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**IN THE**  
**Supreme Court of Virginia**

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**RECORD NO. 071979**

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**BOARD OF SUPERVISORS OF LOUDOUN COUNTY, VIRGINIA,**

**Appellant,**

**v.**

**NORTHERN VIRGINIA TRANSPORTATION AUTHORITY,**

**Appellee.**

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**BRIEF OF APPELLEE**  
**NORTHERN VIRGINIA TRANSPORTATION AUTHORITY**

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Appellee, the Northern Virginia Transportation Authority ("NVTA"), by counsel, submits this brief in response to the County of Loudoun's Opening Brief and in support of the August 31, 2007 Final Order of the trial court. For the reasons stated below, NVTA submits that the trial court's judgment was correct and should be affirmed.

**STATEMENT OF THE NATURE OF THE CASE AND MATERIAL  
TRIAL COURT PROCEEDINGS**

**-A-**

**Statement of the Nature of the Case**

The 2007 Session of the General Assembly of Virginia adopted House Bill 3202, now Chapter 896, 2007 Va. Acts of Assembly (hereinafter "Chapter 896" or the "Act"). J.A. 973-1013. Chapter 896 was the first major transportation funding and reform legislation passed by the General Assembly in over two decades. The General Assembly passed Chapter 896 by an overwhelming majority. *See* <http://legl.state.va.us/cgi-bin/legp504.exe?scs=171&typ+bil&val=hb3202> (House, 85-15; Senate, 29-10). Chapter 896 authorizes NVTA, a political subdivision of the Commonwealth, to impose seven regional taxes and fees ("Regional Taxes and Fees"). For each tax or fee, the General Assembly specified the subject of taxation, fixed the amount, and specified the purposes for which the revenue could be spent. Following the effective date of Chapter 896, the NVTA Board adopted resolutions authorizing (1) the issuance of bonds, (2) imposing the seven Regional Taxes and Fees, and (3) the filing of this bond validation proceeding in the Circuit Court of the County of Arlington.

NVTA's Complaint requested, among other things, validation of its proposed bonds, in an amount not to exceed \$130,000,000 (the "Bonds"). NVTA also requested validation of the seven Regional Taxes and Fees which it has levied to pay the Bonds. *See* J.A. 1, 2, 7.

**-B-**  
**Material Trial Court Proceedings**

NVTA filed its Complaint pursuant to Article 6 of the Public Finance Act of 1991, Va. Code §§ 15.2-2650 to -2658, and the Northern Virginia Transportation Authority Act, Va. Code §§ 15.2-4829, *et seq.* On July 18, 2007, the Governor of Virginia, the Attorney General of Virginia, and the Speaker of the House of Delegates (collectively "the Commonwealth") intervened as plaintiffs in support of NVTA's Complaint.

Two *amicus* parties filed briefs in support of NVTA's bond validation, including one by the Northern Virginia Transportation Alliance ("the Alliance"), which is a non-partisan group composed of citizens and businesses that seek to advance better regional transportation solutions for Northern Virginia.<sup>1</sup> The Hampton Roads Transportation Authority, a new political subdivision created by the General Assembly in Chapter 896 to undertake transportation responsibilities similar to NVTA in Tidewater Virginia localities, submitted the other *amicus* brief supporting NVTA's bond validation. J.A. 454-469.

On August 2, 2007, the County of Loudoun ("Loudoun County" or "Loudoun") answered as a defendant opposing the requested validation and filed a response and answer.<sup>2</sup> Later, several individuals ("Marshall appellants") also responded as defendants opposing the validation and filed an answer and counterclaim.

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<sup>1</sup> Alliance members include the Apartment and Office Building Association of Metropolitan Washington, Arlington Chamber of Commerce, Committee for Dulles, Dulles Regional Chamber of Commerce, Fairfax County Chamber of Commerce, Greater Reston Chamber of Commerce, Greater Washington Board of Trade, Heavy Construction Contractors Association, Loudoun County Chamber of Commerce, Northern Virginia Association of Realtors, Northern Virginia Building Industry Association, Northern Virginia Technology Council, Virginia Transportation Construction Alliance, Prince William County-Greater Manassas Chamber of Commerce, Prince William Regional Chamber of Commerce, and Washington Airports Task Force. Individual company members of the Alliance include: The Buchanan Companies, Beers & Cutler, PLLC, Burgess and Niple, The Christopher Companies, Guernsey Office Products, Inc., McLean Insurance Co., S.W. Rodgers, Inc., and TETRA Corporation.

<sup>2</sup> Loudoun is a member locality of NVTA.

On August 27, 2007, the trial court conducted a hearing in which it denied the Marshall appellants' motion for summary judgment. J.A. 711. It then received certain exhibits offered by NVTa into evidence, and heard extensive arguments on the merits. The defendants introduced no evidence. The following day, the Court issued its opinion from the bench, granting NVTa's request for declaratory and injunctive relief as to all of its claims and denying the defendants' claims and requests for relief. J.A. 945-46. The Court entered its Final Order on August 31, 2007. J.A. 576.

### **QUESTION PRESENTED**

Did the trial court err in holding that the General Assembly of Virginia has the legislative power to prescribe the Regional Taxes and Fees and authorize NVTa, a special, limited unit of government, to impose them?

### **STATEMENT OF FACTS**

**-A-**

#### **Background**

The General Assembly passed Chapter 896 to address the transportation crisis in the Commonwealth. J.A. 1014-15. The Act gives some measure of relief across the Commonwealth and greater, in-depth relief in Northern Virginia and Hampton Roads, where traffic stifles economic growth and places a heavy burden on the quality of life for residents in those locations.

The Northern Virginia and the Washington, D.C., metropolitan areas now have the nation's third-highest rate of traffic congestion. J.A. 1111-17; J.A. 734. Northern Virginia alone accounts for over twenty percent of the daily vehicle miles traveled ("VMT") for the entire Commonwealth, J.A. 953; J.A. 1144-45, and one third of the Commonwealth's automobile accidents. J.A. 1126-29. Yet, it has less than ten percent of the Commonwealth's roadway lane miles. J.A. 953.

This congestion endangers public health and safety by causing a disproportionate number of vehicle crashes, escalating air pollutants, and slowing emergency medical, fire, and police responders. J.A. 1148, 1152, 1160; J.A. 601-02. Gridlock on the major thoroughfares is also no longer the sole manifestation of "rush hour" in Northern Virginia. Instead, it affects the entire transportation system, spreading to neighborhood streets and transit systems. *See* J.A. 1148, 1151, 1152, 1153-54; J.A. 1204. Peak period travel has extended to multiple hours both in the morning and in the evening. J.A. 1153, 1156. It affects travel throughout the work day and during the weekend. Congestion has amplified the travel "time penalty" so that it takes much longer to get to any destination, not just to work. *Id.* at 1155-56. One study concludes that area residents wasted 145,484,000 travel hours in 2003. J.A. 1134.

Congestion has also destabilized travel reliability by undermining the ability to predict travel within the region at any given time during the day. *Id.* at 1135-36. Other than the Hampton Roads region, no other area in Virginia has experienced such congestion or its attendant problems.<sup>3</sup>

Within the next 25 years, Northern Virginia is expected to attract nearly one million new residents, J.A. 953, who will join the over two million Northern Virginia residents on area roads today, thus exacerbating traffic conditions in the most congested area in the Commonwealth.

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<sup>3</sup> Together, Northern Virginia and Hampton Roads have the two highest VMTs in the State. J.A. 1139-1145. Traffic congestion problems exist in Hampton Roads similar to those in Northern Virginia. Hampton Roads has serious traffic bottlenecks at its tunnels. J.A. 1161-68. A 2001 report of the Hampton Roads Planning District Commission determined that traffic exceeded capacity for three of the four major tunnels for much of the year. *Id.* at 1165. Other studies found that Hampton Roads ranked 17th in the nation in terms of VMT per capita in 2005, which is the highest of any region in Virginia. J.A. 1169, 1171. The growth in vehicular travel in Hampton Roads far outpaced population growth. *Id.* at 1171. In 2005 Hampton Roads was estimated to have 1,633,000 residents, an increase of 6% from 1996. *Id.* at 1172. During this time, vehicular travel in Hampton Roads increased 18%, meaning that the growth in regional vehicular travel was three times higher than the growth in the regional population. *Id.*

**-B-**  
**Chapter 896**

Chapter 896 comprises a three-pronged approach to the transportation crisis, including (1) a statewide and regional funding component, (2) a Virginia Department of Transportation reform component, and (3) a land-use component intended to reduce the impact of development on transportation. J.A. 1017.

The questions presented by Loudoun in its opening brief pertain exclusively to the regional funding component of Chapter 896, which provides revenue to NVTa to pay its bonds to finance transportation projects at the regional level. In particular, Loudoun objects to the General Assembly's seven new Regional Taxes and Fees which it authorized NVTa to impose. These Regional Taxes and Fees are (i) the additional annual regional vehicle license fee under Va. Code § 46.2-755.1, (ii) the initial vehicle registration fee under Va. Code § 46.2-755.2, (iii) the additional safety inspection fee under Va. Code § 46.2-1167.1, (iv) the retail sales and use tax on auto repairs under Va. Code §§ 58.1-605 and 58.1-606, (v) the regional congestion relief fee under Va. Code § 58.1-802.1, (vi) the local rental car transportation fee under Va. Code § 58.1-2402.1, and (vii) the additional transient occupancy tax under Va. Code § 58.1-3825.1.

**-C-**  
**NVTa**

The General Assembly created NVTa in 2002 as a political subdivision, Va. Code § 15.2-4830, embracing nine jurisdictions: the Counties of Arlington, Fairfax, Loudoun, and Prince William, and the Cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park (collectively, the "Member Localities"), Va. Code § 15.2-4831. Its Board consists of fourteen (14) voting members, of whom twelve (12) are elected by the people directly to a

legislative office, with the other two being appointed by the Governor. The elected members of the Board include the chairman of the board of supervisors of each member county, and the mayor of each member city, two members of the House of Delegates, and one member of the Senate, all residing in localities embraced by NVTa. Va. Code § 15.2-4832. The citizens electing these officials to their legislative positions all reside within the Member Localities. The Act requires all decisions to be made by a super majority of Board members present and voting.<sup>4</sup>

NVTa's powers are limited by the enabling legislation to activities pertaining to regional transportation, including allocating to priority regional transportation projects any funds made available to NVTa. See Va. Code §§ 15.2-4830, -4840(5). NVTa may issue bonds and other evidences of debt. Va. Code § 15.2-4839. Pursuant to Chapter 896, NVTa may impose the seven Regional Taxes and Fees designated by the General Assembly only to pay its Bonds and provide revenue for other authorized transportation purposes. Va. Code § 15.2-4838.1.

**-D-**

**NVTa Is A Special Unit of Government**

NVTa is not a regional government as that term is used in Article VII, Section 1 of the Constitution and has never claimed to be such an entity. Rather, NVTa is a separate, special unit of government akin to numerous other special units of government in Virginia which include special districts and public authorities. See, e.g., Va. Code § 5.1-153 (Metropolitan Washington

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<sup>4</sup> Va. Code § 15.2-4834 provides, in pertinent part:

A majority of the Authority, which majority shall include at least a majority of the representatives of the counties and cities embraced by the Authority, shall constitute a quorum. Decisions of the Authority shall require a quorum and shall be in accordance with voting procedures established by the Authority. In all cases, decisions of the Authority shall require the affirmative vote of two-thirds of the members of the Authority present and voting, and two-thirds of the representatives of the counties and cities embraced by the Authority who are present and voting and whose counties and cities include at least two-thirds of the population embraced by the Authority . . . .

Airports Authority); § 15.2-4903(A) (industrial development authority); § 15.2-5302 (hospital authority); § 15.2-5102 (water and waste authorities); §§ 21-113, 21-118 (sanitary districts); Va. Code § 36-4 (local redevelopment and housing authorities); 1980 Va. Acts of Assembly, ch. 380 (Richmond Capital Region Airport Commission).

-E-

NVTA's Public Hearing And Imposition Of Taxes and Fees

NVTA held a public hearing on July 12, 2007, at which over fifty (50) speakers addressed the proposed issuance of the Bonds and the proposed imposition of the Regional Taxes and Fees. Speakers stated that the traffic crisis in the area adversely impacts their quality of life and the general well-being of the citizens and inhibits the day-to-day business of Northern Virginia's companies. *See, e.g.*, J.A. 1111-17; J.A. 600-01, 601-02, 603-04, 605-07, 608, 609-10, 611, 615, 618; J.A. 953.

Following the public hearing, NVTA adopted resolutions authorizing issuance of the Bonds and authorizing imposition of the seven Regional Taxes and Fees (the "Imposition Resolutions") and specified the effective date of the Regional Taxes and Fees as January 1, 2008. J.A. 10 to 38. NVTA adopted each in accordance with the quorum and voting requirements specified in the NVTA Act.<sup>5</sup>

In the Bond Resolution, NVTA found and determined, among other things, that the issuance of the Bonds will be for the benefit of the inhabitants of the Commonwealth and the Member Localities and promote their safety, health, welfare, convenience and prosperity. *Id.* at 39-46. NVTA also determined that the Bonds will further the purposes of NVTA and the NVTA Act by, among other things, financing the construction and acquisition of transportation projects identified in, or consistent with, the regional transportation plan approved by NVTA and the

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<sup>5</sup> The representatives of the Member Localities unanimously approved the motor vehicle rental fee and the transient occupancy tax. J.A. 15; J.A. 19.

Member Localities. *See id.* The Bond Resolution was unanimously approved by the Authority. J.A. 39.

### **ARGUMENT**

Any analysis of the constitutionality of Chapter 896 must begin with an acknowledgment that this Court has repeatedly recognized that there is a strong presumption that the General Assembly's statutes are constitutional. *Coleman v. Pross*, 219 Va. 143, 153, 246 S.E.2d 613, 619 (1978). Legislation cannot be declared unconstitutional unless it "clearly" and plainly violates the Constitution in such manner as to leave no doubt or hesitation. *Reed v. Union Bank of Winchester*, 70 Va. (29 Gratt.) 719, 722 (1878). "[E]very reasonable doubt must be resolved in favor of the act's constitutionality." *Terry v. Mazur*, 234 Va. 442, 449, 362 S.E.2d 904, 908 (1987) (citing *Almond v. Gilmer*, 188 Va. 822, 834, 51 S.E.2d 272, 276 (1949)). Indeed, "[t]o doubt is to affirm." *Peery v. Virginia Bd. of Funeral Dirs. & Embalmers*, 203 Va. 161, 165, 123 S.E.2d 94, 97 (1961) (quotations and citations omitted). "The courts will declare the legislative judgment null and void only when the statute is plainly repugnant to some provision of the state or federal constitution." *Blue Cross of Va. v. Commonwealth*, 221 Va. 349, 358, 269 S.E.2d 827, 832 (1980).

#### **A. The Constitution of Virginia Does Not Constrain the General Assembly's Authorization of the Regional Taxes and Fees.**

Loudoun's first challenge to the trial court's ruling, Loudoun Br. 8-13, is predicated upon a too narrow interpretation of the powers of the General Assembly of Virginia. The fundamental flaw in Loudoun's contention arises from its faulty premise that the Virginia Constitution delegates powers and specifies authority. This is incorrect. In contrast to the federal Constitution, the Virginia Constitution "is not a grant of legislative powers to the General Assembly, but is a restraining instrument only, and, except as to matters ceded to the federal



government, the legislative powers of the General Assembly are without limit." *Harrison v. Day*, 201 Va. 386, 396, 111 S.E.2d 504, 511 (1959). Accordingly, when addressing the power of the General Assembly, the appropriate starting place is the first paragraph of Article IV, Section 14, which provides:

[T]he authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted; and a specific grant of authority in this Constitution upon a subject shall not work a restriction of its authority upon the same or any other subject. The omission in this Constitution of specific grants of authority heretofore conferred shall not be construed to deprive the General Assembly of such authority, or to indicate a change of policy in reference thereto, unless such purpose plainly appear.

Va. Const. art. IV, § 14. As described by Professor Howard, the portion of the constitutional provision quoted above states two propositions:

- (1) that the Legislature has the power to legislate on any subject unless the Constitution says otherwise;
- (2) that the canon of construction, *expressio unius est exclusio alterius*, does not apply in interpreting the legislative powers of the General Assembly . . . .

A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 538 (University Press of Virginia 1974) (hereinafter "Howard"). See Report of the Commission on Constitutional Revision 152 (Jan. 1, 1969) (hereinafter "CCR").

In *Alderson v. County of Allegheny*, 266 Va. 333, 585 S.E.2d 795 (2003), a case Loudoun cited in its opening brief, Loudoun Br. 9, this Court read the pertinent sections of Articles IV and VII of the Constitution together to give a *more expansive scope* of power to the General Assembly to use special legislation to deal with a local problem rather than to restrict the power of the legislature. This Court avoided the more restrictive interpretation which might have followed had Article IV, § 14(5) been read in isolation. Such an expansive interpretation of the

power of the General Assembly follows from the duty of the judiciary to uphold a legislative enactment if possible, *Terry v. Mazur*, 234 Va. 442, 449, 362 S.E.2d 904, 908 (1987), and to strike down an act of the General Assembly only when it plainly violates some provision of the Constitution. *Blue Cross of Va. v. Commonwealth*, 221 Va. 349, 358, 269 S.E.2d 827, 832 (1980).

Here, the gravamen of Loudoun's complaint is that the General Assembly has given taxing power to a special unit of government whose board members are not directly elected by the people to serve on that particular body. There is no constitutional provision which forbids the General Assembly from doing so.

Since the Commonwealth's founding, the General Assembly has utilized special units of government to perform public functions outside the traditional county, city or town structure. S.J. Makielski, Jr. & David G. Temple, *Special District Government in Virginia* (University Printing Office 1967); Albert O. Porter, *County Government in Virginia: A Legislative History, 1607-1904*, 39-40 (1947); S.J. Makielski, Jr., *The Special District Problem in Virginia*, 55 Va. L. Rev. 1182, 1187 (1969).

In 1970, when the present Constitution was adopted, there were over two hundred special districts utilized in Virginia. Secretary of the Commonwealth, Report to the Governor and General Assembly of Virginia, 84-125 (1968-69). Nevertheless, the present Virginia Constitution does not expressly address special units of government. The omission of constitutional limits regarding such special districts and authorities was not accidental. In fact, the Commission on Constitutional Revision made a "thorough study of local authorities in Virginia" but did "not recommend a constitutional provision dealing specially with authorities" under Article VII. CCR at 227.

Loudoun asserts that the power of taxation "may not be removed from the control of the local legislative representatives." Loudoun Br. 9. Chapter 896 does not do so. Those bodies still possess all of their functions and duties. In fact, the General Assembly has created an additional unit of government with new power to address a specific, complex regional problem confronting all of Northern Virginia. While the scope of its responsibility is limited to transportation, NVTa is no less a public, legislative body than the governing body of any local political subdivision.

Moreover, the Regional Taxes and Fees are not a true delegation because the General Assembly itself specified the subject of the seven Regional Taxes and Fees, dictated the tax rates, and specified how the revenue derived would be spent. *E.g.*, Va. Code § 58.1-605(K) (retail sales tax of 5% on charges for labor or services on motor vehicle repair). The General Assembly has opened to NVTa's Board, composed primarily of locally-elected representatives, a very narrow window to impose and collect the taxes and fees. It has specified the purpose for which the revenue must be used. Va. Code § 15.2-4838.1(A). Moreover, the General Assembly retains authority and control over the Regional Taxes and Fees. It is free to amend or repeal them and to restrict NVTa's power to impose them. Thus, the General Assembly made the law under Chapter 896 and did not delegate that function to NVTa.

In any event, this Court has also long recognized that the "legislature may delegate its power to political subdivisions, governmental bodies, and certain regulated private entities exercising functions charged with the public interest." *Hamer v. School Bd. of Chesapeake*, 240 Va. 66, 70, 393 S.E.2d 623, 626 (1990). Such delegation is valid when the General Assembly establishes policies and standards to guide the official, agency, or board in the exercise of such power. *E.g.*, *Ames v. Painter*, 239 Va. 343, 349, 389 S.E.2d 702, 705 (1990); *Chapel v. Commonwealth*, 197 Va. 406, 89 S.E.2d 337 (1955). As stated by Mr. Howard,

invariably [the Court] is forced to recognize that a certain amount of delegation is essential to the efficient administration of the government. The dilemma is usually solved by stating that the delegation is valid if the Legislature declares the policy of the law and prescribes the controlling legal principle, leaving to the agency the task of applying the Legislature's guiding standards.

Howard at 469.

Here, the General Assembly has prescribed a narrow standard for NVTa to impose specific taxes. The General Assembly itself established each of the seven Regional Taxes and Fees, specified the subject of each tax, dictated the tax rates, and restricted the purposes for which the resulting revenues may be spent.

Loudoun cites *County of Fairfax v. Fleet Industrial Park Ltd. Partnership*, 242 Va. 426, 410 S.E.2d 595 (1992), a zoning case, for its non-delegation argument. Loudoun Br. 9. There, this Court invalidated a statute providing an advisory commission (one half of whose members were privately selected), and not the County, with absolute veto power to determine final zoning classifications as well as ordinance text and regulations. This Court relied upon earlier zoning decisions such as *Laird v. City of Danville*, 225 Va. 256, 302 S.E.2d 21 (1983), in which the Court explained:

Under Va. Code § 15.1-486, the zoning of property is accomplished when the "governing body" of a county or municipality "by ordinance" classifies the territory within its jurisdiction. Similarly, under Code § 15.1-491(g), the rezoning of property is accomplished when the "governing body . . . by ordinance" amends the property's zoning classification. In each instance, the term "governing body" identifies the board of supervisors in a county, or the municipal council in a city or town, as the entity which alone has the authority to legislate "by ordinance" in a particular locality.

*Laird*, 225 Va. at 261, 302 S.E.2d at 24. Delegations similar to those at issue in *Fleet Industrial* and *Laird* simply do not exist here. Instead, unlike those zoning cases, the General Assembly, itself, has exercised its power and authority to specify the Regional Taxes and Fees under

Chapter 896 and retains ultimate control over them; it has not relinquished such discretion to private parties or staff, and it remains free to amend or repeal them at any time.

Loudoun references a 2002 general sales tax referendum that voters in Northern Virginia failed to approve. Loudoun Br. 13. That referendum pertained to an across-the-board sales tax that was wholly dissimilar to the Regional Taxes and Fees approved under Chapter 896. Also, as Loudoun admits, the Constitution did not require that the proposed 2002 measure to be approved by referendum but the General Assembly imposed that requirement voluntarily. Chapter 896 simply provides a different approach by the General Assembly that has no relation to the 2002 matter and is not prohibited by the Constitution.

In sum, the trial court correctly determined that the Constitution does not prohibit the General Assembly from prescribing the Regional Taxes and Fees and authorizing NVTa, a special unit of government, to impose them.

**B. Article VII of the Constitution Does Not Apply.**

Loudoun incorrectly claims that Article VII, § 7 of the Constitution must be interpreted to preclude the possibility of providing other units of government with taxing power. Loudoun Br. 13-16. Loudoun's contention is wrong, because Section 7: (1) is a procedural provision and not an affirmative grant of power; (2) omits special units of government from its operation; and (3) cannot be read to infer that the term "elected" means elected by the people to a particular governing body.

First, by its plain terms, that Article concerns the local governing bodies of counties, cities, towns and regional governments and their officers. Article VII, Section 7 of the Virginia Constitution is entitled "Procedures." It provides, in pertinent part:

No ordinance or resolution appropriating money . . . ,  
imposing taxes, or authorizing the borrowing of money shall

be passed except by a recorded affirmative vote of a majority of all members elected to the governing body.

When read in context with other provisions of Article VII, it is clear that the term "governing body," as used in Section 7, is a limited reference to the governing body of counties, cities or towns, and not to representatives of any other entity. This is evidenced by the fact that, prior to the adoption of the new Constitution in 1970, the predecessor to Section 7 referenced only cities, and the revision broadened its application to counties. CCR at 236.

Section 7 plainly establishes a process that a local governing body must follow in undertaking the actions enumerated in it. *Town of Madison v. Ford*, 255 Va. 429, 498 S.E.2d 235 (1998) (zoning ordinance void where Court could not determine from the minutes which of the board members voted for adoption of the ordinance). Section 7 is not, as Loudoun posits, an affirmative grant of the powers of appropriation, taxation or borrowing to the specified governing bodies; nor is it a restriction on the powers of other political subdivisions not mentioned.

Article VII, Section 7 does not restrict the General Assembly from providing for special units of government and their powers. Despite a "thorough study of local authorities in Virginia," the Commission on Constitutional Revision did "not recommend a constitutional provision dealing specially with authorities" under Article VII. CCR at 227. While a clear limitation in the Constitution may act as a restriction on the General Assembly's otherwise unlimited power, the purposeful omission of any explicit reference to authorities in Article VII makes clear that the Article does not prohibit the General Assembly from creating authorities and giving them taxing power.

That Loudoun's construction of Section 7 is wrong is made manifest by its consequences. Loudoun's argument focuses solely upon the word "taxes" in the first sentence of Section 7 and

totally ignores the rest of the sentence which also references "appropriating" and "borrowing" money. The General Assembly has authorized numerous special units of government in Virginia to "borrow money." *See* Va. Code § 5.1-156 (Metropolitan Washington Airports Authority); § 10.1-628 (watershed improvement districts); § 15.2-4518(5) (transportation district commissions); § 15.2-4905 (industrial development authorities); § 15.2-5114(9) (water and waste authorities); § 15.2-5158 (community development authorities); § 15.2-5205(10) (hospital and health center commissions); § 15.2-5339 (hospital authorities); § 15.2-5406(11) (electric authorities); § 15.2-5431.11(8) (wireless service authorities); § 15.2-5504(6) (tourism development authorities); § 15.2-5512(6) (Southside Virginia Tourism Development Authority); § 15.2-5704(16) (park authorities); § 15.2-5805(11) (Virginia Baseball Stadium Authority); § 15.2-5905(11) (Hampton Roads Sports Facility Authority); § 15.2-6311 (former federal facilities development authorities); § 15.2-6405(9) (regional industrial facilities authority); § 15.2-6606(15) (Middle Peninsula Chesapeake Bay Public Access Authority); § 15.2-6632(15) (Northern Neck Chesapeake Bay Public Access Authority); §§ 21-122, 21-168 (sanitary districts); § 36-19 (housing authorities).

The General Assembly has also authorized each of the entities listed in the preceding paragraph to employ staff, enter into contracts, build facilities, and acquire or lease property - i.e., to "appropriate" money. Va. Code § 5-156; Va. Code §§ 10.1-627 & 628; Va. Code §§ 15.2-4518(7), -4905, -5114, -5158(1), -5205, -5324, -5330, - 5337, -5406, -5411, -5431.11, -5431.12, -5504, -5512, -5704, -5805, -5807, -5905, -5907, -6308, -6405, -6606, -6632; Va. Code §§ 21-168 and 248; Va. Code § 36-19.<sup>6</sup>

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<sup>6</sup> The term "appropriating" is not defined in the Constitution. Under such circumstances, this Court interprets a term according to its plain meaning. *See Hoffman Family L.L.C. v. City of Alexandria*, 272 Va. 274, 284, 634 S.E.2d 722, 727 (2006) (utilizing plain dictionary meaning of the term "public purpose"). The term "appropriation" means "[i]n

Loudoun's contention lifts the phrase "imposing taxes" from Section 7 and ignores the phrases "appropriating money" and "authorizing the borrowing of money." That approach contravenes basic rules of statutory construction. *Hubbard v. Henrico Ltd. Partnership*, 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998) (noting the "settled principle of statutory construction that every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary"). Such a limited interpretation is also inconsistent with decades of practice because hundreds of political subdivisions, without governing bodies elected directly by the people, borrow and appropriate money.

If Article VII, Section 7 prevents NVTa from imposing taxes, then every authority created pursuant to Title 15.2, Title 21 and Title 36 of the Code of Virginia which has borrowed money or appropriated it, has acted unlawfully, including those whose bonds have been validated by this or lower courts. *See, e.g., Dykes v. Northern Va. Transp. Dist. Comm'n*, 242 Va. 357, 411 S.E.2d 1 (1991) (opinion on rehearing beginning at 242 Va. 370, 411 S.E.2d 8 (Nov. 8, 1991)). Such an interpretation leads to irrational consequences. *E.g., Jeneary v. Commonwealth*, 262 Va. 418, 431, 551 S.E.2d 321, 327 (2001) (rejecting interpretation of a statute that would lead to absurd result); *McFadden v. McNorton*, 193 Va. 455, 461, 69 S.E.2d 445, 449 (1952) (statutes should not be interpreted so as to lead to an absurd result); 2A Norman J. Singer, Sutherland Statutory Construction § 46:5 (2007 ed.) (enactment should be harmonized to produce logical results).

Finally, lest there be any doubt, Section 3 of Article VII confirms that the General Assembly has the power to create "other unit[s] of government" separate and apart from any county, city or town. That section provides in pertinent part:

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governmental accounting, an expenditure authorized for a specified amount, purpose, and time." *Black's Law Dictionary* 101 (6<sup>th</sup> ed. 1990).



The General Assembly may provide by general law or special act that any county, city, town, or *other unit of government* may exercise any of its powers or perform any of its functions and *may participate in the financing thereof* jointly or in cooperation . . . .

Va. Const. art. VII, § 3 (emphases added). The lack of limitation regarding the "other unit of government" is a clear acknowledgment of the unlimited nature of the General Assembly's power on the subject of creating a special district to perform limited functions. Furthermore, by referring to "financing" "its functions", the Constitution plainly contemplates "other units" with taxing power.<sup>7</sup>

Moreover, the principal case law relied upon by Loudoun to support its Section 7 argument does not support its position. Loudoun Br. 9, 14. In *Wise County Board of Supervisors v. Wilson*, 250 Va. 482, 463 S.E.2d 650 (1995), the Supreme Court considered the question whether the Wise County Board of Supervisors, on the one hand, or the County's Commissioner of Revenue, on the other, had sole authority in Wise County to set the assessment ratio for computing the merchant's capital tax under Va. Code § 58.1-3509 (providing that the capital of merchants is segregated for local taxation). The Court held that the Board of Supervisors had such authority because, in part, if the law were otherwise, the Board's ability to levy taxes under Article VII would be constrained. *Wilson* did not address the power of the General Assembly to give separate taxing power to an authority; nor did it broadly hold that taxes may be levied only by local governing bodies.

The Court's decision in *Wright v. Norfolk Electoral Board*, 223 Va. 149, 286 S.E.2d 227 (1982), is also inapposite. Loudoun Br. 14. There, the Supreme Court considered a petition by a committee of citizens seeking a court order for a referendum to be submitted to the voters to set

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<sup>7</sup> The Marshall appellants contend that Article VII, Section 3 is merely a procedural section authorizing the joint sharing of powers and that it is not a grant of authority. Even assuming, *arguendo*, that point, the Section is nonetheless a recognition that the General Assembly has the power to create other units of government with the power to finance, that is raise revenue through unlimited means, including taxation.

the real estate tax rate for the City of Norfolk. The charter of the City provided its citizens with the right to apply to the local court for such an order. The Court held that the attempt by the citizens to set the tax rate in the City by referendum was unconstitutional on the grounds that Sections 2 and 7 of Article VII prescribed the method for municipal corporations to establish taxes. The *Wright* Court did not consider and did not discuss the General Assembly's power to authorize other political subdivisions with limited regional responsibilities to impose regional taxes and fees.

Even assuming, *arguendo*, that Article VII, Section 7 does apply to NVTAs, for Loudoun's claim to be accepted, it would also have to demonstrate that the term "elected" means only those chosen by the people in a general election to serve on that particular body. Loudoun has offered no case or commentary supporting such a narrow interpretation, and, in fact, Virginia law undermines it. As an example, Va. Code § 24.2-228 authorizes, in part, judges of the appropriate circuit court to fill vacancies in a local governing body if the remaining members fail to do so. In a situation where the court fills two vacancies on a five person body, Loudoun's narrow reading would result in undermining the governing body's approval of any tax, authorization to borrow, or appropriation, where the two appointed members voted for the measure and two elected members voted against it. We submit that such a reading makes no sense.

In any event, the record demonstrates that NVTAs complied with the approval requirements described in Section 7. At the July 12 Meeting, NVTAs met and considered each of the Regional Taxes and Fees, and the members of the governing board, elected to that board in accordance with the provisions of the NVTAs Act, approved the Regional Taxes and Fees in compliance with NVTAs's quorum voting requirements. J.A. 10 through 38.

Loudoun cites what it claims are "good example[s]" of regional taxation authorizations by the General Assembly. Loudoun Br. 16. While these examples may be methods preferred by Loudoun, they do not demonstrate that they are the only method of raising revenue or that the Constitution prohibits the General Assembly's actions under Chapter 896.

**C. Article VII, Section 2 of the Constitution Does Not Eliminate Utilization Special Units of Government.**

Loudoun would have the Court believe that Article VII, Section 2, which, in part, concerns regional governments, excludes the possibility of creating other limited units of government with regional taxing authority. Loudoun Br. 17.

Article VII, Section 2 provides, in part, that "[e]very law providing for the organization of a *regional government* shall . . . require the approval of the organization of the regional government by a majority vote of the qualified voters . . . ." (Emphasis added.) The Constitution defines "regional government" as "a *unit of general government* organized as provided by law within defined boundaries, as determined by the General Assembly . . . ." Va. Const. art. VII, § 1 (emphasis added). This constitutional definition denotes a unit of government having a broad range of powers and functions organized for general governmental purposes in contrast to political subdivisions organized for "special purposes" such as authorities. Howard at 799.

Here, the General Assembly established NVTa as an independent political subdivision for a specific, single purpose pertaining only to transportation. Va. Code § 15.2-4830 (NVTa directed to prepare a regional transportation plan and authorized to construct or acquire transportation facilities specified in the regional transportation plan); § 15.2-4840(5) (NVTa responsible for allocating to priority regional transportation projects funds made available and may oversee such projects). Accordingly, because NVTa was created for a specific purpose and

has only limited powers related to that purpose, it is not a unit of general government. Therefore, Article VII, Section 2 does not apply.

As stated in Section 14 of Article IV, the rule of construction, *expressio unius est exclusio alterius*, does not apply to provisions in the Constitution expressly granting a power to the General Assembly. Mr. Howard confirms that the listing in Article VII of "counties, cities, towns and regional governments" is not exclusive because "[a]nother unit of government, not expressly provided for in the Constitution, is the special district. This is usually a single-purpose unit of government, created to perform a specific task." Howard at 783.

While Mr. Howard suggests that special districts often do not possess the power of taxation, *id.*, he further points out that sanitary districts are special units of government, not mentioned in the Constitution, which do have taxing power. *Id.* at 798-800. See Va. Code § 21-118(6). The citizens of a sanitary district do not elect the board of directors of the sanitary district; rather, the board of supervisors of the county, typically a much larger unit of government embracing many more citizens, is designated to serve as the governing body of the sanitary district. Thus, in Virginia, there is a well recognized practice of having special districts, with limited powers including the power of taxation, whose citizens do not directly elect those persons to the particular board exercising the power of taxation.

Moreover, the Supreme Court of the United States' decision in *Heald v. District of Columbia*, 259 U.S. 114 (1922), directly undermines Loudoun's claim that Virginia's Constitution requires that only locally elected bodies are empowered to impose taxes. There, the Court considered whether an act of Congress imposing an intangible property tax on persons residing within the District of Columbia was void because it subjected District residents to taxation without representation. The Court acknowledged that District residents lacked suffrage,

but held that "[t]here is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation." *Id.* at 124.

*Heald* is particularly instructive because it applied the Federal Constitution, which, unlike the Virginia Constitution, constitutes a *grant* of legislative power. As Mr. Howard opined:

In constitutional theory, a state's government is a government of plenary powers, except as limited by state and federal constitutions. Unlike the Federal Constitution, which is a grant of power, a state constitution is a restraint on power. Accordingly, unlike Congress, whose legislative powers ultimately traced to the grants of Article I of the Federal Constitution, a state's legislature has all legislative powers not prohibited to it by the federal or state constitutions.

Howard at 537 (footnote omitted). Accordingly, if the Federal Constitution, which is a grant of power, permits taxation of persons who did not elect the body imposing such taxes, certainly the Virginia Constitution, which reflects the plenary power of the General Assembly, also permits such an act because our Constitution contains no provision forbidding or restricting taxation of persons who did not directly elect the members of the governmental body imposing the taxes.

Loudoun speculates that other powers may be in the wings for NVTa. Loudoun Br. 18. There was no evidence presented of any possibility that the General Assembly might further broaden NVTa's powers beyond what is presently in the NVTa Act, as amended by Chapter 896. Whether the General Assembly may do so in the future is irrelevant to the issues raised by Loudoun in this appeal. In any event, one of the powers Loudoun mentions, eminent domain, is a sovereign power the General Assembly has provided to many special units of government. *See, e.g.,* Va. Code §§ 62.1-128, 62.1-132.3, 62.1-136 (Virginia Port Authority may condemn in order to stimulate the commerce of the ports of the Commonwealth); Va. Code § 15.2-5114 (water and waste authorities may condemn properties to construct water and wastewater facilities); Va. Code §§ 5.1-2.2:1, 5.1-2.5 (Virginia Aviation Commission); Va. Code §§ 21-113,

21-118 (sanitary districts); Va. Code § 23-288 (Jamestown-Yorktown Foundation); Va. Code §§ 32.1-189, 32.1-193 (district mosquito control commissions); Va. Code §§ 36-4, 36-19, 36-27 (local redevelopment and housing authorities). The General Assembly long ago authorized NVTa's sister authority, the Northern Virginia Transportation Commission, to utilize eminent domain. See Va. Code § 15.2-4515(5)(a). Whether such a power is sought or authorized is for the General Assembly to say, not Loudoun.

In sum, the constitutional provisions cited by Loudoun are limited in their scope and applicability by their very terms. As such, they simply do not forbid or restrict the power of the General Assembly to prescribe taxes and to endow a special purpose unit of government, such as NVTa, with the power to impose them.

### **CONCLUSION**

Chapter 896 is presumed to be constitutional. *E.g., Coleman v. Pross*, 219 Va. 143, 153, 246 S.E.2d 613, 619 (1978). Any doubt as to its validity must be resolved in favor of its validity. *Almond v. Gilmer*, 188 Va. 822, 834, 51 S.E.2d 272, 276 (1949).

For the reasons described above, NVTa submits that the trial court's judgment was correct and that the General Assembly has acted within the scope of its power. There is no provision in the Constitution which forbids the action taken by the General Assembly relevant to this case, and there is no provision in the Constitution which so restricts the power of the legislature that its act is plainly in violation of that charter. Indeed, Loudoun seeks to undo centuries of precedent in which Virginia has utilized, and relied upon, special units of government to address special problems, and in recent decades, the General Assembly's use of regional authorities to issue debt for such problems. See *Dykes v. Northern Va. Transp. Dist. Comm'n*, 242 Va. 357, 411 S.E.2d 1 (1991) (opinion on rehearing beginning at 242 Va. 370, 411 S.E.2d 8 (Nov. 8, 1991)).

NVTA urges this Court to affirm the trial court's Final Order of August 31, 2007.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify Rule 5:26(d) has been complied with and that on the 18<sup>th</sup> day of December, 2007, twenty (20) copies of the foregoing Brief were filed with the Clerk's Office of the Supreme Court of Virginia, a duplicate electronic version of the Brief was emailed to [scvbriefs@courts.state.va.us](mailto:scvbriefs@courts.state.va.us), and three (3) copies were mailed, first class, postage prepaid to the following counsel of record:

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