

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

VIRGINIA BAPTIST HOMES, INC., AND
THE GLEBE, INC.

APPELLANTS.

v.

BOTETOURT COUNTY

APPELLEE.

BRIEF AMICUS CURIAE

Edwin N. Wilmot (Va. Bar No. 26278)
City of Hopewell
300 N. Main Street
Hopewell, Virginia 23860
(804) 541-2247
(804) 541-2248 (fax)

Phyllis A. Errico, CAE (Va. Bar No. 23869)
Virginia Association of Counties
1001 East Broad St. Suite LL20
Richmond, Virginia 23219
(804) 343-2509
(804) 788-0083 (fax)

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TABLE OF CONTENTS

I. BURDEN, PRESUMPTIONS AND RULE OF CONSTRUCTION TO BE APPLIED.....1

II. EXEMPTION BY DESIGNATION.....3

 A. Ownership Interest In The Property.....3

 B. Use Of The Property.....6

 C. Use Exclusively For Religious or Benevolent Purposes.....12

III. EXEMPTION BY CLASSIFICATION.....16

IV. SOURCE OF REVENUE OR PROFIT.....16

V. PUBLIC POLICY.....20

VI. CONCLUSION.....21

TABLE OF AUTHORITIES

CASES

<i>Board of Supervisors of Wythe County v. Medical Group Found. Inc.</i> , 204 Va. 807, 134 S.E.2d 258 (1964).....	5, 6
<i>Bogese, Inc. v. State Highway Comm’r</i> , 250 Va. 226, 462 S.E.2d 345 (1995).....	9, 10
<i>City of Richmond v. McKenney</i> , 194 Va. 427, 73 S.E.2d 414 (1952).....	5
<i>City of Richmond v. United Givers Fund</i> , 205 Va. 432, 137 S.E.2d 876 (1964).....	11
<i>City of Richmond v. Virginia United Methodist Homes, Inc.</i> , 257 Va. 146, 509 S.E.2d 504 (1999).....	14, 15
<i>Ceroli v. Clifton Forge</i> , 192 Va. 118, 63 S.E.2d 781 (1951).....	5
<i>Commonwealth v. Lynchburg Y.M.C.A.</i> , 115 Va. 745, 80 S.E. 589 (1914).....	13
<i>Commonwealth v. Manzer</i> , 207 Va. 996, 154 S.E.2d 185 (1967).....	1
<i>Commonwealth v. Trustees of Hampton Normal and Agric. Inst.</i> , 106 Va. 614, 56 S.E. 594 (1907).....	18
<i>Commonwealth v. Wellmore Coal Corp.</i> , 228 Va. 149, 320 S.E.2d 509 (1984).....	passim
<i>DKM Richmond Assocs. v. City of Richmond</i> , 249 Va. 401, 457 S.E.2d 76 (1995).....	passim

<u>Manassas Lodge v. Prince William County</u> , 218 Va. 220, 237 S.E.2d 102 (1977).....	13
<u>Mariner’s Museum v. City of Newport News</u> , 255 Va. 40, 495 S.E.2d 251 (1998).....	passim
<u>Memorial Hosp. Ass’n, Inc. v. County of Wise</u> , 203 Va. 303, 124 S.E.2d 216 (1962).....	7
<u>Newport News v. Warwick County</u> , 159 Va. 571, 166 S.E. 570 (1933).....	16
<u>Norfolk v. Nansemond Supervisors</u> , 168 Va. 606, 192 S.E. 588, 594 (1937).....	16
<u>Norfolk v. Perry Co.</u> , 108 Va. 28, 61 S.E. 867 (1908), <u>aff’d</u> 220 U.S. 472 (1911).....	5
<u>Sams v. Redevelopment Auth.</u> , 244 A.2d 779 (Pa. 1968).....	10
<u>Smyth County Community Hosp. v. Town of Marion</u> , 259 Va. 328, 527 S.E.2d 401 (2000).....	passim
<u>St. Andrews Ass’n v. City of Richmond</u> , 203 Va. 630, 125 S.E.2d 864 (1962).....	11
<u>Westminster-Canterbury of Hampton Roads Inc. v. City of Virginia Beach</u> , 238 Va. 493, 385 S.E.2d 561 (1989).....	passim

STATUTES

Code § 8.01-680.....2
Code § 58.1-3606(A)(5).....9
Code § 58.1-3650.....passim
Code § 58.1-3650.33.....3, 7
Code § 58.1-3650.33(B).....passim
Code § 58.1-3603(A).....16

OTHER

Va. Const. art. X § 1.....2
Va. Const. art. X § 6(f).....2, 7, 12
1991 Ops. Va. Att’y Gen. 263 and 303.....6

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA AT RICHMOND

VIRGINIA BAPTIST HOMES, INC., and)
THE GLEBE, INC.)
Appellants,)
v.) Record No. 072042
BOTETOURT COUNTY)
Appellee.)

BRIEF AMICUS CURIAE

I. BURDEN, PRESUMPTIONS AND RULE OF CONSTRUCTION TO BE APPLIED

In Virginia, the burden is on the taxpayer and to prove entitlement to an exemption from local real estate taxation. *Mariner’s Museum v. City of Newport News*, 255 Va. 40, 44, 495 S.E.2d 251, 253 (1998); *DKM Richmond Assocs. v. City of Richmond*, 249 Va. 401, 407, 457 S.E.2d 76, 80 (1995); *Commonwealth v. Wellmore Coal Corp.*, 228 Va. 149, 153, 320 S.E.2d 509, 511 (1984); *Commonwealth v. Manzer*, 207 Va. 996, 1000, 154 S.E.2d 185, 189 (1967). Without question, as

repeatedly held by this Court, “[i]n Virginia, the general policy is to tax all property.” DKM Richmond Assocs., 249 Va. at 407, 457 S.E.2d at 80; see also Mariner’s Museum, 255 Va. at 44, 495 S.E.2d at 252; Va. Const. art. X, § 1. Exemptions from taxation are to be strictly construed against the taxpayer, and in favor of taxation. Va. Const. art. X, § 6 (f); see, e.g., Smyth County Community Hosp. v. Town of Marion, 259 Va. 328, 333, 527 S.E.2d 401, 403 (2000); Westminster-Canterbury of Hampton Roads Inc. v. City of Virginia Beach, 238 Va. 493, 501, 385 S.E.2d 561, 565 (1989); Mariner’s Museum, 255 Va. at 44, 495 S.E.2d at 253. “[W]here there is any doubt, the doubt is resolved against the one claiming exemption, . . . and to doubt an exemption is to deny it.” Wellmore Coal, 228 Va. at 153-54, 320 S.E.2d at 511 (citations omitted).

The judgment of the trial court (here, disallowing the exemption) is not to be set aside unless it appears from the evidence that the judgment is “plainly wrong or without evidence to support it.” Commonwealth v. Wellmore Coal Corp., 228 Va. at 156-57, 320 S.E.2d at 513 (quoting Va. Code § 8.01-680).

II. EXEMPTION BY DESIGNATION

Using the burden, presumptions and rule of construction set forth hereinabove, it is clear that the property at issue does not qualify for exemption by designation from local real estate taxation. The Glebe is not entitled to exemption by designation because the tax-exempt designee, VBH, does not hold the necessary ownership interest in the property; because VBH is not the entity using the property; because the property is not used exclusively for religious or benevolent purposes; and because the property is not used in accordance with the purpose for which VBH was designated exempt. See Va. Code §§ 58.1-3650 and 58.1-3650.33.

A. Ownership Interest In The Property

Virginia Code § 58.1-3650 provides that in order to qualify for exemption by designation, the property at issue must be “of an organization designated [exempt].” Similarly, Va. Code 58.1-3650.33(B) limits VBH’s designated exemption to property “owned by” VBH. This means that in order for the property occupied and operated by The Glebe, Inc. to qualify for tax

exemption under the code section, VBH must be deemed the owner of the property. Although VBH holds bare legal title to the property, that is not sufficient to exempt the property from taxation because VBH lacks the necessary ownership interest in the property to qualify the property for exemption pursuant to its designation. Rather, the evidence establishes that The Glebe, Inc. should be considered the “owner” of the property because it (rather than VBH) has all of the incidents of ownership other than bare legal title, including possession and beneficial use. The agreements between VBH and The Glebe turn over control and use of the property to The Glebe, and provide that The Glebe may purchase the property for \$1. J.A. 0788-0814. The operating agreement characterizes it as “an installment sale agreement in the form of a capital lease,” and gives The Glebe an Option to purchase the property for \$1 at any time before December 15, 2038. J.A. at 0797. Also, The Glebe carries the property as its asset on its books. J.A. at 0428.

This Court has consistently recognized that bare legal title is not determinative of whether an entity is entitled to exemption

for property in which it holds an interest. For example, in Board of Supervisors of Wythe County v. Medical Group Found. Inc., 204 Va. 807, 134 S.E.2d 258 (1964), this Court held that property leased to a hospital corporation, and operated as a hospital by that corporation, was entitled to exemption (by classification) from real estate taxation, notwithstanding that the hospital corporation did not hold legal title to the property. This Court held that the hospital corporation's exclusive right to possession and use of the property under the lease meant that the real estate "belonged to" the hospital corporation, rather than the lessor, which held legal title to the property.

This Court has recognized that the term "owner" for real estate tax purposes includes "any person who has the usufruct, control or occupation of the land, whether his interest in it is an absolute fee, or an estate less than a fee." City of Richmond v. McKenney, 194 Va. 427, 430, 73 S.E.2d 414, 416 (1952) (citation omitted). Both life tenants and lessees have been held "owners" for real estate tax assessment purposes. See, e.g., Ceroli v. Clifton Forge, 192 Va. 118, 125-26, 63 S.E.2d 781, 785

(1951); *Norfolk v. Perry Co.*, 108 Va. 28, 30-31, 61 S.E. 867, 868 (1908), aff'd 220 U.S. 472 (1911); see also, 1991 Ops. Va. Att'y Gen. 263 and 303 (discussing factors in determining the ownership of property for tax purposes).

Using the required strict construction of Va. Code §§ 58.1-3650 and 58.1-3650.33(B), this Court should hold that the property at issue here belongs to The Glebe, Inc. rather than VBH because The Glebe is vested with the rights of possession and use (and ultimately, ownership pursuant to the \$1.00 Option) of the property. Under these circumstances, the property should not be deemed to be owned by VBH under the reasoning of *Board of Supervisors of Wythe County*.

B. Use Of The Property

Even if this Court were to hold that The Glebe is property “of” and “owned by” VBH, the property is nevertheless properly subject to taxation because it is not **used by** VBH. It is **used by** The Glebe, Inc.

In order for a specific parcel of real property to qualify for exemption from taxation by designation, the property must be

“used by” the designated tax-exempt entity. This is an express statutory requirement, which must be construed strictly against exemption by virtue of constitutional and statutory dictate. Va. Code §§ 58.1-3650 and 58.1-3650.33; Va. Const art. X, § 6 (f).

The reasoning of this Court in Smyth County Community Hosp. v. Town of Marion, 259 Va. 328, 527 S.E.2d 401 (2000) is instructive in determining whether the property occupied and operated by The Glebe, Inc. is “used by” VBH so as to satisfy the above-cited statutory requirement for exemption. In Smyth, this Court was called upon to decide whether an intermediate care nursing home facility belonged to a tax-exempt hospital (the “Hospital”) and was “actually and exclusively occupied and used by” the Hospital, so as to be exempt from taxation. Smyth, 259 Va. at 333, 527 S.E.2d at 403 (quoting Memorial Hosp. Ass’n, Inc. v. County of Wise, 203 Va. 303, 307, 124 S.E.2d 216, 219 (1962)). This Court recognized that exemptions from taxation must be strictly construed and that “any doubt concerning the exemption . . . must be resolved against the party claiming the exemption.” Smyth, 259 Va. at 333, 527 S.E.2d at 403 (citing

Westminster-Canterbury of Hampton Roads, Inc. v. City of Virginia Beach, 238 Va. 493, 501, 385 S.E.2d 561, 565 (1989)).

In Smyth, the county argued that the nursing home, which was called Francis Marion Manor (the “Manor”), was a separate entity, and therefore was “not actually and exclusively occupied and used by the Hospital, as required by the statute.” Smyth, 259 Va. at 333, 527 S.E.2d at 403. Although this Court held that the property at issue in Smyth was used by the Hospital, such that it qualified for exemption, the Court based its decision on the fact that the Manor was not a separate legal entity. 259 Va. at 333, 527 S.E.2d at 404. This Court held that the statutory requirement that the property be **used by** the tax-exempt entity was satisfied, reasoning:

While the evidence cited by the County, taken alone, may support an inference that the Manor is a separate entity, such an inference cannot overcome the undisputed evidence that the Manor is not a legal or operational entity separate and apart from the Hospital. . . .The undisputed evidence in this record shows that the Hospital owns the property operated by the Manor. The undisputed evidence also shows that Hospital employees staff the Manor and the Manor is operated according to Hospital policies adopted and imposed by the Hospital’s board of

trustees. There is nothing in the record to suggest any entity or persons other than Hospital personnel, with the exception of patients at the Manor, occupy or use the Manor. Based on this evidence, there can be no doubt that the Hospital actually and exclusively occupied and used the Manor, as required by § 58.1-3606(A)(5).

Smyth, 259 Va. at 333-34, 527 S.E.2d at 404.

This Court has consistently recognized that corporations are separate legal entities. See, e.g., Bogese, Inc. v. State Highway Comm’r, 250 Va. 226, 462 S.E.2d 345 (1995). In Bogese, this Court held that because two adjacent tracts of land were owned by different corporate entities at the time one was subject to condemnation, the properties did not satisfy the unity of ownership requirement at the time of taking, which would have allowed the owner of the tract taken to be compensated for damage to the adjacent tract. This Court was convinced by precedent recognizing the independence of separate corporate entities. The Court quoted from precedent to that effect of the Supreme Court of Pennsylvania, as follows:

In our view, one cannot choose to accept the benefits incident to a corporate enterprise and at the same time brush aside the corporate form when it works to their (shareholders’)

detriment. The advantages and disadvantages of the corporate structure should be seriously considered and evaluated at the time such organization is contemplated and after incorporation has been selected, the shareholders cannot be heard to argue that the courts should not treat them as a corporation for some purposes and as a corporation for other purposes, whichever suits their present economic interest.

Bogese, 250 Va. at 230, 462 S.E.2d at 347 (quoting Sams v. Redevelopment Auth., 244 A.2d 779, 780 (Pa. 1968)).

VBH and The Glebe, Inc. are not one in the same. They are separate legal entities. Property used by VBH (for certain purposes, as discussed hereinbelow) has been designated exempt by the General Assembly. Property used by The Glebe, Inc. **has not** been so designated. VBH turned over control and operation of the property to The Glebe, Inc. See J.A. at 0788-0814. The Glebe, Inc. occupies and operates the property. This arrangement between VBH and The Glebe, Inc., providing for use of the property by The Glebe, was purposeful. As the president of VBH and The Glebe, Inc. testified at trial:

We operate through separate corporations to certainly limit the liability. It also gives us a good way to define ourselves for companies that would loan us money in bonds, and of course we

have been advised to do it this way by accountants and lawyers because this is a prudent way to operate a business like ours that is growing.

J.A. at 0205.

Cases in which a tax exemption was not lost even though the property was occupied or operated by an entity other than its owner are clearly distinguishable. Those cases, see, e.g., *City of Richmond v. United Givers Fund*, 205 Va. 432, 137 S.E.2d 876 (1964) and *St. Andrews Ass'n v. City of Richmond*, 203 Va. 630, 125 S.E.2d 864 (1962), involved: (1) liberal construction of the exemption, rather than the strict construction to be applied to the Glebe; (2) exemption by classification, rather than designation; and (3) retention of much greater indicia of ownership interest in the property than that retained by VBH in this case.

Having turned over occupation, control and use of the property to a separate legal corporate entity, VBH should not be entitled to claim exemption by designation of the property.

To exempt the property would be to ignore:

1. The statutory requirement that the property be used by the designated organization;

2. The rule of strict construction against exemption; and
3. The fact that VBH and The Glebe, Inc. are separate, independent legal entities.

Exemption would be inconsistent with the reasoning of *Smyth*, recognizing that the designated entity must be the one using the property.

C. Use Exclusively For Religious Or Benevolent Purposes

Even if the property were owned by VBH, and even if the property were used by VBH, it still would not qualify for exemption from taxation because it is not used **exclusively** for religious or benevolent purposes, as required by statute. Va. Code §§ 58.1-3650 and 58.1-3650.33(B). Under Va. Code § 58.1-3650, the property must also be “used in accordance with the purpose for which the organization [was] classified [exempt].” These requirements must be strictly construed against exemption, and any doubt whether the requirements are satisfied must be resolved in favor of the taxability of the property, and against exemption. Va. Const. art. X, § 6 (f); *see, e.g., DKM Richmond Assocs. v. City of Richmond*, 249 Va. 401,

407, 457 S.E.2d 76, 80 (1995); Westminster-Canterbury of Hampton Roads, Inc. v. City of Virginia Beach, 238 Va. 493, 501, 385 S.E.2d 561, 565 (1989); Commonwealth v. Wellmore Coal Corp., 228 Va. 149, 153-54, 320 S.E.2d 509, 511 (1984).

The exclusive use requirement for a charitable or benevolent tax exemption has been construed to mean that the “dominant purpose” to which the property is devoted must be consistent with the purpose for which the tax-exempt organization was created. Smyth County Community Hosp. V. Town of Marion, 259 Va. 328, 334, 527 S.E.2d 401, 404 (2000); Manassas Lodge v. Prince William County, 218 Va. 220, 224, 237 S.E.2d 102, 105 (1977). The property must have direct reference to the purposes for which the tax-exempt organization was created, and must tend immediately and directly to promote those purposes. Smyth, 259 Va. at 334-35, 527 S.E.2d at 404 (quoting Commonwealth v. Lynchburg Y.M.C.A., 115 Va. 745, 752, 80 S.E. 589, 591 (1914) (other citations omitted)).

In two cases with pertinent facts similar to those of the instant case, this Court ruled that the properties at issue were not

tax exempt. In Westminster-Canterbury of Hampton Roads, Inc. v. City of Virginia Beach, 238 Va. 493, 385 S.E.2d 561 (1989), the Court held that the tax-exempt designation of three housing and healthcare facilities for the elderly owned and operated by a non-profit corporation did not confer tax-exempt status on a similar facility also owned by the corporation which not so designated.

In City of Richmond v. Virginia United Methodist Homes, Inc., 257 Va. 146, 509 S.E.2d 504 (1999), this Court held that two properties owned by a non-profit corporation and devoted to continuing care facilities for adults lost their tax-exempt status because the purpose of the properties, as indicated in the articles of incorporation of the corporate owner, changed from providing for “aged and infirm and needy persons” to providing for “aging persons.” Id. at 158; 509 S.E.2d at 509.

The Glebe is an upscale retirement community. Its residents pay for everything they receive. The fees charged are substantial, and the Glebe residents are affluent, living a (deservedly) affluent lifestyle. The Glebe is not a home for the

“aged, indigent and infirm.” Its religious aspect is marginal at most. The property occupied and operated by The Glebe is, therefore, not being used **exclusively** for religious or benevolent purposes as is required for exemption under Va. Code §§ 58.1-3650 and 58.1-3650.33(B). Nor is the property being used **exclusively** for the purposes for which VBH was designated exempt (i.e., as a home for the “aged, indigent and infirm”), as is required under Va. Code 58.1-3650. The property occupied by the Glebe (and the purpose to which the property is devoted) is thus similar to those involved in Virginia United Methodist Homes and Westminster-Canterbury. Therefore, again under the required rule of strict construction, the Glebe is not exempt from taxation by designation or classification because the “dominant purpose” of the Glebe is not consistent with the purposes for which VBH was originally created and granted tax exemption; and the Glebe does not tend immediately and directly to promote those purposes. This result is dictated by Virginia United Methodist Homes and Westminster-Canterbury.

III. EXEMPTION BY CLASSIFICATION

The trial court pointed out that VBH did not rely on exemption by classification, instead relying solely on its claim to exemption by designation. J.A. at 0139. If exemption by classification were at issue, the Glebe would still not be exempt because the property does not satisfy the requirements for such an exemption, as set forth in Sections I, II(C), and IV-VI of this brief.

IV. SOURCE OF REVENUE OR PROFIT

Property which would otherwise be exempt from taxation (and does not belong to the Commonwealth) loses its exemption if it is a source of substantial revenue or profit. Va. Code §58.1-3603(A). Because the Glebe generates substantial revenue or profit, the property loses any exemption it might otherwise enjoy under this section.

Although this Court has construed the terms “revenue” and “profit” to mean “substantial net profit,” Norfolk v. Nansemond Supervisors, 168 Va. 606, 620, 192 S.E. 588, 594 (1937); Newport News v. Warwick County, 159 Va. 571, 593-98, 166 S.E.

570, 578-79 (1933), the Court has held that the code section effects a forfeiture of exemption when the property generates substantial income which does not tend to immediately and directly promote the objects and purposes for which the tax exempt entity was created. Mariner's Museum v. City of Newport News, 255 Va. 40, 495 S.E.2d 251 (1998). In Mariner's Museum, this Court held that the lease of property owned by a museum to a healthcare association, which used the property exclusively as a hospital conducted not for profit, for a lease term of 72 years for a total sum of \$5 million dollars, resulted in the taxability of the property leased because the rental constituted substantial revenue or profit to the lessor museum. The Court noted that although "one may assume that any funds received by a museum will promote its charitable purposes" . . . "there [was] no evidence that the \$5 million dollar rent tended 'immediately and directly to promote the objects and purposes' for which the Museum was chartered." Id. at 47, 495 S.E.2d at 254. The Court noted that loss of the tax exemption by virtue of the revenue paid to the lessor results even though the lessee of a

tax-exempt owner also enjoys tax exempt status. Id. (citing Commonwealth v. Trustees of Hampton Normal and Agric. Inst., 106 Va. 614, 621, 56 S.E. 594, 598 (1907)).

In the instant case, the record establishes that The Glebe signed a note to repay VBH for the cost of the real property upon which the Glebe is situated (\$1.138 million dollars), plus interest at 5%. See J.A. at 0406-0407. The Glebe is also obligated to pay VBH \$3.423 million dollars for costs advanced to The Glebe by another entity affiliated with VBH. See J.A. 0407. Testimony indicated that on July 1, 2008, The Glebe will be responsible for paying \$15 million dollars plus interest on bonds which had been issued. J.A. at 0409. After that, The Glebe is obligated for a level payment of \$3 million dollars per year for bond principal and interest through 2036. Id. These payments are to be made out of entrance fees and charges paid by of the residents of the Glebe. Id. at 0409-10. In order for The Glebe to be able to make these payments, testimony indicated that The Glebe will have to earn 130% each year of the \$3 million dollar per year payment due from The Glebe on the bonds. Id. at 0464-0467.

Testimony also revealed that The Glebe, as of the date of trial, had received \$17 million dollars, and it was anticipated that The Glebe would be receiving an additional \$9 million dollars by July 1 of 2008. Id. at 0410.

VBH argues that The Glebe has not generated any profit. However, this argument ignores the fact that The Glebe had millions more on hand than it had spent as of trial. These revenues are real, and they do not disappear by virtue of (1) bookkeeping and accounting practices which make assets equal liabilities; (2) the amortization and capitalization of expenses; and (3) the reinvesting of revenues into the property. The revenues are devoted to providing upscale retirement living for those who can afford it, not for funding an institution for the “aged, indigent and infirm.” Accordingly, as in Mariner’s Museum, the record does not establish that the revenues garnered by the Glebe tend “immediately and directly to promote the objects and purposes” for which VBH was chartered and granted tax-exempt status.

V. PUBLIC POLICY

Public policy favors taxation of the Glebe. There are public policy reasons for the presumption in favor of taxation and the rule of strict construction against exemption. Local governments in the Commonwealth provide essential and desirable services to their residents, including police and fire protection, schools, waste disposal and transportation services and infrastructure. Tax revenues are necessary to fund these services, and real estate taxes are a primary source of local revenue. Local governing bodies strive to equitably distribute the costs for these services across the tax base. The Glebe and its residents enjoy these services. Residents of the Glebe are among the more affluent in the area. Yet, VBH and The Glebe want to avoid paying their fair share of the county's costs for governmental services. Taxes not paid by VBH, The Glebe and its residents will be made up elsewhere, assessed on other residents and taxpayers. These other residents and taxpayers, most of whom are less affluent than the residents of the Glebe, would thereby be unfairly subsidizing the upscale living of the Glebe's residents. This surely

cannot be consistent with the General Assembly's intent and the applicable constitutional and statutory code sections. This explains why the applicable code sections constrain this Court to presume that the property occupied and operated by The Glebe is taxable, and to strictly construe any claim of exemption.

VI. CONCLUSION

If there is **any doubt** regarding VBH's entitlement to tax exemption for the Glebe, that doubt must be resolved in favor of taxability, and against exemption. Smyth County Community Hosp. v. Town of Marion, 259 Va. 328, 333, 527 S.E.2d 401, 403 (2000); Westminster-Canterbury of Hampton Roads, Inc. v. City of Virginia Beach, 238 Va. 493, 501, 385 S.E.2d 561, 565 (1989). "[T]o doubt an exemption is to deny it." Commonwealth v. Wellmore Coal Corp., 228 Va. 149, 154, 320 S.E.2d 509, 511 (1984) (citations omitted). In the present case, **any doubt** that: (1) VBH possesses the required ownership interest in the Glebe; (2) VBH uses the property; (3) the Glebe is used exclusively for religious or benevolent purposes; (4) the Glebe is used for the purposes for which VBH was designated exempt; or (5) the Glebe

does not generate substantial revenue or profit, results in the conclusion that the property is subject to taxation, as held by the trial court. The record demonstrates substantial doubts in each of these areas, making affirmance of the trial court's decision clearly appropriate.

Respectfully submitted,

Edwin N. Wilmot
Counsel for Amicus, Local Government
Attorneys of Virginia, Inc.
City Attorney
City of Hopewell
300 N. Main Street
Hopewell, Virginia 23860
(804) 541-2247
(804) 541-2248 facsimile
VSB 26278

Phyllis A. Errico, CAE
General Counsel
Virginia Association of Counties
1001 East Broad St. Suite LL20
Richmond, Virginia 23219
Phone 804-343-2509
Fax 804-788-0083
VSB 23869

CERTIFICATE OF SERVICE

I hereby certify that I have complied with Rule 5:26(d) of the Rules of the Supreme Court of Virginia, and that on this 2nd day of May, 2008, three true and exact copies of the foregoing Brief *Amicus Curiae* were mailed, postage prepaid, to Counsel for Appellants, William L. S. Rowe, Esquire, Robert Dean Pope, Esquire, and Edward P. Noonan, Esquire, at Hunton & Williams LLP, Riverfront Plaza, East Tower, 951 East Byrd Street, Richmond, Virginia 23219, and to Counsel for Appellee, Frank K. Friedman, Esquire and Neil V. Birkhoff, Esquire, Woods Rogers PLC, 10 South Jefferson Street, P.O. Box 14125, Roanoke, Virginia 24038-4125. I further certify that this Brief shall be filed by hand delivery to the Clerk of this Court.

Edwin N. Wilmot
Counsel for Amicus
Local Government Attorneys
of Virginia, Inc.