
In the
Supreme Court of Virginia
At Richmond

Record No.

FFW ENTERPRISES,

Petitioner,

– v. –

**FAIRFAX COUNTY and
THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY,**

Respondents.

PETITION FOR APPEAL

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ASSIGNMENTS OF ERROR

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

QUESTIONS PRESENTED

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

STATEMENT OF THE CASE

This case concerns a question of first impression regarding the power of the General Assembly to subclassify taxable real property for a specific public benefit given the structure and uniformity requirement of the Virginia Constitution.

Petitioner FFW Enterprises is the owner of commercial real property located in Fairfax County. In 2008, Fairfax County levied a tax upon that property pursuant to Va. Code § 58.1-3221.3. From 2006 to 2008, Fairfax County levied a tax upon that property pursuant to Va. Code § 33.1-435. Pursuant to Va. Code § 58.1-3984, FFW Enterprises brought the instant lawsuit against Fairfax County and its Board of Supervisors (collectively, the “County”) challenging the taxes on the basis that both are facially unconstitutional under the Virginia Constitution for failing to include residential real property as the class subject to taxation.

There was no discovery conducted, as the parties believed that they could come to an agreement on the material issues of fact relevant to the case. Pursuant to that goal, the parties entered into a Joint Stipulation of Admitted Facts that was submitted to the trial court on February 20, 2009. By order of Fairfax Circuit Court Judge Jane Marum Roush, the parties entered into a briefing schedule in which the parties filed cross motions for

summary judgment and respective reply briefs. Oral argument was heard on April 3, 2009, at the conclusion of which the trial court stated that she was taking the motions under advisement and would issue a memorandum opinion. In its opinion of June 5, 2009 (the "Memorandum Opinion"), the trial court denied FFW Enterprises' motion for summary judgment and granted the motion for summary judgment filed by the County. A Final Order to that effect was entered on June 16, 2009.

FFW Enterprises noticed an appeal of the trial court's rulings on July 16, 2009.

STATEMENT OF FACTS

In the Joint Stipulation of Admitted Facts submitted to the Circuit Court (hereinafter “S.”), the parties stipulated many of the facts underlying this cause of action.

Petitioner FFW Enterprises is the owner of commercial real property located at 8455A Tyco Road in Fairfax County. S. ¶ 23. In 2008, that real property was levied a tax by Fairfax County pursuant to Va. Code § 58.1-3221.3 (the “Transportation Tax”), which FFW Enterprises timely paid. S. ¶ 24. In 2006, 2007 and 2008, the same real property was levied a tax by Fairfax County pursuant to Va. Code § 33.1-435 (the “District Tax”), which FFW Enterprises timely paid. S. ¶ 25. The parties stipulated that the General Assembly duly enacted both statutes (S. ¶¶ 1, 7) and that the County followed all applicable statutory requirements in implementing and levying the taxes, including the County’s use of the revenues generated by the taxes (S. ¶¶ 2, 4-6, 14-22, 26). The litigation was thereby focused on the facial constitutionality of the statutes themselves.

The Transportation Tax is an ad valorem tax on real property that may be instituted by any local government within the Northern Virginia Transportation Authority or the Hampton Roads Transportation Authority.

With regard to the classification of the real property to be taxed, the

Transportation Tax states as follows:

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

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

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

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

property in commercial use and therefore subject to the special improvements tax authorized by this section.

Va. Code § 33.1-435. Revenues raised by this ad valorem tax are dedicated to transportation improvements in the district, or can be paid to the Commonwealth Transportation Board. See Va. Code §§ 33.1-433 and 436.

The parties agree that FFW Enterprises' commercial real property falls within the geographical and classification boundaries of both taxes. However, the parties disagree on one crucial fact: FFW Enterprises maintains that the transportation improvements that will be funded by both taxes will benefit the owners of residential real property not subject to the taxes as much or more than the commercial and industrial real property owners that must pay the taxes.

ARGUMENT

This case requires this Court to determine whether the General Assembly has the power to subclassify real property for taxation given the mandate under Article X, § 1 of the Virginia Constitution that all taxes on real property be uniform. This Court has not previously considered a constitutional challenge to the General Assembly's power to enact a tax on a subclassification of real property to raise revenue for a specific public purpose, so this case appears to be one of first impression in the Commonwealth. Moreover, given that the precedent set by these taxes, should they be upheld, would allow the General Assembly to effectively force commercial and industrial landowners, or even subsections thereof, to foot the entire cost of all public services and amenities in the Commonwealth, it is of monumental importance that this Court grant review of the questions presented in this Petition and provide definitive guidance on these issues for the consideration of future taxes.

At the hearing before the trial court, FFW Enterprises argued that Va. Code §§ 58.1-3221.3 (the "Transportation Tax") and 33.1-435 (the "District Tax") were facially unconstitutional because (1) the General Assembly lacked the authority to subclassify real property for the purpose of taxation beyond those classifications specifically granted exemptions in Article X, §§

1, 2, and 6 of the Virginia Constitution, and (2) the challenged taxes violate the constitutional requirement that all taxes on real property be uniform pursuant to Art. X, § 1 of the Virginia Constitution as the taxes lacked a rational basis under *City of Hampton v. Ins. Co. of North America*, 177 Va. 494, 14 S.E.2d 396 (1941).

In its Memorandum Opinion denying FFW Enterprises' motion for summary judgment and granting summary judgment for the County, the trial court completely ignored FFW Enterprises' first argument. As for the second argument, the trial court failed to give due consideration to this Court's holding in *City of Hampton*, despite the fact that the unanimous opinion had not been overruled explicitly or implicitly by this Court. The trial court also disregarded the evidence that FFW Enterprises cited in support of its claim under *City of Hampton's* benefit/burden rational basis test that residential real property owners would benefit as much or more than commercial and industrial real property owners from transportation improvements funded by the challenged taxes, and the court cited to facts not in the record to support the County's position. The trial court simply accepted the County's proposed bases for the tax classifications without engaging in any scrutiny whatsoever.

As a result, this Court should grant review in this case to determine whether the challenged tax statutes are facially unconstitutional and violate the uniformity requirement of the Virginia Constitution both under the inherent structure of the Virginia Constitution and the standard set forth in *City of Hampton*.

I. STANDARD OF REVIEW

This Court reviews rulings regarding the constitutionality of a statute *de novo*. *Shivae v. Commonwealth*, 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005). When challenging a tax statute as lacking uniformity or otherwise unconstitutional, the taxpayer bears the burden of proof. Va. Code § 58.1-3984. When evaluating a constitutional challenge to an act of the General Assembly, every reasonable doubt must be resolved in favor of constitutionality. See, e.g., *Hunton v. Commonwealth*, 166 Va. 229, 236, 183 S.E. 873, 876 (1936). However, “Ours is a government whose powers are limited by the Constitution. Where statutory enactments and common-law rules come into conflict with constitutional principles, the latter must prevail.” *Commonwealth v. Owens-Corning Fiberglass Corp.*, 238 Va. 595, 600, 385 S.E.2d 865, 868 (1989). Even though the purpose of a statute may be “altruistic and praiseworthy,” this Court has reminded itself in dicta that the “impulse” to uphold such a statute “must not cause us to hesitate in

the preservation of the integrity of the Constitution, which is the foundation of our structure of government.” *City of Hampton*, 177 Va. at 508.

II. The General Assembly Lacked Authority To Exclude Residential Real Property From The Classes Subject To Taxation Because Residential Real Property Is Not A Use Subject To Exemption From Taxation Under The Virginia Constitution.

In terms of what kind of property was made a class subject to taxation and what benefits were to be created with the revenue generated thereby, the Transportation Tax and the District Tax are largely similar in that they both only tax commercial and industrial real property¹ for the purpose of paying for transportation improvements. FFW Enterprises argues that these taxes are both facially unconstitutional under the Virginia Constitution for failing to include residential real property as a subject for taxation.

The General Assembly is empowered by the Virginia Constitution to “define and classify taxable subjects” under Article X, § 1. “Such classifications may be with respect to the subjects of taxation generally, the kinds of property to be taxed, the rates to be levied or the amounts to be raised, or the methods of assessment, valuation and collection.” *City of Richmond v. Commonwealth*, 188 Va. 600, 605, 50 S.E.2d 654, 656 (1948) (quoting 51 Am. Jur. Taxation, § 173, pp. 230-31) (emphasis omitted).

¹ The District Tax also applies to “taxable leasehold estates,” but neither tax includes residential real property as part of the taxable subject class.

However, that power is not unlimited. A “direct tax on property,” such as the taxes challenged in this case, is subject to the uniformity requirement of the Virginia Constitution. *Bradley & Co. v. Richmond*, 110 Va. 521, 525, 66 S.E. 872 (1910). That uniformity requirement in Article X, § 1 provides:

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

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

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

Finally, Article X, § 6 of the Virginia Constitution also lists additional classes of property that “shall be exempt” from taxation. Residential real property as a whole is not listed in the Virginia Constitution under any of

these sections as a class of property that may receive a deferral of, or relief or exemption from taxation.

Under the principle of *expressio unius est exclusio alterius*,² the Virginia Constitution's specification of certain types of real estate eligible for an exemption, deferral or relief from taxation necessarily implies that types of real estate not so specified, such as residential real estate, shall not be entitled to exemption, deferral or relief. As a result, the natural reading of these constitutional provisions together is that, except for the exceptions specifically mentioned in Art. X, §§ 1, 2 and 6 of the Virginia Constitution, all real property within a given jurisdiction must be treated as a single, indivisible class for the purpose of taxation, and the General Assembly does not have the authority to enact a statute that taxes only a portion of the real property within a taxing jurisdiction, whether based on use or location.

This Court reinforced the principle that taxation must be uniform across all forms of real estate barring a specific constitutional exemption in *City of Roanoke v. Hill*, 193 Va. 643, 70 S.E.2d 270 (1952). In that case, taxpayers brought a uniformity challenge on the basis that real property

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

within a sanitary district annexed into the City of Richmond was assessed a tax of \$1.65 per \$100 of valuation, while real property already in the City was assessed a tax of \$2.50 per \$100. After annexation, the sanitary district's rate did not change. The Court upheld the disparity on the basis that Section 169 of the Virginia Constitution had an explicit exception to the uniformity rule in those cases where real property was annexed by a governmental authority.³ However, the Court noted in dicta that were it not for the constitutional provision regarding annexation, "the city of Roanoke would have had to levy a tax rate of \$2.50 on all the land in the annexed areas because that was the rate that was levied on all the real estate included in the corporate limits of the city of Roanoke prior to and after the annexation of the area herein concerned." *Id.* at 648-49.

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

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

This approach is consistent with the practice of our sister Commonwealth of Pennsylvania, whose Constitution has a uniformity provision similar to Virginia's. See PA. CONST. Art. 8, § 1 (1968).⁴ The Supreme Court of Pennsylvania has construed its uniformity provision to hold that "all real estate is a constitutionally designated class entitled to uniform treatment" for the purposes of taxation. *Westinghouse Elec. Corp. v. Bd. of Property Assessment, Appeals and Review of Allegheny County*, 539 Pa. 453, 469, 652 A.2d 1306, 1314 (1995). The sole exceptions to this rule are those specifically enumerated in the Pennsylvania Constitution. *Hess v. Montgomery County Bd. of Assessment Appeals*, 75 Pa. Commw. 69, 73, 461 A.2d 333, 335 (Pa. Commw. Ct. 1983); see also PA. CONST. Art. 8, § 2 (listing exceptions).

Pennsylvania originally allowed for real estate to be divided into separate classes, see, e.g., *City of Williamsport v. Brown*, 84 Pa. 438 (1877), but decided to adopt the indivisibility standard after a history of interpretation of the uniformity clause that was "as unpredictable and winding as Alice's road through Wonderland." *In re Lower Merion Tp.*, 427 Pa. 138, 143, 233 A.2d 273, 276 (1967). In *Merion*, the Supreme Court of

⁴ That provision states: "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

Pennsylvania struck down amendments to the Commonwealth's code that "prohibit[ed] interim assessments for un conveyed or unoccupied residential structures." *Id.* at 142. Since "residential real property, occupied or not," was not subject to an exemption under the Pennsylvania Constitution, *id.*, and since "real estate as a subject for taxation may not validly be divided into different classes," those amendments treating un conveyed or unoccupied residential real estate differently from other forms of real property were not constitutionally uniform. *Id.* at 143.

Accordingly, this Court should grant review of this case to determine whether Art. X, §§ 1, 2, and 6 of the Virginia Constitution, construed together, mandate that all real property be an indivisible class for the purposes of taxation, subject only to the express exceptions enumerated therein, as Pennsylvania's Supreme Court has done.

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

In determining whether a tax classification is unconstitutional for lack of uniformity under Art. X, § 1, the Virginia Supreme Court has held that the classification may not be "arbitrary, discriminatory or unreasonable." *East Coast Freight Lines v. City of Richmond*, 194 Va. 517, 527, 74 S.E.2d 283,

289 (1953). This standard has been likened to “rational basis” scrutiny. *Bd. of Supervisors v. McDonald’s Corp.*, 261 Va. 583, 591, 544 S.E.2d 334, 339 (2001) (using same standard for zoning ordinances), see also *Commonwealth v. Whiting Oil Co.*, 167 Va. 73, 78, 187 S.E. 498, 500 (1936).

There is no question that when considering taxes that raise revenues for the general public coffers, the General Assembly may, within a larger taxation scheme, implement taxes that target specific classifications of property “based upon a principle of equalization of the tax load” across all classes of property. *Caskey Baking Co. v. Commonwealth*, 176 Va. 170, 180, 10 S.E.2d 535, 540 (1940), *aff’d* 313 U.S. 117, 61 S.Ct. 881 (1941). For those taxes, “[o]ne who assails the classification . . . must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.” *Whiting Oil Co.*, 167 Va. at 78. However, the taxes challenged in this lawsuit are unique from most other taxes previously considered by this Court because each targets a particular subclassification of real property (here, commercial and industrial real property) for the purpose of providing a specific benefit (here, transportation improvements) instead of going toward general revenues.

The last time this Court examined a tax with those characteristics was in *City of Hampton v. Ins. Co. of North America*, 177 Va. 494, 14 S.E.2d 396 (1941). In that case, this Court considered the constitutionality of sections 3144t, 3144u, 3144v, and 3144w of chapter 387 of the Acts of the General Assembly of Virginia of 1934. Pursuant to those statutes, the City of Hampton passed an ordinance levying a tax on fire insurance companies licensed to do business in Virginia, based on fire insurance policies covering property within the city's limits, for the benefit of a fireman's relief fund. The Court was asked to determine the constitutionality of the classification under the uniformity provision of the Virginia Constitution at the time,⁵ given that the taxation of fire insurance premiums to raise money for firefighters was "a classification founded upon benefits bestowed." *Id.* at 499.

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

⁵ VA. CONST. § 168 (1902).

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

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

The lesson of *City of Hampton* is clear: when considering the constitutionality of a tax on a particular class of property to raise revenue

for a specific purpose, that tax lacks a rational basis and fails the uniformity requirement of the Virginia Constitution if those not part of the taxed class benefit from the purpose of the tax as much or more than those who are taxed.

In this case, the trial court failed to properly apply the benefit/burden test of *City of Hampton* in determining whether the General Assembly had a rational basis for the tax classifications of the challenged taxes. The trial court also improperly questioned the viability of *City of Hampton* and incorrectly decided that the decision was not binding on this case, notwithstanding the fact that *City of Hampton's* premiums tax is similar to the taxes challenged here and the decision has not been overturned or distinguished in subsequent decisions of this Court. These issues will be addressed in turn.

A. *The Trial Court Failed to Properly Apply the City of Hampton Benefit/Burden Test to the Facts of this Case*

Under the benefit/burden test of *City of Hampton*, the trial court was required to hold that the challenged taxes were unconstitutional under Art. X, § 1 of the Virginia Constitution if there were “others, who are benefited as much or more than those smarting under the tax imposition, who go unwhipped of its burden[.]” *City of Hampton*, 177 Va. at 498. Since residential real property owners would benefit as much or more from the

transportation improvements funded by the challenged taxes, the trial court erred in finding that “there is nothing in the record to support [FFW Enterprises’] argument that residential property owners will be benefited by the proceeds of the transportation taxes ‘as much if not more’ than commercial and industrial property owners.” Memorandum Opinion at 7.

For the same reason that this Court decided on its own in *City of Hampton* that fire departments were of a like benefit to all property owners within the city’s jurisdiction, as “the duty of a fire department is the same towards all combustible property within the municipality,” 177 Va. at 498, this Court should also find that transportation infrastructure, such as roads, light rail, and bridges, also benefit all landowners within the relevant jurisdiction. Transportation infrastructure, like fire departments, does not confine its benefits to particular property owners in the taxing jurisdiction. A public road does not refuse access based on whether the traveler is on a personal errand or a commercial delivery.

Moreover, as FFW Enterprises argued at the hearing, even when the transportation improvements enable a resident to reach a commercial business and engage in a commercial transaction—the most obvious “benefit” the commercial landowner can receive—the resident has benefited from the commercial transaction as well: “There is not a winner

and a loser, there are two winners, just as much as there are two winners when someone can make it to the commercial business and have the ability to go to work.” Hearing Transcript, p. 67:6-9. And FFW Enterprises argued in its initial memorandum in support of summary judgment “that all transportation improvements, including Metrorail, benefit all surrounding landowners, regardless of commercial or residential use, for the simple reason that the increase in access to a district enables all people, whether residents or employees, to travel to and from that area[,] . . . decreasing travel time and increasing property values—items of benefit to all landowners.” Memorandum of Points and Authorities In Support of Plaintiff’s Motion for Summary Judgment, pp. 7-8. Thus, it should be self-evident that transportation improvements, like fire departments, are a benefit to all property owners within a given jurisdiction.

This conclusion is further compelled when the implications to Virginia tax policy, should the challenged taxes be upheld, are considered. If commercial and industrial landowners can be singled out to bear the entire burden of transportation improvements and maintenance, then there is no reason why those same landowners could not also be forced to bear the burden of other public goods, such as parks, sewers, government buildings, or monuments. If such public goods are not self-evidently a

benefit to all, and thus need not be paid for by all within the taxing jurisdiction, then unpopular or less politically savvy property owners will inevitably be forced to bear the burden of paying for them.

Even worse, if it is acceptable for businesses to shoulder the entire burden of a public good, the door is then open for the General Assembly to narrow its classifications even further—perhaps to target a subset of commercial properties, like those designated as part of a regional retail commercial district; or even more narrowly, like supermarkets. This is surely not the inequitable result that the uniformity provision of the Virginia Constitution was intended to create.

To support its finding that transportation improvements would not benefit residential landowners as much or more than commercial/industrial landowners subject to the tax, the trial court relied on the “petition of affected property owners . . . [which] alleged that ‘landowners of industrially and commercially zoned property and of taxable leasehold interests . . . would *benefit specially* from the extension of rail service to Dulles Airport.’” Memorandum Opinion at 7 (emphasis in Opinion). The first problem with this factual determination is that it had not been stipulated *as a fact* that commercial/industrial landowners would “benefit specially” from the District Tax—it was only stipulated that the petition requesting the creation of the

special transportation district “asserted” as such, not that the petition’s assertion was true. S. ¶ 13. The statements made in the petition, if taken for the truth of the matter asserted, are classic hearsay. So while the parties had admitted that the petition stated certain things, the parties had not admitted to any of the opinions presented in the petition, and it was error for the trial court to rely on those opinions.

The second problem is that even if the trial court was entitled to treat that portion of the petition’s language as evidence toward the benefit/burden test, the same petition also stated that “the citizens of Fairfax County . . . and all travelers to and from the Nation’s Capital would derive *extraordinary benefits* from the [expansion].” S. Ex. 2, p. 1 (emphasis added). The petition also asserts that the extension would “significantly relieve traffic congestion, resulting in better air quality and related environmental benefits as well as an improved quality of life *for the citizens of Fairfax County.*” *Id.* at p. 2 (emphasis added). By the petition’s own admission, these are not benefits solely retained by commercial and industrial landowners in the Phase I District, but are benefits to *every resident* in the County. So to reach the conclusion that the only evidence provided by the parties on the benefit/burden test was the petition’s assertion that commercial/industrial landowners would “benefit specially”

from the transportation improvements funded by the District Tax meant the trial court had to arbitrarily ignore the other assertions made by the petition cited above that clearly supported FFW Enterprises' position.

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

The County proffered three so-called rational bases to uphold the challenged taxes, and the trial court, with no scrutiny whatsoever, adopted those bases wholesale. While FFW Enterprises demonstrated in its Opposition and in oral argument how those bases were not sustainable (see FFW Enterprises Opposition to Defendants' Motion for Summary Judgment and Final Order, pp. 5-9; Hearing Transcript, pp. 29:8 to 32:30, 69:20 to 71:8), the more important point is that, under *City of Hampton*, the traditional rational basis test does not apply to taxes that target a class of

property for the purpose of funding a specific benefit. Instead, this Court made clear that “uniformity is nonexistent” when such a tax fails the *City of Hampton* benefit/burden test. 177 Va. at 499. Thus, the trial court’s consideration and adoption of the County’s bases for upholding the challenged taxes was improper.

For these reasons, the trial court erred by not finding that transportation improvements benefit residential landowners as much or more than the commercial and industrial landowners subject to the challenged taxes, and accordingly failed to apply the benefit/burden test of *City of Hampton* to strike down the challenged taxes under Art. X, § 1 of the Virginia Constitution. This Court should accordingly grant review of the trial court’s rulings.

B. City of Hampton Is Still Good Law and Applies In This Case

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

Nevertheless, the County argued that since it had “never been cited by the Virginia Supreme Court in almost 70 years since it was decided,” Hearing Transcript, p. 41:10-11, it “has disappeared” as a practical matter as an opinion relied upon by this Court for any principle of law, *id.* at 41:17, and thus the decision was “the ultimate outlier.” *Id.* at 40:20. In its Memorandum

Opinion, the trial court openly challenged the validity of *City of Hampton* on the bases raised by the County. Memorandum Opinion at 7. FFW Enterprises maintains that every decision of this Court is binding on the courts of the Commonwealth, regardless of the number of times each is cited, *only until* this Court decides to overturn it. Moreover, as demonstrated *infra*, the decision in *City of Hampton* was not an “outlier,” being the natural product of previous decisions of this Court, and is well-grounded in the purpose and intent of the uniformity provision of the Virginia Constitution. Finally, the trial court erred in finding that the benefit/burden test of *City of Hampton* was not binding on this case. This Court should accordingly grant review to reaffirm *City of Hampton*, explicitly reject the proposition that decisions of this Court lose precedential weight based on the number of citations to any particular opinion, and apply the reasoning of *City of Hampton* to this case.

City of Hampton's benefit/burden test developed from previous tax opinions this Court had considered. Road taxes, which for obvious reasons bear a strong relation to the transportation taxes challenged here, have traditionally been assessed against real property abutting the roads to be improved by the revenues from the tax, as those properties would obviously stand to benefit from the road being maintained. In one such

case, *Norfolk City v. Ellis*, 26 Gratt. (67 Va.) 224 (1875), this Court stated that a tax “not founded upon any idea of revenue, but upon the theory of benefits conferred,” must function “according to the maxim, that he who receives the *benefit* ought to bear the *burden*; and it [should] aim[] to exact from the party assessed no more than his just share of that burden according to an equitable rule of apportionment.” *Id.* at 227 (upholding road tax that was assessed against all real property abutting the roads to be improved according to the “front feet” of each property) (emphasis added).

There, as here and in *City of Hampton*, the correlation between the transportation benefit and the property taxed had to match up in order for the tax to be uniform under the Virginia Constitution. It is clear, however, that the challenged taxes here, by only taxing commercial/industrial real property, have deviated from the traditional transportation tax upheld in *Norfolk City*, and do not share the benefit/burden aspects of that tax.

In *Day v. Roberts*, 101 Va. 248, 43 S.E. 362 (1903), the General Assembly enacted a statute that exempted the town of Smithfield within the Isle of Wight from having to pay all of the taxes levied by the county. In striking down that tax as unconstitutional, this Court identified the aspects of uniformity that all taxes must ascribe to:

[U]niform taxation requires uniformity, not only in the rate of taxation, and in the mode of assessment upon the taxable

valuation, but that uniformity must be coextensive with the territory to which it applies. If a state tax is imposed, it must be uniform over the whole state; if by a county, city, town, or other subordinate district, the tax must be uniform throughout the territory to which it is applicable. *Id.* at 363.

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

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

As a result, this Court held that the General Assembly lacked the power to classify the real estate within the town of Smithfield separately from the rest of the Isle of Wight, and could not exempt that town from the county’s real property taxes. As in *Norfolk City*, this Court held that the burden of a tax must be distributed to all who would benefit from the proceeds of the tax.

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

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

Despite the trial court’s opinion that “the facts [of *City of Hampton*] are sufficiently different from the facts of this case that the court does not find it to be binding precedent,” Memorandum Opinion at 7, the trial court provided no reasoning for why that is so. To the contrary, the challenged taxes in this case are largely similar to the unconstitutional tax considered in *City of Hampton*, as these taxes all target a specific classification of property for the purpose of raising revenue for a specific public benefit. The *City of Hampton* tax was a tax on particular business property within a jurisdiction for the purpose of raising revenue for a particular benefit—a tax

based on a theory of benefits conferred—and that benefit was a public benefit that served all within the taxing jurisdiction. Similarly, the Transportation Tax and the District Tax are both taxes based on a theory of benefits conferred, where each taxes business property within the designated jurisdiction for the purpose of raising revenue for a particular public benefit—transportation improvements—that serves all real property owners within the jurisdiction. And although the premiums tax in *City of Hampton* did not apply to real property, this Court still construed the limit on the General Assembly’s classification power under the Virginia Constitution’s uniformity provision, as it must here, to determine the constitutionality of that tax. Thus, the reasoning of *City of Hampton* is not only still binding, but should also apply in this case.

This Court should grant review in this case to reaffirm the holding of *City of Hampton*, apply its reasoning to the taxes challenged in this case, and determine whether the challenged taxes violate the uniformity requirement of the Virginia Constitution for failing to tax residential real property owners that will benefit as much, if not more, from the transportation improvements funded by those tax revenues than the commercial/industrial property owners subject to those taxes.

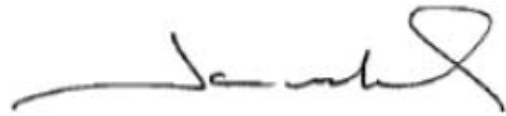
CONCLUSION

For the reasons stated in this Petition, FFW Enterprises respectfully requests that this Court grant review of the trial court's rulings to determine (1) whether Article X of the Virginia Constitution requires that all real property be treated as one indivisible class for the purposes of taxation, subject only to the express exceptions in Art. X, §§ 1, 2, and 6, thus rendering Va. Code §§ 58.1-3221.3 and 33.1-435 facially unconstitutional; and (2) whether Va. Code §§ 58.1-3221.3 and 33.1-435 are facially unconstitutional for lack of uniformity under Art. X, § 1 of the Virginia Constitution.

Respectfully submitted,

FFW ENTERPRISES

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CERTIFICATE

I HEREBY CERTIFY as follows:

- 1) The Petitioner is FFW ENTERPRISES;
- 2) Counsel for the Petitioner is:

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- 3) The Respondents are FAIRFAX COUNTY and
THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY;

- 4) Counsel for the Respondents is:

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- 5) Counsel for the Petitioner **desires to state orally to a panel of this Court the reason why the petition should be granted, and he wishes to do so in person;**
- 6) On this the 15th day of September, 2009, a copy of the foregoing Petition for Appeal was mailed or delivered to counsel for the Respondents at the above address. This same date, seven copies of the same were hand delivered to the clerk's office.

/s/ James N. Markels
James N. Markels