IN THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA

JEFFERSON COUNTY FOUNDATION, INC.,
a West Virginia Non-Profit Corporation,

Petitioner / Plaintiff Below,

v. **CASE NO.: 21-0235**

WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY,
a Public Corporation of the State of West Virginia,

Respondent / Defendant Below,

and

ROXUL USA, INC. d/b/a ROCKWOOL,
a Delaware Corporation,

Respondent / Defendant Below.

PETITIONER'S BRIEF

Appeal Arising from Orders Entered in
Civil Action No.: 20-C-332 in the
Circuit Court of Kanawha County, West Virginia
Business Court Division

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VI. THE CASE SHOULD NOT HAVE BEEN TRANSFFERED FROM THE REGULAR CIVIL JURISDICTION OF THE KANAWHA COUNTY CIRCUIT COURT TO THE BUSINESS COURT DIVISION.

IV. STATEMENT OF THE CASE

The Plaintiff below and Appellant herein, the Jefferson County Foundation, Inc. ("JCF"), filed the underlying Complaint against the West Virginia Economic Development Authority ("WVEDA") and Roxul USA, Inc. d/b/a Rockwool ("Rockwool"). JA 023. Plaintiff requested that the Circuit Court declare a Resolution and related actions taken by the WVEDA, specifically to authorize the issuance of revenue bonds for the benefit of Rockwool, in exchange for certain commercial properties, facilities and equipment owned by Rockwool, to be unconstitutional, because it allows Rockwool to be exempt from equal and uniform taxation. JA 026. The Complaint for Declaratory Judgment was filed in the Kanawha County Circuit Court, the jurisdiction wherein the WVEDA conducts its business. JA 023.

JCF is a 501(c)(3) Non-Profit Corporation, formed for the purpose of preserving and protecting the quality of life for all Jefferson County, West Virginia residents. JA 023. It educates and advocates for effective and accountable government, sustainable development, and the protection of health, heritage, and the environment. JA 024. It has a current priority focus of ensuring the accountability of all government entities that are involved in and responsible for the location, construction, permitting, and operation of the Rockwool industrial facility in Jefferson County. JCF has a Board of Directors consisting of three (3) members, who all own real and/or personal property in Jefferson County, West Virginia, and who pay related property taxes for the same. The Complaint herein was filed by the Directors, on behalf of JCF, in both their individual capacities as taxpayers and organizational capacities as Directors. These Directors will be damaged by Rockwool's unfair tax treatment identified herein. Id.

Defendant WVEDA is a public body organized pursuant to W.Va. Code § 31-15-1, et seq. (2020). JA 024. Defendant Rockwool, a Delaware Corporation, is a manufacturer of stone

wool insulation, and offers insulation products for the retail, commercial and industrial markets. Id. Rockwool is a private, for profit entity that does not serve any public purpose.

Rockwool has constructed a heavy industrial manufacturing facility on a parcel of real property located in the City of Ranson, in the vicinity of West Virginia State Route 9, in Jefferson County, West Virginia, known as Jefferson Orchards. JA 024. From the planning inception, Rockwool and various local, county and state entities agreed to work together, at times inconspicuously, to ensure that Rockwool will operate. JA 025.

Rockwool and certain Jefferson County agencies executed a Payment in Lieu of Taxes Agreement ("PILOT"), that purported to exempt Rockwool from paying ad valorem taxes on its real and personal property. JA 029. For reasons similar to some of the arguments raised in this case, the PILOT was challenged as being unconstitutional in the Jefferson County Circuit Court. The Circuit Court ultimately determined, in part, that the PILOT was invalid as the Jefferson County Development Authority ("JCDA") was not included as a signatory to the PILOT. JA 025.

Meanwhile, upon information and belief, and in response to the PILOT's invalidation, Rockwool approached the WVEDA to secure certain funding assistance for its facility. JA 025. On May 2, 2019, the WVEDA passed a RESOLUTION AUTHORIZING THE ISSUANCE OF BONDS BY THE WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY TO BE EXCHANGED FOR CERTAIN COMMERCIAL FACILITIES AND EQUIPMENT OWNED BY ROXUL USA INC. D/B/A ROCKWOOL ("RESOLUTION"). JA 044.

Pursuant to the RESOLUTION, the WVEDA has agreed to issue certain revenue bonds, with the proceeds payable to Rockwool, in an amount not to exceed One Hundred and Fifty Million Dollars ($150,000,000.00), in exchange for ownership of Rockwool's property. JA 045. Pursuant

to the RESOLUTION, the property would then be leased back to Rockwool by the WVEDA for a term not to exceed the term of the bonds and for lease payments to be made equal to the debt service payments on the bonds. Id. Pursuant to the RESOLUTION, Rockwool will then purchase the property from the WVEDA for One Dollar ($1.00) at the end of the lease term. Id.

The clear purpose of this scheme is that WVEDA's interest in Rockwool's property will be exempt from ad valorem property taxation. As a result, Rockwool will not have to pay the same real and personal property taxes at the same rates as are assessed and levied against all other Jefferson County citizens and businesses.

JCF has alleged that the conduct and actions of the WVEDA violate Article X, Section 1 of the West Virginia Constitution, which provides that all property shall be taxed equally, and violate Article 11, Section 3, Chapter 9 of the West Virginia Code of 1931, as amended, as not being one (1) of the authorized articulated exceptions from ad valorem taxation. JA 026. JCF has further alleged that Chapter 31, Article 15, Section 7 of the West Virginia Code of 1931, as amended, is, on its face, vague, overly broad, irrational, unreasonable and/or violates JCF's rights under Article III, Section 10 and Article X, Section 1 of the West Virginia Constitution. JA 027. JCF requested that the actions of the Defendant WVEDA be declared null and void, of no effect, and not authorized by law.

This case was referred to the Business Court Division, Judge Christopher C. Wilkes, presiding (JA 351), over both Plaintiff's objections (JA 339) and the objections of the presiding Kanawha County Circuit Court, Judge Tod J. Kaufman (JA 345). Motions to Dismiss were filed by both Defendants, and upon briefing, were granted. JA 049; JA 247. JCF now appeals the following two (2) Orders: 1) Order Granting Defendant Roxul's Motion to Dismiss (JA 013); and 2) Order Granting Defendant WVEDA's Motion to Dismiss (JA 002)

V. STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that oral argument will assist this Honorable Court in properly reviewing this matter as this case presents issues of great significance to the citizens of Jefferson County and the State.

VI. SUMMARY OF THE ARGUMENT

The Business Court – the improper venue for this type of case – erred in dismissing the Complaint with the overarching conclusion that the Appellant's claims are non-justiciable political questions. The WVEDA does not have requisite authority to exempt Rockwool from equal and uniform taxation through the proposed sale-leaseback scheme. This scheme violates Article X, Section 1 of the West Virginia Constitution and conflicts with the tax immunity laws devised by the West Virginia Legislature.

VII. ARGUMENT

Standard of Review

All the issues raised on this appeal present purely questions of law, which this Court reviews *de novo*. *E.g.*, State ex rel. W. Va. Economic Development Grants Committee, 213 W. Va. 255, 262, 580 S.E.2d 869, 876 (2003); Phillip Leon M. v. Greenbrier County Board of Education, 199 400, 404, 484 S.E.2d 909, 913 (1996). As the case was decided below on two (2) Rule 12(b)(6) Motions to Dismiss, the facts alleged in the Complaint are to be taken as true and construed in the light most favorable to the Plaintiff. *E.g.*, Sedlock v. Mayle, 222 W. Va. 547, 550, 668 S.E.2d 176, 179 (2008).

I. CONTRARY TO THE BUSINESS COURT'S HOLDING, APPELLANT'S CLAIMS DO NOT PRESENT A POLITICAL QUESTION.

The Business Court concluded both its Dismissal Orders with the following:

> [T]he Court finds that 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.

JA 012; JA 022. The court, however, nowhere identifies why any aspect of the case presents a non-justiciable political question. The Plaintiff's claims rely on straightforward questions of statutory interpretation (whether the Code confers authority on the WVEDA to enter into the leaseback contract with Rockwool, thereby giving it an enormous tax exemption) and constitutional law (whether that arrangement violates Article X, § 1 or Article III, § 10 of the West Virginia Constitution). These contentions do not implicate any of the traditional criteria that courts have relied upon to decide that a matter is a political question.

The criteria most prominently identified as bases for finding a political question include "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion[.]" Baker v. Carr, 369 U.S. 186, 217 (1962). This is not a case like Nixon v. United States, 506 U.S. 224 (1993), where the Constitution clearly assigned impeachment judgments to the Houses of Congress, or like Rucho v. Common Cause, 139 U.S. 2484 (2019), where the Court could find no manageable standards to determine just when a partisan gerrymander has gone too far. There is not even an argument that the Equal and Uniform Clause has been textually assigned elsewhere, and this Court has routinely decided cases applying it, *e.g.*, Killen v. Logan County Commission; In re Assessment of Kanawha Valley Bank, and had no difficulty finding standards to determine what was "equal and uniform." Nor is this an instance involving an initial policy judgment clearly not for judicial discretion. Moreover, this Court has repeatedly rejected calls to label issues as non-justiciable political questions and has, instead, chosen to vindicate important

constitutional policies. *E.g.*, State ex rel. Justice v. King, 244 W. Va. 225, 852 S.E.2d 292 (2020); State ex rel. Workman v. Carmichael, 241 W. Va. 105, 819 S.E.2d 251 (2018); Killen, *supra* (construing the meaning of Article X, § 1); Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979); Isaacs v. Board of Ballot Commissioners, 122 W. Va. 703, 12 S.E.2d 510 (1940).[1]

The only authorities that the lower court mounted in support of its conclusions are completely inapposite. It cited Huffman v. Goals Coal Company, 223 W. Va. 764, 670 S.E.2d 323 (2009), for the proposition that courts have a "duty to enforce legislation unless it runs afoul of the State or Federal Constitutions." JA 019-020. Of course courts have such a duty, but the Plaintiff has alleged in this case that the relevant statutes do not authorize the WVEDA's action and that the action "runs afoul" of the Constitution. Huffman dealt with the meaning of the term, "permit area," under the Surface Mining Control and Reclamation Act and had absolutely naught to do with political questions. The lower court also relied upon Morrisey v. West Virginia AFL-CIO, 239 W. Va. 633, 636, 804 S.E.2d 883, 886 (2017), for the observation that courts do not inquire into the policy determinations that the Legislature makes in drafting a statute, but that Court also proceeded to address the constitutional merits of the challenge that was made there to the State's recently enacted "right to work law." Finally, the lower court noted the Court's admonition in Appalachian Power Company v. State Tax Department, 195 W. Va. 573, 596, 466 S.E.2d 424, 447 (1995), that courts should be wary about scrutinizing underinclusive challenges to tax legislation. Other than observing that that case and this one both involve taxation, the Business Court offered

[1] There may well be some issues that would qualify as a non-justiciable political question under the West Virginia Constitution, but one would be hard-pressed to find a decision of this Court that declines to decide an issue on the merits because it is a political question. Clearly, the scope of the doctrine in West Virginia is narrower than that applied by the United States Supreme Court. *e.g.*, compare State ex rel. Workman, *supra,* with Nixon, *supra*, and compare White v. Manchin, 173 W.Va. 526, 318 S.E.2d 470 (1984), and Issacs, *supra*, with Powell v. McCormack, 395 U.S. 486, 520-522 (1969).

no explanation as to how the two contexts are similar and none comes to mind. Despite the caution expressed by the Appalachian Power Court, it did decide the merits of the equal protection challenge made in that case. Moreover, this case does not require an equal protection assessment of complex tax statutes; rather, this appeal, like Killen, *supra*, involves a straightforward interpretation of the meaning of "taxation shall be equal and uniform."

As this Court recently explained:

> Challenges to constitutional language are not foreign to this Court. As the highest court in the State, it is clear that we are vested with the authority to review and interpret provisions of our State Constitution when presented with such cases and controversies. While this Court cannot and will not legislate, we will examine the Constitution's language, interpret it if necessary, and apply its provisions in a way that is consistent with the original purpose and understanding of the citizens at the time of the Constitution's ratification.

State ex rel. Justice v. King, 244 W. Va. at 298, 852 S.E.2d at 298.

II. THE BUSINESS COURT ERRED IN DECLARING THAT THE WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY HAS THE AUTHORITY TO EXEMPT ROCKWOOL FROM EQUAL AND UNIFORM TAXATION THROUGH THE PROPOSED SALE-LEASEBACK ARRANGEMENT.

Any exemptions from equal and uniform taxation that are allowed under Article X, § 1 of the West Virginia Constitution are exclusive, thus any exemptions legislatively created must be within the meaning of the listed terms and furthermore should be strictly construed. Central Realty Co. v. Martin, 126 W.Va. 915, 30 S.E.2d 720 (1944), In re Maier 173 W.Va. 641, 646, 319 S.E.2d 410, 415 (1984), and In re Hillcrest Memorial Gardens, Syl. Pt. 2, 146 W.Va. 337, 119 S.E.2d 753 (1961).[2]

[2] See also Robert M. Bastress, Jr., The West Virginia State Constitution 287 (2d ed. 2016), and Blake N. Humphrey, *Pilot Agreements in West Virginia: A Tale of Turbulent Taxation*, 123 W. Va. L. Rev. 376-77 (2020), available at: https://researchrepository.wvu.edu/wvlr/vol123/iss1/12 (last visited Jan. 26, 2021).

The provisions of the West Virginia Economic Development Act, codified at W.Va. Code § 31-15-1 et seq. ("the Act"), that set forth the authority provided to the WVEDA must be read conservatively, not expansively, in any attempt to construe the Act as authorizing an exemption from equal and uniform taxation.

In this respect, the Act's findings have no bearing in this analysis, as the need for the tax exemption for a private corporation at issue in this matter is in no way inherent in the legislature's identification of the need to combat unemployment and promote commerce in § 31-15-2 or its enunciation of the purposes for which the WVEDA was created in § 31-15-3 or its provision of "all powers necessary" to carry out the purposes in § 31-15-6. In other words, the WVEDA can work to accomplish its objectives and purposes without providing to Rockwool, a foreign private corporation, a tax exemption via the use of the sale-leaseback scheme at issue here.

Similarly, the authorities provided to the WVEDA in §§ 31-15-6(h),[3] 31-15-6(i),[4] 31-15-6(j),[5] 31-15-6(x), 31-15-6(ee), 31-15-7, and 31-15-9(a) do not establish an exemption from fair and equal taxation for the sale-leaseback scheme that is at issue in this matter:

- Section 31-15-6(h)'s authorization for the WVEDA "[t]o finance any projects by making loans to industrial development agencies or enterprises upon such terms as the authority shall deem appropriate" does not imply or require that the terms of such loans made by the WVEDA would have the impact of providing an exemption from property tax to Rockwool.

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[3] Defendant WVEDA's Memorandum of Law Accompanying its Motion to Dismiss references § 31-5-6(h) but presumably meant to refer to § 31-15-6(h).
[4] Defendant WVEDA's Memorandum of Law Accompanying its Motion to Dismiss references § 31-5-6(i) but presumably meant to refer to § 31-15-6(i).
[5] Defendant WVEDA's Memorandum of Law Accompanying its Motion to Dismiss references § 31-5-6(j) but presumably meant to refer to § 31-15-6(j).

- Section 31-15-6(i)'s authorization for the WVEDA "[t]o issue revenue bonds or notes to fulfill the purposes of this article, and to secure the payment of such bonds or notes" does not imply or require that the terms of such revenue bonds or notes, including the securitization of same, would have the impact of providing an exemption from property tax to Rockwool.

- Section 31-15-6(j)'s authorization for the WVEDA "[t]o issue and deliver revenue bonds or notes in exchange for a project" can be interpreted in multiple ways including most straightforwardly as permitting the WVEDA to issue revenue bonds or notes for a permissible project in return for a binding commitment that such project would proceed. Section 31-15-6(j) cannot reasonably be interpreted to authorize a sale-leaseback arrangement with a private corporation of the type that is at issue in this matter and no case law supports such an interpretation. If that is the WVEDA's position, it directly conflicts with the statutory construction required to determine the appropriateness of tax exemptions.

- Section 31-15-6(x)'s authorization for the WVEDA "[t]o acquire...any real or personal property, or any right or interest therein, as may be necessary or convenient to carry out the purposes of the authority" does not imply or require that such property acquisition would involve a sale-leaseback arrangement of the type at issue here.

- Section 31-15-6(ee)'s authorization for the WVEDA "[t]o sell, license, lease, mortgage, assign, pledge or donate its property, both real and personal, or any right or interest therein to another...in such manner and upon such terms as it deems appropriate" does not explicitly authorize the sale-leaseback mechanism at issue in this matter, which would need to be the case for this or any of the cited provisions (singly or in combination) given the strict construction required to be used in light of the subject matter at hand.

- Section 31-15-7's authorization for the WVEDA to loan an enterprise up to 100% of the costs of a "project" from the proceeds of bonds or notes specifies terms that the WVEDA could include within the terms of such a loan "to protect the jobs intended to be created by the project" but does not specify the sale-leaseback mechanism at issue in this matter as one of them. Thus, given the strict construction required to be used in light of the subject matter at hand, this authorization (as well as the authorization in § 31-15-9(a)) does not support the sale-leaseback mechanism creating an impermissible tax exemption for Rockwool.

Furthermore, while § 31-15-17 exempts WVEDA's property from taxation, that section fails to explicitly authorize the sale-leaseback transaction at issue in this matter and thus does not have the effect of authorizing the tax exemption to Rockwool. Additionally, that section limits the tax exemption that it does authorize to those arising from "[t]he exercise of the powers granted to the [WVEDA] by [Article 15]" and as noted above the WVEDA did not properly exercise the powers granted to it thus making inapplicable to the current instance the tax exemption authorized by § 31-15-17.

Finally, the facts that the legislature established the entity now called the WVEDA in 1962 and that the WVEDA has participated in similar schemes in the past to provide tax exemptions to other private corporations are irrelevant in analyzing the merits herein. As a commentator recently noted, unlike in other states, in West Virginia, these types of sale-leaseback arrangements[6] "have not received significant judicial or legislative scrutiny with regard to either constitutionality or legality."[7] Defendants' characterization of the WVEDA's performance as "game changing" and

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[6] Such sale-leaseback arrangements are frequently accompanied by an agreement for payments to be made by the private corporation to local governmental or other entities in lieu of (and less than) the taxes the corporation would otherwise have paid, thus leading to the name "PILOT" being used to describe these mechanisms.

[7] Humphrey, *supra*, at 375.

"successful" in helping to create jobs and business opportunities is unaccompanied by substantiation; indeed, since Defendants have opened the door to characterizing the WVEDA's performance it should be noted that ample criticism exists not only of the WVEDA's lack of transparency and management discipline, but also of the inherent tendency of such tax exemptions to be overused to the detriment of the State's economy.[8]

The preceding analysis shows that this Court should find that the powers statutorily conferred on the WVEDA as set forth in the West Virginia Economic Development Act do not, when construed appropriately, authorize the type of sale-leaseback scheme that exempts Rockwool from equal and uniform taxation. Finding otherwise, *i.e.*, that the language of the Act would have the effect of authorizing such a tax exemption, would then implicate the constitutionality of the WVEDA's authorizing statute itself, which would have much broader ramifications.

III. THE BUSINESS COURT FAILED TO RECOGNIZE THAT THE ROCKWOOL TAX EXEMPTION CREATED BY WVEDA'S RESOLUTION CONFLICTS WITH THE TAX IMMUNITY LAW DEVISED BY THE LEGISLATURE.

The WVEDA relied upon W.Va. Code § 31-15-17 for the authority to pass the RESOLUTION and acquire title to Rockwool's property, with the result that Rockwool will not have to pay any property taxes. Section 31-15-17 provides:

> 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

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[8] For example, see Id. at 385-90 (lack of transparency and metrics). See also Joint Committee on Government and Finance, West Virginia Office of the Legislative Auditor, Post Audit Division, report on audit of West Virginia Economic Development Authority: $25 Million Non-Recourse Loan Program (Jan. 26, 2021), available at: https://bloximages.chicago2.vip.townnews.com/wvnews.com/content/tncms/assets/v3/editorial/9/a7/9a7a19db-6645-5c05-9fab-a0a4a4cc6793/6010672c62984.pdf.pdf (last visited Jan. 26, 2021) (finding lack of management discipline and failure to repay more than $24 million of $25 million in loan program administered by WVEDA).

> 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. Id.

Unlike W.Va. Code § 8-19-4 (2020), as related to public works projects (*i.e.*, waterworks, power systems, etc.),[9] W.Va. Code § 31-15-17 does not expressly provide for the type of sale-leaseback arrangement set forth in the subject RESOLUTION. Moreover, W.Va. Code § 11-3-9 (2020), expressly outlines "[p]roperty exempt from taxation" and does not include real and personal property owned and leased pursuant to the terms of the RESOLUTION at issue here.

Appellant asks this Court to review the exhaustive list of property tax exemptions set forth in W.Va. Code § 11-3-9, as amended. Notably, "property belonging exclusively to the state" is set forth Section (a)(2), and "property belonging exclusively to any county, district, city, village or town in this state and used for public purposes" is set forth in Section (a)(3). This clarification of "exclusivity" is important, in that it mandates outright ownership and not a sale-leaseback scheme as is contemplated in this case.

Furthermore, this Court should pay particular attention to the following notable exemptions:

> (a)(12) Property used for charitable purposes *and not held or leased out for profit*;

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[9] W.Va. Code § 8-19-4 expressly provides for the type of sale-leaseback arrangement at issue here, but only for public interest utility projects. The language, in part, reads: "...All such bonds and the interest thereon shall be exempt from all taxation by this state, or any county, municipality or county commission, political subdivision or agency thereof. Notwithstanding any other provision of this code to the contrary, the real and personal property which a municipality or county has acquired and constructed according to the provisions of this article, and any leasehold interest therein held by other persons, shall be deemed public property and shall be exempt from taxation by the state, or any county, municipality or other levying body, so long as the same is owned by such municipality or other levying body..." *This language is not set forth in the enacting statutes for the WVEDA.*

(a)(13) Property used for the public purposes of distributing electricity, water or natural gas or providing sewer service by a duly chartered nonprofit corporation when such property *is not held, leased out or used for profit*;

(a)(14) Property used for area economic development purposes by nonprofit corporations when the property *is not leased out for profit*;

(a)(16) All property belonging to benevolent associations *not conducted for private profit*;

(a)(19) Homes for children or for the aged, friendless or infirm *not conducted for private profit.* Id. (emphasis added)

These express exemptions make clear that the Legislature has not provided tax exemptions to a project *owned, operated or leased out for private profit.* Section (a)(27) even refers to a lease purchase agreement and a possible exemption stemming therefrom upon certain terms and conditions – but these terms and conditions do not apply in this instance. Notwithstanding how the Defendants wish to characterize the Rockwool project, and notwithstanding a leasehold term or otherwise, an express exemption has not been adopted for the type of sale-leaseback arrangement that Rockwool will enjoy. Rockwool is a foreign private corporation, serving absolutely no public function, with the sole intent of making a profit, and its real and personal property should therefore be taxed accordingly. The Legislature has not authorized, and this Court has not sustained, any tax exemption in these circumstances.

IV. CONTRARY TO THE BUSINESS COURT'S CONCLUSION, THE SALE-LEASEBACK ARRANGEMENT CREATED BY WVEDA'S RESOLUTION VIOLATES ARTICLE X, § 1 OF THE WEST VIRGINIA CONSTITUTION.

Article X, § 1 of the West Virginia Constitution states that "taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value." The history of the provision demonstrates the importance of equality in taxation in West Virginia. The pre-Civil War Virginia Constitutions accorded major tax breaks to wealthy East Virginians on their slave property, a fact that stoked great resentment among those in the west

who paid taxes on the full value of their realty, livestock, and personalty. That resentment, in turn, contributed to the east-west rift that led to the formation of the new state.[10] The framers of both the 1863 and the 1872 Constitutions were therefore insistent upon strict equalization in taxation. In addition to the Equal and Uniform Clause, they also included in § 1 a provision that precluded any one "species of property" from being "taxed higher than any other species of property of equal value." That language was later qualified, but only to a limited degree by the 1932 Tax Limitation Amendment. To stray from strict enforcement of taxation equality would offend the efforts and clear intent of the constitutional framers.

The Equal and Uniform Clause means that government must assess all property at the same proportion to its actual value in the marketplace. Killen v. Logan County Commission, 170 W.Va. 602, 295 S.E.2d 689 (1982); *see also* W. Va. Constitution, Art. X, § 1b, and must impose the same tax rate on all property within each of the four classes of property created by the 1932 Amendment and inserted into § 1. See Killen, *supra;* In re Assessment of Shares of Stock of Kanawha Valley Bank, 144 W.Va. 346, 109 S.E.2d 649 (1959). The section also authorizes the Legislature to create exceptions to the normal rule requiring equal and uniform taxes. The exemptions include "property used for educational, literary, scientific, religious or charitable purposes, all cemeteries, public property," personal property used for agricultural purposes, and agricultural products while owned by their producers. The § 1 exemptions are not self-executing – they require legislative implementation – but they are exclusive. The Legislature may not add to the list of exemptions,

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[10] *See* CHARLES H. AMBLER, WEST VIRGINIA STORIES AND BIOGRAPHIES 317-18 (1937); ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 12, 15, 284-85 (Oxford Univ. Press, 2nd ed. 2016); Jane Moran, *Is Everyone Paying Their Fair Share? An Analysis of Taxpayers' Actions to Equalize Taxes*, 85 W. VA. L. REV. 209, 212-13 (1983); *see also Killen*, 170 W. Va. at 614, 295 S.E.2d at 701.

and any exemptions created must be within the meaning of the listed terms. Central Realty Co. v. Martin, 126 W.Va. 915, 30 S.E.2d 720 (1944).[11]

This Court and other courts nationwide have repeatedly made clear that tax exemptions are not favored. As stated in In re Maier 173 W.Va. 641, 646, 319 S.E.2d 410, 415 (1984), and In re Hillcrest Memorial Gardens, Syl. Pt. 2, 146 W.Va. 337, 119 S.E.2d 753 (1961):

> Constitutional and statutory provisions exempting property from taxation are strictly construed. It is incumbent upon a person who claims his property is exempt from taxation to show that such property clearly falls within the terms of the exemption; and if any doubt arises as to the exemption, that doubt must be resolved against the one claiming it.[12]

Accord, Central Realty Co., *supra,* 126 W.Va. at 920, 30 S.E.2d at 724.

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[11] Although the circuit court dismissed the complaint on political question grounds, it nevertheless expressed an opinion on plaintiff's Equal and Uniform Clause claim, which the court concluded was "not persuasive." Its rationale for that conclusion was that "a leasehold presumptively lacks independent value from the freehold," citing Syllabus Point 2 to Great A & P Tea Company v. Davis, 167 W. Va. 53, 278 S.E.2d 352 (1981). Roxul Order at 9; WVEDA Order at 9-10. That may or may not be a fair reading of the point, but the circuit court failed to grasp that that syllabus point and that case also made clear that a leasehold may have value and may be taxed accordingly. The court overlooked, as well, the considerable number of decisions, some of which are cited in the text, in which this Court has upheld tax assessments on leaseholds. The only other authority cited by the lower court for support – other than the "Defendant's Memorandum" – was Musick v. University Park at Evansdale, LLC I, 238 W. Va. 106, 792 S.E.2d 605 (2016) and Musick II, 241 W. Va. 194, 820 S.E.2d 901 (2018). The first of those decisions resolved a procedural issue unrelated to any issue in this case, and the second merely held that the assessor had had his chance to prove the value of the assessed leasehold and had failed to take advantage of it. Neither decision bears on this case.

[12] The points made in the text are accepted throughout the country. ANTIEAU ON LOCAL GOVERNMENT LAW§ 64.09[1] (tax exemptions "will be very strictly construed and every doubt resolved against exemption") & § 64.09(7] ("It is firmly established that state exemptions from local government taxation will be strictly construed against persons claiming such exemptions" and "In all jurisdictions the burden of proof is upon a party claiming an exemption from local government taxation to show clearly and unequivocally that he or she comes within the terms of an exemption") (1997); EUGENE MCQUILLEN, THE LAW OF MUNICIPAL CORPORATIONS 303 ("It is the generally accepted rule that exemption statutes and constitutional provisions should receive a strict rather than a liberal construction in the interest of the public") & 309 ("the prevailing doctrine is that any doubt or ambiguity must be resolved in favor of the public") (3rd ed. 2003); *see also, e.g.,* Gables Realty Limited Partnership v. Travis Central Appraisal District, 81 S.W.3d 869 (Tex. App. 2002) (discussed below).

The cases articulate dual concerns about inequality with regards to tax exemptions of private enterprises. First, the constitutional mandate for equal and uniform taxation reflects a consensus that everyone should share alike in supporting the fiscal state. Maier, 173 W.Va. at 650, 319 S.E.2d at 419. Second, the courts recognize that exemptions for commercial enterprises bestow considerable economic advantages on the favored businesses at the expense of their competitors. As this Court observed in Central Realty, the charity-owned hotel "in question is in competition with other properties in the City of Huntington" and thus did "not come within the letter or spirit of the constitutional provision relating to exemption of property from taxation." 126 W. Va. at 921, 30 S.E.2d at 724.

Unless the Court is "to abandon [its] logic and common sense," Winkler v. West Virginia School Building Authority, 189 W.Va. 748, 763, 434 S.E.2d 420, 435 (1993), it must conclude that Rockwool's arrangement proposes an artificial facade to hide a huge tax break for a strictly private, profit-making enterprise. As declared in Maier, to sustain the claimed exemption "would erode the language of this State's Constitution that 'taxation shall be equal and uniform' and would expand the 'public property' exemption to impermissible limits." 173 W. Va. at 649-50, 319 S.E.2d at 418-19. Indeed, if the Court were to approve the tax avoidance scheme orchestrated here, through the guise of the purported authority of the WVEDA, what limitations, if any, would exist for such state-funded private enterprises? Purported "[e]xemption statutes threaten to lessen that constitutionally required equality and uniformity in taxation and should, therefore, be strictly construed .... [E]quality and uniformity in taxation aid in placing 'the public burdens, as nearly as may be, upon all property and citizens alike.'" 173 W. Va. at 650, 319 S.E.2d at 419.

The Defendants suggested below that the decisions in Maplewood Community, Inc. v. Craig, et al., 216 W.Va. 273, 607 S.E.2d 379 (2004); Ohio Valley Jobs Alliance, Inc. v. Public

Service Commission of West Virginia, 2018 WL 5734679 (2018) (memorandum opinion); and Musick v. University Park at Evansdale, LLC, 241 W. Va. 194, 820 S.E.2d 901 (2018), are somehow dispositive on the constitutional issue that the Plaintiff raises. That is simply not true. None of the cited cases dealt with a sale-leaseback arrangement created under the guise of W.Va. Code § 31-15-17. Those cases did not address the constitutionality of such an arrangement or the factual question of whether the same would constitute a tax sham. Furthermore, the cases do not address the taxability of a leasehold interest structured like the Rockwool deal – a leasehold interest obviously fashioned for the sole purpose of avoiding taxation of a private, for-profit, company.

The Maplewood case involved two elder care facilities seeking ad valorem tax exemptions. The Court recognized the presumption that "all property is subject to taxation unless expressly exempted," Id. at 279, and iterated the two-prong test for determining whether real property may be exempted from ad valorem taxation: "1) the corporation or other entity must be deemed a charitable organization...and 2) the property must be used *exclusively* for charitable purposes." (emphasis added). Id at 280. The Court importantly recognized:

> Where real estate is used solely by an organization for education and charitable purposes and such use is immediate and primary the constitutional exemption from taxation applies; and the statute enacted in pursuance thereof inhibits any assessment for taxation; *but real estate is not exempt where owned by a like organization and is leased for private purposes, notwithstanding the application of the income from rentals to charitable and benevolent purposes and upkeep of the premises.*

Id., citing Central Realty (emphasis added). The Court determined that the elder care facilities were not entitled to a tax exemption based upon the nature of the for-profit services provided.

The Court further determined, as related to arms-length leasehold interests, not the sham structure perpetrated for Rockwool, that "a separate leasehold is taxable if it has a separate and independent value from the freehold." Maplewood at 286, *citing* Great A & P Tea Co. v. Davis,

167 W.Va. 53, 278 S.E.2d 352 (1981). "The separate value of a leasehold, if any, is based on whether the leasehold is economically advantageous to the lessee, that is a so-called bargain lease, and is freely assignable so that lessee may realize the benefit of such bargain in the market place." Id. Considering the Rockwool sham, it is clear that its leasehold interest is economically advantageous to Rockwool – by avoiding significant tax burdens – and further clear that Rockwool has the right to terminate, sell, or otherwise dispose of its interests in its real and personal property at any time.

Ohio Valley Jobs dealt with a PILOT for an electric power plant – a project that serves a public use. Moreover, the PILOT Agreement referred to in the Ohio Valley Jobs case was based upon the express statutory authority found in W.Va. Code § 8-19-4. There is no express statutory authority for the financing scheme created by the subject RESOLUTION of the WVEDA. The Musick case set forth the same standard identified in Maplewood regarding the taxability of leasehold interests, and involved property owned by a public institution for use by that institution – a constitutionally exempted educational purpose. In any event, none of the cited cases addressed the constitutionality of the arrangement contemplated by the WVEDA and Rockwool – one that would exempt a private, for-profit, company from paying its fair share of the public obligation.

The West Virginia Supreme Court's decision in Maier, regarding the taxability of leasehold interests, is telling and warrants detailed consideration:

> . . . [I]nasmuch as this action concerns only the appellee's leasehold interest, the assessment is contrary neither to the above provision of this State's constitution nor to the provisions of W.Va. Code 13-2C-15 (1963). This Court in In re: Hillcrest Memorial Gardens, supra, stated as follows: 'Taxation of all property, both real and personal, is the general rule fixed by constitutional mandate, while exemption from taxation constitutes the exception.' 146 W.Va. at 342, 119 S.E.2d at 756.
>
> Nor does the denial of the tax exemption with respect to the assessment in question controvert the purpose of the Industrial Development Bond Act, which purpose was to promote industrial development in this State and lessen the problem of

> unemployment. W.Va. Code 13-2C-15 (1963), provides that 'revenue bonds issued pursuant to this article and the income therefrom shall be exempt from taxation except inheritance, estate, and transfer taxes...'...In considering the exemption provisions of W.Va. Code 11-3-9 (1933), we indicated in Greene Line Terminal Co. that the answer to the exemption question depended upon whether the leasehold interest was used 'primarily as a public service, or as a private enterprise for profit.' . . .
>
> A result contrary to our holding under the circumstances of this action would erode the language of this State's constitution that 'taxation shall be equal and uniform' and would expand the 'public property' exemption to impermissible limits. Exemption statutes threaten to lessen that constitutionally required equality and uniformity in taxation and should, therefore be strictly construed. As this Court indicated in State v. Kittle, supra, equality and uniformity in taxation aids in placing 'the public burdens, as nearly as may be, upon all property and citizens alike.'

In re Maier, 173 W.Va. at 648-50, 319 S.E.2d at 417-20.

The above conclusion, and that which plaintiff seeks in this case, relies upon and promotes the equality and fairness precepts expressed through the Equal and Uniform Clause. The principles have been relied upon elsewhere to arrive at the same result. For example, in Gables Realty Ltd. Partnership v. Travis Central Appraisal District, 81 S.W.3d 869 (Tex. App. 2002), a real estate company constructed and operated for-profit apartment complexes on two parcels of land leased from two separate state institutions. A Texas statute made state-owned property exempt from taxation, and Gables claimed that statute made its complexes exempt from taxation. After noting Article VIII, Sec. 1(a) of the Texas Constitution, which – just like West Virginia's Constitution – requires that "taxation shall be equal and uniform," the court held that "land that is exempt to the State will become taxable at its full value to any lessee putting the land to private commercial use." Id. Further, to be exempt under the just-cited constitutional provision, "it is essential that the property be used for public purposes." Id. (internal citations and quotation marks deleted).

The Rockwool sale-leaseback scheme should be treated the same as the leaseholds in Maier, Hillcrest Memorial Gardens, Central Realty, and Gables Realty. Rockwool's resulting

leasehold interest will be a private enterprise for profit. Plaintiff understands that West Virginia should be "open for business," but not at the expense of unconstitutional inequalities in taxation and of sacrificing significant tax revenue.

V. THE BUSINESS COURT ERRED BY DISMISSING THE COMPLAINT WITHOUT ADDRESSING ANY ASPECT OF COUNT II OF THE COMPLAINT, WHICH SETS FORTH A SEPARATE CLAIM THAT WEST VIRGINIA CODE § 31-15-7 VIOLATES ARTICLE III, § 10 OF THE WEST VIRGINIA CONSTITUTION.

Count II incorporates all the preceding paragraphs of the Complaint, and then further alleges that West Virginia Code § 31-1-7, upon which the WVEDA relied for its authority in issuing the RESOLUTION, is facially "vague, [overbroad], irrational, unreasonable, and/or violates Plaintiff's rights under Article III, Section 1 of the West Virginia Constitution." JA 027. The Business Court completely ignored the claim in granting the dismissal of the Plaintiff's Complaint. To fail to even address a properly alleged claim without even setting the matter for argument is an abuse of discretion and requires remand of this case to the Circuit Court of Kanawha County with directions to, at a minimum, consider the merits of Plaintiff's Count II.

VI. THE CASE SHOULD NOT HAVE BEEN TRANSFFERED FROM THE REGULAR CIVIL JURISDICTION OF THE KANAWHA COUNTY CIRCUIT COURT TO THE BUSINESS COURT DIVISION.

As set forth in W.Va. Code § 51-2-15 (2019):

> (a) The West Virginia Legislature finds that, due to the complex nature of litigation involving highly technical commercial issues, there is a need for a separate and specialized court docket to be maintained in West Virginia's most populated circuit court districts with specific jurisdiction over *actions involving commercial issues and disputes between businesses* (emphasis added).
>
> (b) The West Virginia Supreme Court of Appeals is authorized to designate a business court division within the circuit court of any judicial district with a population in excess of sixty thousand according to the 2000 Federal Decennial Census.

> (c) Upon the determination to designate business court divisions, the West Virginia Supreme Court of Appeals shall promulgate rules for the establishment and jurisdiction of the business court divisions within the circuit court system.

As set forth in Rule 29.06 of the West Virginia Trial Court Rules (2020):

> (a) "Business Litigation" -- one or more pending actions in circuit court in which:
>
> (1) *the principal claim or claims involve matters of significance to the transactions, operations, or governance between business* entities; and
>
> (2) the *dispute presents commercial and/or technology issues* (emphasis added) in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable; and
>
> (3) the principal claim or claims do not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

This case does not *involve matters of significance to the transactions, operations, or governance between business entities*. As previously noted, JCF is a West Virginia 501(c)(3) Non-Profit Corporation – a citizen-action group – formed for the purpose of preserving and protecting the quality of life for all Jefferson County, West Virginia residents. JCF's work is primarily organizing and education; it performs no commercial functions. To the point, JCF is not a "business entity" as contemplated by the W.Va. Code § 51-2-15 and the promulgated trial court rules.

Also as previously noted, Defendant WVEDA is a public body organized pursuant to W.Va. Code § 31-15-1, et seq. (2019), and also not a "business entity" as required in W.Va. Code

§ 51-2-15. Defendant Rockwool, a Delaware Corporation, is a "business entity," but not one that has any business transactions or dealings with Plaintiff JCF. The Business Court Division was created to expeditiously resolve disputes between "business entities." This matter is nothing of the sort. It is a statutory and constitutional challenge to actions taken by the WVEDA that would exempt Rockwool from paying its fair share of ad valorem taxes to Jefferson County citizens.

Even assuming the Plaintiff JCF is a business entity as contemplated by the statutes and rules for the Business Court Division, this matter does NOT involve *commercial issues and disputes between businesses, matters of significance to the transactions, operations, or governance between business entities*, nor does it concern a *dispute* that *presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter*.

In short, this case has no business being in the Business Court. The Honorable Chief Justice determined that this matter was appropriate for the Business Court and issued an Administrative Order to that end. JA 351. Appellant suggests that this matter should be remanded back to the Kanawha County Circuit Court, under its regular jurisdiction.

VIII. REQUEST FOR RELIEF

WHEREFORE, for the reasons set forth herein, Appellant requests that this Honorable Court reverse the decision of the Business Court and remand this matter for further proceedings below.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA

JEFFERSON COUNTY FOUNDATION, INC.,
a West Virginia Non-Profit Corporation,

Petitioner / Plaintiff Below,

v. **CASE NO.: 21-0235**

WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY,
a Public Corporation of the State of West Virginia,

Respondent / Defendant Below,

and

ROXUL USA, INC. d/b/a ROCKWOOL,
a Delaware Corporation,

Respondent / Defendant Below.

CERTIFICATE OF SERVICE

I, Robert M. Bastress, III, Esq., do hereby certify that I have served a copy of the foregoing PETITIONERS' BRIEF upon the following counsel via regular mail this 24th day of June, 2021:

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