly completed, with approximately $266 million in Commonwealth and EDA bonds outstanding. The initial bonds for the project were issued by the Commonwealth in 1988. Subsequent bonds have been issued through the EDA, backed by the moral obligation of the two counties. The source of funds to repay these bonds is a tax levied on commercial and industrial real property within a transportation improvement district pursuant to Va. Code Ann. § 15.2-4607. This statute is very similar to § 33.1-435, and indeed could be considered the model for that later enactment. Thus, a ruling in favor of FFW could by implication effectively render § 15.2-4607 unconstitutional, causing a profound adverse effect on the repayment of those bonds as contemplated in the financings. In that

event, there may be grave financial consequences for both counties and the Commonwealth.

Second, as a party to the Agreement to Fund the Capital Cost of Construction of Metrorail in the Dulles Corridor, Loudoun County has a vital interest in the ongoing construction project to extend the Metrorail public transit system from Falls Church into Fairfax County. Phase Two of the project will further extend Metrorail to Dulles Airport and then along the Dulles Greenway to its terminus in Loudoun County. There are two stations planned in Loudoun County, in addition to the Dulles Airport station, and the County Board of Supervisors has planned and zoned areas around the stations for significant commercial development. Although § 33.1-435 does not apply to Loudoun County, Loudoun is aware that Fairfax County's commitment to share in funding the Dulles Rail Project is critically dependent on that statute. Fairfax County's ability to obtain up to $720 million in construction funding is based on taxes levied on commercial and industrial land in two transportation improvement districts created pursuant to the Transportation Districts Within Certain Counties Act, Va. Code Ann. §§ 33.1-430 to -446 (2005). Accordingly, a decision of this Court in favor of FFW could significantly jeopardize the continuing construction of the

Dulles Rail Project and in particular its completion into Loudoun County as part of Phase Two of the project.

Third, while Loudoun County has not imposed a tax as authorized by § 58.1-3221.3, it has the statutory ability to do so if necessary or desirable to pay for transportation improvements. If the Court were to rule in favor of FFW, then that funding option would be eliminated at a time of constrained State funding for transportation.

Fourth, adopting the reasoning espoused by FFW to constrain the General Assembly's discretion in classifying real property would appear to call into question many of the personal property classifications set out in Va. Code Ann. §§ 58.1-3504 to -3506. Loudoun County has relied on these classifications in establishing different personal property tax rates. Among the considerations in setting tax rates for certain classes of personal property is fostering desirable economic development activity, as well as other legitimate public policy objectives.

STATEMENT OF THE CASE

Loudoun County adopts the Statement of the Case set forth in the brief of the Appellees.

STATEMENT OF THE FACTS

Loudoun County adopts the Statement of the Facts set forth in the brief of the Appellees.

QUESTIONS PRESENTED

Loudoun County adopts the Questions Presented as set forth in the brief of the Appellees, with the added comment that the implications of this case go beyond the constitutionality of the two statutes directly at issue.

ARGUMENT

I. There is no basis to write into the Constitution of Virginia an implied "rule of universality" limiting the authority of the General Assembly to define subjects of property taxation.

Among the powers of the General Assembly expressly recognized by the Constitution of Virginia is the authority to define and classify taxable subjects. Article X, § 1. FFW asks this Court to write into the Constitution of Virginia an implied "rule of universality" restricting the General Assembly's authority on this subject. FFW cites a uniformity provision in the Constitution of the Commonwealth of Pennsylvania similar to that in Article X, § 1, and rulings of the Pennsylvania courts imposing a "rule of universality" with respect to property tax classifications. This rule, according to FFW, prohibits any classification that does not include all classes of real property. FFW also argues that specific provisions of the

Constitution of Virginia providing that the General Assembly may authorize differential assessment of agricultural lands and may authorize differential rates for annexed or consolidated areas somehow limits the General Assembly's discretion in defining taxable classes of real estate. Although neither provision on its face limits subjects for classification, FFW invokes a rule of construction that to express or include one thing implies the exclusion of the other (*expressio unius est exclusion alterius*). Extending that reasoning would lead to a similar restriction on the General Assembly with respect to classifying taxable personal property.

The General Assembly has broad plenary power:

> The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted; and a specific grant of authority in the Constitution upon a subject shall not work a restriction of its authority upon the same or any other subject. The omission in this Constitution of specific grants of authority heretofore conferred shall not be construed to deprive the General Assembly of such authority, or to indicate a change of policy in reference thereto, unless such purpose plainly appear.

Constitution of Virginia, Article IV, §14. *See Harrison v. Day,* 201 Va. 386, 396, 111 S.E.2d 504, 511 (1959) (Constitution of Virginia is not a grant of legislative powers to the General Assembly and the legislative powers of the General Assembly are without limit unless restrained thereby); *Kirkpatrick v. Board of Supervisors,* 146 Va. 113, 115, 136 S.E.2d 186, 190

(1926) (General Assembly may enact any law not prohibited). Importantly, the Constitution of Commonwealth of Pennsylvania does not contain a provision similar to Article IV, § 14 with respect to its state legislature.

In his commentaries on the Constitution of Virginia, Professor Howard made the following observations about Article IV, §14:

> The principles stated in the first paragraph of the section serve a useful purpose. The first proposition's reminder that the General Assembly has power to legislate on any subject unless the Constitution denies or limits that power is especially appropriate in a Constitution which, as the Commission would have it, is freed of needless detail. The second proposition, rebutting negative inferences from specific grants of authority, is valuable in light of the mischief that courts of other states, though happily not those of Virginia, have done in applying the *expressio unius* rule in constitutional interpretation. The third proposition, rebutting negative implications arising from deletions of specific grants of authority, parallels the first proposition in making it possible to omit unnecessary detail from the Constitution without running the risk that the deletion will be construed to mean a denial of authority of the Legislature.

1 A. E. Dick Howard, *Commentaries on the Constitution of Virginia* 538 (1974).

Whether stated as a "rule of universality" or the principle of *expressio unius,* the Court should decline FFW's request to rewrite the Constitution of Virginia with respect to the General Assembly's authority and power to define classifications of property for local taxation. Article IV, § 14 explicitly provides that a specific grant of authority does not work to limit the General

Assembly's authority on the same subject. No such provision appears in the Constitution of the Commonwealth of Pennsylvania, and accordingly, the Pennsylvania cases should not be applied here in Virginia.

II. The decision in this case has significant implications for Loudoun County and other parties.

A. A ruling that a tax classification composed of commercial and industrial real property is facially unconstitutional would implicitly undermine the Route 28 Highway Transportation Improvement District and its outstanding bond obligations.

The most immediate concern to Loudoun County is the potential impact of this case on the existing Route 28 Highway Transportation Improvement District ("Route 28 District"). A similar commercial and industrial tax classification was authorized by the General Assembly in 1987 and has been used to finance transportation improvements in the Route 28 District over the last two decades. If the Court were to limit the ability of the General Assembly to classify commercial and industrial land as a separate category for taxation, the consequences to Loudoun County could be profound.

Starting in 1988, commitments have been made to the holders of bonds issued to finance the Route 28 improvements. Currently, there are $266 million in outstanding Commonwealth and local bonds issued in reliance on the statute authorizing the taxation of commercial and industrial

land as a separate category. If such taxes no longer could be levied and collected to pay for substantial expenditures already made to improve Route 28 as requested by commercial and industrial landowners, there could be an adverse effect on the financial status and credit ratings of both counties and the Commonwealth itself. Some tax revenues that already have been expended might have to be refunded.

In 1987, the General Assembly enacted the "Primary Highway Transportation Improvement District in Multi-County Areas Act".[1] The statute authorized the boards of supervisors of certain adjoining counties, including Loudoun County and Fairfax County, to create a single multi-jurisdictional transportation improvement district to construct, improve and expand any primary highway located within the district.

The power to create such a district can only be exercised upon receipt of a joint petition to both boards of supervisors from the owners of over half the commercial and industrial real property located within a proposed district. Va. Code § 15.2-4603. The petition must specify the transportation improvements to be provided as well as a plan to provide

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[1] When Title 15.1 was recodified in 1997, this statute was renumbered as Va. Code §§ 15.2-4600 to -4618, but was no longer set out in the Code. The recodified statute is found in 1997 Va. Acts ch. 587 and amended by 2000 Va. Acts ch. 435 and 2002 Va. Acts ch. 770. References in this brief are to the Title 15.2 sections found in the Acts of Assembly.

them. A district created under this statute has no independent power to impose taxes; however, the board of supervisors of the counties may levy and collect an annual tax on "taxable real estate zoned for commercial or industrial use or used for such purposes" to pay for the cost of district transportation improvements requested by the petition. Va. Code § 15.2-4607.

On October 17, 1987, such a petition to create the Route 28 Highway Transportation Improvement District (the "Route 28 District") was submitted by commercial and industrial landowners to the Boards of Supervisors of Loudoun and Fairfax Counties. It proposed creation of the Route 28 District to pay for construction of improvements to Route 28 (then a two lane road) to transform it into a limited access, divided highway with six lanes in some areas and eight in others and 13 grade-separated interchanges. On December 7 and 21, 1987, respectively, the Boards of Supervisors of Fairfax County and Loudoun County adopted resolutions creating the Route 28 District exactly as requested by the petitioning commercial and industrial landowners. Commencing in 1988 and continuing every year since, the Route 28 District Commission has asked the two Boards to levy and collect taxes on commercial and industrial properties in the Route 28 District pursuant to the enabling statute to pay

75% of the cost of constructing the requested improvements (the Commonwealth agreed to be responsible for the other 25% of such costs, the accounting to take place after all the improvements requested by the landowners were constructed), and each year the two Boards have complied.

The improvements were constructed in phases as the commercial and industrial tax base fostered by the improvements became strong enough to support the financing necessary to fund each phase. Construction of Phase One was undertaken soon after creation of the Route 28 District. It was financed in part with approximately $138 million in Commonwealth of Virginia Transportation Contract Revenue Bonds, to be repaid from the tax on commercial and industrial property pursuant to § 15.2-4607. Phase One improved the road to six lanes between Interstate Route 66 in Fairfax County and State Route 7 in Loudoun County with three grade-separated interchanges. Construction of later phases was delayed by the downward market pressure on commercial and industrial property values in the early 1990's, but finally was undertaken after the turn of the new century.

The EDA issued approximately $184 million in bonds from 2003 to 2008 to fund Phase Two improvements to Route 28. Again, the tax on

commercial and industrial land is pledged toward the repayment of these bonds. The Counties of Fairfax and Loudoun provided a moral obligation in support of the bonds, in reliance on their authority to levy and collect the tax on commercial and industrial land in the Route 28 District.

If the classification of commercial and industrial property is struck down as facially unconstitutional in this case, the ramifications for the Route 28 District and its bonds are obvious, and potentially dire. Repayment to the bondholders from the special tax will be placed in jeopardy. Loudoun County could be faced with choosing between an unanticipated financial obligation on its general fund or the risk of compromising its AAA credit rating. Fairfax County and the Commonwealth would likely face similar choices.

B. Striking down the commercial and industrial tax classification would jeopardize the pending Dulles Rail project planned for Loudoun County.

As one of the funding partners, along with the Metropolitan Washington Airports Authority and Fairfax County, Loudoun County has a keen interest in the financial viability of the Dulles Rail Project. The adverse effect of a ruling in favor of FFW with respect to that project is obvious because the subject matter of Record No. 091930 is the validation of bonds to finance the first phase of construction, which has begun.

Depriving Fairfax County of the ability to finance several hundred million dollars of construction costs as planned for years would endanger the Dulles Rail Project, one of the most important ongoing construction projects in the Commonwealth. Without Phase One, extending rail into Loudoun County will be impossible.

C. Limiting the General Assembly's power to classify commercial and industrial land as a proper subject of taxation would eliminate the funding mechanism provided to localities in Northern Virginia and Hampton Roads to address transportation needs.

In 2007, the General Assembly enacted Va. Code Ann. § 58.1-3221.3 for the Northern Virginia and Hampton Roads localities. It authorizes a tax on commercial and industrial property to fund transportation improvements in those congested regions of the Commonwealth. This tax is a local option to be levied and collected by the governing body of each of the eligible localities. This case directly challenges that statute as well as § 33.1-435. Although Loudoun County has not implemented this authority, it has an interest in retaining this local option tax. For the reasons previously set out, Loudoun County respectfully requests that the Court decline the invitation by FFW to rewrite the Constitution of Virginia and insert a "rule of universality" to limit the General Assembly's power to define and classify subjects of local taxation.

D. The rule of universality urged by FFW would have a similar effect on limiting the General Assembly's power to define classifications of personal property for local taxation.

FFW argues that a "rule of universality" should be implied because of two specific provisions in the Constitution of Virginia dealing with the differential treatment of taxable real estate. First, FFW cites the provision of Article X, § 1 that provides for differences in the rate of real estate taxation in annexed or consolidated areas. Next, it cites the provision of Article X, § 2 for deferral of taxes on agricultural, horticultural, forest or open space land. Neither provision expressly limits the classification of taxable subjects. In citing these provisions, however, FFW asks that the court imply a rule of construction that to express or include one thing implies the exclusion of the other (*expressio unius est exclusion alterius*). As previously noted, this rule of construction is directly contrary to the provisions of Article IV, § 14 relating to the powers of the General Assembly.

If such a rule of construction is applied with respect to real property under the structure and content of the Constitution of Virginia, it puts at issue any classification of tangible personal property not explicitly provided in that document. Article X, § 1 includes not only a provision for a difference in the rate of taxation on real property in annexed or

consolidated areas, it has a similar provision allowing for the differential rates for tangible personal property owned by elderly and disabled. The application of the *expressio unius* rule of construction in this constitutional context would call into question many of the tangible personal property classifications established by the General Assembly in Va. Code Ann. §§ 58.1-3504 to -3506.

Loudoun County has relied on these classifications in setting differential rates for personal property. For example, the section now codified as § 58.1-3506(5) was amended in 1986 to add "flight simulators" as part of that separate classification of personal property. 1986 Va. Acts ch. 195. This allowed Loudoun County to establish an attractive tax rate to attract a flight simulator business to the county.

Other important public policy considerations come into play in establishing and applying different classes of property for local taxation. To promote recruitment at volunteer fire and rescue companies, a locality can recognize vehicles owned by volunteers as a separate class of property subject to taxation different from other motor vehicles. Va. Code Ann. § 58.1-3506(15) and (16). To promote the purchase of less-polluting vehicles, taxation of "clean special fuels" and "electric" vehicles may be treated differently from other vehicles. Va. Code Ann. § 58.1-3506(22) and

(40). There are many legitimate public policy reasons for such classifications that have nothing to do with a benefit-burden analysis urged by FFW. The General Assembly's discretion in this regard should not be tampered with lightly.

CONCLUSION

If the Court were to adopt FFW's reasoning, it would have ripple effects across other enactments of the General Assembly upon which localities have relied for decades. With respect to the Route 28 District, bond issuers and bond holders have also relied on these enactments. The financial implications to the Commonwealth and it political subdivisions cannot be understated. Accordingly, Loudoun County respectfully requests that the Court affirm the trial court rulings in this matter and leave undisturbed the power of the General Assembly to define and classify subjects of taxation.

Respectfully submitted,

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CERTIFICATE

I certify that, on June 28, 2010, pursuant to Rule 5:26(d), fifteen copies of this brief amicus curiae were filed with the Clerk of the Supreme Court of Virginia, an electronic copy was e-mailed to scvbriefs@ courts.va.us, and one electronic copy, by email, and three bound copies, by U.S. Mail, were sent to the offices of each of the following:

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