

# COMMONWEALTH OF VIRGINIA



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## Sixteenth Judicial Court

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January 15, 2021

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Re: Regulus Books, LLC, v. City of Charlottesville

Dear Counsel,

Thank you for your thoughtful well written memoranda and oral arguments. I have reviewed the documents and exhibits filed by the parties and considered your oral arguments. Please note that the ruling that follows resolves all issues raised in the motions for summary judgement filed by Plaintiff and Defendant.

As you know a motion for summary judgement is defined in Virginia Supreme Court Rule 3:20. In general, the motion turns purely on questions of law. Summary judgement may not

be granted if there is any genuine dispute concerning any material fact. As evidenced by the competing Motions for Summary Judgement filed in this matter the Court finds that there is no genuine dispute concerning any material fact. The Court must accept as true those inferences from the facts that are most favorable to the nonmoving party, unless the inferences are forced, strained, or contrary to reason. Fultz v. Delhaize America, Inc., 677 S.E.2d 272, 278 Va. 84 (2009), (quoting Dickerson v. Fatehi, 253 Va. 324, 327, 484 S.E.2d 880, 882 (1997); Carson v. LeBlanc, 245 Va. 135, 139-40, 427 S.E.2d 189, 192 (1993)).

## FACTS AND PROCEDURAL HISTORY

Plaintiff, Regulus Books, LLC, is a Virginia limited liability company whose sole member and owner is Corbin A. Klug. Regulus Books, LLC is a business. Mr. Klug lives and works in Charlottesville. Klug is an author and Regulus holds all rights to Mr. Klug's books. Mr. Klug has been writing fulltime since 2011. Regulus has no employees and does not maintain a storefront. Regulus is not a publisher of Mr. Klug's own works, as such Regulus has never offered goods and/or services for sale in Charlottesville.

On July 24, 2018, the City's Commissioner of Revenue sent a letter to Mr. Klug requesting information regarding Regulus' business income. The Commissioner's letter explained that the request was triggered by the filing of a Schedule C tax form reporting business income. Mr. Klug responded to the request for information on August 10, 2018. Mr. Klug confirmed that Regulus filed a Schedule C with his tax return but did not agree that his employment as a freelance author required a license from the City. The City disagreed and taxed Regulus' gross receipts pursuant to the Charlottesville City Code.

The City chose to tax Regulus under the catchall provision at a rate of \$0.36 per \$100 of gross receipts. Regulus objected to this tax and has requested relief in this Court. The City has opposed this request for relief. Regulus complained that the City Code imposed an impermissible burden upon speakers and was therefore in violation of the First Amendment to the United States Constitution. Regulus further argued the City Code was unconstitutionally vague as Regulus could not find his business listed in the City Code. The City demurred as to both issues. The Court overruled the demurrer. The City and Regulus filed Motions for Summary Judgement. On October 20, 2020, after oral argument, the Court granted Defendant's Motion for Summary Judgement as to the First Amendment issues raised by the Plaintiff. The Court found that the tax was content neutral as to any speaker and to Regulus Books in specific. As a result, this opinion concerns the remaining legal issue – is the Charlottesville City Ordinance §14-19 unconstitutionally vague as to Regulus Books? Further, does the City Code even apply to Regulus Books, LLC?

## DUE PROCESS AND CONSTITUTIONAL VAGUENESS

The “vagueness claim must be evaluated as the statute is applied to the facts of this case.” Chapman v. United States, 500 U.S. 453, 467 (1991) (citing United States v. Powell, 423 U.S. 87, 92, 96 (1975)). Vagueness is evaluated by first determining whether the “law gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498

(1982) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108–109 (1972)). Second, the law “must provide explicit standards to those who apply them.” Id. This is to prevent subjective application in an arbitrary and discriminatory way. Id.

The City Code contains eight classes of businesses subject to licensure with over 130 occupations and /or professions specifically referenced. Authors such as Mr. Klug and Regulus, the holder of his works, are not referenced in the Code with any specificity. The City, however, classified Regulus under a catch all provision of the Code. Charlottesville City Ordinance §14-19. Section 14-19 taxes “any other repair, personal, or business service not specifically included in other sections of the Code at a rate of \$0.36 per \$100 of gross receipts. City Code §14-19(i)(12). The City Code defines “services” as those services purchased by a customer which do not have physical characteristics, or which are not goods, wares, or merchandise. City Code §14-2. The City has argued that Regulus provides a service or business to his publisher. The Court disagrees. The Court finds the argument that Regulus provides a service to his publisher to be forced, strained, or contrary to reason. Fultz v. Delhaize America, Inc., 677 S.E.2d 272, 278 Va. 84 (2009), (quoting Dickerson v. Fatehi, 253 Va. 324, 327, 484 S.E.2d 880, 882 (1997); Carson v. LeBlanc, 245 Va. 135, 139-40, 427 S.E.2d 189, 192 (1993)).

Instead, the Court relies upon a fundamental principle of statutory construction that *expressio unius est exclusio alterius*, or “where a statute speaks in specific terms, an implication arises that omitted terms were not intended to be included within the scope of the statute.” Conkling v. Com., 612 S.E.2d 235, 45 Va. App. 518 (2005) (quoting Commonwealth v. Brown, 259 Va. 697, 704-05, 529 S.E.2d 96, 100 (2000)). The Court finds that the City cannot tax Regulus under Code Section 14-19, as Regulus Books is neither a service nor a service provider. Mr. Klug/Regulus produces books which have physical characteristics.

Since Regulus does not fit into the “any other repair, personal, or business service” category, the Court moves to consider whether the Code is vague as to Regulus. To answer this question, the Court turns to Williams v. City of Richmond, 177 Va. 477 (1941). Williams operated dental labs in Richmond and challenged the application of the city’s business license tax to his business. Williams was taxed in the city’s catch-all section, as Regulus was in the instant case, the court found the city’s code unconstitutional as to Williams. Justice Gregory writing for the Court stated:

Not only is this catch-all section of the City Tax Code uncertain, but there is no provision for making it certain by any proper authority. The imposition of a license tax on any unnamed business rests solely in the hands of the commissioner of the revenue. The subject of a tax must be determinable from the statute or ordinance and must rest upon the judgment of the legislative body; not upon the whims of a ministerial officer. The intent of the legislative body must be found in the language used. Here the City Council, in enacting § 166, **expressed no intent to lay a tax on dental laboratories**. Intent cannot be presumed, because the Council has never exercised its judgment under § 166, or expressed any purpose to tax the petitioners. The license tax here is solely the result of the action of the

commissioner of the revenue. He, and not the council, has selected the subject of taxation.

[The code] imposing tax must be certain, clear, and unambiguous, especially as to the **subject of taxation and the amount of the tax.**"

Williams, at 487 (emphasis added). See also Dan River Mills, Inc. v. City of Danville, 194 Va. 654, 75 S.E.2d 72 (1953).

The City attempts to distinguish the instant case from Williams by relying upon City of Richmond v. Robert T. Fary, Director of Finance of the City of Richmond. City of Richmond v. Fary, 210 Va. 338, 171 S.E.2d 257 (1969). In Fary, the Virginia Supreme Court found that the imposition of an occupations tax was not unconstitutional. In deciding Fary the court correctly distinguished the Fary decision from Williams. Justice Snead noted – [m]ore recently we have recognized that an occupation tax differs from a true license tax in that an occupation tax is not exacted as a prerequisite to the right to engage in business. [citation omitted.] City of Richmond v. Fary, 210 Va. 338, 171 S.E.2d 257 (1969). The City Code imposes a true license tax.

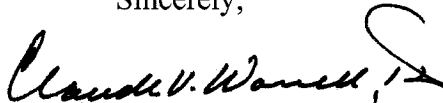
#### Conclusion

Regulus' business cannot be found in the City Code and cannot be taxed under the City Code as City Code §14-1 et seq. is unconstitutionally vague as to Regulus.

The Court grants Plaintiff's Motion for Summary Judgement.

The Court asks counsel for Plaintiff to draft and circulate an Order consistent with this ruling.

Sincerely,

  
Claude V. Worrell, II

cc: Charlottesville City Circuit Court Clerk's Office