In the

Supreme Court of Virginia

At Richmond

Record No. 091883

FFW ENTERPRISES,

Appellant,

– v. –

FAIRFAX COUNTY, et al.,

Appellees.

Record No. 091930

FFW ENTERPRISES,

Appellant,

– v. –

FAIRFAX COUNTY ECONOMIC DEVELOPMENT AUTHORITY, et al.,

Appellees.

REPLY BRIEF OF APPELLANT

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ARGUMENT

The Brief of Appellees Fairfax County, the Board of Supervisors of Fairfax County, and the Fairfax County Economic Development Authority (collectively, the "County"), attempts to twist the two straightforward legal arguments presented by FFW Enterprises in an effort to avoid a hearing on the merits, relies on inapplicable legal authority to support its position, ignores the pertinent facts in this case that compel the conclusion that Va. Code §§ 33.1-435 and 58.1-3221.3 (the "Challenged Taxes") violate the Uniformity Provision[1] of the Virginia Constitution, and then, for the first time in this litigation, claims "catastrophic consequences" if the Challenged Taxes are not upheld based on facts not in evidence. For the reasons provided herein, these arguments all fail.

I. All Of FFW Enterprises' Arguments Were Presented To The Circuit Court

In an attempt to avoid the full merits of this case, the County argues that FFW Enterprises should be precluded from raising the "rule of universality" or anything from Art. X, § 6 of the Virginia Constitution on the basis that these issues had not been raised earlier in the litigation. This wishful thinking is wholly based on the County misconstruing FFW Enterprises' arguments.

[1] VA CONST. Art. X, § 1 (1971).

FFW Enterprises' first argument in its Petition for Appeal argued that the Challenged Taxes violated the Virginia Constitution because the canon of *expressio unius est exclusio alterius* prohibited the General Assembly from exempting real property from a tax not granted an express exemption in the Virginia Constitution. The County did not object to this argument being raised on appeal since it had been argued before the Circuit Court, and this Court properly granted certiorari to hear that issue.

The County's claim that the "rule of universality" had not been argued below crumbles when one realizes, as Loudoun County has and FFW Enterprises made clear on page 17 of its Opening Brief, that the rule of universality is the same as *expressio unius*. Amicus Curiae Brief of Loudoun County at 7 ("Whether stated as a 'rule of universality' or the principle of *expressio unius* . . ."). Moreover, citing to Art. X, § 6 is not a new argument, as it is part and parcel of the interpretation of the Uniformity Provision: "The basic uniformity clause will often be supplemented by other constitutional provisions directed to some particular element of the general limitation, . . . [t]herefore, the entire 'uniformity structure' of each state constitution, rather than the basic uniformity clause alone, must be analyzed to understand the basic uniformity provision." WADE J. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION §

2.02 (2d ed. 1984) (hereafter "Newhouse"). Given that Art. X, § 6 contains several tax exemptions, it is a natural part of the argument raised by FFW Enterprises in the Circuit Court that the General Assembly could not exempt real property from a tax beyond those exemptions granted in the Virginia Constitution because real property is one indivisible tax class.

FFW Enterprises has not changed its argument—it has simply brought more research and analysis to bear on its arguments, apparently to the County's chagrin.

II. The County And Amici Rely On Inapplicable Law For Their Position That The General Assembly May Exclude Non-Exempt Real Property From A Tax

There are multiple aspects of a tax that the Uniformity Provision can apply to, such as the designated property to be taxed also known as the "object" of a tax, the "method of taxation" through the base and rate of the tax, and the method of assessing that property for *ad valorem* taxation. Newhouse, § 2.02 (listing aspects), and § 2.04 (assessment).[2] This case does not concern uniformity as to the base or rate of taxation, or the method of assessment, and FFW Enterprises agrees *arguendo* that the

[2] This Court has noted the same: "There is a marked difference between making a levy and the assessment of property for the purpose of taxation. A levy is merely fixing the subject and the amount at which property is to be taxed. An assessment consists in listing the property and putting a value thereon to which the rate fixed by the levy is to be applied." *Breckenbridge v. County School Bd.*, 146 Va. 1, 5, 135 S.E. 693, 695 (1926)

General Assembly can ascribe different rates to commercial and residential real property, so long as a rate is not so low as to be a *de facto* exemption, or use different methods to assess the value of commercial and residential real property for tax purposes. This case, however, solely concerns the limitations on the General Assembly's power to *designate the objects* of a real property tax; in other words, "Must all property within the territory of a taxing authority, except that explicitly designated as exemptible by the constitution, be selected for the object of any property tax imposed by that authority?"[3] Newhouse at § 2.02. As a result, the County and Amici's reliance on cases concerned with the Uniformity Provision's application to a tax rate or method of assessment is simply misplaced.

Time and again the County and Amici cites to decisions of this Court that did not address the aspect of uniformity raised here. For example, the County and Amici rely on *East Coast Freight Lines v. City of Richmond*, 194 Va. 517, 74 S.E.2d 283 (1953), to argue that the legislature enjoys broad discretion in classifying the objects of a tax, yet that opinion specifically set forth how Va. Const. § 169 expressly authorized the tax class—public service corporations—in that case. *Id.* at 522. This Court

[3] FFW Enterprises' alternative argument under the benefit/burden rational basis test focuses on the same aspect of uniformity, but from the perspective of relative benefits to those taxed and untaxed.

then upheld the General Assembly's power to subclassify within that constitutionally-provided class so long as the subclass taxed was not "precisely the same" as another subclass. *Id.* at 527. There was no exemption at issue like there is in this case, and thus it does not control here. The County also cited to *Breckenbridge* for the position that Virginia has not adopted the rule of universality, Brief of Appellees at 38, but the statute at issue in that case specifically created "a special tax on *all the property* subject to local school taxation in the said county," and thus did not exempt any property as would be prohibited by the rule. 146 Va. at 4, n. 1. Indeed, *Breckenbridge* did not concern the Uniformity Provision at all.

The County and Amici also rely on a host of decisions that only concerned uniformity of assessment, such as *Lee Gardens Arlington, L.P. v. Arlington County Bd.*, 250 Va. 534, 463 S.E.2d 646 (1995), *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, 10 S.E.2d 515 (1940), *Southern Ry. Co. v. Commonwealth*, 211 Va. 210, 176 S.E.2d 578 (1970), *Smith v. City of Covington*, 205 Va. 104, 135 S.E.2d 220 (1964), and *R. Cross, Inc. v. City of Newport News*, 217 Va. 202, 228 S.E.2d 113 (1976), or uniformity of the rate of taxation, such as *Va. Elec. & Power Co. v. Commonwealth*, 169 Va. 688, 194 S.E. 775 (1938) and *City*

of Richmond v. Drewry-Hughes, Co., 122 Va. 178, 94 S.E. 989 (1918). These aspects of uniformity are not at issue in this case, and have no application to the matter at hand. While the power to create a class for taxation was the subject of *Commonwealth v. Whiting Oil Co.*, 167 Va. 73, 187 S.E. 498 (1936), this Court quickly determined that the license tax therein was not a direct tax on property, and thus was not subject to the Uniformity Provision at all. *Id.* at 77.

The County's confusion is perhaps best evidenced in its flawed analysis of *Clifton v. Allegheny County*, 600 Pa. 662, 969 A.2d 1197 (2009), which the County cited for the proposition that Pennsylvania is "reconsidering" its approach to uniformity.[4] Again, the County failed to distinguish between Pennsylvania's uniformity as to the objects of a tax, which remains unchanged, and uniformity as to the methods of assessment between tax classes, which is what *Clifton* addressed and is the area of uniformity that the Pennsylvania Supreme Court may be moderating, as was already mentioned in the Opening Brief at 23. Pennsylvania has yet to overrule its original holding that all real property is of a single, indivisible tax class absent an explicit exemption in the Pennsylvania Constitution,

[4] The County even goes so far as to accuse the Pennsylvania Supreme Court of having "misconstrued" its own opinions, Brief of Appellees at 41, although the County gives no basis for why it should be considered a higher authority on Pennsylvania law than that state's supreme court.

despite the County's wishes to the contrary. See, e.g., *In re Lower Merion Twp.*, 427 Pa. 138, 143, 233 A.2d 273, 276 (1967).

Finally, some Amici claim that Art. IV, § 14 of the Virginia Constitution precludes the application of the rule of universality to the Uniformity Provision, yet their argument neglects to address the fact that Art. X, § 6 specifically states that the express exceptions "and no other" are allowed—thus fixing the number of exemptions the General Assembly may utilize. *Hollywood Cemetery Co. v. Commonwealth*, 123 Va. 106, 110, 96 S.E. 207, 208 (1918). In that sense, the rule of universality is not merely implied in this instance, it is *expressly mandated* as a limitation on the legislature's power to exempt classes of real property from a tax.

III. The County Ignores Key Facts Supporting FFW Enterprises' Position

The County repeatedly stresses in Part III of its Brief that FFW Enterprises has not met its evidentiary burden to demonstrate that the Challenged Taxes lack a rational basis and thus violate the Uniformity Provision. However, the County is not considering the pertinent facts in this case that prove the Challenged Taxes are unconstitutional.

It is undisputed that the Challenged Taxes, by their terms, tax only certain commercial/industrial real property, and specifically exclude

residential real property from the respective tax classes. It is also undisputed that the Challenged Taxes, by their terms, collect revenues for the sole purpose of funding transportation improvements that either benefit the entire taxing locality or the general public as a whole. See Opening Brief at 41-42 (quoting from each statute). These are the only facts necessary to find that the Challenged Statutes violate the Uniformity Provision under the benefit/burden rational basis test of *City of Hampton v. Ins. Co. of North America*, 177 Va. 494, 14 S.E.2d 396 (1941).

As previously discussed, the benefit/burden rational basis test of *City of Hampton* applies to those taxes based on a theory of benefits conferred, and asks: "are there others, who are benefited as much or more than those smarting under the tax imposition, who go unwhipped of its burden?" *Id.* at 498. Under that test, this Court reasoned that a tax on fire insurance companies to fund fireman pensions violated the Uniformity Provision because those who were not insured "benefited as much or more than insurance companies by the activities of fire departments." *Id.* It is enough, as the County repeatedly admitted, to find a uniformity violation when those subject to the tax "received no preferential treatment or heightened degree of service" from the benefit conferred, since "[o]ther properties, including uninsured or underinsured property, would get at least

as good a response [from the fire department]." Brief of Appellees at 20, and see *City of Hampton*, 177 Va. at 498.

The County argues that FFW Enterprises must present "quantitative" evidence regarding the "relative magnitude of benefits that would be enjoyed by any particular property" as a result of the transportation improvements to be funded by the Challenged Taxes. Brief of Appellees at 20. But that misconstrues the application of the benefit/burden test. The *City of Hampton* Court did not require that the petitioners demonstrate the precise level of benefits received by any particular property owner from the fire departments in the taxing jurisdiction. A public benefit like fire departments was *presumptively determined* to be of a like benefit to all property owners in the taxing jurisdiction, absent evidence that the subject benefit actually favored one class of property owners over another. In other words, under *City of Hampton*'s analysis, if a specific public benefit is to be funded by a tax, the presumption is that all property owners within the taxing jurisdiction will equally benefit from the tax.

The only factual question, then, is whether the benefits provided by the Challenged Taxes are public in nature like the fire departments in *City of Hampton*. The answer is clearly yes. The very terms of the Challenged Taxes themselves compel the factual determination that the transportation

improvements funded by each tax are to benefit the entire locality and the public as a whole, and not with specific weight in favor of the commercial and industrial real property. Indeed, a plain reading of each statute indicates that revenues raised cannot be used on transportation projects that do not benefit the entire locality or the public as a whole—and thus could not be used for transportation improvements that specifically benefit the commercial/industrial real property being taxed.

Despite the County's protests, the plain language of the Challenged Taxes themselves provide all the evidence this Court needs to find each facially unconstitutional under the Uniformity Provision as construed through the benefit/burden rational basis test of *City of Hampton*.

IV. The Claim That The Challenged Taxes Must Be Upheld To Avoid "Catastrophic Consequences" Is Wholly Speculative And Demonstrably False

The County and Amici rely on hyperbolic public policy appeals, based on evidence not in the record, praying that the Court will uphold the Challenged Taxes regardless of their constitutionality, or else certain essential transportation projects and personal property taxes will be threatened. This argument does not hold water.

As an initial matter, it is important to remember that from its earliest days, this Court has held the Virginia Constitution as "sacred," certainly

more so than any one road or transportation project. *Kamper v. Hawkins*, 3 Va. 20, 59 (1788)(Op. of Tyler, J.). This Court has repeatedly reminded itself that protecting the Constitution is more important than any particular public policy goal, no matter how "praiseworthy and altruistic" that goal is claimed to be. *City of Hampton*, 177 Va. at 508. If a public policy goal cannot be achieved without violating the Constitution as currently written, the General Assembly has ample power under Art. XII to amend the Constitution accordingly. There is simply no excuse for perpetuating a violation of the Constitution, and just because the General Assembly thinks what it is has been doing is constitutional does not mean that a tax that violates the clear language of the Uniformity Provision is thereby, *ipso facto*, constitutional.

A. Threats to Current Projects Are Highly Unlikely

The County and Amici argue that even if the Challenged Taxes are deemed unconstitutional, they must be upheld because any constitutional tax thereupon enacted (which would merely have to tax all real property within the respective jurisdictions not subject to an express exemption under Article X) would be inadequate to meet the obligations of each transportation project, whether it be Route 28 or the Metrorail extension. The only reason given is simply political expediency: the "difficulties [a

constitutional tax] 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." Brief of Appellees at 48. In other words, since it might be politically hard to get residential real property owners to pony up a share of the cost, the General Assembly should be allowed to exempt them from the tax.[5]

Such reasoning finds no basis in this Court's uniformity jurisprudence, and for good reason: such political expediency excuses could always be used to target a tax on those who are politically disfavored or powerless, and exempt those who are politically favored or powerful.

The County also threatens that if the Challenged Taxes are struck down, an "excess of a billion dollars" could be at stake as a result of "likely" delays in construction of the Metrorail extension, with not a shred of actual evidence to prove any of these claims. Brief of Appellees at 48. The County is not above even threatening "abandonment" of the entire project altogether. *Id.* at 49. One would think that if such dire consequences were possible, the County would have mentioned them to the Circuit Court, or at

[5] The County and Amici do not consider the possibility of a tax on all real property within a subject jurisdiction where the taxing jurisdiction is drawn to only include commercial and industrial real property. Such an approach would be similarly politically expedient and compliant with the rule of universality.

least during the petition stage of this appeal. Claiming like Chicken Little that the sky is falling only after this Court has granted this appeal gives a clear indication as to the proper weight to ascribe to this parade of horribles.

It is a matter of public record that the County's share of the cost for the Metrorail extension is minor compared to the billions already committed by the federal government, the Commonwealth, and other entities. And yet the Commonwealth, which is currently obligated to pay a much larger amount of the cost through revenues generated from the Dulles Toll Road, notably declined to support the County's doom-and-gloom predictions in its amicus brief.

If the Challenged Taxes are deemed unconstitutional, the General Assembly would still have a wealth of options available with which to institute new constitutional taxes to take their place, with little probable effect on any of the ongoing transportation projects, and the County and Amici have not demonstrated otherwise.

B. This Court's Application of the Rule of Universality to Strike Down the Challenged Taxes Would Not Affect Personal Property Taxes

The County and Amici all argue that if the Challenged Taxes are struck down for failing to include all non-constitutionally exempt real

property within the subject tax class, the same result must apply to personal property taxes. FFW Enterprises already anticipated and answered this argument, see Opening Brief at 24-27 and merely amplifies the fact that the only personal property taxes the County and Amici have been able to identify as being, in their view, endangered by a decision in this case are Va. Code §§ 58.1-3504 through 3506, even though §§ 58.1-3504 and 3505 both enjoy explicit constitutional authority under Art. X, § 6(e), and § 58.1-3506 allows different rates of taxation rather than exemption. In effect, the County and Amici have not demonstrated that Virginia taxes on personal property would change at all under the rule of universality.

CONCLUSION

The remaining arguments presented by the County and Amici have already been fully addressed in the Opening Brief or by the Amicus Curiae Brief of the Tax Foundation. Accordingly, for the reasons presented in the Opening Brief and herein, FFW Enterprises respectfully requests relief as set forth in its Opening Brief.

Respectfully submitted,

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RULE 5:26(d) CERTIFICATE

I HEREBY CERTIFY that on the 8th day of July, 2010, fifteen copies of the foregoing Reply Brief of Appellant were hand-delivered to:

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