



West Virginia E-Filing Notice

CC-19-2018-C-171

Judge: David Hammer

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA
Jefferson County Vision Inc., a West Virginia Non-Profit Corporation v. ROXUL USA INC., d/b/a
ROCKWOOL, a Delaware Corporation
CC-19-2018-C-171

The following order - case - final was FILED on 8/8/2019 5:49:45 PM

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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

JEFFERSON COUNTY VISION, INC., *et al.*,

Plaintiffs,

v.

Civil Action No. 18-C-171

ROXUL USA, INC., *et al.*,

Defendants.

DISMISSAL ORDER

Jefferson County Vision, Inc., a non-profit corporation, and Donald Sutherland, an individual, [Plaintiffs], seek a declaratory judgment and writ of mandamus against Roxul USA, Inc., [aka "Rockwool"] the owner of 194.7 acres of land located within the municipal boundaries of the City of Ranson, Jefferson County upon which Rockwool is constructing an industrial manufacturing facility; the Jefferson County Development Authority ["JCDA"]; the Jefferson County Commission ["JCC"]; the Board of Education of Jefferson County ["BOE"]; the Sheriff of Jefferson County; the Ranson City Council¹; and the Assessor of Jefferson County [collectively, Defendants]. Plaintiffs ask this Court to declare:

- 1) That a purported agreement, called a Payment in Lieu of Taxes Agreement ["PILOT"], executed by all defendants *except* the Jefferson County Development Authority, violates Article X, Sections 1 and 6 of the West Virginia Constitution (*Complaint*, Counts I and II);
- 2) That W. Va. Code § 7-12-10 is facially vague, overbroad, irrational, unreasonable and violates Plaintiff's rights under Article X, Section 1 of the West Virginia Constitution (*Complaint*, Count III);

¹ Properly, the City of Ranson, a public corporation of the State of West Virginia.

3) That the JCDA lacks the legal authority to enter into a PILOT that will allow Rockwool to avoid equal and uniform taxation (*Complaint*, Count IV) and that Defendants' actions violate public policy (*Complaint*, Count V);

4) That the failure of defendant JCDA to be a party to the PILOT agreement renders it "defective on its face" and that Plaintiffs have been or will be damaged by the PILOT on the basis of unequal taxation (*Complaint*, Count VI).

The Court has carefully considered the parties' briefs, the applicable law and the arguments of counsel. The Court agrees with the Plaintiffs' contention in Count VI that the PILOT is defective on its face: The only two essential parties to the PILOT are Rockwool and the JCDA. Absent the JCDA's assent evidenced by a vote of its board, the PILOT is not an enforceable agreement – it is merely a proposal. Whether the proposed terms of the PILOT at issue will, at some point in the future, be agreed upon is not knowable by this Court or any court. But when relief is sought pursuant to the Uniform Declaratory Judgments Act, W. Va. Code § 55-13-1, *et seq.*, as it is in this case, the Court's power to declare rights, status and other legal relations depends upon the facts existing at the time the proceeding is commenced. Future and contingent events are not to be considered. Town of S. Charleston v. Bd. of Ed. of Kanawha Cty., 132 W. Va. 77, 84, 50 S.E.2d 880, 883 (1948) (no justiciable controversy where the disposition of disputed land depended solely upon a future, contingent event and thus, the court was without jurisdiction to pronounce any decree, except dismissal), *cited in* Chesapeake & Potomac Tel. Co. of W. Va. v. City of Morgantown, 144 W. Va. 149, 163, 107 S.E.2d 489, 497 (1959) ("Neither the circuit court nor this Court has jurisdiction in such a proceeding to make declarations relating to matters which may or may not be subjects of actual controversy between the litigants at some future time."). For the

reasons set forth below, the Court concludes that this action is non-justiciable and dismisses this civil action without prejudice.

Discussion and Analysis

The creation of county development authorities, such as the JCDA, is authorized by W. Va. Code § 7-12-1. The Legislature described the purposes of development authorities as:

The purposes for which the authority is created are to promote, develop and advance the business prosperity and economic welfare of the municipality or county for which it is created, its citizens and its industrial complex; to encourage and assist through loans, investments or other business transactions in the locating of new business and industry within the municipality or county and to rehabilitate and assist existing businesses and industries therein; to stimulate and promote the expansion of all kinds of business and industrial activity which will tend to advance business and industrial development and maintain the economic stability of the municipality or county, provide maximum opportunities for employment, encourage thrift, and improve the standard of living of the citizens of the county; to cooperate and act in conjunction with other organizations, federal, state or local, in the promotion and advancement of industrial, commercial, agricultural, and recreational developments within the municipality or county; and to furnish money and credit, land and industrial sites, technical assistance and such other aid as may be deemed requisite to approved and deserving applicants for the promotion, development and conduct of all kinds of business activity within the municipality or county.

W. Va. Code § 7-12-2. Management and control of a county development board is vested **solely** in a board of not fewer than twelve nor more than twenty-one persons who have been selected by a county commission. W. Va. Code § 7-12-3. A development authority is deemed to be a public corporation (W. Va. Code § 7-12-6), and the Legislature granted development authorities broad, discretionary powers, including the powers:

(3) to enter into contracts with any person, agency, governmental department, firm or corporation, including both public and private corporations, and generally to do any and all things necessary or convenient for the purpose of promoting, developing and advancing the business prosperity and economic welfare of the county in which it is intended to operate, its citizens and industrial complex ...

(4) to amend or supplement any contracts or leases or to enter into new, additional or further contracts or leases upon such terms and conditions, for such consideration and for such term of duration, with or without option of renewal, as may be agreed upon by the authority and such person, agency, governmental department, firm or corporation;

(5) unless otherwise provided for in, and subject to the provisions of, such contracts, or leases, to operate, repair, manage and maintain such buildings and structures ... and to effectuate such incidental purposes, grant leases, permits, concessions or other authorizations to any person or persons, upon such terms and conditions, for such consideration and for such term of duration as may be agreed upon by the authority and such person, agency, governmental department, firm or corporation; ...

(8) to acquire real property by gift, purchase or construction, or in any other lawful manner, and hold title thereto in its own name and to sell, lease or otherwise dispose of all or part of such real property which it may own, either by contract or at public auction, upon the approval by the board of directors of the development authority ...

and (12) to expend its funds in the execution of the powers and authority herein given, which expenditures, by the means authorized herein, are hereby **determined and declared as a matter of legislative finding to be for a public purpose** and use, in the public interest, and for the general welfare of the people of West Virginia, to alleviate and prevent economic deterioration and to relieve the existing critical condition of unemployment existing within the state.

W. Va. Code § 7-12-7 (a) [emphasis added]. Not only has the Legislature granted broad authority to county development boards, it has also declared that when a development authority board acts pursuant to its grant of authority, those actions themselves are declared to be for a **public purpose**. Thus, the power vested in the board of a development authority is akin to that of the sovereign because its official actions, grounded in the wisdom of the twelve to twenty-one appointees to a

development authority's board, are declared by the Legislature to be for a public purpose.

Moreover, the Legislature has declared that development authorities themselves are exempt from all state and local taxes, and development authorities' *properties* are exempt from the payment of taxes that would otherwise be due to a locality or municipality:

The authority shall be exempt from the payment of any taxes or fees to the state or any subdivision thereof or to any officer or employee of the state or other subdivision thereof. The property of the authority shall be exempt from all local and municipal taxes. Bonds, notes, debentures and other evidence of indebtedness of the authority are declared to be issued for a public purpose and to be public instrumentalities, and shall be exempt from taxes.

W. Va. Code § 7-12-10.

The *ad valorem* tax, the subject of the instant *Complaint*, is a state tax imposed upon the value of property and, as noted, the property of the JCDA is not exempted from that tax by W. Va. Code § 7-12-10. However, the taxability inquiry does not end there as not all other property is necessarily subject to *ad valorem* taxation; the West Virginia Constitution provides that certain classifications of property *may be* exempted from taxation. Those types of property are: "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....**" W. Va. Const., Art. X, Section 10-1 [bold face added].

The Legislature, acting upon this state constitutional grant of authority, enacted and from time to time amended, W. Va. Code § 11-3-9 – Property exempt from taxation.

Amongst the property classifications that the Legislature has exempted from taxation are:

“(3) Property belonging exclusively to any county, district, city, village or town in this state and used for public purposes; ...

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

(27) All property belonging to the state, any county, district, city, village, town or other political subdivision or any state college or university which is subject to a lease purchase agreement and which provides that, during the term of the lease purchase agreement, title to the leased property rests in the lessee so long as lessee is not in default or shall not have terminated the lease as to the property....”²

Note that insofar as any county assessor is concerned, any property exempt from *ad valorem* tax pursuant to W. Va. Code § 11-3-9 (a) “shall be entered upon the assessor’s books, together with the true and actual value thereof, but no taxes may be levied upon the property or extended upon the assessor’s books.” *Id.* at § 11-3-9 (c). Thus, while an assessor would continue to enter the true value of the property on the assessor’s books, a sheriff could not collect taxes upon a property so exempted. In other words, these functions of the assessor and sheriff are mandated, ministerial duties not subject to the discretion of either office.

The “Payment in Lieu of Taxes Agreement”, attached to the *Complaint* at Exhibit D, purports to obligate the JCDA to, *inter alia*:

- Acquire legal title to the Project in the form of a freehold [PILOT, Recitals, ¶ 3];

² The Court does not reach the issue of whether the terms of the PILOT, as proposed, would exempt the Project from taxation pursuant to these classifications or any other classification listed in W. Va. Code § 11-3-9.

- Lease the Project back to Rockwool pursuant to a lease agreement “to be entered into” upon completion of construction of the Project (which construction is expected to be completed three years hence) [PILOT, Recitals, ¶ 4];
- Own the real and personal property of the Project, “subject to the Lease (not yet agreed upon) and other rights and interests aforesaid.” [PILOT, Recitals, ¶ 6]
- Agree, pursuant to the terms of a Lease (not yet agreed upon), that all “improvements, repairs, alterations, renewals, substitutions and replacements of, and additions and appurtenances to” shall, subject to the Lease become vested in the JCDA, *i.e.*, without the contemporaneous assent of the board of the JCDA. [PILOT, Recitals, ¶ 7];
- Agree to a schedule of payments to be made in lieu of taxes;³
- Agree that the JCDA’s freehold legal title, unless terminated sooner, shall revert back to Rockwool nine years after Rockwool completes construction of the Project. [PILOT, § 4.02].
- Agree that the PILOT itself does not become effective “unless and until” Rockwool transfers ownership to the JCDA, but if Rockwool does not transfer ownership the PILOT “shall terminate and be null and void.” [PILOT, § 4.10].

³ During oral argument counsel for Rockwool agreed that the payments proposed to be made in lieu of taxes were less than the amount that would otherwise have been due in payment of *ad valorem* taxes.

As the Plaintiffs rightly observe, the PILOT, while purporting to bind the JCDA to exercise its broad, discretionary powers in both acquiring, leasing (pursuant to terms yet to be agreed upon) and disposing of the Rockwool Project property, has not obtained the JCDA's board's agreement to enter into such a contract and thereby deem this Project to be for "public purpose" as it is authorized to do by the Legislature.⁴ As a matter of statutory law, the management and control of the JCDA is vested solely in its board; no other public or private entity has the authority to exercise a development authority's powers and management.

Remarkably, and despite purporting to bind the JCDA, the PILOT does not even contemplate obtaining the JCDA's agreement. See *e.g.*, the opening introduction to the PILOT: "This AGREEMENT is made and entered into this the 3rd day of October, 2017, by..." [list of parties, but that list does not include the JCDA]. Absent an agreement in fact by the JCDA's board approving this PILOT, which approval, depending upon the terms of the PILOT, could statutorily cause the Project to be deemed "public property" being used for "public purpose," thereby exempting the Project from the payment of *ad valorem* taxes, this Project is not "public property" being used for a "public purpose." Thus, and as is the case, Rockwool, as owner of the Project has been assessed *ad valorem* taxes for the current year. See August 5, 2019 letter submission made in supplementation of Rockwool's jurisdictional argument.

The West Virginia Supreme Court adopted a four-pronged test to assist judges with the identification of a justiciable controversy:

⁴ The JCDA concedes that it "is not a signatory to the PILOT itself." Defendant JCDA's Reply in Support of its Motion to Dismiss, p. 9.

In deciding whether a justiciable controversy exists sufficient to confer jurisdiction for purposes of the Uniform Declaratory Judgment Act, West Virginia Code §§ 55–13–1 to–16 (1994), a circuit court should consider the following four factors in ascertaining whether a declaratory judgment action should be heard: (1) whether the claim involves uncertain and contingent events that may not occur at all; (2) whether the claim is dependent upon the facts; (3) whether there is adverseness among the parties; and (4) whether the sought after declaration would be of practical assistance in setting the underlying controversy to rest.

W. Virginia Inv. Mgmt. Bd. v. Variable Annuity Life Ins. Co., 234 W. Va. 469, 476–77, 766 S.E.2d 416, 423–24 (2014). In this case, the first, second and fourth prongs cannot be satisfied.⁵ With regard to the first prong, uncertain and contingent events, as discussed, *supra*, absent the JCDA's approval of a PILOT, including acceptance of the many terms to which the JCDA's assent is necessarily required, and following approval the consequent statutory declaration of public purpose, there simply is no basis to claim that Rockwool is not subject to equal and uniform taxation. To the contrary, Rockwool has been assessed *ad valorem* taxes on the whole of its Jefferson County property and thus, Plaintiffs' contention that they "have been" damaged lacks merit.

As to the second prong, whether the claim is dependent on the facts, the analysis is closely related to the analysis of the first prong; the critical fact – the terms of a PILOT agreed to by the JCDA – cannot be decided absent a vote by the board of the JCDA.

Finally, with regard to the fourth prong, whether a declaration would be of "practical assistance" in setting the underlying controversy to rest, the answer is unequivocally "no" because the Court [and parties] cannot say whether the JCDA will approve the PILOT and, if so, what that PILOT's terms will provide. It would be nothing

⁵ Because of this Court's ruling on prongs one, two and four it is unnecessary to address prong three, legal adverseness, which is complementary to Defendants' standing arguments.

more than speculation as to uncertain future events for this Court, or any court, to guess whether a PILOT will be approved and the terms of such a PILOT. Unlike a circumstance where the terms of a PILOT have been agreed upon by the property owner and a development authority, but performance is not to begin until after certain milestones are attained, that is not the case here. Here, while a PILOT *proposal* has been circulated, there is no agreement because, as the Plaintiffs rightly assert, the JCDA, the public body statutorily authorized to enter into a PILOT, has not agreed to the PILOT proposal.⁶ Thus, Plaintiffs' claim that they "will be" damaged by some future PILOT is without basis.

Based upon the foregoing, this civil action is hereby DISMISSED WITHOUT PREJUDICE because there is no justiciable controversy.

Each party is to bear their own costs. The Clerk is directed to place this matter amongst causes ended.

It is so ORDERED and ADJUDGED.

Entered: August 8, 2019



David M. Hammer, Judge
of the 23rd Judicial Circuit

⁶ While there may be reason to question whether the JCC, the BOE, the Assessor and the Sheriff have actually entered into a binding contract when they executed the PILOT (because it does not appear that those entities have any say at law or in fact in the execution, delivery or performance of the Project as set forth in the current PILOT proposal), it is unnecessary to this opinion to reach those issues and so the Court declines to do so.