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 JOINT REPLY TO RESPONDENTS' BRIEFS

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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I. APPELLANT HAS STANDING TO PURSUE ITS CLAIM.

JCF has legal standing to assert the claims as set forth in the Complaint. As clearly set forth in Tug Valley Recovery Center, Inc. v. Mingo County Commission, et al., 164 W.Va. 94 (1979):

> Insofar as W.Va. Code §§ 18-9A-11 and 11-3-25 both relate to the standing of taxpayers and residents to insure full and proper assessment of all the county's land, they are to be read together. Any interested party may compel compliance with the State Tax Commissioner's report through a writ of mandamus, as provided in W.Va. Code § 18-9A-11; persons likewise have standing to contest the assessment of property in their home counties by way of statutory appeal after having appeared before the Board of Equalization and Review. W.Va. Code § 11-3-25. Id., at Syl. Pt. #3.
>
> Every person affected by the tax base, has a financial interest in seeing that all property in the county is property taxed. By increasing the tax basis, the rate necessary for the operation of government will be reduced and the individual's tax correspondingly lowered. This constitutes the 'direct and substantial interest' required to give a party standing in a given controversy. Id., at Syl. Pt. #4.

The rationale, as confirmed by the Tug Valley case, recognizes that all county residents are affected by the tax assessment system. "If one party is underassessed," or not assessed as in this matter, "the resulting injury is to all other members of the taxing district who are discriminatorily assessed and denied the benefits of full and equitable taxation." Id., at 105.

An association – like the JCF – has standing to sue as the representative of its members when: 1) its members would have standing to sue in their own right; 2) the interests it seeks to protect are germane to the organization's purpose; and 3) neither the claim asserted, nor the relief requested requires the participation of individual members in the lawsuit. Syl. Pt. 2, Snyder v. Callaghan, 168 W.Va. 265, 276 (1981).

JCF educates and advocates for effective and accountable government, sustainable development, and the protection of health, heritage, and the environment. 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 proposed Rockwool industrial facility in Jefferson County. JA 024.

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. This Action is being brought by the Directors, on behalf of the organization, in both their individual capacities as taxpayers and organizational capacities as Directors. These members will be damaged by Rockwool's unfair tax treatment set forth herein. Undoubtedly, if the current scheme is allowed to go forward, the total tax revenues for Jefferson County will be (considerably) less as Rockwool will not be paying its fair share. Id.

That the procedural posture in Tug Valley differed from the direct constitutional challenge presented in this case does not alter – at all – the standing analysis. JCF's members and directors are injured here as clearly were the taxpayer members of the Lincoln Citizens for Tax Reform in Tug Valley, 164 W. Va. at 98, or was the taxpaying Tug Valley Recovery Center, Inc. Id., at 95. This Court recognized that taxpayers have a legally redressable injury when unequal taxation is imposed. Furthermore, this Court has conferred standing on citizens and taxpayers who seek to compel officials' compliance with their constitutional duty. *E.g.*, State ex rel. Barker v. Manchin, 167 W. Va. 155, 165, 279 S.E.2d 622 (1981); State ex rel. Brotherton v. Moore, Syl. Pt. 1, 159 W. Va. 934, 230 S.E.2d 638 (1976).

Contrary to the WVEDA's assertions, then, this is not a case in which the Petitioner is asserting the rights of third parties. Rather, Petitioner quite clearly puts forth its own members' rights, the same as those asserted and recognized in Tug Valley.

The WVEDA invokes the U.S. Supreme Court decision in Daimler Chrysler v. Cuno, 547 U.S. 332 (2006). However, the case does not bear on Petitioner's standing herein. It was a challenge brought by taxpayers challenging tax credits handed out by Ohio and the City of Toledo to induce a manufacturer to keep its Toledo operations in Toledo and to expand them. The plaintiffs claimed as their injury the higher taxes they had to pay because of the tax breaks accorded DaimlerChrysler and the reduced state and local revenues. The Supreme Court ruled that the alleged injury was a generalized grievance that was insufficient to support *federal* court Article III standing. The federal courts' unwillingness to recognize taxpayer standing, without more, was insufficient to create a concrete, personalized grievance is grounded in concerns about both judicial intrusion on executive or legislative branch prerogatives, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); United States v. Richardson, 418 U.S. 166 (1974), and federalism through federal judicial insinuation into matters of state and local governance, e.g., Los Angeles v. Lyons, (1983); Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974); and Allen v. Wright, 468 U.S. 737, 759-61 (1984).

Those concerns do not arise, however, and have naught to do with, standing in a *state* court and, particularly in a West Virginia Court.[2] *E.g.*, State ex rel. Abraham Linc Corp. v. Bedell, 216 W. Va. 99, 118, 602 S.E.2d 542, 561 (2004) (Starcher, J., concurring) ("federal court [standing] decisions [are] grounded in a fundamentally different jurisprudential soil" than are West Virginia's standing cases. Taxpayer standing has been conclusively decided by the West Virginia Supreme

[2]Not surprisingly, the plaintiffs in Cuno filed their claims in a state court in Ohio. The defendants then removed the case to federal court based on federal question jurisdiction. The plaintiffs opposed removal on the ground that they lacked federal court standing. The district court denied plaintiffs' motion to remand, Cuno v. DaimlerChrysler, Inc., 154 F. Supp. 1196, 1198 (N.D. Ohio 2001), and the Sixth Circuit did not address the issue. 386 F.3d 738 (6th Cir. 2004). The Supreme Court, then, agreed with the plaintiffs' assessment of their lack of federal court standing.

Court's decision in Killen v. Logan County Commission, recognizing taxpayer standing to challenge another citizen's or corporation's property tax assessment (or the lack thereof). See also State ex rel. Barker v. Manchin, 167 W. Va. 155, 165, 279 S.E.2d 622, 629 (1981) ("A citizen and taxpayer . . . has a right . . . [to sue] to compel a public official to perform a non-discretionary constitutional duty" and "no 'special or pecuniary interest must be shown by individuals who sue in this capacity'"), quoting State ex rel. Brotherton v. Moore, 159 W. Va. 934, 938, 230 S.E.2d 638, 640-641 (1976). The West Virginia cases are legion in allowing citizen and taxpayer challenges to alleged violations of constitutional limitations on state borrowing or lending the state's credit. e.g., West Virginia Citizens Action Group v. West Virginia Economic Grants Committee, 213 W. Va. 255, 580 S.E.2d 869 (2003) (citizen challenge to both a bond issue and gubernatorial exercise of the appointments power); Winkler v. State School Building Authority, 189 W. Va. 748, 434 S.E.2d 420 (1993). Similarly, the West Virginia Supreme Court in State ex rel. Rist v. Underwood, 206 W. Va. 258, 524 S.E.2d 179 (1999), entertained a citizen/taxpayer challenge to a gubernatorial appointment for allegedly violating the Emoluments Clause in Article VI, § 15, even though the United States Supreme Court has denied citizen standing to challenge a presidential appointment that allegedly violated the federal Emoluments Clause. *Ex parte Levitt*, 302 U.S. 633 (1937).

Finally, it is important to note that the Business Court did not dismiss this matter based upon standing. Indeed, Judge Wilkes rules upon the merits of the claims and did not discuss standing in the Dismissal Orders.

II. APPELLANT DID NOT ABANDON ITS CLAIMS IN COUNT II OF THE COMPLAINT THAT W.VA. CODE § 31-15-17 IS FACIALLY VAGUE, OVERLY BROAD, IRRATIONAL, UNREASONABLE, OR OTHERWISE IN VIOLATION OF ITS RIGHTS UNDER ARTICLE III § 10 AND ARTICLE X § 1.

The Respondents argue that the Appellant abandoned its claims in Count II of the Complaint by failing to address the same in its Responses to the Motions to Dismiss. This is simply not true. As set forth in its Response to the Motion to Dismiss filed by Rockwool, Appellant argued as follow:

> **C. Chapter 31, Article 15, Section 17 of the West Virginia Constitution, as amended, is, on its face, vague, overly broad, irrational, unreasonable; and the subject RESOLUTION, adopted pursuant to this Section, violates Article X, Section 1 of the West Virginia Constitution.**
>
> If the Court were to determine that the subject RESOLUTION was indeed permitted by W.Va. Code § 31-15-17, and its accompanying statutes, it would become clear that this purported legislative exemption violates Article X, Section 1 of the West Virginia Constitution. "The power of the Legislature to enact laws relating to the public welfare is 'almost plenary' under W.Va. Const. Art. 6, § 1, and...its powers are limited only by express restriction or restrictions necessarily implied by a provision or provisions of our Constitution." Thorne v. Roush, W.Va. 261 S.E.2d 72, 74 (1979); See also Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co., 174 W.Va. 538, 328 S.E.2d 144 (1985); Robertson v. Hatcher, 148 W.Va. 239, 135 S.E.2d 675 (1964); State ex rel. County Court of Marion County v. Demus, 148 W.Va. 398, 135 S.E.2d 352 (1964).
>
> For the reasons identified herein above, a tax exemption for a private for-profit corporation has never been found constitutionally sound by the West Virginia Supreme Court. To the contrary, the litany of cases addressing tax exemption for private corporations has only granted such exemptions if a true public purpose was found. See Chapman v. Huntington, W.Va. Housing Authority, et al., 121 W.Va. 319, 3 S.E.2d 502 (1939); State v. Kittle, et al., 87 W.Va. 526, 105 S.E. 775 (1921); United Hospital Center, Inc. v. Romano, 233 W.Va. 313, 758 S.E.2d 240 (2014); Meisel v. Tri-State Airport Authority, 135 W.Va. 528, 64 S.E.2d 32 (1951); Mountain Valley Pipeline, LLC v. McCurdy, 238 W.Va. 200, 793 S.E.2d 850 (2016); Central Realty Co. v. Martin, 126 W.Va. 915, 30 S.E.2d 720 (1944); Prichard v. County Court of Kanawha County, 109 W.Va. 479, 155 S.E. 542 (1930); Zaleski v. West Virginia Physicians' Mutual Insurance Company, 220 W.Va. 311, 647 S.E.2d 747 (2007); State ex rel. West Virginia Housing Development Fund v. Copenhaver, 153 W.Va. 636, 171 S.E.2d 545 (1969); State ex rel. City of Charleston v. Coghill, 156 W.Va. 877, 207 S.E.2d 113 (1973).

> Rockwool serves no true public function, and any statute purporting to exempt it from equal taxation is vague, overly broad, irrational, unreasonable and violates Plaintiffs' Constitutional Rights under Article X, Section 1 of the West Virginia Constitution. JA 144.

Appellant did indeed respond to the arguments raised by Rockwool as related to Count II. Notwithstanding, Judge Wilkes did not address these claims in the Dismissal Orders. The Respondents cite no authority that supports their contention that the Appellant abandoned these claims. To the contrary, the Business Court failed to address them.

III. DEMUS DOES NOT CONTROL THE DECISION IN THIS CASE.

Both Respondents emphasize this Court's decision in County Court of Marion County v. Demus, 148 W. Va. 398, 135 S.E.2d 352 (1964), notwithstanding its inapplicability. Demus addressed the constitutionality of a county's bond issue to finance an Industrial Park. The case did not involve a citizen/taxpayer challenge to an unequal taxation of property, such as arose in Tug Valley Recovery Center, *supra*, and as we have in this case. The Court simply held that a tax exemption created for the county-acquired property did not invalidate the at issue bonds. It also recognized its prior decision in Greene Line Terminal Company v. Martin, 122 W. Va. 483, 10 S.E.2d 901 (1940), which held taxable a wharf owned by the City of Huntington but operated for profit by a taxpayer. The Demus Court did not disturb that holding but concluded only that, whatever might be the ultimate tax consequences of the statutory exemption, it did not affect the validity of the county's bonds. The case did say that the tax exemption for public property does not depend on its use but read in context the reference is clearly to Article X, § 1's enumeration of exemptions for property used for "educational, literary, scientific, religious or charitable purposes." It was not a holding that property titularly owned by government, but used and controlled by a for-profit entity for the purpose of making a profit, would be exempt from all taxation. *See* Greene Line Terminal, *supra*.

Demus can also be distinguished by the subject provision found in the at issue Industrial Bond Act. Section 15 of this Act provides as follows: "...the real and personal property which a county court or municipality may acquire to be leased to an industrial plant according to the provision of this article, shall be exempt from taxation by the state, or any county, municipality, or other levying body, as public property, so long as the same if owned by such county or municipality." Demus, 148 W.Va. 398, 406 (1964). Based upon this provision, at least in part, this Court determined that the Act did not violation Article X, Section 1 of the Constitution.

In this matter, the enacting statute of the WVEDA does not contain the same language. As evidenced by Respondent's arguments, the Court would need to cobble together the powers of the WVEDA through varying statutory sections to conclude that it has the authority to provide a tax exemption to Rockwool via the subject Resolution. 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). Therefore, the facts and holding of Demus must be distinguished from the case at hand.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Christopher P. Stroech, Esq., do hereby certify that I have served a copy of the foregoing PETITIONERS' JOINT REPLY BRIEF TO RESPONDENTS' BRIEF upon the following counsel via regular mail this 30th day of August, 2021:

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