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Virginia Local Government Law

Classifying to Not Tax Residential Property: Constitutional? FFW Enterprises v Fairfax County

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Constitutional issues related to classification of property for taxation were at issue in FFW Enterprises v. Fairfax County, another opinion issued by the Virginia Supreme Court on November 4, 2010.

Specifically at issue in this case was the constitutionality of two special tax levies, authorized by Virginia Code section 33.1-431, *et seq* and section 58.1-3221.3. Both statutes allowed special taxes to be imposed upon commercial and industrial properties, but not residential. This omission by classification was called into question by a taxpayer owning commercially-zoned property in Fairfax County.

Background

In 2004, Fairfax County created a special transportation district as authorized by Section 33.1-431, and in 2006, began to levy a special tax as authorized by Section 33.1-435 on all real property located in the district that is zoned for commercial or industrial use or used for such purposes, including property owned by the taxpayer, FFW Enterprises. Special tax revenues collected were to be used for transportation improvements within the district. Residential real property within the district is not subject to the special tax.

In 2007, the General Assembly adopted Virginia Code section 58.1-3221.3, which declared real property zoned or used for commercial and industrial uses in certain jurisdictions including Fairfax County to be a separate class of property and authorized assessment of an additional amount of real property tax on the class. The revenues are dedicated to local transportation improvements. In 2008, Fairfax County began to levy and collect this additional tax on all commercial and industrial property in the County.

Taxpayer's Argument

The taxpayer asserted that Sections 33.1-435 and 58.1-3221.3 on ther face violated the requirement for tax uniformity of Article X, Section 1 of the Virginia Constitution under various theories.

First, citing the lack of specific constitutional authority expressly authorizing the General Assembly to separately classify different kinds of real property, the taxpayer asserted that under the principle of statutory construction, *expressio unius est exclusio alterius*, "rule of universality" should be applied so that "all real property be deemed one indivisible subject class for purpose of taxation." Slip Opinion, at 9. Characterizing the two statutory tax classifications as exemption statutes, the taxpayer argued that the General Assembly could not exempt particular classes of property from taxation beyond those exemptions expressly provided in the Constitution itself.

The taxpayer also argued that the classifications had no reasonable basis because residential property, which was excluded from the two tax classes, also would benefit from the transportation improvements that would be constructed with tax revenues (notably in the case of 33.1-435 the extension of Metrorail service to Dulles Airport), based upon an older case, *City of Hampton v. Insurance Company of North America*, 177 Va. 494, 14 S.E.2d 396 (1941), that never had been cited by the Court for any purpose.

The Ruling

Applying the strong presumption under Virginia law for the constitutionality of statutes, the Virginia Supreme Court upheld both statutes as constitutional, and disagreed with both of the taxpayer's arguments.

The Court declined to adopt a "rule of universality," citing the broad authority granted the General Assembly in Article IV, Section 14 of the Virginia Constitution. Quoting Professor Howard, the Court noted that *expressio unius est exclusio alterius* does not apply in interpreting the legislative powers of the General Assembly. Rather, the Constitution restricts powers otherwise practically unlimited. Slip Opinion at 12. Observing that the uniformity requirement of Article X, Section 1 is tempered by language expressly preserving the general Assembly's power to define and classify the subjects of taxation and noting long-standing rules against implied limitations on legislative power, the Court declined to imply a "rule of universality."

The Court also ruled that there was no evidence that the classifications in question were unreasonable or arbitrary. Noting that the challenger on these grounds must affirmitively disprove every conceivable reasonable basis, the Court held that the taxpayer had failed to do so here. The Court observed that the *City of Hampton* case was based on specific circumstances not present in this case. The Court also ruled that even if it had been applicable, the taxpayer failed to meet the benefit/burden test of *City of Hampton* because the taxpayer here did not prove that residential property owners would benefit "as much [if] not more" than the commercial and industrial property owners. This latter ruling is especially important for all special taxes, because the Court rejected the taxpayer's argument that proof merely that the untaxed would benefit to some extent from the funded improvements was proof enough of unreasonableness. This argument, if adopted, could have been the end of all special taxes for transportation and otherwise.

The tax classification authority of the General Assembly which resulted in these statutes was upheld.

Significance

This is a significant win for local governments, which are facing less and less support from the state for needed infrastructure improvements. Special taxes such as these, and those in service districts and CDAs, are an

increasingly important source of needed revenue for infastructure critical to economic development. Legal limitations such as those argued by the taxpayer could have reduced or eliminated many opportunities for special taxes.

This opinion also affirms the scope of legislative discretion when reasonably classifying as needed for tax purposes. The opinion specifically upheld classification for taxation between commercial and industrial properties on the one hand, and residential on the other. This sort of classification is becoming more common on the state and local level.

Note: Also on November 4, 2010, the Virginia Supreme Court issued an unpublished order in the case of *Nageotte v. Board of Supervisors of Stafford County*, Record No. 09053. Citing *FFW Enterprises*, the Court upheld a similar classification by local government within a service district adopted pursuant to Virginia Code section 15.2-2400, *et seq*. This significant result for local governments will be discussed in a future post. In the meantime, see the Virginia Lawyers' Weekly SCoVA Blog post regarding the order.