IN THE
SUPREME COURT OF VIRGINIA

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 THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF APPELLEES

The Commonwealth of Virginia, pursuant to VA. S. CT. R. 5:30(a)(1), files this Brief Amicus Curiae as of right in support of the Appellees.

INTEREST OF THE COMMONWEALTH

The Commonwealth's interest in this case is limited to the Constitutional Issue raised in the First and Second Assignments of Error.

STATEMENT OF THE CASE

The Commonwealth adopts the Statement of the Case presented by the Local Entities.

STATEMENT OF FACTS

The Commonwealth adopts the Statement of Facts presented by the Local Entities.

ARGUMENT

I. Neither Va. Code § 33.1-435 nor Va. Code § 58.1-3221.3 violates Article X, § 1 of the Virginia Constitution.

FFW contends that, because Va. Code §§ 33.1-435 and 58.1-3221.3 define and classify residential real property and commercial property as separate classes of property for the purposes of taxation, both statutes violate Article X, § 1's uniformity requirement. However, a review of Article X, § 1 and this Court's prior cases regarding the uniformity requirement demonstrate that neither statute violates Article X, § 1.

Article X, § 1 provides, in pertinent part, that:

> All property, except as hereinafter provided, shall be taxed. All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects . . . .
>
> The General Assembly may define and classify taxable subjects.

By its very terms, the uniformity requirement of Article X, § 1 applies to "all property," whether real or personal. FFW concedes this point, noting that "it is true that personal property is also subject to the uniformity provision . . . ." Opening Brief of FFW, p. 24, (citing, *Alderson v. County of Allegheny*, 266 Va. 333, 340, 585 S.E.2d 795, 798 (2003)).

In interpreting the uniformity requirement and in construing Article X, § 1's declaration that "[t]he General Assembly may define and classify taxable subjects . . . ," this Court has consistently held that the General Assembly may distinguish between classes of property and subject them to different rates of taxation. In *Southern Ry. Co. v. Commonwealth*, this Court explained the uniformity rule, holding that

> It is everywhere agreed that neither the Fourteenth Amendment to the Federal Constitution nor the equality and uniformity requirements of the state constitutions prohibit the making of classifications in state legislation relating to taxation. The power of a state to make reasonable and natural classifications for purposes of taxation, it has been said, is clear and not questioned. 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.* Granting the power of a state to make classifications in tax matters, it has been said, we must then grant the right to select the differences upon which the classification shall be based.

211 Va. 210, 219-20, 176 S.E.2d 578, 584 (1970) (internal quotations omitted), citing, *City of Richmond v. Commonwealth*, 188 Va. 600, 605-06, 50 S.E.2d 654, 656 (1948). In short, this Court has consistently held that the General Assembly may create different classifications of property for taxation purposes and tax them differently so long as properties within the same classification are taxed the same. *See*, *e.g.*, *Lee Gardens Arlington, Ltd. P'ship v. Arlington County*, 250 Va. 534, 538, 463 S.E.2d 646, 698

(1995); *R. Cross, Inc. v. Newport News*, 217 Va. 202, 206, 228 S.E.2d 113, 116 (1976); *East Coast Freight Lines v. City of Richmond*, 194 Va. 517, 522, 74 S.E.2d 283, 287 (1953); *City of Richmond v. Commonwealth*, 188 Va. 600, 50 S.E.2d 654 (1948); *Washington County Nat'l. Bank v. Washington County*, 176 Va. 216, 218, 10 S.E.2d 515, 516 (1940); *City of Richmond v. Drewry Hughes Co.*, 122 Va. 178, 195, 94 S.E. 989, 993 (1918). Clearly, this uninterrupted line of cases establishes that the General Assembly may create different classifications of property under Article X, § 1, such as classifying some property as residential and some as commercial/industrial, and tax those classifications differently, so long as properties within the same classifications are taxed the same.

II. Because the relevant portions of Article X, § 1 of the Virginia Constitution do not distinguish between real and personal property, there is no basis for arguing that they should be regarded differently for uniformity purposes.

In its Opening Brief, FFW challenges the binding effect of the above-referenced decisions interpreting Article X, § 1 by arguing that, although the uniformity requirement applies textually with equal force to personal and real property, "there is no reason why the rule [FFW seeks to impose regarding real property] must be applied to personal property." Opening Brief of FFW, p. 24. However, such an interpretation, treating personal

property differently from real property for uniformity purposes, is inconsistent with the plain text of Article X, § 1.

By its very terms, the uniformity require of Article X, § 1 applies to all property. Article X, § 1 provides, in pertinent part,

> **All property**, except as hereinafter provided, shall be taxed. All taxes shall be levied and collected under general laws and **shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax** . . . .

(emphasis added). Similarly, the portion of Article X, § 1 granting the General Assembly the power to define and classify classes of property for the purposes of taxation also applies to all types of property without distinction between real and personal property. Article X, § 1 ("The General Assembly may define and classify taxable subjects."). Thus, for FFW's construction to be accepted, this Court would have to hold that the single, identical phrase in Article X, § 1 means one thing for real property and another for personal property. Such an interpretation is simply untenable.

Furthermore, the argument that the General Assembly may not define different classes of real property for taxation purposes is inconsistent with the prior decisions of this Court. For example, in *City of Richmond v. Commonwealth*, 188 Va. 600, 50 S.E.2d 654, this Court noted and approved the practice of placing the real property of both railroad and

electric power companies into different tax classifications from the real property of other corporations. The Court held,

> In view of the wide differences in the methods of taxing railroads and assessing the values of their properties for taxation from those applicable to individuals and non-public service corporations, we conclude that the two types of properties are different classes of subjects of taxation, and that **neither the Constitution nor the statutes of the State require that assessments of the real estate . . . of railroads be equalized in any manner with assessments of similar properties of others which are made by the local assessing officers.**

188 Va. at 620-21, 50 S.E.2d at 663-64 (emphasis added). If the real property of particular types of corporations can be placed in different classifications from the real property of other corporations because of the differences in the corporations as perceived by the legislature, certainly the differences between commercial/industrial real estate and residential real estate are sufficient to allow the legislature to classify them differently for taxation purposes. *See also Lee Gardens,* 250 Va. at 538, 463 S.E.2d at 648 (recognizing in a discovery dispute that apartment complexes were a different class of real estate for taxation purposes than other "'commercial properties'").

III. The trial court correctly found that there was a rational basis for the General Assembly's decision to classify residential real estate in one class and commercial/industrial real estate in another.

While Article X, § 1 does grant the General Assembly the ability to "define and classify taxable subjects," that power is not absolute. Both the Virginia and Federal Constitutions require that any such classifications have a rational basis. As this Court has stated on multiple occasions,

> It is everywhere agreed that neither the Fourteenth Amendment to the Federal Constitution nor the equality and uniformity requirements of the state constitutions prohibit the making of classifications in state legislation relating to taxation. The power of a state to make reasonable and natural classifications for purposes of taxation, it has been said, is clear and not questioned.

Southern Ry., 211 Va. at 219-20, 176 S.E.2d at 584 (citation omitted). *See also Commonwealth v. Whiting Oil Co.*, 167 Va. 73, 78, 187 S.E. 498, 500 (1936) ("Classification for the purposes of taxation is a lawful device, commonly resorted to, is at times necessary, and must be sustained if it rests upon any reasonable basis."); *East Coast Freight Lines v. City of Richmond*, 194 Va. 517, 526-27, 74 S.E.2d 283, 288-89 (1953) (same). Thus, so long as there is any conceivable, rational basis for classifying residential real estate differently from commercial/industrial real estate, FFW's Article X, § 1 challenge must fail.

There is no serious question that multiple rational bases exist to treat residential real estate and commercial/industrial real estate differently. As the trial court properly found,

> For this court to invalidate the legislative classification of property for taxation purposes, there must be no rational basis for the classification. The County has posited several conceivable rational bases for the classifications in this case:
>
> > 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.

> It is not the County's burden, however, to prove that there is a rational basis for the classification. The burden rests upon the challenger of a tax classification to prove that no reasonable basis for that classification can be conceived. FFW has failed to meet that burden.

FFW Enters. v. Fairfax County, 2009 Va. Cir. LEXIS 38, at *11-13. Clearly, there are rational reasons to treat residential real estate differently from commercial/industrial real estate. Accordingly, FFW's Article X, § 1 challenge must fail.

CONCLUSION

To the extent that it reaches the merits of FFW's Article X, § 1 challenge, this Court should affirm the judgment below.

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CERTIFICATE OF SERVICE

I certify that on this 25TH day of June 2010, fifteen copies of the BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF THE APPELLEES have been hand delivered and filed in the office of the Clerk of the Supreme Court of Virginia; an electronic copy of the same was filed via e-mail to scvbriefs@courts.state.va.us; and three copies have been mailed by first class, postage prepaid, U.S. Mail to counsel listed below:

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