IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0235

Jefferson County Foundation, Inc.,

Plaintiff Below, Petitioner,

v.

West Virginia Economic Development Authority and Roxul USA, Inc. d/b/a ROCKWOOL

Defendants Below, Respondents.

(Circuit Court of Kanawha County Civil Action No. 20-C-332)

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

For the past 15 years, the West Virginia Economic Development Authority (the "WVEDA") and its local counterparts have attracted thousands of jobs and billions of dollars in capital investment by using sale-leasebacks.[1] Under a sale-leaseback, a development authority will acquire a business's new investment in West Virginia and then lease it back to the business for a term of years, subject to a repurchase option. Long-standing West Virginia law treats the development authority's freehold interest as exempt and the business's leasehold interest as non-exempt but lacking assessable value. The effect is a *de facto* property-tax abatement that places West Virginia on even footing with its neighboring states for attracting new business.[2]

In May 2019, the WVEDA adopted a resolution authorizing its officers to enter into a sale-leaseback with ROCKWOOL[3] (the "Resolution") for its new mineral wool manufacturing facility in Ranson, West Virginia (the "RAN-5 Facility").[4] The Resolution found that the RAN-5 Facility would create at least 120 full-time jobs and the sale-leaseback would further the WVEDA's public purpose of promoting economic development and employment.[5] Though the sale-leaseback has yet to occur, it anticipates the WVEDA first issuing up to $150 million in bonds that it will exchange with ROCKWOOL for the RAN-5 Facility.[6] The WVEDA will then lease the RAN-5 Facility back to ROCKWOOL for a term of years not to exceed the term of the bonds.[7] At the end of the lease, ROCKWOOL will have the option to repurchase the RAN-5 Facility.[8] The steps to create the sale-leaseback are shown in the diagram on the following page.

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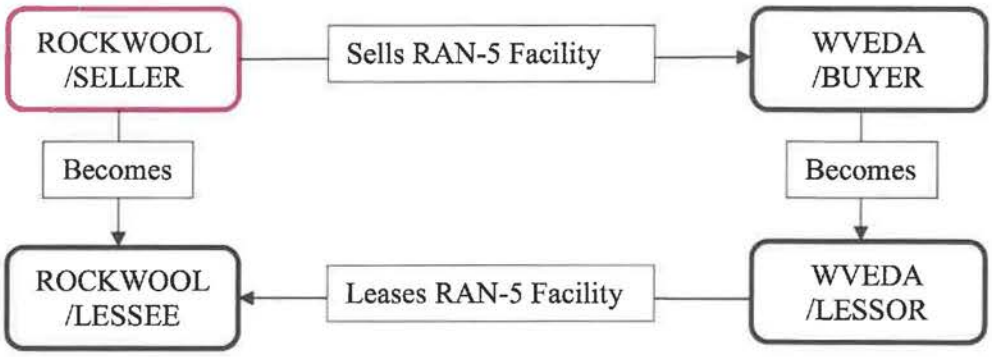
[1] J.A. 83-84.
[2] J.A. 81.
[3] ROCKWOOL is the trade name for Roxul USA, Inc.
[4] J.A. 44-48.
[5] J.A. 44-45.
[6] J.A. 45.
[7] *Id.*
[8] *Id.*



Jefferson County Foundation, Inc. (the "Foundation") opposes the construction and operation of the RAN-5 Facility, and, in April 2020 it sued the WVEDA and ROCKWOOL to either invalidate the Resolution or bar the sale-leaseback.[9] The Foundation alleged in Count I, first, that certain unspecified conduct by the WVEDA violated the equal and uniform taxation clause under Article X § 1 of the West Virginia Constitution and, second, that the same conduct conferred an exemption not authorized under W. Va. Code § 11-3-9.[10] The Foundation alleged in Count II that the tax exemption conferred on the WVEDA under W. Va. Code § 31-15-17 is facially vague, overly broad, irrational, unreasonable, and in violation of Article III § 10 and Article X § 1 of the West Virginia Constitution.[11] It then asked for five forms of relief:[12]

> 1. A declaration that ROCKWOOL and the 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 the WVEDA's actions are null, void, and of no effect;
> 3. A declaration that the WVEDA's statutory tax exemption (W. Va. Code § 31-15-17)[13] is facially vague, overbroad, irrational,

[9] J.A. 23-45.
[10] J.A. 26-27. The Foundation originally misidentified the statute as the nonexistent W. Va. Code § 9-11-3.
[11] J.A. 27. The Foundation originally misidentified the statute as W. Va. Code § 31-15-7.
[12] J.A. 28.
[13] The Foundation clarified in response to motions to dismiss that it had intended to challenge the tax exemption conferred on the WVEDA under W. Va. Code § 31-15-17, not the power to make loans conferred on the WVEDA under § 31-15-7. *See, e.g.*, J.A. 138.

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 trial court deemed appropriate.

ROCKWOOL and the WVEDA moved to dismiss the complaint under both Rule 12(b)(1) and Rule 12(b)(6).[14] The defendants argued under Rule 12(b)(1) that the trial court lacked jurisdiction under ripeness, standing, and political question doctrines.[15] And the defendants argued under Rule 12(b)(6) that the Foundation could not state claims given the broad powers conferred upon the WVEDA, the plain language of the statutory exemption for the WVEDA under W. Va. Code § 31-15-17, and this Court's precedent on the tax treatment of leasehold interests.[16] Though made separately, any distinctions in ROCKWOOL's and the WVEDA's arguments were minor.

While the motions to dismiss were pending, the Chief Justice granted ROCKWOOL and the WVEDA's joint motion to transfer this case to the Business Court Division.[17] Judge Christopher Wilkes of the Business Court Division then oversaw the completion of briefing and, in February 2021, entered an Order granting ROCKWOOL's motion to dismiss and a substantially-similar Order granting the WVEDA's motion to dismiss.[18] Those dismissal orders did not specifically address the Article III § 10 equal protection or the Article X § 6 public credit clause claims because the Foundation had abandoned them when it failed to offer a defense in response to the defendants' motions to dismiss. Judge Wilkes instead focused on the Article X § 1 and W. Va. Code § 11-3-9 claims and found them to be without any merit.[19] He concluded that the Legislature had given the

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[14] J.A. 49-85 & J.A. 247-263.
[15] *See, e.g.*, J.A. 57 & J.A. 249-50.
[16] *Id.*
[17] J.A. 351.
[18] J.A. 2-12 & J.A. 13-22.
[19] *See* J.A. 8-9 & J.A. 18-20.

WVEDA the power to engage in each step incident to the sale-leaseback under W. Va. Code § 31-15-1 *et seq.*, as well as a specific statutory exemption under W. Va. Code § 31-15-17 for any property that it would acquire.[20] Judge Wilkes accordingly understood the Foundation as asserting that the "sale-leaseback is something the law blesses when it should not," and he dismissed the complaint as raising a non-justiciable political question.[21]

This appeal followed.

SUMMARY OF THE ARGUMENT

The Legislature gave the WVEDA the statutory power under W. Va. Code § 31-15-1 *et seq.* for each step incident to the sale-leaseback: the issuance of bonds, the exchange of those bonds for the RAN-5 Facility, and the lease of the RAN-5 Facility back to ROCKWOOL. The Legislature also has the constitutional authority under Article X § 1 to exempt public property, like the freehold interest that the WVEDA will acquire in the RAN-5 Facility, regardless of its use. And this Court has held that the presumption against assessable value for the leasehold interest that ROCKWOOL will acquire in the RAN-5 facility is *not* an exemption, which means that it does not implicate Article X § 1. Nothing about the sale-leaseback or its tax consequences violates Article X § 1 or W. Va. Code § 11-3-9, which is why the trial court properly characterized the Foundation's complaint as alleging that the law blesses something that it should not—a political question that the trial court was right to dismiss.

It is of no moment that the trial court did not address the Foundation's claims in Count II under Article III § 10 because they were abandoned when the Foundation failed to defend them in response to ROCKWOOL's and the WVEDA's motions to dismiss. In any case, the specific

[20] J.A. 6-8 & J.A. 17-19.
[21] J.A. 10 & J.A. 20.

equal and uniform taxation clause claims under Article X § 1 will preclude any claims under Article III § 10. Finally, to the extent that this Court need address the issue, it should hold that the original referral to Business Court Division is neither reviewable nor in error.

This Court should accordingly affirm the trial court's dismissal orders and dismiss the Foundation's appeal.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal may be resolved in a memorandum decision, without oral argument, because the trial court applied well-settled West Virginia law to dismiss the Foundation's complaint.

ARGUMENT

A. This Court reviews *de novo* orders granting Rule 12(b)(1) or Rule 12(b)(6) motions to dismiss.

Though the Foundation states in its opening brief that this case was decided on Rule 12(b)(6)[22] motions to dismiss,[23] ROCKWOOL and the WVEDA also raised jurisdictional arguments under Rule 12(b)(1),[24] and the trial court dismissed this case by applying the political question doctrine—a jurisdictional doctrine.[25] This Court reviews dismissals under either rule *de novo*,[26] but the particular rule defines the scope of this Court's inquiry. Because the Court must determine the matter of its jurisdiction before it proceeds to the merits, under Rule 12(b)(1)[27] the Court may consider matters outside the pleadings without converting the motion to dismiss to a

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[22] W. Va. R. Civ. P. 12(b)(6).
[23] Pet'r's Br. 5
[24] W. Va. R. Civ. P. 12(b)(1).
[25] *See E. Assoc. Coal Corp. v. Doe*, 159 W. Va. 200, 208, 220 S.E.2d 672, 678 (1975) (identifying the political question doctrine as a jurisdictional doctrine).
[26] *Savarese v. Allstate Ins. Co.*, 223 W. Va. 119, 123-24, 672 S.E.2d 255, 259-60 (2008).
[27] W. Va. R. Civ. P. 12(b)(1).

motion for summary judgment.[28] Under Rule 12(b)(6),[29] by contrast, the Court's review is generally limited to the four corners of the plaintiff's complaint and any exhibits incorporated therein.[30] The Court under Rule 12(b)(6)[31] must also construe the plaintiff's allegations in the light most favorable to the plaintiff and only dismiss where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[32]

B. The trial court properly dismissed the Foundation's complaint.

1. The trial court properly concluded that the Legislature gave the WVEDA the statutory authority to enter into a sale-leaseback with ROCKWOOL.

The Foundation's core argument rests on a mistaken premise: that because the sale-leaseback provides ROCKWOOL with a property-tax exemption (untrue for reasons discussed below), the legislative powers conferred on the WVEDA under the West Virginia Economic Development Authority Act, W. Va. Code § 31-15-1 *et seq.* (the "Act"), must be strictly construed for compliance with the equal and uniform taxation clause under Article X § 1.[33] The Foundation accordingly argues at length that, because the Act does not specifically authorize a sale-leaseback, this Court should disregard clear statutory authority for the WVEDA to engage in every step incident to that transaction: the issuance of bonds, the exchange of those bonds for property, and the lease of any property acquired.[34] The rule upon which the Foundation relies, however, actually says that "[*c*]*onstitutional and statutory provisions exempting property from taxation* are strictly construed ...."[35]

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[28] *Elmore v. Triad Hosp., Inc.*, 220 W. Va. 154, 157 n.7, 640 S.E.2d 217, 220 n.7 (2006) (*per curiam*) (citing *Easterling v. Am. Optical Corp.*, 207 W. Va. 123, 128-29, 529 S.E.2d 588, 593-94 (2000)).
[29] W. Va. R. Civ. P. 12(b)(1).
[30] *Forshey v. Jackson*, 222 W. Va. 743, 746-749, 671 S.E.2d 748, 751-54 (2008).
[31] W. Va. R. Civ. P. 12(b)(6).
[32] Syl. Pts. 2 & 3, *Bowden v. Monroe*, 232 W. Va. 47, 750 S.E.2d 263 (2013) (*per curiam*).
[33] *See, e.g.*, Pet'r's Br. 8.
[34] *See, e.g., id.* at 9-11.
[35] Syl. Pt. 1, in part, *In re Maier*, 173 W. Va. 641, 319 S.E.2d 410 (1984) (emphasis added).

The purpose of the inquiry is to determine whether the exemption should be conferred—not whether the underlying transaction is authorized.

In *Greene Line Terminal Co. v. Martin*,[36] for instance, this Court considered whether a privately-operated wharf under lease from the City of Huntington was entitled to a property-tax exemption. Though the *Greene Line Terminal* court held that the exemption for Huntington's free-hold as public property did not carry through to the wharf's leasehold, it did *not* invalidate the transaction.[37] The result was to deny the wharf's request for an exemption.[38]

This Court in *In re Maier*[39] similarly considered whether a leasehold in county-owned property was entitled to a property-tax exemption. The Kanawha County Commission had issued $1.65 million in revenue bonds to acquire property from the Owens-Illinois Glass Company, and it then immediately leased that property to a non-profit corporation, the Sarah and Pauline Maier Scholarship Foundation, to operate a commercial warehouse facility.[40] Though the *In re Maier* court held that the Maier Scholarship Foundation's leasehold interest did not qualify for an exemption, either on its own terms or under a carry-through exemption from the Kanawha County Commission, it also did *not* invalidate the transaction.[41] The result again was to deny the Maier Scholarship Foundation's request for an exemption. ROCKWOOL is in fact not aware of a single West Virginia court that has applied the strict-construction standard to go beyond denying an exemption to bar an entire transaction.

Contrary to the strict-construction standard advanced by the Foundation, when this Court considers whether the powers given to the WVEDA under the Act violate Article X § 1 of the

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[36] *Greene Line Terminal Co. v. Martin*, 122 W. Va. 483, 10 S.E.2d 901 (1940).
[37] *Id.* at ---, 10 S.E.2d at 904-05.
[38] *Id.*
[39] *In re Maier*, 173 W. Va. at 642, 319 S.E.2d at 411.
[40] *Id.* at 642, 319 S.E.2d at 411-12.
[41] *Id.* at 647-48, 319 S.E.2d at 417-18.

West Virginia Constitution, it is required to "exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question."[42] As this Court held when rejecting a similar Article X § 1 challenge, the "power of the legislature of this state is 'almost plenary' and ... its powers are limited only by express restriction or restirctions [sic] necessarily implied therein by a provision or provisions in our constitution."[43]

When the trial court cited *Huffman v. Goals Coal Co.*[44] for the principle that it has a duty to "enforce legislation unless it runs afoul of the State or Federal Constitutions,"[45] it properly applied this restrained rule of construction that requires every doubt to be construed in favor of constitutionality. And doing so, the trial court correctly rejected the Foundation's argument, repeated here, that the Legislature must expressly authorize the WVEDA to enter into a sale-leaseback. The Legislature, in adopting the Act, expressed an intent for its provisions to be "liberally construed and applied" to fulfill the purposes for which the WVEDA was created.[46] Those purposes, set forth in W. Va. Code § 31-15-3, cover nearly any activity that might be associated with the promotion of economic development or employment in this State.[47]

The trial court correctly concluded that the RAN-5 Facility represents the type of economic development and employment opportunity that the WVEDA was created to support.[48] It in fact

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[42] Syl. Pt. 3, in part, *State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 730 S.E.2d 368 (2012).
[43] *State ex rel. Cnty. Ct. of Marion Cnty. v. Demus*, 148 W. Va. 398, 403, 135 S.E.2d 352, 356 (1964).
[44] Syl. Pt. 2, *Huffman v. Goals Coal Co.*, 223 W. Va. 724, 679 S.E.2d 323 (2009).
[45] J.A. 9 & J.A. 19-20.
[46] W. Va. Code § 31-15-33.
[47] W. Va. Code § 31-15-3.
[48] J.A. 7 & J.A. 18

found that ROCKWOOL's RAN-5 Facility was just one of several similar projects that the WVEDA had supported throughout its history.[49] And it further found that the WVEDA had invoked its powers under W. Va. Code § 31-15-6 (not W. Va. Code § 31-15-17, as the Foundation continues to insist), to authorize the sale-leaseback here.[50] The trial court then correctly concluded, as the following table shows, that W. Va. Code § 31-15-6 provides the WVEDA with the authority for each step incident to the sale leaseback transaction with ROCKWOOL.

Sale-Leaseback Step	**WVEDA Authority**	**Trial Court Citation**
Issuance of revenue bonds	"To issue revenue bonds or notes to fulfill the purposes of [Article 15, Chapter 31] ..."[51]	J.A. 6 & J.A. 17.
Deliverance of revenue bonds for the RAN-5 Facility	"To issue and deliver revenue bonds or notes in exchange for a project."[52]	J.A. 8 & J.A. 19.
Acquisition of the RAN-5 Facility	"To acquire by purchase, lease, donation, or eminent domain, any real or personal property, or any right or interest therein, as may be necessary to carry out the purposes of the authority."[53]	J.A. 6 & J.A. 17.
Lease of the RAN-5 Facility	"To ... lease ... its property, both real and personal, or any right or interest therein to another or authorize the possession, occupancy or use of such property or any right or interest therein by another, in such manner and upon such terms as it deems appropriate."[54]	J.A. 8 & J.A. 19.
Sale of the RAN-5 Facility at the end of the lease term	"To ... sell ... its property, both real and personal, or any right or interest therein to another or authorize the possession, occupancy or use of such property or any right or interest therein by another, in such manner and upon such terms as it deems appropriate."[55]	J.A. 6 & J.A. 17.

The Foundation undoubtedly will argue in reply, as it has in its opening brief, that none of

[49] *Id.*
[50] J.A. 6-7 & J.A. 17.
[51] W. Va. Code § 31-15-6(i).
[52] W. Va. Code § 31-15-6(j).
[53] W. Va. Code § 31-15-6(x).
[54] W. Va. Code § 31-15-6(ee).
[55] *Id.*

these steps is necessary to fulfill the WVEDA's purposes of combatting unemployment and promoting commerce.[56] But that argument is firmly foreclosed by *State ex rel. County Court of Marion County v. Demus*[57] and *State ex rel. Ohio County Commission v. Samol*.[58]

This Court's decision in *Demus* is in fact dispositive of the Foundation's constitutional challenges to the Act. This Court was called upon in *Demus* to decide the constitutionality of the former Industrial Development Bond Act, which the Marion County Commission had relied upon to issue $1.75 million in revenue bonds to construct, acquire, and then lease an industrial manufacturing facility to a private, for-profit business.[59] A key issue was whether Article X § 1 authorized the statutory exemption under that law for any property acquired by a county or municipality. The *Demus* court upheld the Industrial Development Bond Act against that Article X § 1 challenge because it concluded that public properties "may be exempted by law *without regard to their use*."[60] It moreover concluded that "[t]he promotion of industry ... is clearly of incidental public benefit ... to the extent that it will furnish employment to a substantial number of its inhabitants."[61] That it might also "result[] in the promotion of and gain to a private corporation" was of no moment.[62] Where the Legislature had determined that the Industrial Development Bond Act would promote the public welfare, the *Demus* court held that "inasmuch as the factual findings of the legislature ... are legislative, not juridical, findings ... this Court is bound thereby."[63]

The *Samol* court extended *Demus* to reject a similar Article X § 1 challenge to the Ohio

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[56] *See, e.g.*, Pet'r's Br. 9.
[57] *Demus*, 148 W. Va. at 398, 135 S.E.2d at 352.
[58] *State ex rel. Cnty. Comm'n v. Samol*, 165 W. Va. 714, 275 S.E.2d 2 (1980).
[59] *Demus*, 148 W. Va. at 400, 135 S.E.2d at 352.
[60] *Id.* at 406, 135 S.E.2d at 358 (emphasis in original).
[61] *Id.* at 408, 135 S.E.2d at 359.
[62] *Id.*
[63] *Id.* at 406, 135 S.E.2d at 358.

County Commission's issuance of $1.575 million in revenue bonds to acquire, expand, and improve a private, for-profit shopping complex.[64] It easily concluded that "the renovation, expansion or creation of existing or new commercial projects gives much the same economic benefit to a community as would comparative activities in the industrial area. Each serves to create or maintain employment and enhances tax revenues, and thereby operates to benefit the community and public in general."[65] Indeed, consistent with the restrained role that this Court must exercise in reviewing constitutional challenges, the *Samol* court held that these findings are not even "subject to judicial investigation" absent some argument that they are irrational or serve illegitimate purposes.[66]

The Foundation never developed an argument for irrationality or illegitimacy below, but it has attempted here to belatedly make that point by citing a student note and State Auditor's report. The student note entitled *Pilot Agreements in West Virginia: A Tale of Turbulent Taxation*, however, was written under the "steadfast guidance" of Professor Robert Bastress—a member of the Foundation's legal team in both the trial court and this appeal.[67] It in fact cites Professor Bastress's arguments in this and a similar Jefferson County Circuit Court case as persuasive authority,[68] a type of bootstrapping that leaves the note without any persuasive value. Nor is the Foundation's reliance on the State Auditor's report much better.[69] Though critical of a non-recourse loan program once administered by the WVEDA, that loan program was created under a different statute and has absolutely nothing to do with the bond-backed transaction at issue here.

The most relevant authority on the benefits of sale-leaseback programs instead comes from

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[64] *Samol*, 165 W. Va. at 715, 275 S.E.2d at 3.
[65] *Id.* at 718, 275 S.E.2d at 4.
[66] *Id.*
[67] Blake N. Humphrey, Note, *Pilot Agreements in West Virginia: A Tale of Turbulent Taxation*, 123 W. VA. L. REV. 335, 391 (2020).
[68] *Id.* at 362-364.
[69] Pet'r's Br. 12.

an *amicus* brief that the West Virginia Development Office ("WVDO") submitted to this Court in another case involving sale-leasebacks.[70] The WVDO identified sale-leasebacks as a "powerful tool" that it could use to offer short-term tax relief and compete with surrounding states for prospective new business.[71] And it informed this Court that its ability to offer a sale-leaseback was "pivotal" to attracting more than 3,000 jobs and $2 billion in capital investment.[72] The trial court appropriately considered those expectation interests as part of its dismissal orders.

Where, as here, the Act authorizes the WVEDA to take each step incident to the sale-leaseback, and the resulting promotion of industrial development is consistent with the legislative purposes, the trial court properly concluded that the WVEDA has the authority to engage in the sale-leaseback with ROCKWOOL. This Court should accordingly reject the Foundation's second assignment of error and affirm the trial court's dismissal orders.

2. The trial court properly concluded that the tax treatment of the property interests created under the sale-leaseback will not violate the equal and uniform taxation clause under Article X § 1 of the West Virginia Constitution or the general exemption statute under W. Va. Code § 11-3-9.

i. The WVEDA will hold a freehold interest that, as public property, the Legislature lawfully exempted under W. Va. Code § 31-15-17.

When the Foundation alleges that the sale-leaseback conflicts with W. Va. Code § 11-3-9 or violates Article X § 1, it confuses matters by failing to identify the specific property interest at issue. That exercise is critical because it has been black-letter law in West Virginia for more than

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[70] Brief of the *Amicus Curiae* West Virginia Development Office in Support of Neither Party, *Musick v. Univ. Park at Evansdale, LLC*, No. 17-0309 (W. Va. filed Aug. 14, 2017) ("WVDO *Amicus* Brief").
[71] *Id.* at 2 & 5.
[72] *Id.* at 5.

80 years that a publicly-held freehold in property is treated separately from a privately-held leasehold in that same property.[73] And here, of course, the sale-leaseback for the RAN-5 Facility will create a *freehold* held by the WVEDA, a State entity,[74] and a *leasehold* held by ROCKWOOL, a private corporation.

ROCKWOOL cannot determine from the Foundation's opening brief whether it believes that applying an exemption to the WVEDA's freehold interest would violate Article X § 1. But any such argument would be foreclosed by the plain constitutional text and decades of precedent. The requirement for equal and uniform taxation under Article X § 1 is qualified by several enumerated exceptions:

> 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; ... but property used for educational, literary, scientific, religious or charitable purposes, *all* cemeteries, *public property*, the personal property, including livestock, employed exclusively in agriculture as above defined and the products of agriculture as so defined while owned by the producers *may by law be exempted from taxation*.[75]

As this Court held more than 100 years ago in *Reynolds Memorial Hospital v. Marshall County Court*,[76] this clause allows the Legislature to exempt public property "*without regard to* [*its*] *use*." The Foundation omits any discussion of this rule but it is so fundamental to West Virginia law that its counsel, Professor Bastress, cites it in his book on the West Virginia Constitution.[77] Whether the WVEDA leases the RAN-5 Facility to ROCKWOOL for a private, profit-

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[73] *See Greene Line Terminal Co.*, 122 W. Va. at ---, 10 S.E.2d at 905.
[74] *See* W. Va. Code § 31-15-5(a).
[75] W. Va. Const. Art. X § 1 (emphasis added).
[76] *Reynolds Mem. Hosp. v. Marshall Cnty. Ct.*, 78 W. Va. 685, ---, 90 S.E. 238, 239 (1916).
[77] Robert M. Bastress, Jr., THE WEST VIRGINIA STATE CONSTITUTION 287 (2d ed. 2016).

making enterprise is accordingly of no constitutional moment as it relates to the WVEDA's freehold interest in the property. The Legislature can constitutionally exempt the WVEDA's freehold interest in the RAN-5 facility—or any other property—regardless of how it is used.

Given the Legislature's absolute authority to exempt public property, the relevant question here is whether the Legislature has exercised that authority in a way that would confer an exemption on the WVEDA's freehold interest in the RAN-5 Facility. The Foundation argues that the Legislature has not. It contends that, in contrast to the exemption for public works projects under W. Va. Code § 8-19-4, the specific exemption for the WVEDA under W. Va. Code § 31-15-17 does not authorize sale-leasebacks.[78] It also relies on the list of general exemptions under W. Va. Code § 11-3-9 to argue that the Legislature has mandated "exclusive" ownership and barred exemptions for projects "owned, operated, or leased out for private profit."[79]

What the Foundation fundamentally misunderstands, however, is that W. Va. Code § 31-15-17 does not need to specifically authorize the sale-leaseback. The authority for the WVEDA to take each step incident to the sale-leaseback is found in W. Va. Code § 31-15-6, as discussed in greater detail above. All that W. Va. Code § 31-15-17 must do is provide the authority to exempt the freehold interest in the RAN-5 Facility that the WVEDA will acquire as part of the transaction. And W. Va. Code § 31-15-17 does so in clear and unambiguous language:

> 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

[78] Pet'r's Br. 13.
[79] *Id.* at 13-14 (emphasis omitted).

> all taxation by this state and any county, municipality, political subdivision or agency thereof, except inheritance taxes.[80]

It is of no moment that the Legislature adopted a *broader* exemption under W. Va. Code § 8-19-4 that extends to both publicly-owned freeholds and privately-owned leaseholds in public works projects. Nor is there any conflict between W. Va. Code § 31-15-17 and W. Va. Code § 11-3-9. Though the Foundation omits this point from its brief, W. Va. Code § 11-3-9 specifically incorporates the WVEDA's exemption into subsection (a)(30), where it exempts "[a]ny other property or security exempted by any other provision of law."[81] The rules of statutory construction would, in any case, require that the "specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled."[82] The specific exemption for the WVEDA under W. Va. Code § 31-15-17 contains no exceptions: it represents the Legislature's full expression of its constitutional authority to exempt public property regardless of its use. As the most specific statute, W. Va. Code § 31-15-17 controls.

This Court in *Demus* in fact already recognized that the specific exemption statute will control in a case like this. The Marion County Commission had issued industrial development bonds to acquire an industrial facility, which it then leased to a private business, and this Court issued a rule to show cause why the Industrial Development Bond Act did not unconstitutionally "exempt[] from taxation property held by the county [commission] for profit and the interest of the lessee in such property."[83] The *Demus* court noted that its earlier decision in *Greene Line Terminal Co.* had interpreted W. Va. Code § 11-3-9 to deny an exemption to a leasehold held by a private, for-profit wharf in property owned by the City of Huntington.[84] Whatever decision it might

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[80] W. Va. Code § 31-15-17 (emphasis added).
[81] W. Va. Code § 11-3-9(a)(30).
[82] Syl. Pt. 1, in part, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984).
[83] *Demus*, 148 W. Va. at 401, 135 S.E.2d at 355.
[84] *Id.* at 405, 135 S.E.2d at 357.

have reached by applying W. Va. Code § 11-3-9, however, the *Demus* court held that the specific exemption from the Industrial Development Bond Act would control.[85] In language that is equally applicable here, the *Demus* court wrote, "Certain it is that the provisions of Article X, Section 1, of the constitution are such as to empower the legislature to make the exemption ... even though it may have used milder language in the general act, [W. Va. Code § 11-3-9]."[86]

The Foundation's efforts to graft standards from other statutes onto W. Va. Code § 31-15-17 are like grafting a "giraffe's head onto an alligator's body."[87] The trial court properly concluded that W. Va. Code § 31-15-17 controls the tax treatment of any freehold that the WVEDA will acquire under the sale-leaseback—something that the Legislature is constitutionally empowered to do for public property regardless of its use. This Court should accordingly reject the Foundation's third and fourth assignments of error and affirm the trial court's dismissal orders.

ii. ROCKWOOL will hold a leasehold interest that, like every other leasehold interest in West Virginia, presumptively lacks assessable value.

Beyond confusing the issues, by treating the sale-leaseback as a *property interest* rather than as a *transaction*, the Foundation obscures the fact that the tax treatment of ROCKWOOL's leasehold interest does not present an exemption issue. But this is essential to determining compliance with Article X § 1 or W. Va. Code § 11-3-9. That is because the tax treatment of ROCKWOOL's leasehold interest cannot violate either the constitution or the statute if no exemption is being claimed.

Starting with the privately-owned wharf operated under lease from the City of Huntington

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[85] *Id.* at 406, 135 S.E.2d at 358.
[86] *Id.*
[87] *Singletary v. Cont'l Ill. Nat. Bank and Trust Co.*, 9 F.3d 1236, 1242 (7th Cir. 1993).

in *Greene Line Terminal*,[88] this Court has held that leaseholds and freeholds will be treated separately. It then expanded upon that holding in its 1981 decision in *Great A&P Tea Co. v. Davis*,[89] where it adopted two syllabus points on how county assessors should treat leaseholds for property-tax purposes:

> 1. The assessor of a county may assess the value of a leasehold as personal property separately in an amount such that when the value of the freehold subject to the lease is combined with the value of the leasehold the total reflects the true and actual value of the real property involved.
>
> 2. *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.

This Court next took up the tax treatment of leaseholds in its 2004 decision in *Maplewood Community, Inc. v. Craig*,[90] where it considered the circumstances under which a leasehold would have independent value. The *Maplewood* court resolved that question by holding that a leasehold will have independent value only if it is "economically advantageous to the lessee, that is a so-called bargain lease, and is freely assignable so that the lessee may realize the benefit of such bargain in the market place."[91]

Twelve years after *Maplewood*, the tax treatment of leaseholds came back before this Court in *University Park at Evansdale, LLC v. Musick (UPE I)*,[92] on an issue that is dispositive here:

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[88] *Greene Line Terminal Co.*, 122 W. Va. at ---, 10 S.E.2d at 905.
[89] Syl. Pts. 1 & 2, *Great A&P Tea Co. v. Davis*, 167 W. Va. 53, 278 S.E.2d 352 (1981) (emphasis added).
[90] *Maplewood Cmty., Inc. v. Craig*, 216 W. Va. 273, 607 S.E.2d 379 (2004) (*per curiam*).
[91] *Id.* at 287, 607 S.E.2d at 393 (quoting "Valuation of Leasehold Interests," State Tax Commissioner's Annual In–Service Training Seminar for Assessors, June 14, 1989)).
[92] *Univ. Park at Evansdale, LLC v. Musick*, 238 W. Va. 106, 792 S.E.2d 605 (2016) (*UPE I*).

whether the presumption against assessable value for leaseholds qualifies as a property-tax exemption. West Virginia University Board of Governors ("WVU") had leased property to a private developer for the development of a new mixed-use facility on its Evansdale Campus.[93] The private developer had then sub-leased the majority of the facility back to WVU for operation as student housing, while retaining a small portion of the facility to operate as retail space on its own.

When the county assessor assessed the private developer's leasehold interest at $9.035 million for tax year 2015, the private developer appealed to the county board of equalization and review.[94] It argued that, under *Maplewood*, its leasehold lacked assessable value because it was not a bargain lease and freely assignable.[95] The board of equalization and review concluded that this was a taxability question (i.e., a claim for an exemption) that fell outside of its jurisdiction and dismissed the appeal.[96] After the trial court affirmed the board of equalization and review in an intermediate appeal, the private developer then appealed to this Court.[97]

The *UPE I* court recognized that the presumption against assessable value leads to a "$0 valuation that may result in a lack of taxability."[98] Even so, the *UPE I* court held that this presumption is *not* a claim to exemption.[99] It is instead a determination of value. And it is for that reason that *UPE I* is dispositive here: when the tax treatment of ROCKWOOL's leasehold interest in the RAN-5 Facility is not based on an exemption, there can be no violation of the constitutional limitations under Article X § 1 or the statutory requirements under W. Va. Code § 31-15-17 or W. Va. Code § 11-3-9.

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[93] *Id.* at 108, 792 S.E.2d at 607.
[94] *Id.*
[95] *Id.*
[96] *Id.* at 108, 792 S.E.2d at 607-08.
[97] *Id.* at 109, 792 S.E.2d at 608.
[98] *Id.* at 113, 792 S.E.2d at 605.
[99] *Id.*

The Foundation attempts to distinguish these cases in its opening brief by framing them as not involving a "tax sham" for the benefit of a private, for-profit company.[100] But the Foundation has misunderstood the facts of these cases and their holdings. Though the *Maplewood* court denied *exemptions* to the two senior living facilities, it remanded the case for one of those facilities for the trial court to make a determination on assessable *value*.[101] The trial court on remand then applied the freely-assignable and bargain-lease standard to set the assessed value at $0.[102] And in the case of *UPE I*, the Foundation omits that the private developer actually retained a portion of the mixed-use facility to operate as retail space on a for-profit basis.[103] This Court nonetheless held when the parties returned two years later, in *Musick v. University Park at Evansdale, LLC* (*UPE II*),[104] that the dispositive factor on value is whether the leasehold *itself* has value—not whether the leaseholder uses it to conduct a for-profit business. The Foundation not only misstates this standard for assessing leasehold interests in its opening brief,[105] it makes assertions about the sale-leaseback terms that it cannot possibly support. No one—and certainly not the Foundation—can state that the leasehold is freely assignable and a bargain lease when the transaction has not even been completed.

Nor has the Foundation identified persuasive authority in *In re Maier*[106] or *Gables Realty L.P. v. Travis Central Appraisal District*.[107] This Court in *In re Maier* was confronted with the question of whether the Maier Scholarship Foundation could claim an *exemption* for the leasehold

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[100] Pet'r's Br. 18.
[101] *Maplewood*, 216 W. Va. at 287, 607 S.E.2d at 393.
[102] *Mon Elder Servs., Inc. v. Monongalia Cnty. Comm'n.*, Nos. 02-C-AP-18, 03-C-AP-10, 04-C-AP-13, 05-C-AP-10 (W. Va. Cir. Ct. June 23, 2005).
[103] *UPE I*, 238 W. Va. at 108 n.1, 792 S.E.2d at 607 n.1.
[104] *Musick v. Univ. Park at Evansdale, LLC*, 241 W. Va. 194, 202 n.33, 820 S.E.2d 901, 909 n.33 (2018) (*UPE II*).
[105] *See* Pet'r's Br. 19.
[106] *In re Maier*, 173 W. Va. at 641, 319 S.E.2d at 410.
[107] *Gables Realty L.P. v. Travis Cent. Appraisal Dist.*, 81 S.W.3d 869 (Tex. App. 2002).

interest it held in property owned by the Kanawha County Commission.[108] The tax treatment of ROCKWOOL's leasehold interest in the RAN-5 facility, however, does not depend on an exemption—it rests on the presumption against assessable *value*. *Gables Realty*, for its part, applies Texas law that, unlike West Virginia law, does not authorize absolute exemptions of public property and generally does not authorize separate assessments of leaseholds.[109] It is entirely irrelevant here.

The trial court properly rejected the inapposite authority advanced by the Foundation and based its decision on the well-established rules for leasehold interests under *Great A&P*, *Maplewood*, *UPE I*, and *UPE II*.[110] The trial court accordingly concluded that the sale-leaseback will provide ROCKWOOL with leasehold that presumptively lacks assessable value.[111] That ROCKWOOL would not then pay the same taxes on its leasehold as it would on a freehold did not, as the trial court logically concluded, give rise to an Article X § 1 equal and uniform taxation clause violation.[112]

This Court should accordingly reject the Foundation's third and fourth assignments of error and affirm the trial court's dismissal orders.

3. The trial court properly concluded that the Foundation had presented a political question by arguing that the law blessed something that it should not.

There should be no doubt from the discussion above that the WVEDA has the power to enter into a sale-leaseback with ROCKWOOL for the RAN-5 Facility. The Legislature has exercised its near-plenary authority to give the WVEDA the power to issue bonds,[113] to exchange those

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[108] *In re Maier*, 173 W. Va. at 646, 319 S.E.2d at 416.
[109] *Gables Realty*, 81 S.W.3d at 874-75.
[110] J.A. 10-11 & J.A. 21-22
[111] J.A. 10 & J.A. 21
[112] J.A. 10-11 & J.A. 21-22.
[113] W. Va. Code § 31-15-6(i).

bonds for the RAN-5 Facility,[114] to lease the RAN-5 Facility back to ROCKWOOL,[115] and then to sell the RAN-5 Facility to ROCKWOOL at the end of the lease term.[116] But there should also be no doubt that the Legislature has the authority under Article X § 1 to exempt the WVEDA's resulting freehold interest in W. Va. Code § 31-15-17 regardless of its use. And there finally should be no doubt that the presumption against assessable value for ROCKWOOL's resulting leasehold interest is not a claim to exemption that implicates either Article X § 1 or W. Va. Code § 11-3-9. The sale-leaseback and its tax consequences are, in a word, *lawful*.

The trial court recognized that what the Foundation is arguing at its core is that "the sale-leaseback is something the law blesses when it should not."[117] That is the political question. It is a request for the courts to usurp a co-equal branch's judgment by determining *how* the WVEDA exercises its legislatively-conferred powers. That is admittedly not an inquiry into legislative apportionment like in *Baker v. Carr*[118] or a collateral attack on an impeachment like in *Nixon v. U.S.*[119] But that does not make it any more justiciable. As this Court held in *Morrisey v. West Virginia AFL-CIO*,[120] the "wisdom, desirability, and fairness of a law are political questions to be resolved in the Legislature." This Court has also written that taxation disputes are perhaps the classic political questions.[121] So when the Foundation asked the trial court to declare that lawful conduct constitutes an unlawful sham, that is something that the political question doctrine will not permit.

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[114] W. Va. Code § 31-15-6(j).
[115] W. Va. Code § 31-15-6(ee).
[116] *Id.*
[117] J.A. 10 & J.A. 20.
[118] *Baker v. Carr*, 369 U.S. 186 (1962).
[119] *Nixon v. U.S.*, 406 U.S. 224 (1993).
[120] *Morrisey v. W. Va. AFL-CIO*, 239 W. Va. 633, 636, 804 S.E.2d 883, 886 (2017).
[121] *Lowe v. Richards*, 234 W. Va. 48, 56 n.9, 763 S.E.2d 64, 72 n.9 (2014) (quoting *Killen v. Logan Cnty. Comm'n*, 170 W. Va. 602, 624, 295 S.E.2d 689, 711 (1982) (Neely, J., dissenting)).

This Court accordingly should reject the Foundation's first assignment of error and affirm the trial court's dismissal orders.

C. The trial court did not err by failing to address the Foundation's claims under Article III § 10 of the West Virginia Constitution in Count II of the complaint.

1. The Foundation abandoned its Article III § 10 claims when it failed to defend them in its responses to the defendants' motions to dismiss.

The Foundation alleged in Count II of its 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.[122] When it moved to dismiss in May 2020, ROCKWOOL dedicated more than five pages of its supporting brief to this claim alone.[123] The response that the Foundation filed in June 2020, however, offered no defense of its claims under Article III § 10.[124] ROCKWOOL accordingly noted in its reply brief, filed that same month, that the Foundation had abandoned them.[125] The Foundation nonetheless again offered no defense of its Article III § 10 claims when, six months later, it filed its response to the WVEDA's separately-filed motion to dismiss.[126]

It was thus entirely proper for the trial court to have not specifically addressed the Foundation's Article III § 10 claims. The Foundation abandoned those claims when it failed to defend them in response to ROCKWOOL's and the WVEDA's motions to dismiss. It would be unthinkably perverse for this Court to reward the Foundation for its own negligence or sloth by now reversing and remanding for those claims to go forward. That is not, and cannot be, the rule in West

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[122] J.A. 27.
[123] J.A. 68-73.
[124] J.A. 127-46
[125] J.A. 171.
[126] J.A. 264-282.

Virginia.

This Court should accordingly reject the Foundation's fourth assignment of error and affirm the trial court's dismissal orders.

2. The Foundation's Article III § 10 are precluded by Article X § 1.

When a plaintiff brings a claim that is covered under a specific constitutional clause it is limited to seeking relief under that clause alone.[127] So when it alleged that ROCKWOOL is benefitting from unequal taxation, the Foundation was limited to arguments under the specific constitutional clause governing that issue: the equal and uniform taxation clause under Article X § 1. The Foundation could not also assert general claims under Article III § 10, and the trial court did not err by not addressing them.

This Court should accordingly reject the Foundation's fourth assignment of error for this additional reason and affirm the trial court's dismissal orders.

D. This Court properly referred this action to the Business Court Division and its decision should not be reviewed as part of this appeal.

The Chief Justice referred this case to the Business Court Division in December 2020 after receiving briefing from all parties and the originally-assigned trial judge, Judge Tod Kaufman. The reason the Chief Justice gave for referral is that the case "involved matters of significance to the transactions, operations, or governance between business entities" and would benefit from specialized treatment.[128] The Foundation never asked the Chief Justice to reconsider that decision, and the Chair of the Business Court Division accordingly assigned Judge Christopher Wilkes to preside

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[127] *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998); *see also Nutter v. Mellinger*, No. 2:19-CV-00787, 2020 WL 401790, at *6 (S.D.W. Va. Jan. 23, 2020) (applying rule to the West Virginia Constitution).

[128] J.A. 351.

over this case. It is from Judge Wilkes' dismissal orders that the Foundation appeals.

There is no authority under the trial court rules governing Business Court Divisions for the Foundation to assign error to the Chief Justice's referral as part of this appeal. Nor can the Chief Justice's referral be considered to be incorporated into the final judgments of the trial court from which this appeal was taken. Any reconsideration of the Chief Justice's referral at this stage would be, at best, discretionary, and there are many reasons why this Court should refrain. Foremost, however, is that reconsideration would undermine confidence in the Business Court Division by calling into question the finality of any referrals. It would also be grossly inefficient to remove this case from Judge Wilkes, who is deeply familiar with the facts and legal arguments, and reassign it to a new trial judge in the regular civil division.[129]

This Court should also refrain from reconsidering referral because the Chief Justice's original decision was correct. The Foundation has renewed its argument here that this case is not a matter "between business entities" and, thus, does not qualify for referral as "business litigation." But the Foundation's interpretation is too narrow. In defining business litigation, this Court specifically included "complex tax appeals" that, similar to this case, will always include at least one governmental party.[130] This Court, moreover, has never defined "business entities," and that term logically encompasses the WVEDA when it is engaging in a business transaction, as it is here.

Whether this case fits the definition for business litigation is also, at bottom, an academic dispute. Under Article VIII § 3 of the West Virginia Constitution, the Chief Justice "shall be the administrative head of all the courts" and "may assign a judge ... from one circuit court to another ... for temporary service."[131] To the extent that the Chief Justice interpreted definition of "business

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[129] Judge Kaufman retired after this case was referred to the Business Court Division.
[130] W. Va. Tr. Ct. R. 29.04.
[131] W. Va. Const. Art. VIII § 3.

litigation" too broadly, he had the constitutional authority to make the assignment regardless.

To the extent that this Court finds it necessary to address this issue, this Court should accordingly reject the Foundation's fifth assignment of error and affirm the Chief Justice's original referral to the Business Court Division.

CONCLUSION

The Act authorizes the WVEDA to take each step incident to a sale-leaseback with ROCKWOOL: issuance of bonds, exchange of those bonds for the RAN-5 facility, and lease of the RAN-5 facility back to ROCKWOOL. Article X § 1 allows the Legislature to exempt the freehold interest that the WVEDA will acquire in the RAN-5 Facility from taxation regardless of its use, and the WVEDA exercised that authority here when it enacted W. Va. Code § 31-15-17. And this Court has held that the leasehold interest that ROCKWOOL will acquire in the RAN-5 facility can presumptively lack assessable value without being treated as an exemption. Having reached those conclusions, the trial court found that the Foundation was asking it to forbid what the law permits and dismissed the complaint as a non-justiciable political question. The trial court neither erred in this judgment nor in failing to address claims that the Foundation had abandoned. This Court should accordingly affirm the trial court's dismissal orders and reject the challenge to its Business Court Division referral as moot.

Signatures appear on next page.

Dated: August 9, 2021

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0235

Jefferson County Foundation, Inc.,

Plaintiff Below, Petitioner,

v.

(Circuit Court of Kanawha County Civil Action No. 20-C-332)

West Virginia Economic Development Authority and Roxul USA, Inc. d/b/a ROCKWOOL

Defendants Below, Respondents.

CERTIFICATE OF SERVICE

I, Joseph V. Schaeffer, hereby certify that on this the 9th day of August, 2021, I served the foregoing **Respondent's Brief** via electronic mail and U.S. Mail, postage pre-paid, addressed as follows:

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