

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

2021 FEB 24 PH 2:35

JEFFERSON COUNTY FOUNDATION, INC.
a West Virginia non-profit corporation,

CATY S. CATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Plaintiff,

vs.

Civil Action No.: 20-C-332
Presiding: Judge Wilkes

WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY,
a Public Corporation of the State of West Virginia,
and **ROXUL USA, INC. D/B/A ROCKWOOL,**
a Delaware corporation,

Defendants.

ORDER GRANTING DEFENDANT WVEDA'S MOTION TO DISMISS

This matter came before the Court this 24th day of February 2021. The Plaintiff, Jefferson County Foundation, Inc. (hereinafter "Plaintiff" or "JCF"), by counsel, Christopher P. Stroeck, Esq., and Robert M. Bastress, Esq., and Defendant, West Virginia Economic Development Authority (hereinafter "Defendant" or "WVEDA"), by counsel, Michael E. Caryl, Esq., and Peter G. Markham, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This matter was commenced on April 23, 2020 when Plaintiff filed a Complaint for Declaratory Judgment¹ based on two causes of action: (1) that WVEDA's actions violate W. Va. Const. Art. X, § 1, and (2) that W. Va. Code § 13-15-7² is facially vague, overly broad, irrational, unreasonable, and/or violates Plaintiff's rights under Article III, Section 10 and Article X, Section I of the West Virginia Constitution. *See* Compl., ¶¶ 21–29. In the Complaint, Plaintiff requested the following relief:

- (1) A declaration that ROCKWOOL and WVEDA's conduct violates the West Virginia Constitution's equal and uniform taxation clause (W. Va. Const. Art. X, § 1) and public credit clause (W. Va. Const. Art. X, § 6);
- (2) A declaration that WVEDA's actions are null, void, and of no effect;
- (3) A declaration that WVEDA's statutory power to make loans (W. Va. Code § 31-15-7) is facially vague, overbroad, irrational, and unreasonable and thereby violates the West Virginia Constitution's guarantees to equal and uniform taxation (W. Va. Const. Art. X, § 1) and equal protection (W. Va. Const. Art. III, § 10);
- (4) An award of attorneys' fees and costs; and
- (5) Such other relief as the Court deems appropriate.

See Compl. WHEREFORE ¶¶ A–E.

2. On June 11, 2020, Defendant, West Virginia Economic Development Authority, filed the instant Motion to Dismiss, seeking to dismiss the Complaint for

¹ This Complaint was originally filed in the Circuit Court of Kanawha County, West Virginia, and was subsequently transferred to the Business Court Division.

² Plaintiff has since conceded that it referenced the incorrect statute in its Complaint and meant to refer to W. Va. Code § 31-15-17.

Declaratory Judgment, adopting and joining Defendant Roxul USA, Inc. d/b/a Rockwool's Motion to Dismiss and its arguments. *See* Def's Mem., p. 1.

3. This matter was subsequently referred to the Business Court Division and assigned to the undersigned as Presiding Judge.
4. Upon referral to the Business Court Division, on January 14, 2021, the undersigned held an initial case management conference, and set forth deadlines for the filing of a response and reply to the instant motion. *See* Day Ord., 1/14/21.
5. Thereafter, on January 29, 2021, Plaintiff filed its Response to the Motion to Dismiss, arguing the instant motion should be denied.
6. Further, on February 8, 2021, Defendant filed its Reply.
7. The Court now finds the instant Motion is ripe for adjudication.

STANDARD OF LAW

This matter comes before the Court upon a motion to dismiss under Rule 12(b)(6). "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530 (1977). "Since the preference is to decide cases on their merits, courts presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true." *Sedlock v. Moyle*, 222 W.Va. 547, 550, 668 S.E.2d 176, 179 (2008). "We recognized, however, that liberalization in the rules of pleading in civil cases does not justify a carelessly drafted or baseless pleading." *Par Mar v. City of Parkersburg*, 183 W.Va. 706, 711 (1990).

A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits.” *Williamson v. Harden*, 214 W.Va. 77, 79 (2003).

CONCLUSIONS OF LAW

In this matter, Defendant, WVEDA, alleges dismissal of Plaintiff’s Complaint for Declaratory Judgment with prejudice is appropriate, and adopts the Motion to Dismiss filed by Defendant Roxul. *See* Def’s Mem., p. 1. Defendant Roxul’s motion to dismiss urged the Court that the Complaint should be dismissed for five reasons: 1) because the sale-leaseback has not been completed, Plaintiff’s claims are not yet ripe; 2) because county boards of equalization and review have exclusive jurisdiction over assessment challenges, Plaintiff cannot bring its claims in this Court; 3) because Plaintiff asserts injuries only to its members as taxpayers, it lacks standing to bring its claims; 4) because it is challenging the fairness of a legislatively-authorized transaction, Plaintiff has raised non-justiciable political questions; and 5) because it misunderstands the relevant law underlying all claims, and because it omits essential allegations supporting others, Plaintiff has failed to state a claim. *See* Def. Roxul’s Mem., p. 1.

Under the Constitution of this state, all property both real and personal shall be taxed except such property as the Legislature may exempt under the exceptions contained therein. Syl. Pt. 1, *In re Northview Servs., Inc.*, 183 W. Va. 683, 683, 398 S.E.2d 165, 165 (1990).

Subject to enumerated exceptions, the state constitution’s equal and uniform taxation clause in Section 1, Article X requires that all property be taxed in proportion to its value, as determined by operation of law. Section 1, Article X of the West Virginia Constitution provides, in pertinent part: Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from

which a tax may be collected shall be taxed higher than any other species of property of equal value; [the exceptions are listed seriatim]... W. Va. Const. art. X, § 1.

As the West Virginia Supreme Court of Appeals has summarized this clause, “[t]he Legislature has the power and the duty to designate the manner in which the actual value of different kinds or ‘species’ of property may be ascertained, but when such value has been ascertained, all species of property must be taxed equally in proportion to its value. *In re Kanawha Val. Bank*, 144 W. Va. 346, 386–87, 109 S.E.2d 649, 672 (1959).

As an initial matter, at the heart of this litigation, there exists a planned sale-leaseback between Rockwool and Defendant West Virginia Economic Development Authority (hereinafter “WVEDA”). *See* Def’s Mem., p. 2. The Court notes the parties refer to the May 2019 Resolution by which the WVEDA authorized this transaction as “the Resolution” and/or the “sale-leaseback” throughout the pleadings.

Under the sale-leaseback, in exchange for up to \$150 million in bonds, the WVEDA will acquire the Rockwool property, lease the facility back to Rockwool for a term of years, after which Rockwool will have an option to purchase the property. *See* Def’s Mem., p. 2.; *see also* Def. Roxul’s Mem., p. 2. The Court notes that despite authorizing certain representatives to undertake this transaction in the May 2019 resolution, the WVEDA has not yet issued the bonds. *Id.*

First, the Court concludes that this economic development arrangement is specifically authorized by the Legislature in the West Virginia Economic Development Act. *See* West Virginia Code §31-15-6 (providing the WVEDA’s general powers, including the power to financially assist projects serving a public purpose, issue bonds in exchange for projects, make contracts, and acquire title to project property). The WVEDA invoked its broad and well-

established powers under the West Virginia Economic Development Act to authorize the issuance of revenue bonds to financial a commercial and industrial manufacturing project. *See* Def's Mem., p. 2; *see also* Reply, p.3; *see also* West Virginia Code §31-15-6(j) ("General powers of authority).

Further, West Virginia Code §31-15-3 outlines the purposes for which the Legislature established the WVEDA, including developing and advancing business prosperity and economic welfare, encouraging and assisting in the location of new business and industry, promoting and advancing industrial, commercial, tourist, and manufacturing developments, and furnishing money and credit or credit enhancement to approved enterprises or for the promotion of new projects or to financially assist projects. West Virginia Code §31-15-3. The West Virginia Economic Development Act was passed by the Legislature specifically to combat unemployment and the lack of business opportunities within West Virginia, and to promote, attract, stimulate, rehabilitate and revitalize "commerce, tourism, industry and manufacturing". *See* West Virginia Code §31-15-2, §31-15-3.

It has been proffered that the Rockwool project promotes economic development and serves the public purposes for which the Legislature established the WVEDA. *See* West Virginia Code §31-15-2, §31-15-3. The Court notes that the Rockwool project is one of numerous bond-financed projects in the WVEDA's history of promoting and facilitating private commercial development in investment in the State of West Virginia for the public purposes of combating unemployment and the lack of business opportunities, a list that includes West Virginia employers Toyota, Macy's, Gestamp, Hino Motors, and Proctor & Gamble. *See* Def's Mem., p. 3, 7.

Additionally, West Virginia Code is clear that real property owned by certain groups, such as religious institutions, 501(c)(3) nonprofits, and here, the state, specifically including the state agency WVEDA, are not subject to tax. Indeed, the WVEDA's tax exemption is codified in West Virginia Code §31-15-17.

West Virginia Code §31-15-17 reads as follows:

The exercise of the powers granted to the authority by this article will be in all respects for the benefit of the people of the state for the improvement of their health, safety, convenience and welfare and is a public purpose. As the operation and maintenance of projects financed under this article will constitute the performance of essential governmental functions, the authority shall not be required to pay any taxes or assessments upon any property acquired or used by the authority or upon the income therefrom. All bonds and notes of the authority, and all interest and income thereon, shall be exempt from all taxation by this state and any county, municipality, political subdivision or agency thereof, except inheritance taxes.

W. Va. Code Ann. § 31-15-17.

In the Response, Plaintiff urges this Court to review the "exhaustive list" of property tax exemptions set forth in West Virginia Code §11-3-9, which lists property exempt from taxation. *See* Pl's Resp., p. 5; *see also* W. Va. Code Ann. § 11-3-9.

Although Plaintiff avers that the underlying intent of the listed property exemptions was not to exempt any project operated for private profit, the Court finds that the Legislature vested in WVEDA the authority "to issue and deliver revenue bonds or notes in exchange for a project" and "to . . . lease . . . its property, both real and personal, or any right or interest therein to another . . . in such manner and upon such terms as [WVEDA] deems appropriate." W. Va. Code § 31-15-6(j) & 6(ee). The Legislature further granted WVEDA an express exemption from taxation "upon any property acquired or used by the authority." W. Va. Code § 31-15-17. *See* Pl's Resp., p. 5-6.

Therefore, the Court cannot look to West Virginia Code's general property tax exemption statute in a vacuum, without also considering this specific tax exemption for WVEDA financed projects which was set forth by the Legislature. *See Reply*, p. 5. The Court notes that the West Virginia Constitution does not require the Legislature to set forth all properties that are exempt from taxation in a single statute. *Id.* at 6. Further, West Virginia Code §11-3-9 does not even purport to do so. *Id.* The Court considers that West Virginia Code §11-3-9 contains a catchall provision which states it incorporates "[a]ny other property or security exempted by any other provision of law". West Virginia Code §11-3-9(a)(30).

The Court "does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation. It is the duty of the Legislature to consider facts, establish policy, and embody that policy in legislation. It is the duty of this Court to enforce legislation unless it runs afoul of the State or Federal Constitutions." Syllabus Point 2, *Huffman v. Goals Coal Co.*, 223 W.Va. 724, 679 S.E.2d 323 (2009). Whether a law is fair or unfair is not a question for the judicial branch of government. Courts cannot dwell "upon the political, social, economic or scientific merits of statutes[.]"¹ The wisdom, desirability, and fairness of a law are political questions to be resolved in the Legislature. *Morrisey v. W. Virginia AFL-CIO*, 239 W. Va. 633, 636, 804 S.E.2d 883, 886 (2017). Specifically, with regard to taxation cases like the one at bar, the West Virginia Supreme Court of Appeals has cautioned that courts "should venture into that thicket only with utmost trepidation and only for a very good reason". *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573, 596, 466 S.E.2d 424, 447 (1995).

Although Plaintiff may have grievances against the Legislature's actions – specifically, the Legislature's decision to vest considerable authority within the WVEDA to promote economic

development throughout West Virginia, for which purpose the Legislature vested in WVEDA “all powers necessary to carry out” its mission, the Court concludes the proper remedy would be for Plaintiff to petition the Legislature to change such authority. *See* W. Va. Code § 31-15-6.

There has been no assertion that the property at the heart of this litigation will not fall squarely within the term of the West Virginia Code § 31-15-17 exemption that the Legislature bestowed on the WVEDA to promote economic development. *See* Reply, p. 2. Rather, a review of the Complaint makes it clear that the Plaintiff asserts that the sale-leaseback is something the law blesses when it should not. *See* Reply to Roxul’s Mot. to Dismiss, p. 14.

However, it is not for this Court to decide whether the Legislature was right to authorize the WVEDA to take ownership and lease back property to private entities like Rockwool. This judgment was made by the Legislature when it adopted the statutory scheme that created and empowered the WVEDA. *See* W. Va. Code § 31-15-1 *et seq.* To the extent that Plaintiff disagrees with that tax policy determination, and if Plaintiff believes that the WVEDA has used its powers in a way that creates a sham on West Virginia citizens, it must petition the Legislature to correct it. However, this Court is barred from doing so under the political question doctrine and must dismiss the Complaint.

However, the Court notes and additionally analyzes Plaintiff’s averment that the *resulting* tax treatment – that the Rockwool property is not taxed while it is owned by the WVEDA – is violative of the West Virginia Constitution’s equal and uniform taxation clause, and finds that it is clear that this argument is not persuasive.

The West Virginia Supreme Court has made it clear that a leasehold presumptively lacks independent value from the freehold, holding as follows: “The county assessor may presume that leaseholds have no value independent of the freehold estate and proceed to tax all real

property to the freeholder at its true and actual value; the burden of showing that a leasehold has an independent value is upon the freehold taxpayer and the taxpayer must request in a timely manner the separate listing of freehold and leasehold interests.” Syl. Pt. 2, *Great A & P Tea Co. v. Davis*, 167 W. Va. 53, 53, 278 S.E.2d 352, 354 (1981).

West Virginia law is clear that Rockwool, as a leaseholder, is not required under the uniform taxation clause to pay the same amount as it would as a freeholder. It is plain that the Resolution contemplates Rockwool conveying its interests in the subject property (consisting of a manufacturing facility and equipment) to the WVEDA in exchange for the bonds, with the WVEDA leasing the property back to Rockwool³. See Def’s Mem., p. 2. As such, it is abundantly clear that Rockwool will have a freehold interest in the property before the sale-leaseback, whereas it will have a leasehold interest in the facility after the WVEDA takes ownership. *Id.* When it acquires the freehold under the sale-leaseback agreement, the WVEDA thus acquires the interest that carries the property’s assessed value, but because of a statutory exemption, the WVEDA will not pay property taxes on that assessment. See Def’s Mem., p. 13; see also Def. Roxul’s Mem., p. 9.

The Court finds that plainly Rockwool should not have to pay the same taxes on a leasehold as it does on a freehold. The Court notes and considers the fact that Defendant Roxul has proffered to the Court, in its motion which was incorporated by Defendant WVEDA, that the sale-leaseback will not change the facility’s total assessed value – the total assessed value will be the same as if the facility had not been transferred to the WVEDA and leased back to Rockwool. See Def. Roxul’s Mem., p. 9.

³ The Court notes the Resolution contemplates that Rockwool will then make lease payments to the WVEDA to service the debt on the bonds authorized by the Resolution, and when they are paid off at the end of the lease, Rockwool will have the option to purchase the WVEDA’s freehold estate in the property. *Id.* at 2-3.

The Court further finds that the true and actual value of a freehold in a property may be determined differently than the true and actual value of a leasehold in a property, and the presumption that leaseholds lack independent value does not give rise to an equal and uniform taxation clause violation. *See UPE I*, 238, W. Va. 106, 792 S.E.2d 605; *UPE II 241*, W. Va. 194, 820 S.E.2d 901.


For all of these reasons, the Court finds the Complaint must be dismissed. Because the Court has decided this matter on the issue of the non-justiciable political question, the Court will dispense with Defendant's remaining arguments.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Defendant's Motion to DISMISS is GRANTED. Plaintiff's Complaint is hereby DISMISSED WITH PREJUDICE.

The Court notes the objections and exceptions of the parties to any adverse ruling herein. This is a FINAL ORDER. There being nothing further to accomplish in this matter, the Clerk is directed to retire this matter from the active docket. The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, to any *pro se* parties of record, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

February 24th 2021
date of entry



JUDGE CHRISTOPHER C. WILKES
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION

Bus Ct
2/25/2021
Date: *2/25/2021*
By: *C. Stroech*
R. Bastress, Jr.
R. Bastress, III
J. Schaffer
J. Waller
J. Simon
M. Carley
Deputy Circuit Clerk