

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

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

Plaintiff,

v.

**CIVIL ACTION NO.: 20-C-332
(Presiding: Judge Wilkes)**

**WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY,
a Public Corporation of the State of West Virginia, and
ROXUL USA, INC. d/b/a ROCKWOOL,
a Delaware Corporation,**

Defendants.

**PLAINTIFF'S RESPONSE TO MOTION TO DISMISS
FILED BY THE WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY**

The Plaintiff, Jefferson County Foundation, Inc. ("JCF"), by counsel, Christopher P. Stroech, Esq., Robert M. Bastress, Jr., Esq., Robert M. Bastress, III, Esq., and the law firm of DiPiero, Simmons, McGinley & Bastress, adopts herein its Response to the Motion to Dismiss filed by Defendant Rockwool and further responds as follows to the Motion to Dismiss filed by the Defendant West Virginia Economic Development Authority ("WVEDA"):

Standard of Review

"The policy of the rule that, for purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true, is to decide cases upon their merits, and if the complaint states a claim upon which relief can be granted under any legal theory, a motion to dismiss must be denied." W.Va. R. Civ. Proc. 12 (2018); Mason v. Torrellas, 792 S.E.2d 12 (2016). As such, the Court is to consider the Complaint herein in the light most favorable to the Plaintiffs, taking all allegations as true. Roth v. DeFeliceCare, Inc., 697 S.E.2d 97, 226 W.Va. 61 (2010), withdrawn and republished at 700

S.E.2d 183, 226 W.Va. 215. "Trial court, in appraising the sufficiency of a complaint on a motion to dismiss for failure to state a claim, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." J.F. Allen Corp. v. Sanitary Bd. of City of Charleston, 2016 WL 1397301 (2016). "The standard which plaintiff must meet to overcome a motion to dismiss for failure to state a claim upon which relief can be granted is a liberal standard, and few complaints fail to meet it." Id.

Facts as Alleged in the Complaint

Plaintiff adopts the facts as set forth in the Complaint and suggests that these facts are not in dispute.

Argument in Response to Motion to Dismiss

Contrary to WVEDA's arguments, Plaintiff's claims are properly stated and ripe for consideration by this Court. The language of the relevant constitutional provision and statutes is clear on its face – certainly clear enough to survive a motion to dismiss and allow the court the opportunity to consider Plaintiff's Complaint.

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." This means that government must assess property in proportion to its actual value in the marketplace and must impose the same tax rate on all property within each of the four classes of property created by the Tax Limitation Amendment of 1932 and inserted into § 1. W. Va. Constitution, Art. X, § 1 b; Killen v. Logan County Commission, 170 W.Va. 602, 295 S.E.2d 689 (1982); In re Assessment of Shares of Stock of Kanawha Valley Bank, 144 W.Va. 346, 109 S.E.2d 649 (1959). Article X, § 1 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, 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). Otherwise, the only proper way to expand these exemptions would be through a constitutional amendment approved, in part, by the citizens of West Virginia.

Furthermore, the West Virginia Supreme 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.¹

Central Realty Co. v. Martin, 126 W.Va. at 915, 30 S.E.2d at 720 (1944).

¹ 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).

Here, there are no valid exemptions on which the WVEDA can rely to legitimize the tax exemption that it seeks to provide Rockwool via a sale-leaseback scheme. The WVEDA RESOLUTION imposes a sham on the citizens of Jefferson County, effectuating an intentional tax scheme that, if allowed to stand, permits Rockwool – a private company serving no public use – to enjoy the benefit that it can avoid paying its fair share of taxes, unlike other taxpayers in West Virginia. For the reasons set forth herein, the Court should deny the Motion to Dismiss. Plaintiffs believe that oral argument on the pending Motions to Dismiss will assist the Court in so ruling.

I. The RESOLUTION and endorsing actions of the WVEDA violate Article X, Section 1 of the West Virginia Constitution.

The WVEDA relies upon W.Va. Code § 31-15-17 (2020) 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 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.)², W.Va. Code § 31-15-17 does not expressly provide for the type of sale-

² W.Va. Code § 8-19-4 expressly provides for the type of sale-leaseback arrangement at issue herein, but only for public 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

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 a RESOLUTION at issue herein.

Plaintiff asks this Court 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 rather than the sale-leaseback scheme contemplated herein.

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*;

(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.*

These express exemptions make clear that the legislative intent, faced with the constitutional limitations outlined herein, was to *not exempt any project owned, operated or leased*

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 and is therefore not an express authority provided at law.*

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 implemented for this type of sale-leaseback arrangement. 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 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 the West Virginia Supreme 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.

Nothing short of the sanctity of the Constitution is at stake here. 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 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. Indeed, if the Court were to approve the tax avoidance scheme orchestrated

herein, through the guise of the purported authority of the WVEDA, what limitations, if any, would exist for such state-funded private enterprises? Purported exemption 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 WVEDA essentially argues that W.Va. Code § 31-15-17 is an exemption statute that clearly and unequivocally permits the sale-leaseback arrangement. Again, and as further noted below in Section III of this Response, there is nothing found in that particular Section nor in that particular Chapter that authorizes or even allows the WVEDA to endorse and execute the subject RESOLUTION. In the context of the Rockwool project, the real and personal property is not “property of the authority.” In all relevant aspects, it is the property of Rockwool. The WVEDA does not have the ability to sell, lease or otherwise dispose of the real and personal property during the lease term. Rockwool (or its contractors) will have total control over the Project and will be the sole beneficiary of the profits derived from it.³

The Defendants suggest that the decisions in Maplewood Community, Inc. v. Craig, et al., 216 W.Va. 273 (2004); Ohio Valley Jobs Alliance, Inc. v. Public Service Commission of West Virginia, 2018 WL 57346789 (2018); and Musick v. University Park at Evansdale, LLC, 820 S.E.2d 901 (2018) are somehow dispositive on the issue raised in Plaintiff’s Complaint. This is simply not true. None of the cited cases dealt with a sale-leaseback arrangement created pursuant to W.Va. Code § 31-15-17. These cases did not address the constitutionality of such an arrangement or the factual question of whether the same would constitute a tax sham.

³ Although it is not necessary to reach this point since a proper interpretation of the relevant statutes clearly prohibits the sale-leaseback arrangement at issue here, *the WVEDA Act* or other statutes cannot authorize a violation of the West Virginia Constitution.

Furthermore, these 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 (2) separate elder care facilities seeking ad valorem tax exemption. The Court recognized the presumption that “all property is subject to taxation unless expressly exempted.” Id at 279. The Court reiterated 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.” Maple 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 real and personal property at any time.

Ohio Valley Jobs deals specifically with 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 sets forth the same standard identified in Maple 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 squarely dealt with the constitutionality of the financing structure as contemplated by the WVEDA and Rockwool - a private, for profit, company.

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

Upon all the above, we hold that a county assessment for ad valorem tax purposes of a leasehold interest in county property was not prohibited by the provisions of W.Va. Code 13-2C-15 (1963), of the Industrial Development Bond Act...which section sets forth certain exemptions from taxation, where the leasehold in question was established under the Industrial Development Bond Act with the county as lessor of the property and a private corporation as lessee, and where a commercial warehouse facility was operated upon the property by the lessee.

In so holding, we again note that the exemption statute in question...has a constitutional origin. The constitutional provision, quoted above, provides that ‘public property’ may be exempted from taxation. As we indicated in Greene Line Terminal Co. and Great A & P Tea Co., a leasehold interest in property may be treated separately from the fee interest for tax purposes. In this action, the fee interest, owned by the county, is clearly public property. The leasehold interest, however, was an interest acquired by a private party, the appellee, for commercial purposes. Therefore, inasmuch 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.’ See n. 14, supra.

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.’ See n. 11, supra. In re Maier, 173 W.Va. at 648.

The Rockwool sale-leaseback scheme should be treated the same. The resulting leasehold interest will be a private enterprise for profit. Plaintiff understands that West Virginia should be "open for business," but not at the unconstitutional result of losing significant tax revenue. If such an exemption is desired, it should be pursued through a constitutional amendment or clear legislative action within constitutional limitations.

II. Plaintiff presents a justiciable controversy.

A. Plaintiff has standing to assert the claims in the Complaint.

JCF has legal standing to assert its claims. As 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.

Tug Valley 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 may have 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.

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 property taxes for the same. This action is 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 the favorable tax treatment accorded to Rockwool by the WVEDA. Undoubtedly, total tax dollars for Jefferson County will be reduced because Rockwool will not be paying its fair share.

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 Plaintiff'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, as 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 The latter is conclusively decided by the West Virginia

²Not 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.

Supreme 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 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).

B. Plaintiff's claim does not require the Court to decide a political question.

The Defendants further suggest that the Court should restrain itself from ruling on the issues set forth in the Complaint as non-justiciable political questions. JCF does not question the decision of the WVEDA to promote and support the Rockwool project, but rather challenges the constitutionality of the means employed by the WVEDA to implement its decision; that is, the action of adopting the RESOLUTION to effectuate the tax avoidance scheme. That challenge in

no way questions an exercise of executive discretion that is beyond judicial scrutiny. The distinction centers on the difference between a challenge to the substance of a decision (here, whether the Rockwool project will further economic development in the State) and the procedures used to implement the decisions (here, giving Rockwool a free ride on property taxes for the term of the financing scheme). See, e.g., Powell v. McCormack, 395 U.S. 486 (1969) (exclusion of a properly elected and qualified Congressman, rather than expulsion, for past misdeeds was unconstitutional means). This Court clearly has the authority to determine if the actions of the WVEDA are constitutional and otherwise proper under the law.

III. The powers conferred on the WVEDA, as set forth in the West Virginia Economic Development Act, do not constitute a proper exemption from equal and uniform taxation under these facts.

As noted above, the exemptions from equal and uniform taxation that are allowed under Article X, § 1 of the West Virginia 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).⁴

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

⁴ 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).

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 arrangement at issue here.

Similarly, the authorities provided to the WVEDA in §§ 31-15-6(h),⁵ 31-15-6(i),⁶ 31-15-6(j),⁷ 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.
- 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.

⁵ 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).

⁶ 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).

⁷ 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(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 Defendant WVEDA cites § 13-15-17 for the proposition that WVEDA's property and debt are exempt from taxation, as noted elsewhere in this Response 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, this section limits the tax exemptions 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 § 13-15-17.

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 of Plaintiff's Complaint. As a commentator recently noted, unlike in other states, in West Virginia these types of sale-leaseback arrangements⁸ "have not received significant judicial or legislative scrutiny with regard to either constitutionality or legality."⁹ Defendant's characterization of the WVEDA's performance as "game changing" and "successful" in helping to create jobs and business opportunities is unaccompanied by substantiation; indeed, since Defendant has opened the door to characterizing the WVEDA's performance it should be noted that ample criticism exists not only of the

⁸ 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.

⁹ Humphrey, *supra*, at 375.

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.¹⁰

To summarize, there are ample grounds for this Court to find that the sale-leaseback arrangement at issue in this matter, as memorialized in the WVEDA's RESOLUTION and endorsing actions, violates West Virginia's Constitution. In addition, the preceding analysis shows that the Court can also 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 mechanism that is at issue in the matter and thus do not constitute a proper exemption from equal and uniform taxation and cannot be used to justify the RESOLUTION. 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.

Conclusion

For the reasons set forth herein, Plaintiff respectfully requests that this Court deny the Motion to Dismiss filed by the WVEDA.

¹⁰ 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).

JEFFERSON COUNTY FOUNDATION, INC.
Plaintiff, By Counsel



/s/Christopher P. Stroeck
Christopher P. Stroeck, Esq. (WVSB #9387)
Arnold & Bailey, PLLC
208 N. George Street
Charles Town, WV 25414
304-725-2002
304-725-0283 (Fax)
cstroeck@arnoldandbailey.com

/s/Robert M. Bastress, Jr.
Robert M. Bastress, Jr. (WVSB #263)
P.O. Box 1295
Morgantown, WV 26507
304-319-0860
rmbastress@gmail.com

/s/Robert M. Bastress, III
Robert M. Bastress, III, Esq.
DiPiero, Simmons, McGinley & Bastress, PLLC
604 Virginia Street, East
P.O. Box 1631
Charleston, WV 25326
304-342-0133
rob.bastress@dbdlawfirm.com

Counsel for Plaintiff

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

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

Plaintiff,

v.

**CIVIL ACTION NO.: 20-C-332
(Presiding: Judge Wilkes)**

**WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY,
a Public Corporation of the State of West Virginia, and
ROXUL USA, INC. d/b/a ROCKWOOL,
a Delaware Corporation,**


Defendants.

CERTIFICATE OF SERVICE

I, Christopher P. Stroeck, Esq., do hereby certify that I served a true copy of the foregoing PLAINTIFF'S RESPONSE TO MOTION TO DISMISS FILED BY THE WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY upon the following counsel by email and United States mail, postage prepaid, this 29th day of January, 2021:

Peter G. Markham, Esq.
Michael E. Caryl, Esq.
Robert S. Kiss, Esq.
Camden P. Siegrist, Esq.
BOWLES RICE LLP
600 Quarrier Street
Charleston, WV 25301
Counsel for Defendant WVEDA

Joseph V. Schaeffer, Esq.
James A. Walls, Esq.
James E. Simon, Esq.
SPILMAN THOMAS & BATTLE, PLLC
301 Grant Street, Suite 3440
Pittsburgh, PA 15219
Counsel for Defendant Rockwool


/s/Christopher P. Stroeck
Christopher P. Stroeck, Esq.