COMMONWEALTH of VIRGINIA

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November 18, 2011

BY UPS

The Honorable Debra Shipp, Clerk
Circuit Court of Albemarle County
Albemarle County Courthouse
Court Square
501 East Jefferson Street
Charlottesville, Virginia 22902-5110

Re: Forest Lodge, LLC v. Virginia Department of Taxation
Case No. 003CL11000654-00

Dear Ms. Shipp:

Enclosed for filing in this case, please find the Demurrer, Memorandum Supporting Demurrer, Counterclaim and Answer of the Department of Taxation to Forest Lodge's Application for Correction of Erroneous Action with Respect to a Tax Attribute. Please file the Demurrer, Memorandum, Counterclaim and Answer at your earliest convenience. If you have questions, please call me at 804 225 3373.

Thank you for your assistance in this matter.

Sincerely,

John Patrick Griffin
Senior Assistant Attorney General

Enclosures
Cc: Craig D. Bell, Esquire
William G. Broaddus, Esquire
J. Christian Tennant, Esquire
William J. White, Assistant Commissioner

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

FOREST LODGE, LLC, A VIRGINIA
LIMITED LAIBILITY COMPANY,
Applicant,

v. Law No. 011-654

COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF TAXATION,

Defendant,

DEMURRER

COMES NOW, the Commonwealth of Virginia, Department of Taxation ("Tax") and submits its Demurrer to the Application for Correction of Erroneous Action with Respect to a Tax Attribute (the "Application") filed by Forest Lodge, LLC, a Virginia limited liability company ("Applicant"), as follows:

The Application establishes the following facts:

A. By deed recorded in Deed Book 3835, page 706, in the Clerk's Office of this Court on December 30, 2009, Applicant sold real property located in Albemarle County, and identified in the Application as "Biscuit Run," to the Commonwealth of Virginia, Department of Conservation and Recreation (the "Deed"). App., Ex. A.[1]

B. The Commonwealth of Virginia, Department of Conservation and Recreation, paid Applicant $9,800,000 as consideration for the December 30, 2009 conveyance of Biscuit Run. App. Ex. A.

[1] "App." references are to the specified Paragraphs in, and Exhibits attached to, the Application.

C. According to the Recording Receipt issued by the Clerk of this Court upon the recordation of the Deed, Applicant paid $9,800 ($4,900 for the Commonwealth's portion and $4,900 for the County's portion) as the Grantor's tax contemplated by Va. Code §58.1-802A. App. Ex. A.

D. Section 58.1-802A of the Va. Code states in relevant part,

> "In addition to any other tax imposed under ... this chapter, a tax is hereby imposed on each deed ... by which lands ... sold [are] ... transferred or otherwise conveyed to ... the purchaser .... The rate of the tax, when the consideration or value of the interest, whichever is greater exceeds $100 ... shall be 50 cents for each $500 or fraction thereof .... The tax imposed by this section shall be paid by the grantor.... No such deed ... shall be admitted to record without certification of the clerk of the court ... that the tax imposed by this section has been paid."

E. By calculating the grantor's tax based on the consideration paid, *i.e.*, $9,800,000, for the conveyance of the property, Applicant represented that the value of Biscuit Run on December 30, 2009 did not exceed $9,800,000.

F. Just as Applicant's tax liability under Va. Code §58.1-802A derives from the value of Biscuit Run on December 30, 2009, the value of Biscuit Run on December 30, 2009 also determines the amount of income tax credits available under Va. Code §58.1-512A when Applicant conveyed Biscuit Run for conservation purposes. Nothing under Virginia law would countenance a taxpayer's limiting its tax liability under Va. Code §58.1-802A by undervaluing property it conveyed and subsequently valuing that same property as of the same date at a significantly greater value to maximize the income tax credits purportedly available under Va. Code §58.1-512A. Thus, Applicant's representation of the value of Biscuit Run for purposes of its recording tax liability under Va. Code §58.1-802A constitutes an admission of the value of Biscuit Run for

determining the aggregate value of the state income tax credits available under Va. Code §58.1-512A.

G. Prior to the filing of this action Tax issued income tax credits to Applicant based on Tax's position that on December 30, 2009, the value of Biscuit Run did not exceed $39,000,000. Applicant asks this Court to order Tax to issue additional income tax credits based on a December 30, 2009 value of Biscuit Run of $87,700,000 rather than $39,000,000. However, Applicant has admitted that the value of Biscuit Run on December 30, 2009 did not exceed $9,800,000, and that value is consistent with Tax's position in this matter. Thus, there is no live controversy between the parties. Indeed, given Applicant's admission as to the value of Biscuit Run, all issues purportedly raised in the Application are non-justiciable and this Court must dismiss the Application.

WHEREFORE, this Court should uphold Tax's Demurrer and dismiss the Application with prejudice.

COUNTERCLAIM

If this Court denies its Demurrer, then pursuant to Rule 3:9 of the Rules of the Virginia Supreme Court, Tax submits its Counterclaim to the Application filed by Applicant, as follows:

The Application as filed establishes the following facts:

(a) By deed recorded in Deed Book 3835, page 706, in the Clerk's Office of this Court on December 30, 2009, Applicant sold real property located in Albemarle County, and identified in the Application as Biscuit Run, to the Commonwealth of Virginia, Department of Conservation and Recreation (the "Deed"). App., Ex. A.

(b) The Commonwealth of Virginia, Department of Conservation and Recreation, paid Applicant $9,800,000 as consideration for the December 30, 2009 conveyance of Biscuit Run. App. Ex. A.

(c) According to the Recording Receipt issued by the Clerk of this Court upon the recordation of the Deed, Applicant paid $9,800 ($4,900 for the Commonwealth's portion and $4,900 for the County's portion) as the Grantor's tax contemplated by Va. Code §58.1-802A. App. Ex. A.

(d) Section 58.1-802A of the Va. Code states in relevant part,

> "In addition to any other tax imposed under ... this chapter, a tax is hereby imposed on each deed ... by which lands ... sold [are] ... transferred or otherwise conveyed to ... the purchaser .... The rate of the tax, when the consideration or value of the interest, whichever is greater exceeds $100 ... shall be 50 cents for each $500 or fraction thereof .... The tax imposed by this section shall be paid by the grantor.... No such deed ... shall be admitted to record without certification of the clerk of the court ... that the tax imposed by this section has been paid."

(e) By calculating the grantor's tax based on the consideration paid, *i.e.*, $9,800,000, for the conveyance of the property, Applicant represented that the value of Biscuit Run on December 30, 2009 did not exceed $9,800,000.

(f) If, as Applicant now claims, on December 30, 2009, the value of Biscuit Run exceeded $9,800,000, the deed to the Commonwealth of Virginia, Department of Conservation and Recreation was improperly recorded. Additionally, Applicant significantly underpaid the tax of Va. Code §58.1-802A.

(g) Virginia courts have the power to correct tax assessments based on the evidence of record in matters pending before them. Va. Code §58.1-1826. If this Court allows Applicant to proceed on its claim that the value of Biscuit Run was $87,700,000

on December 30, 2009, the Application and Exhibits thereto establish a $78,000 underpayment of the recording tax required by Va. Code §58.1-802A.

(h) Based on Paragraphs (a) through (g), Tax asks this Court to assess Applicant with $78,000 in unpaid recordation taxes, together with statutory interest thereon from December 30, 2009. Tax also asks this Court to consider the further assessment of the 100% penalty under Va. Code §58.1-812C if Applicant is not able to establish that the $78,000 underpayment of tax was not false or fraudulent with the intent to evade a tax.

WHEREFORE, since if this Court allows Applicant to attempt to claim that the value of Biscuit Run was $87,700,000, recording tax should have been paid on that amount, Tax asks this Court to require Applicant to immediately pay $86,526.18[2] into this Court pending the resolution of this matter, to be disbursed as follows: If the value of Biscuit Run as finally determined by this Court exceeds $9,800,000, but is less than $87,700,000 Tax asks that this Court order payments from the $86,526.18 in the amount of the actual underpayment in the grantor's tax, together with statutory interest thereon and any appropriate penalty, with one-half of such sum paid to the Commonwealth and one-half to the Clerk of this Court, and the remainder, if any, paid to Applicant. If this Court ultimately finds that the value of Biscuit Run as of December 30, 2009 was $87,700,000, Tax asks that the $86,526.18, with any additional interest, be paid one-half to the Commonwealth and one-half to the Clerk of this Court. Finally, Tax asks that this Court require Applicant to post a $100,000 bond with this Court to insure the payment of the cost of penalties, if any, and interest with any such payment to be divided equally between the Commonwealth and the Clerk of this Court.

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[2] The underpayment in tax, $78,000, plus statutory interest from December 30, 2009 to November 18, 2011, $8,526.18 totals $86,526.18.

ANSWER

If this Court denies Tax's Demurrer as set forth above, Tax submits its Answer to the Application as follows:

1. In response to the allegations of Par. 1 of the Application, Tax states only that as of November 2, 2011, the records of the State Corporation Commission indicate that the status of Forest Lodge, LLC is "active."

2. In response to the allegations of Par. 2 of Application, Tax states that according to the Virginia Tax Form LPC-1 filed by Forest Lodge, LLC the address of the LLC is P.O. Box 5590, Charlottesville, VA 22905.

3. Tax does not have sufficient information to admit or deny the allegations of Par. 3 of the Application and therefore Tax denies them generally.

4. Tax admits the allegations contained in Pars. 4 & Par. 6 of the Application.

5. Par. 5 of the Application contains conclusions of law which Tax is required to neither admit nor deny. Tax states, however, as more fully explained in Tax's Demurrer submitted herewith, that the Application does not raise justiciable issues within the power of this Court to resolve.

6. Pars. 7 through 14, inclusive, of the Application contain conclusions of law which Tax is required to neither admit nor deny.

7. Tax denies the allegations in Par. 15 of the Application.

8. Pars. 16 through 18, inclusive, of the Application contain conclusions of law which Tax is required to neither admit nor deny.

9. Tax states that it has the power to require the submission of information over and above that included on or with Form LPC-1, and therefore, denies the allegations in Par. 19 of the Application.

10. Tax does not have sufficient information to admit or deny the allegations of Pars. 20, 22 and 23 of the Application and therefore Tax denies them generally.

11. Because the recorded deeds to Applicant and the Commonwealth show (a) that the land conveyed to the Commonwealth was a portion of land originally acquired by Applicant, and (b) a discrepancy in the recording date on the deed to Applicant and the Applicant's closing date on its purchase per the Application, Tax does not have sufficient information to admit or deny the allegations in Pars. 21 and 24.

12. Tax does not have sufficient information to either admit or deny the allegations of Pars. 25 through 31, inclusive, of the Application and therefore Tax denies them generally.

13. In response to the allegations of Par. 32 of the Application Tax states that on December 30, 2009, Applicant's Deed, dated December 28, 2009, conveying "Biscuit Run" to the Commonwealth was recorded in the Clerk's Office of Albemarle County.

14. Tax admits the allegations of Par. 33 of the Application.

15. Tax does not have sufficient information to admit or deny the allegations of Par. 34 of the Application and therefore Tax denies them generally.

16. Tax denies the allegations of Par. 35 of the Application.

17. In response to the allegations of Par. 36 of the Application Tax admits only that it received the Form attached as Exhibit A to the Application.

18. In response to the allegations of Par. 37 of the Application Tax admits only that Applicant's Form LPC-1 as originally received by Tax included several Exhibits.

19. Par. 38 of the Application contains conclusions of law which Tax is required to neither admit nor deny.

20. In response to the allegations of Pars. 39 and 40 of the Application Tax admits only that it received the letter attached as Exhibit B to the Application. Tax notes that the letter does not purport to establish a dollar amount for any conservation value.

21. In response to the allegations of Par. 41 of the Application Tax states that the Piedmont Appraisal estimated that the value of Biscuit Run was $87,700,000 as of December 30, 2009.

22. Tax does not have sufficient information to admit or deny the allegations of Par. 42 of the Application and therefore Tax denies them generally.

23. Par. 43 of the Application contains conclusions of law which Tax is required to neither admit nor deny.

24. Par. 44 of the Application contains conclusions of law which Tax is required to neither admit nor deny. Tax also notes that even though an appraisal may meet the minimum requirements to be considered "qualified" that does not mean that it necessarily establishes or reflects the value of the property.

25. Tax does not have sufficient information to admit or deny the allegations of Par. 45 of the Application and therefore Tax denies them generally.

26. Pars. 46 and 47 of the Application contain conclusions of law which Tax is required to neither admit nor deny. Tax notes, however, that due to the consequences for appraisers that follow a determination by Tax that an appraisal is false or fraudulent, as a

general rule Tax does not make such a determination the first time it reviews an appraisal by a particular appraiser.

27. Tax admits the allegations of Par. 48 of the Application.

28. In response to the allegations of Par. 49 of the Application Tax states that as indicated above because of the consequences for appraisers that follow a determination by Tax that an appraisal is false or fraudulent, as a general rule Tax does not make such a determination the first time it reviews an appraisal by a particular appraiser and therefore as of September 21, 2010, neither Tax nor Larry Durbin was prepared to label the Piedmont Appraisal either false or fraudulent.

29. In response the allegations of Par. 50 of the Application Tax states that Larry Durbin indicated that he believed the Piedmont Appraisal overestimated the value of the Biscuit Run and asked something along the lines of why would Applicant sell property worth $87,700,000 for $9,800,000?

30. Tax admits the allegations of Par. 51 of the Application.

31. Tax does not have sufficient information to admit or deny the allegations of Par. 52 of the Application and therefore Tax denies them generally.

32. In response to the allegations of Pars. 53 and 54 of the Application Tax denies that the referenced sales are "comparable" and notes that an Amended Piedmont Appraisal lists more than 5 sales.

33. Tax does not have sufficient information to admit or deny the allegations of Par. 55 of the Application and therefore Tax denies them generally, specifically denies that the referenced sales are "comparable" and notes that an Amended Piedmont Appraisal lists more than 5 sales.

34. Tax does not have sufficient information to admit or deny the allegations of Pars. 56 through 58, inclusive, of the Application and therefore Tax denies them generally.

35. In response to the allegations of Par. 59 of the Application Tax states that the Piedmont Appraisal assumed the stated number of units and affordable units for purposes of reaching its valuation.

36. In response to the allegations of Par. 60 of the Application Tax states only that it sent Applicant a letter, a copy of which is attached as Exhibit C to the Application.

37. In response to the allegations of Par. 61 of the Application Tax notes that its letter mentioned two appraisals, both of which estimated the value of Biscuit Run at significantly less than $87,700,000.

38. In response to the allegations of Par. 62 of the Application Tax states that its representatives did not consider the VDOT appraisal to be a qualified appraisal but that since both appraisals identified in Exhibit C valued the property at significantly less than Applicant's claimed value, that discrepancy contributed to Tax's decision to question Applicant's valuation.

39. In response to the allegations of Par. 63 of the Application Tax states only that an appraisal with an effective date of December 30, 2009 by Lawrence Salzman of Salzman Real Estate Services, Inc. was considered as a part of Tax's determination of the appropriate income tax credits to issue to Applicant.

40. In response to the allegations of Par. 64 of the Application Tax admits that Salzman Real Estate Services, Inc. is located in Richmond, Virginia, but denies the remainder of that paragraph.

41. Tax admits the allegations of Par. 65 of the Application.

42. In response to the allegations of Par. 66 of the Application Tax states that Mr. Salzman has previously represented Tax as an attorney and has acted as a consultant for Tax with respect to land preservation credits claimed by other taxpayers.

43. In response to the allegations of Par. 67 of the Application Tax states that the Salzman Appraisal estimated that the fair market value of Biscuit Run as of December 30, 2009 was $39,000,000.

44. In response to the allegations of Par. 68 of the Application Tax states that a sales comparison approach and an income/subdivision development approach were among the methodologies Mr. Salzman considered in preparing his appraisal.

45. Tax denies the allegations of Pars. 69 through 76, inclusive, of the Application.

46. Tax does not have sufficient knowledge to admit or deny the allegations in Par. 77 of the Application and therefore denies them generally.

47. Tax denies the allegations of Pars. 78 and 80 of the Application.

48. In response to the allegations of Par. 79 of the Application Tax states that a subdivision development approach was among the methodologies Mr. Salzman considered in preparing his appraisal.

49. In response to the allegations of Par. 81 of the Application Tax states that Mr. Salzman discussed discount rates with Mr. Van Epp but denies that Mr. Salzman's determination of an appropriate discount rate was limited to or overly influenced by the discussions with Mr. Van Epp.

50. Tax does not have sufficient knowledge to admit or deny the allegations in Par. 82 of the Application and therefore denies them generally.

51. Tax denies the allegations of Pars. 83 and 84 of the Application.

52. To the extent that the allegations in Par. 85 of the Application suggest that Tax uses or has used arbitrarily high discount rates, Tax denies those allegations. Tax states that discount rates can play a role in the appraisal process.

53. Tax denies the allegation of Pars. 86 and 89 of the Application.

54. In response to the allegations of Par. 87 of the Application Tax agrees that on September 21, 2010 Applicant provided Tax with a written statement purportedly by Mr. Van Epp but notes that Mr. Van Epp was not present to discuss or explain the actions attributed to various persons in the written statement.

55. Tax does not have sufficient knowledge to admit or deny the allegations in Par. 88 of the Application and therefore denies them generally.

56. In response to the allegations of Par. 90 of the Application Tax states that a determination of an appropriate absorption rate takes into account several factors, only one of which is units available for development. Thus Mr. Salzman considered factors in addition to units available for development.

57. Tax denies the allegations of Pars. 91, 94 and 97 through 100, inclusive, of the Application.

58. Tax does not have sufficient knowledge to admit or deny the allegations in Pars. 92, 93 and 96 of the Application and therefore denies them generally.

59. Tax denies the allegations of Par. 95 of the Application.

60. In response to the allegations of Par. 101 of the Application Tax states that in accordance with its previously noted policy concerning appraisals submitted to Tax by appraisers whose work Tax has not previously analyzed, while Tax has not stated that the Piedmont Appraisal is false or fraudulent, Tax believes that the Piedmont Appraisal is clearly erroneous but presently lacks evidence of intent and other attributes necessary to determine whether it is false or fraudulent. In any event, Tax does not believe it presents an accurate estimate of the value of Biscuit Run.

61. Tax denies the allegations of Pars. 102 through 107, inclusive, of the Application.

62. In response to the allegations of Par. 108 of the Application Tax admits that it received a copy of Exhibit D to the Application.

63. In response to the allegations of Par. 109 of the Application Tax states that Applicant filed this action before Tax issued a determination in the Applicant's administrative appeal.

64. In response to the allegations of Par. 110 of the Application Tax states that it did hire Samuel B. Long to appraise Biscuit Run as of December 30, 2009.

64. In response to the allegations of Par. 111 of the Application Tax states that Samuel B. Long's Appraisal estimates that the value of Biscuit Run as of December 30, 2009 was $32,200,000.

65. In response to the allegations of Par. 112 of the Application Tax states that the Long Appraisal utilized a sales comparison methodology and did not use cost or income capitalization methodologies.

66. In response to the allegations of Par. 113 of the Application Tax states that upon analysis Samuel B. Long concluded that: limitations associated with the income capitalization approach under then current market conditions rendered that methodology likely to produce a speculative estimate of the value of Biscuit Run as of the effective date of the appraisal; the cost approach was inappropriate for unimproved land.

67. In response to the allegations of Pars. 114 through 117, inclusive, of the Application Tax agrees that among the factors and conditions affecting the value of Biscuit Run, the Long Appraisal analyzed the sales of ten comparable properties; that the comparable properties were located in Henrico Co. (1), Botetourt Co. (1), Bedford Co. (1), Orange Co. (1), Culpepper Co. (1) and Chesterfield Co. (5). Tax further states that Samuel B. Long found no sales of properties comparable to Biscuit Run within the immediate area of Biscuit Run.

68. In response to the allegations of Par. 118 of the Application Tax agrees that the adjustments Samuel B. Long made in analyzing the sales of the properties in Henrico and Chesterfield Counties to render those sales comparable to the subject property, Biscuit Run, did not include a factor attributable solely to the fact that the properties were not in Albemarle County.

69. In response to the allegations of Par. 119 of the Application Tax states only that Mr. Long did not interview anyone associated with Applicant to formulate his Appraisal Report but notes that Samuel B. Long obtained and considered what he believed to be adequate background information, including but not limited to surveys, the Neighborhood Model District rezoning applications and approvals, post rezoning development plans and the Biscuit Run Code of Development.

70. Tax does not have sufficient knowledge to admit or deny the allegations in Pars. 120 through 123, inclusive, 125 and 128 through 137, inclusive, of the Application and therefore denies them generally.

71. In response to the allegations of Par. 124 of the Application Tax states that the original AGI Appraisal estimated that as of December 30, 2009, the value of Biscuit Run was $86,500,000.

72. In response to the allegations of Par. 126 and 127 of the Application Tax denies that the sales relied on in the AGI Appraisal were comparable sales.

73. Tax denies the allegations of Pars. 138 and 139 of the Application.

74. To the extent that any allegation of fact contained in the Application is not expressly admitted herein, Tax denies it generally.

75. Tax denies that Applicant is entitled to any relief in this matter.

WHEREFORE, Tax requests that if appropriate, this Court grant the relief requested in Tax's Counterclaim or dismiss the Application with prejudice.

By: _____

John Patrick Griffin, Va. Bar 19852
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
Telephone (804) 225 3373
Fax (804) 786 9907

Counsel for the Commonwealth of Virginia,
Department of Taxation

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Demurrer, Counterclaim and Answer was sent to the following by U.S. Mail, postage prepaid, on November 18, 2011:

Craig D. Bell, Esquire
William G. Broaddus, Esquire
J. Christian Tennant, Esquire
McGuire Woods LLP
One James Center
901 East Main Street
Richmond, VA 23219-4030

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

FOREST LODGE, LLC, A VIRGINIA
LIMITED LAIBILITY COMPANY,
Applicant,

v. Law No. 011-654

COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF TAXATION,

Defendant,

MEMORANDUM SUPPPORTING DEMURRER

COMES NOW, the Commonwealth of Virginia, Department of Taxation ("Tax") and submits its Memorandum Supporting Demurrer to the Application for Correction of Erroneous Action with Respect to a Tax Attribute (the "Application") filed by Forest Lodge, LLC, a Virginia limited liability company ("Applicant"), as follows:

ARGUMENT

A. Controlling Facts. On December 30, 2009, Applicant conveyed approximately 1,194 acres in Albemarle County, known as Biscuit Run, to the Commonwealth of Virginia, Department of Conservation and Recreation and received as consideration therefor $9,800,000. Because the consideration received exceeded $100, Applicant was obligated to pay recording taxes for the privilege of the recording the deed in the land records of Albemarle County. That recording tax is based on the greater of the consideration paid or the value of the property conveyed and is calculated as "50 cents for each $500 or fraction thereof." Va. Code §58.1-802A. Upon recording the deed Applicant paid $9,800 as the tax due under Va. Code §58.1-802A. Application, Ex. A.

Thus, Applicant based the tax on the consideration received and thereby represented that the value of Biscuit Run was not greater than $9,800,000.

Section §58.1-512A of the Va. Code governs Applicant's claim for state income tax credits based on the conveyance of Biscuit Run to the Commonwealth. Those credits derive from the value of the land conveyed for conservation purposes. Applicant implicitly agrees that the controlling date for valuing the property for purposes of determining credits available under Va. Code §58.1-512A is December 30, 2009. Application Exhibit A & Application ¶¶ 37 & 120. Hence, the value of Biscuit Run on the date of the conveyance of the property, controls both the calculation of Applicant's tax liability under Va. Code §58.1-802A and the amount of any credits which Applicant might legitimately claim under Va. Code §58.1-512A.

B. Judicial Estoppel. Judicial estoppel prevents a party from relying on an interpretation of specific facts to obtain a favorable ruling and subsequently interpreting the same facts differently in the same case or proceeding. *Bentley Funding Group, LLC v. SK&R Group, LLC*, 269 Va. 315, 325-27, 609 S.E. 49, 54-55 (2005). Here qualifying for tax credits under §58.1-512A requires the conveyance of an interest in property and the recording of the deed evidencing such conveyance constitutes an integral part of the process. As noted above the value of the property conveyed, as of the date of the conveyance, determines both the tax liability for recording tax purposes and the resulting tax benefit, *i.e.*, the amount of the income tax credits. Determining the value of property presents a question of fact. Thus, Applicant cannot assert that on December 30, 2009 the value of Biscuit Run did not exceed $9,800,000 and significantly limit its recording tax

liability and later claim that as of that same date, that same property had a value of $87,700,000 and significantly inflate its value when claiming Virginia income tax credits.

Since the recording tax is mandatory and Applicant has enjoyed the benefits of recordation, Applicant is estopped from claiming that the value of Biscuit Run on December 30, 2009 was more than $9,800,000. Nothing under Virginia law would countenance a taxpayer's limiting its tax liability under Va. Code §58.1-802A by undervaluing property it conveyed and subsequently valuing that same property as of the same date at a significantly greater value to maximize the income tax credits purportedly available under Va. Code §58.1-512A. Thus, Applicant's representation of the value of Biscuit Run for purposes of its recording tax liability under Va. Code §58.1-802A also determines the value of Biscuit Run for calculating the aggregate value of the state income tax credits available under Va. Code §58.1-512A.

C. Non-Justiciability. Court's are empowered "to decide actual controversies ... and not to give opinions on moot questions or abstract propositions ... which cannot affect the matter in issue in the case before it." *Potts v. Mathieson Alkali Works*, 165 Va. 196, 225, 181 S.E. 521, 533 (1935). More specifically, the Virginia Supreme Court in *Hankins v. Town of Virginia Beach*, 182 Va. 642, 644, 29 S.E.2d 831, 832 (1944), adopted the holding in *Mills v. Green,* 159 U.S. 651, 653 (1895), and quoted from that decision, "The duty of this court, as of every other judicial tribunal, is to decide actual controversies ... and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." The absence of a live controversy renders a case moot. When a request for

relief would have no substantive impact on the parties, it does not present a live controversy. *Va. Beach v. Brown*, 858 F. Supp. 585, 588 (E.D.Va. 1994).

In its prayer for relief Applicant asks this Court to find that the value of Biscuit Run as of December 30, 2009 was $87,700,000, to order Tax to issue all credits that Applicant requested based on that valuation of $87,700,000 and for any additional relief this Court deems appropriate. Nevertheless as noted, Applicant cannot claim that the value of Biscuit Run exceeds $9,800,000. During the administrative proceedings Tax's position was that the value of Biscuit Run did not exceed $39,000,000. Obviously, Tax is willing to accept $9,800,000 as the value of Biscuit Run on December 30, 2009, and Applicant cannot claim that it had a greater value. Accordingly, there is no live controversy between the parties and the Application is non-justiciable.

WHEREFORE, Tax asks this Court to dismiss the Application with prejudice.

By: _____

John Patrick Griffin, Va. Bar 19852
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Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
Telephone (804) 225 3373
Fax (804) 786 9907

Counsel for the Commonwealth of Virginia,
Department of Taxation

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Memorandum Supporting Demurrer was sent to the following by U.S. Mail, postage prepaid, on November 18, 2011:

Craig D. Bell, Esquire
William G. Broaddus, Esquire
J. Christian Tennant, Esquire
McGuire Woods LLP
One James Center
901 East Main Street
Richmond, VA 23219-4030