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Annual Survey of Virginia Law: Administrative Procedure

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ARTICLES

ADMINISTRATIVE PROCEDURE*

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I.	Introduction	475
II.	Judicial Decisions Affecting Administrative Law	477
	A. Combination of Functions Within an Agency Passes Muster	477
	B. Judicial Deference to the State Agency	481
	C. Standing to Challenge Agency Action	489
	D. Part 2A of the Rules of the Supreme Court of Virginia Are Jurisdictional	491
III.	Legislative Changes Affecting Virginia Administrative Procedure	492
	A. Housekeeping and Clarifying Amendments Enacted	493
	B. Standards for Inspection of Buildings For Asbestos Exempt From VAPA	494
	C. Appellate Courts Empowered to Transfer Appeal	495
	D. VAPA Applies to Chesapeake Bay Criteria	495
IV.	Conclusion	496

I. INTRODUCTION

The express purpose of the Virginia Administrative Process Act (VAPA)¹ is to supplement present and future basic laws that confer authority on agencies to make regulations and decide cases, and to standardize court review thereof except where laws later enacted

* This article addresses legislation from the 1988 session of the General Assembly and decisions of Virginia Courts issued from May 1987 through May 3, 1988.

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1. VA. CODE ANN. §§ 9-6.14:1 to :25 (Repl. Vol. 1985 & Cum. Supp. 1988).

may otherwise expressly provide.² VAPA does not supercede or repeal additional procedural requirements set forth in the basic laws.³ Instead, its purpose is to supplement the procedural requirements of existing laws.⁴ The "basic law" includes provisions in the constitution and statutes of the Commonwealth of Virginia which authorize a state government agency to make regulations or decide cases, or which contain procedural requirements for such activities.⁵

Due to the potential modification of VAPA procedures by legislative changes to an agency's "basic law," it is not possible to provide a comprehensive update on Virginia administrative procedure during the past year without reviewing legislative changes or court interpretations of the "basic laws" for each agency of state government. Such an undertaking is beyond the scope of an annual survey of Virginia law on administrative procedure.⁶ Consequently, this article will address the relatively few legislative changes affecting VAPA itself and the growing body of judicial decisions which continue to give direction and clarification to practitioners of state administrative law in Virginia. Practitioners must review the basic law, as well as VAPA, to ensure that *all* procedures are understood.

2. *Id.* § 9-6.14:3.

3. *Id.*

4. *Id.* revisor's note.

5. *Id.* § 9-6.14:4(C).

6. For example, during the 1988 session, the Virginia General Assembly recodified Title 54 of the Code of Virginia relating to professions and occupations, which includes agencies within the Department of Commerce and the Department of Health Professions. Act of April 11, 1988, ch. 765, 1988 Va. Acts 1016. The General Assembly also recodified Title 10, which includes state agencies relating to conservation, historic preservation, scenic rivers, flood protection and dam safety, shoreline erosion, forestry, environmental quality, air pollution, and the regulation of solid, hazardous and radioactive wastes. Act of April 20, 1988, ch. 891, 1988 Va. Acts 1874. These basic laws must be reviewed to ascertain all procedural requirements when representing clients within the jurisdiction of a state agency. Procedures under the basic law can override procedural requirements under VAPA. See *Commonwealth v. County Utils. Corp.*, 223 Va. 534, 541, 290 S.E.2d 867, 871 (1982); see also Adams, *The Virginia Administrative Process Act: The Yellow Brick Road of State Government*, 36 Va. B. News No. 8 15-18 (Feb. 1988).

II. JUDICIAL DECISIONS AFFECTING ADMINISTRATIVE LAW

A. *Combination of Functions Within Agency Passes Judicial Muster*

A due process challenge to the fundamental method by which many state agencies render case decisions failed in the Virginia Supreme Court this year. In many respects, the court's decision in *Hladys v. Commonwealth*⁷ was the most significant case regarding administrative law in the Commonwealth. In *Hladys*, the supreme court held that there was no per se due process violation resulting from the combination of adjudicative and prosecutorial functions in the Office of the Attorney General. Further, the court found that no per se due process violation existed even though the agency's hearing officer was an official of the same agency that investigated and prosecuted the case, and was a colleague of the chief witness against the accused.⁸ A contrary holding would have caused wholesale changes in the approach employed by the Office of the Attorney General and many state agencies when prosecuting and adjudicating case decisions.

Dr. Hladys had a contract with the State Department of Health to be a "physician-provider" under the Virginia Medical Assistance Program (Medicaid). After an investigation into his billing practices, Dr. Hladys received a contract termination notice. An administrative hearing was conducted at Dr. Hladys' request, resulting in a determination against the physician.⁹ On appeal, the circuit court remanded to the agency for further proceedings.

At the second administrative hearing, an assistant health commissioner was appointed as the hearing officer, an assistant attorney general was designated as counsel to the hearing officer to advise on procedural and evidentiary matters, and a second assistant attorney general prosecuted the case for the Commonwealth. The Commonwealth's chief witness was the deputy health commissioner—the immediate superior of the hearing officer at the State Department of Health. The decision of this second hearing was adverse to Dr. Hladys as was his appeal to the circuit court.

Dr. Hladys' appeal to the Virginia Supreme Court was limited to the question of whether the second administrative hearing was so

7. 235 Va. 145, 366 S.E.2d 98 (1988).

8. *Id.* at 148, 366 S.E.2d at 100.

9. *Id.* at 146, 366 S.E.2d at 99.

procedurally flawed as to deny Hladys due process of law.¹⁰ Hladys contended that the combination of adjudicative and prosecutorial functions in the Office of the Attorney General as well as the appointment of a hearing officer who was an official of the investigating and prosecuting agency, and a colleague of the chief witness against him, was a per se deprivation of due process.

In deciding the merits of this argument, the Virginia Supreme Court analyzed the minimum requirements of constitutional due process for administrative hearings set out in *Goldberg v. Kelly*.¹¹ In *Kelly*, the United States Supreme Court determined that one such requirement is the right to be tried by an impartial decision-maker. The *Kelly* Court noted that an official of the agency involved could serve as the decision-maker, even if the official had some prior involvement with the case, as long as that decision-maker did not participate in making the determination under review.¹²

The Virginia Supreme Court's decision in *Hladys* turned on the presumption of official regularity, or rather, a presumption that public officials have acted correctly.¹³ The court stated that "[w]ithout a showing to the contrary, state administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'"¹⁴ This same presumption was accorded to the assistant attorneys general involved in the *Hladys* case.¹⁵ Although the presumption may be overcome by evidence of bias or improper conduct, such evidence was not offered by Dr. Hladys.¹⁶

While the *Hladys* decision is supported by opinions from the United States Supreme Court and other courts,¹⁷ one wonders if there are any circumstances, absent proof of actual bias, which would prompt the Virginia Supreme Court to hold that a petitioner had been denied his constitutional right to a hearing before an impartial decision-maker. In *Hladys*, the third-ranking administrator within the State Department of Health was required to

10. *Id.*

11. 397 U.S. 254 (1970).

12. *Id.* at 271.

13. *Hladys*, 235 Va. at 149, 366 S.E.2d at 100.

14. *Id.* at 148, 366 S.E.2d at 100 (quoting *Withrow v. Larkin*, 421 U.S. 35, 55 (1974) (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941))).

15. 235 Va. at 149, 366 S.E.2d at 100.

16. *Id.*

17. See cases cited in *Hladys*, 235 Va. 145, 366 S.E.2d 98.

judge the credibility of the second-ranking administrator within the same agency. It is obviously difficult—but theoretically possible—for a subordinate to publicly question an immediate superior's credibility without any fear of consequences.

The Canons of Judicial Conduct adopted by the Virginia Supreme Court require a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned.¹⁸ The Canon states that a judge “should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by his kinship, rank, position or influence of any party or other person.”¹⁹ The application of this standard in the context of *Hladys* would have led in all likelihood to the hearing officer's disqualification. The procedure employed in *Hladys*, while not per se constitutionally infirm, leaves a great deal to be desired from the standpoint of avoiding the appearance of impropriety and ensuring impartial tribunals in state administrative agency proceedings.

Arguably, the General Assembly remedied the hearing officer problem presented in the *Hladys* case by an amendment to VAPA, section 9-6.14:14.1, which relates to the appointment of hearing officers to preside over formal hearings that are conducted pursuant to section 9-6.14:12.²⁰ The amendment directs the use of independent lawyer contractors for the conduct of such hearings.²¹ However, a 1987 amendment to section 1.17-2 of the Code of Virginia authorizes an agency to delegate to any agency officer or employee the duties and responsibilities imposed on the agency by law.²² Therefore, one commentator has noted that since many agency laws require the agency to conduct formal adjudicative hearings, section 1-17.2 seems to repeal by necessary implication section 9-6.14:14.1 as far as limiting an agency's ability to appoint its own presiding officer for a formal hearing.²³ Thus, the *Hladys* hearing officer situation could occur again. Moreover, *Hladys* involved an

18. Va. Sup. Ct. R. pt.6, § III, Canon 3C(a).

19. *Id.*

20. VA. CODE ANN. § 9-6.14:14.1 (Cum. Supp. 1988).

21. *Id.*

22. *Id.* § 1-17.2 (Repl. Vol. 1987).

23. See Jones, *Administrative Procedure: Annual Survey of Virginia Law*, 21 U. RICH. L. REV. 611, 619-21 (1987). In 1988, the General Assembly amended § 1-17.2 and enacted § 2.1-20.01:2. Act of March 24, 1988, ch. 273, 1988 Va. Acts 330 (codified as amended at Va. Code Ann. § 2.1-20.012 (Cum. Supp. 1988)). Section 2.1-20.01:2, however, does not remedy the conflict described by Professor Jones.

informal hearing pursuant to Virginia Code section 9-6.14:11. Most agency proceedings are of the informal variety, and thus, the requirement in section 9-6.14:14.1 to appoint an independent hearing officer for *formal* hearings would not apply to the majority of state administrative hearings conducted in Virginia. Even if an independent lawyer is selected as a hearing officer pursuant to section 9-6.14:14.1, the agency's ability to control the outcome of a case decision is inherent in the current procedure. The agency can—and often does—direct the hearing officer to make findings of fact and conclusions of law, but not to make recommendations for disposition.²⁴ Exceptions can be filed to the hearing officer's findings and conclusions by both the prosecuting assistant attorney general and counsel for the other party.²⁵

The agency retains the power to change the hearing officer's findings of fact and conclusions of law, including findings based upon a determination of the credibility of a witness whom the agency did not observe testify.²⁶ The agency's decision to alter a hearing officer's findings is not governed by any standard such as the "abuse of discretion" of clearly erroneous standards applicable to overturning judge or jury findings.

An agency decision to revise findings of fact is reached typically in executive session on advice from an agency counsel. The agency counsel is not the prosecutor, but a different assistant attorney general who often works side by side within the same section of the Office of the Attorney General as the prosecutor. Thus, findings of fact can be removed from the independent hearing officer's determination, even though he or she may be the only official in a position to personally judge the credibility of a witness.

The current agency hearing system is analogous to one attorney from a private law firm presenting a case before a non-lawyer arbitration panel that is counseled by a second lawyer from the same firm. The only protection available to litigants before state agencies is the presumption of official regularity which we must trust to be well-founded. Governor Gerald L. Baliles, while serving as Attorney General, recognized some of the shortcomings described herein and proposed the enactment of legislation to establish a system by which administrative law judges would conduct agency

24. VA. CODE ANN. § 9-6.14:12(C) (Repl. Vol. 1985 & Cum. Supp. 1988).

25. *Id.*

26. *Id.*

hearings. The bill did not garner enough support in the General Assembly. However, in light of the *Hladys* decision, perhaps a similar proposal will be revived.

B. *Judicial Deference to the State Agency*

Virginia courts have rendered several decisions giving deference to an agency's interpretation of the statutes that it is charged to administer and enforce. In *King Land Corp. v. Board of Supervisors*,²⁷ a divided panel of the court of appeals held that the State Board of Health's failure to promulgate statutorily mandated financial responsibility regulations for a period of seven years did not invalidate a private corporation's state permit to operate a solid waste, nonhazardous landfill. In the dissent, Judge Benton forcefully argued that the majority opinion rendered meaningless the statutory command that the Board of Health *shall* promulgate the regulations.²⁸

The majority based its opinion upon the absence of a specified deadline in the statute for promulgation by the Board of Health.²⁹ In addition, after a review of the legislative history, the majority presumed that the General Assembly was aware that final regulations had not been promulgated³⁰ and deferred to the agency's interpretation of the statutory mandate.³¹ Although, the majority utilized the foregoing statutory construction aids, it claimed it applied the "plain-meaning" rule and declared the statute to be clear and unambiguous.³²

The state permit in *King Land* was challenged by the Board of Supervisors on the ground that the issuance of the permit in the absence of the required regulations on financial responsibility con-

27. 4 Va. App. 597, 359 S.E.2d 823 (1987).

28. *Id.* at 607, 359 S.E.2d at 828.

29. *Id.* at 603, 359 S.E.2d at 826.

30. *Id.* at 604-05, 359 S.E.2d at 826-27.

31. *Id.* at 605, 359 S.E.2d at 827.

32. *See id.* at 605, 359 S.E.2d at 827. *But see* *Brown v. Lukhard*, 229 Va. 316, 330 S.E.2d 84 (1985).

When an enactment is clear and unequivocal, general rules for construction of statutes of doubtful meaning do not apply. Therefore, when the language of an enactment is free from ambiguity, resort to legislative history and extrinsic facts is not permitted because we take the words as written to determine their meaning.

Id. at 321, 330 S.E.2d at 87; 17 MICHIE'S JUR. *Statutes* § 40 (Repl. Vol. 1979 & 1987 Cum. Supp.). Since the court in *King Land* determined the statute to be clear and unambiguous, the evidence of agency interpretation and court deference thereto was inadmissible and inappropriately considered.

stituted an "error of law" under section 9-6.14:17 which required the permit to be set aside under section 9-6.14:19.³³

The majority relied in part upon an affidavit submitted by the agency which stated that the intent of the statute was for the State Board of Health to mirror federal regulations on financial responsibility. The federal regulations were never enacted because of the national difficulty encountered by facility operators in obtaining financial assurances in the market place.³⁴ The majority assumed that the General Assembly was aware of the issuance of seventy-three permits without the required regulations and, over a period of seven years, acquiesced in the agency's interpretation and practice.³⁵

The elementary rule of statutory interpretation is that the construction accorded a statute by public officials charged with its administration and enforcement is entitled to be given great weight by the court. The legislature is presumed to be cognizant of such construction. When it has long continued without change, the legislature will be presumed to have acquiesced therein.³⁶

In the dissent, Judge Benton gave no deference to agency interpretation. He relied instead on what in his view was the clear and unambiguous statutory language.³⁷ Judge Benton felt that the failure of the Board of Health to comply with the statutory mandate within a reasonable period of time rendered the grant of the per-

33. *King Land*, 4 Va. App. at 599, 359 S.E.2d at 824.

34. *Id.* at 604-05, 359 S.E.2d at 826-27. The impact on the court of the fact that seventy-three other permits, issued after enactment of the statute, would be of questionable validity if the trial court's decision had been affirmed should not be overlooked.

35. *Id.* at 605, 359 S.E.2d at 827.

36. *Id.* (quoting *Peyton v. Williams*, 206 Va. 595, 600, 145 S.E.2d 147, 151 (1965)).

37. *Id.* at 606, 359 S.E.2d at 828. Judge Benton stated that:

[T]he Board was given an express mandate to begin the process of promulgating regulations responsive to the General Assembly's concerns. Code § 32.1-182(c) explicitly and uncharacteristically commanded that the Board 'shall make available for public hearing and comment an initial draft' of the regulations '[n]o sooner than October 1, 1980, and no later than March 1, 1981.' The process was to culminate in accordance with the unambiguous command of Code § 32.1-182(A) that '[t]he Board *shall* no sooner than October 1, 1981, promulgate' the final financial responsibility regulations. . . . The statute leads necessarily to the conclusion that the final regulations were to be promulgated 'no sooner than October 1, 1981' but certainly within a reasonable time period subsequent to the statutorily mandated public hearing and comments on the initial draft. . . . The Board had no discretion to elect to forego enacting the regulations.

Id. at 606-07, 359 S.E.2d at 828 (emphasis added); see also *supra* note 32.

mit in the absence of the promulgation of the financial assurance regulations to be a "case decision" not in accordance with law.³⁸

Virginia Circuit Court decisions rendered after *King Land* were less deferential to agency interpretation than the court of appeals. In *Commonwealth ex rel. Commissioner of Labor and Industry v. Southern Brick Contractors*,³⁹ Judge Kulp rejected the agency interpretation of a Federal Occupational Safety and Health Administration (OSHA) regulation that the agency was charged with enforcing. The standard required a guard to be placed on machinery with moving parts if such parts were exposed to contact with employees or otherwise created a hazard. The court noted that the regulation cloaks the state inspector with a degree of discretion in determining if the regulation has been violated.

The court rejected the inspector's interpretation that a citation should be issued if, in the agency's view, the absence of a guard would make an accident more possible. In the court's view, such an interpretation would give the agency unbridled discretion with due process implications and allow application of the standard to situations posing insignificant risks that are beyond the scope of OSHA.⁴⁰ Therefore, the court required the agency to show that the absence of the guard presented a significant risk of harm which in *Southern Brick*, the agency could not do.

A close reading of *Southern Brick* reveals no real erosion to the principle of judicial deference to agency interpretation of regulations. The court's ruling is grounded in the belief that the agency interpretation exceeded the scope of agency authority under the enabling law.⁴¹ The agency interpretation deserved and in this case, received no deference when it exceeded the statutory mandate. Hence, Judge Kulp's decision is consistent with prior judicial decisions.⁴²

In *Red River Coal Co. v. Division of Mined Land*,⁴³ Judge Stump did not accord deference to the agency's interpretation of

38. See *King Land*, 4 Va. App. at 609, 359 S.E.2d at 828-30.

39. 10 Va. Cir. 188 (Henrico County 1987).

40. *Id.* at 190.

41. "Congress was concerned, not with absolute safety, but with the elimination of significant harm." *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980).

42. See 2 AM. JUR. 2D *Administrative Law* §§ 296, 300 (1962); cf. *Commonwealth v. County Utilities*, 223 Va. 534, 546 (1982).

43. 9 Va. Cir. 249 (Wise County 1987).

its enabling act and regulations under the Coal Surface Mining Control and Reclamation Act. The issue in *Red River* was whether the agency had the authority to vacate a notice of violation if it was validly issued. The Commissioner felt that he lacked the statutory authority. The Wise County Circuit Court held that the issue did not involve specialized expertise regarding the regulated industry but instead involved an application of common law principles and statutory interpretation. Therefore, the court determined that the issue fell within an exception to the agency deference rule and accordingly, gave its interpretation little deference.⁴⁴

The two circuit court opinions, *Southern Brick* and *Red River*, demonstrate a refreshing approach by the judiciary to independently scrutinize agency interpretations of law and to apply exceptions to the general rule of judicial deference to agency interpretations. Independent judicial review of questions of law is essential to a fair resolution of disputes with state agencies, particularly in light of VAPA's requirements for judicial deference on factual determinations made by the agency.⁴⁵

The Virginia Court of Appeals in *Bio-Medical Applications, Inc. v. Kenley*⁴⁶ elaborated on the deference accorded to an agency's findings of fact when the substantial evidence test is applied.⁴⁷ The case's major contribution to existing jurisprudence is the consolidation of authorities defining the scope of judicial review with respect to the substantial evidence test, the degree of judicial deference to agency findings, and the presumptions that attach in favor of the agency.⁴⁸

44. *Id.* at 251 (citing K. DAVIS, 2 ADMINISTRATIVE LAW TREATISE, § 7:22 at p. 105 (2d ed. 1978)).

45. VA. CODE ANN. § 9-6.14:17 (Repl. Vol. 1985).

When the decision on review is so to be made on such agency record, the duty of the court with respect to issues of fact is limited to ascertaining whether there was substantial evidence in the agency record upon which the agency as the trier of the facts could reasonably find them to be as it did

Id.

46. 4 Va. App. 414, 358 S.E.2d 722 (1987).

47. *Id.* at 427, 358 S.E.2d at 729. The term "substantial evidence" as used in § 9-6.14:17 refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Virginia Real Estate Comm'n v. Bias*, 226 Va. 264, 269, 308 S.E.2d 123, 125 (1983) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). A reviewing "court may reject agency findings of fact 'only if, considering the record as a whole, a reasonable mind, would necessarily come to a different conclusion.'" *Bias*, 226 Va. at 269, 308 S.E.2d at 125 (quoting B. MEZINES, ADMINISTRATIVE LAW 51.01 (1981)).

48. *Kenley*, 4 Va. App. at 427-29, 358 S.E.2d at 729-30.

If a formal hearing has been conducted pursuant to VAPA,⁴⁹ the determination of factual issues is made upon the whole evidential record compiled by the agency.⁵⁰ The scope of review is limited to a search in the record for substantial evidence to support the agency's decision.⁵¹ Substantial evidence means "'such relevant evidence as a reasonable mind *might* accept as adequate to support a conclusion.'"⁵² A "court may reject agency findings 'only if, considering the record as a whole, a reasonable mind would *necessarily* come to a different conclusion.'"⁵³ The substantial evidence test is designed to give great stability and all but absolute finality to the fact-findings of an administrative agency.⁵⁴

Finally, under this deferential standard, the court must review the record in the light most favorable to the agency's decision. Due account must be taken of the presumption of official regularity, the experience and specialized competence of the agency, and the purposes of the basic law under which the agency has acted.⁵⁵ Is it any wonder that there are few, if any, reported decisions in Virginia of successful challenges to state agency decisions based upon a claim that the agency record lacked substantial evidence to support the agency findings of fact? Not surprisingly, the challenge in *Bio-Medical Applications* was unsuccessful.⁵⁶

In *Johnston-Willis, Ltd. v. Kenley*,⁵⁷ the court of appeals analyzed the State Health Commissioner's denial of a Certificate of Need (CON) giving comprehensive and overdue guidance on the standard of review and degree of judicial deference to be accorded to agency case decisions. The court defines specifically the appropriate standard of review in terms of the degree of deference to be given to agency decisions by distinguishing between whether the issue was legal, factual, or mixed questions of law and fact and whether the issue fell within the area of "experience and specialized competence of the agency."⁵⁸

49. VA. CODE ANN. § 9-6.14:12 (Repl. Vol. 1985 & Cum. Supp. 1988).

50. *Id.* § 9-6.14:17(a).

51. *State Bd. of Health v. Godfrey*, 223 Va. 423, 433, 290 S.E.2d 875, 879-80 (1982).

52. *Bias*, 226 Va. at 269, 308 S.E.2d at 125 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

53. *Id.* (quoting B. MEZINES, ADMINISTRATIVE LAW § 51.01 (1981) (emphasis in original)).

54. *Bias*, 226 Va. at 269, 308 S.E.2d at 125.

55. VA. CODE ANN. § 9-6.14:17; *Virginia ABC Comm'n v. York Street Inn*, 220 Va. 310, 313, 257 S.E.2d 851, 853 (1979).

56. *Kenley*, 4 Va. App. at 432, 358 S.E.2d at 732.

57. 6 Va. App. 231, 369 S.E.2d 1 (1988).

58. *Id.* at 242-46, 369 S.E.2d at 7-11.

Johnston-Willis reiterated that under VAPA, the burden is upon the party challenging the agency's decision to demonstrate an error of law subject to review. These "errors of law" include:

1. Agency failure to accord constitutional right, power, privilege, or immunity;
2. Agency failure to comply with statutory authority, jurisdiction limitations, or right as provided in the basic laws;
3. Agency failure to observe required procedures where the failure is not mere harmless error; and
4. Agency failure to have substantial evidential support for findings of fact.⁵⁹

The court observed that factual issues are generally accorded greater deference to give stability and finality to the fact finding of the agency. Such factual findings are accorded great deference under the substantial evidence standard of review.⁶⁰ However, in the view of the *Johnston-Willis* court, agency determinations of legal issues are accorded less deference.

Thus, where the legal issues require a determination by the reviewing court whether an agency has, for example, accorded constitutional rights, failed to comply with statutory authority, or failed to observe required procedures, less deference is required and the reviewing courts should not abdicate their judicial function and merely rubber-stamp an agency determination.⁶¹

If the legal issue falls outside the area generally entrusted to the agency and is one in which the courts have special competence, i.e., the common law or constitutional law, then there should be little or no deference to the agency interpretation. When the legal interpretation is within the specialized competence of an agency which has been entrusted with wide discretion by the legislature, then the agency's interpretation of the law it administers and enforces is entitled to special weight by the courts.⁶² Thus, the basic law of

59. *Id.* at 241-42, 369 S.E.2d at 6-7; VA. CODE ANN. § 9-6.14:17 (Repl. Vol. 1985).

60. *Johnston-Willis*, 6 Va. App. at 243, 369 S.E.2d at 7; see *supra* notes 47-56 and accompanying text.

61. *Johnston-Willis*, 6 Va. App. at 243, 369 S.E.2d at 7-8.

62. *Id.* at 244, 369 S.E.2d at 8. "[T]he court shall take due account of the presumption of official regularity, the experience and specialized competence of the agency, and the purposes of the basic law under which the agency has acted." VA. CODE ANN. § 9-6.14:17 (Repl. Vol. 1985).

the agency and the purposes it seeks to accomplish are crucial to proper judicial review of an agency decision.⁶³

The *Johnston-Willis* court summarized the standard of review and degree of deference to agency decisions as follows:

In summary, the four issues of law subject to judicial review pursuant to Code § 9-6.14:17 present distinct issues that must be reviewed by the court utilizing separate standards. These separate standards of review dictate the degree of deference, if any, to be given an agency's decision on appeal. Where the issue is whether there is substantial evidence to support findings of fact, great deference is to be accorded the agency decision. Where the issue falls outside the specialized competence of the agency, such as constitutional and statutory interpretation issues, little deference is required to be accorded the agency decision. Where, however, the issue concerns an agency decision based on the proper application of its expert discretion, the reviewing court will not substitute its own independent judgment for that of the agency but rather will reverse the agency decision only if that decision was arbitrary and capricious. Finally, in reviewing an agency decision, the courts are required to consider the experience and specialized competence of the agency and the purposes of the basic law under which the agency acted.⁶⁴

After enunciating these standards, the court analyzed each of the six issues presented, characterized each in accordance with the appropriate standard, and accorded the degree of deference appropriate to its characterization.

In addition to enunciating a comprehensive standard of review and appropriate degrees of deference, the *Johnston-Willis* opinion applied the harmless error doctrine. The court acknowledged that the State Medical Facilities Plan, which was relied upon by the Commissioner in denying the CON, did not comply with the filing requirements of the Virginia Register Act.⁶⁵ The court found that the agency's failure to meet the filing requirements of the Virginia Register Act, although an error of law as defined by section 9-6.14:17 of the Code of Virginia, was mere harmless error since the Plan was merely a statistical update required by the basic law, and

63. *Johnston-Willis*, 6 Va. App. at 244, 369 S.E.2d at 8.

64. *Id.* at 246, 369 S.E.2d at 9.

65. VA. CODE ANN. §§ 9-6.15-6.22 (Repl. Vol. 1985).

did not involve the exercise of agency discretion or substantive changes.⁶⁶

Johnston-Willis also contended that it did not have notice, pursuant to section 9-6.14:11, of all contrary facts in the possession of the agency upon which the Commissioner could rely in making an adverse decision. On two grounds, the court rejected the contention that Johnston-Willis did not have notice of the Commissioner's intention to apply a seventy-five percent occupancy standard for the type of obstetrical unit proposed. First, the court declared that the standard was not a "fact," but a regulatory guideline. As such, section 9-6.14:11 did not require prior notice. Secondly, the court noted that in prior obstetrical unit CON cases, the Commissioner had applied the same standard, and therefore, such prior decisions were public records subject to judicial notice. Hence the court concluded that the Commissioner could act upon the record presented and other matters that are properly received through "official notice."⁶⁷

The court did find that the Commissioner had improperly considered extra-record evidence, but such consideration did not compel a remand to the agency.⁶⁸ Although the court acknowledged that members of an administrative body must base decisions on evidence produced before them, it held that rules of evidence in an administrative proceeding are relaxed and findings will not be reversed solely because extra-record evidence was considered.⁶⁹ To obtain a reversal, the appellant must make "a clear showing of prejudice arising from the admission of such evidence, or unless it is plain that the agency's conclusions were determined by the improper evidence, and that a contrary result would have been reached in its absence."⁷⁰ The court determined that the Commissioner's decision was based upon a multitude of proper factors and that the extra-record evidence was not dispositive.⁷¹

66. *Johnston-Willis*, 6 Va. App. at 248-49, 369 S.E.2d at 10-11.

67. *Id.* at 254-58, 369 S.E.2d at 15-16. *But see* *State Farm Mut. v. Powell*, 227 Va. 492, 497, 318 S.E.2d 393, 395-96 (1984) (party must be afforded an opportunity to dispute judicially noticed facts); *M/V American Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483 (9th Cir. 1983) (court may not take notice of proceedings or records in another case to supply, without formal introduction of evidence, facts essential to support a contention in the case before it); C. FRIEND, *THE LAW OF EVIDENCE IN VIRGINIA*, § 284 (2d. ed. 1983).

68. *Johnston-Willis*, 6 Va. App. at 258, 369 S.E.2d at 16.

69. *Id.*

70. *Id.* at 258, 369 S.E.2d at 16 (quoting *Virginia Real Estate Comm'n v. Bias*, 226 Va. 264, 270, 308 S.E.2d 123, 126 (1983)).

71. *Id.* at 258-59, 369 S.E.2d at 16.

The *Johnston-Willis* decision is a major contribution to the law of judicial review of agency decisions. For the first time, a Virginia court has given comprehensive treatment to the standard of review under VAPA and the degree of judicial deference to be accorded to the multitude of issues raised in administrative appeals. Close scrutiny of *Johnston-Willis* is essential for practitioners of administrative law in Virginia.

C. *Standing to Challenge Agency Action*

The recent trend by the Virginia Supreme Court narrowing the class of plaintiffs meeting the necessary requirements to establish standing to challenge governmental decisions continued in the court of appeals with its decision in *D'Alessio v. Lukhard*.⁷² In this case of first impression, the court determined that D'Alessio, the father of a child alleged to have been sexually abused, did not have standing under VAPA to appeal the ruling of the Commissioner of Social Services expunging the name of the alleged abuser of his daughter from the central registry for child abuse and neglect.⁷³

An investigation by Child Protective Services resulted in a determination that a foundation existed for a complaint by the father that his two-and-one-half year-old daughter had been sexually abused by the boyfriend of his estranged wife. Pursuant to statute,⁷⁴ the boyfriend's name was entered on the central registry as a child abuser. The boyfriend commenced an administrative appeal of which the father received no notice. The father learned of the appeal and submitted a letter and other evidence which resulted in a denial of the boyfriend's appeal to the chief of the Bureau of Child Welfare Services. The boyfriend then appealed to the Commissioner who reversed the prior decisions and expunged the name from the registry. D'Alessio had no notice of the second appeal and only learned of it after the Commissioner rendered his decision.⁷⁵

D'Alessio filed a timely notice and petition for appeal in circuit court, pursuant to VAPA, alleging that as the father of the victim he had a right to participate in the appeal by the boyfriend and that he was aggrieved by the agency decision. The trial court sustained the Commissioner's demurrer to D'Alessio's petition holding

72. 5 Va. App. 404, 363 S.E.2d 715 (1988).

73. *Id.*

74. VA. CODE ANN. § 63.1-248.6(D)(2) (Repl. Vol. 1987).

75. *D'Alessio*, 5 Va. App. at 406, 363 S.E.2d at 717.

that he had no right to participate in the agency process and that he was not an "aggrieved party" within the meaning of the law.⁷⁶

The court adopted a narrow interpretation of D'Alessio's legal interest in the expungement proceedings. While acknowledging that D'Alessio, as a parent, had an understandable interest in the proceeding, "it was not a legal interest sufficient under the law to give him standing to appeal."⁷⁷ The court noted that D'Alessio's rights to pursue other means of relief were not affected. He could still seek injunctive relief against the abuser or seek criminal prosecution. The court also stated that the ruling appealed by the boyfriend was favorable to D'Alessio, and thus, even if he were a proper party, D'Alessio would not have been able to appeal because the agency regulations only provide for appeal of a refusal to purge.⁷⁸

Although the court did not cite the Virginia Supreme Court's recent decision in *Virginia Beach Beautification Commission v. Board of Zoning Appeals*,⁷⁹ the court did cite to *Virginia Association of Insurance Agents v. Commonwealth*,⁸⁰ a case that was followed by the *Beautification Commission* court. The court relied upon the definition of the word "aggrieved" as used in VAPA and defined in *Insurance Agents* as a "substantial grievance, a denial of some personal or property right, legal or equitable, or the imposition upon a party of a burden or obligation."⁸¹ The court noted that D'Alessio was not denied personal or property rights, and no burden or obligation was imposed upon him. Thus, he was not "aggrieved" by the decision and had no standing to appeal.

The *D'Alessio* decision evidences a continuation of what has been described as "judicial reluctance to acquiesce in the trend elsewhere [other than Virginia] recognizing a wider set of interests sufficient for standing."⁸² Read together, *Beautification Commission* and *D'Alessio* restrict access to the courts for the purpose of

76. *Id.*

77. *Id.*

78. The court overlooks the fact that if D'Alessio was a proper party, he would have been entitled to notice and to participate in all further appellate proceedings as an appellee. See Va. Sup. Ct. R. 5:9, 5:17, 5A:6, 5A:12, 2A:2, 2A:4 (1988) (these rules require that notice and petition for appeal be served upon every party to the decision appealed from).

79. 231 Va. 415, 344 S.E.2d 899 (1986).

80. 201 Va. 249, 253, 110 S.E.2d 223, 226 (1959).

81. 4 C.J.S. *Appeal & Error* § 183b (1957), quoted in *Insurance Agents*, 201 Va. at 253, 110 S.E.2d at 226.

82. Jones, *supra* note 23, at 632.

challenging an agency decision to persons who suffer immediate injury to one or more of the following interests: pecuniary, personal, property, ownership, or the imposition of a burden or obligation. If this trend continues, the courts will eliminate any role in protecting the general public interest except as that interest may be identified with governmental action.

D. Part 2A of the Rules of the Supreme Court of Virginia Are Jurisdictional

The court of appeals has held that Part 2A of the Rules of the Supreme Court relating to the time limitations for perfection of an appeal from an agency decision to the circuit court are mandatory and jurisdictional.⁸³ In *Mayo v. Department of Commerce*,⁸⁴ the petitioner filed a notice of appeal within thirty days after entry of the agency decision,⁸⁵ but failed to file a petition for appeal within thirty days thereafter as required by rule 2A:4 of the Rules of the Supreme Court.⁸⁶ After the thirty days elapsed, Mayo filed a motion for an extension of time to file her petition for appeal. The Department's motion to dismiss was granted by the circuit court, which held that the time limitation in rule 2A:4(a) is mandatory and jurisdictional, and that the court is without authority to enlarge or modify the time limitations in the rules.⁸⁷

The court, relying upon supreme court authority interpreting Part 5 of the Rules of the Supreme Court,⁸⁸ held that the failure to present the petition for appeal within the time provided by the rules is fatal. The court found the rationale for dismissing appeals at the appellate level for failure to comply with time requirements equally applicable to appeals to circuit courts from administrative agency decisions:

83. *Mayo v. Department of Commerce*, 4 Va. App. 520, 358 S.E.2d 759 (1987).

84. *Id.*

85. The court noted that the notice of appeal required by rule 2A:2 was filed with the circuit court. The record was unclear as to whether the notice had been filed with the agency secretary as required by the rule. Since the Department did not raise that issue, the court assumed that the notice was timely filed with the agency as required. In light of the court's broad language regarding the mandatory nature of court rules, it is assumed that failure to timely file the notice with the agency would also be grounds for dismissal of the appeal. *Id.* at 522 n.2, 358 S.E.2d at 760 n.2.

86. Mayo's counsel had apparently engaged in some preliminary maneuvers in the circuit court, including an attempt to stay the agency decision, within the thirty-day period. *Id.* at 523, 358 S.E.2d at 760.

87. *Id.*

88. *Condrey v. Childress*, 203 Va. 755, 758, 127 S.E.2d 150, 152 (1962).

The purpose of the specific time limit is not to penalize the appellant but to protect the appellee. If the required papers are not filed in 60 days, the appellee is entitled to assume that the litigation is ended, and to act on that assumption. Litigation is a serious and harassing matter, and the right to know when it is ended is a valuable right.⁸⁹

It has long been assumed by practitioners of administrative law that the reasoning adopted by the supreme court—regarding adherence to rules of court for perfecting appeals to the supreme court—also applies to appeals from state agencies. Although the Virginia Supreme Court has not yet addressed this issue,⁹⁰ lawyers who ignore the mandatory appellate deadlines are advised to keep their malpractice insurance premiums current.⁹¹

III. LEGISLATIVE CHANGES AFFECTING VIRGINIA ADMINISTRATIVE PROCEDURE

The 1988 session of the Virginia General Assembly made relatively minor adjustments to VAPA. Three of the bills amended the exemptions and exclusions section of VAPA.⁹² A fourth bill, while not amending VAPA, added a new section on appellate procedure which reverses the outcome of last year's supreme court decision in *Commonwealth v. Yeatts*.⁹³

Perhaps the most significant legislative action taken by the General Assembly in the area of administrative law was the enactment of the Chesapeake Bay Preservation Act.⁹⁴ Although the Act does not affect VAPA per se, it utilizes procedures under VAPA to exercise unique powers granted to a new State agency, and thus is worthy of mention here.

89. *Avery v. County School Bd.*, 192 Va. 329, 333, 64 S.E.2d 767, 770 (1951).

90. See Adams, *supra* note 6, at 18.

91. But see *Reeves v. Virginia Employment Comm'n*, 10 Va. Cir. 466 (City of Roanoke 1988) (An appeal under the Unemployment Compensation Act filed one day after the mandatory twenty-day filing period expired was allowed to proceed. The court reasoned that mail notification of an agency decision entitled petitioner to at least one more day).

92. VA. CODE ANN. § 9-6.14:4.1 (Cum. Supp. 1988).

93. 233 Va. 17, 353 S.E.2d 717 (1987); See Jones, *supra* note 23, at 635-37.

94. Act of April 9, 1988, ch. 608, 1988 Va. Acts 792 (codified as amended at VA. CODE ANN. §§ 10.1-2100 to -2115 (Repl. Vol. 1988)).

A. Housekeeping and Clarifying Amendments Enacted

The General Assembly became concerned with the problem caused when agency regulations inaccurately cite statutory references. Certain types of agency regulations are exempted from the usual public notice and comment requirements of VAPA for their promulgation.⁹⁵ These exemptions apply to certain non-controversial matters such as regulations pertaining to agency organization, technical corrections to existing regulations, or emergency regulations of limited duration.⁹⁶ The General Assembly responded to concerns that certain agency regulations inaccurately cite statutory references, thereby creating confusion. Consequently, VAPA now requires every agency governed by VAPA to review all Virginia Code references cited within their regulations to insure the accuracy of each section or subsection. The agency must conduct this review annually, or each time a new Virginia Code supplement or replacement volume is issued. Any changes resulting from this review need not comply with the VAPA public notice and comment procedures.⁹⁷

The second amendment placed a maximum twelve-month limitation on emergency regulations adopted without public notice and comment.⁹⁸ Before the change, VAPA merely stated that such emergency regulations would be "limited in duration."⁹⁹ Also, the bill clarified that adopted regulations which are exempt from the public notice and comment provisions of VAPA become effective thirty days after publication of the final regulation in the Virginia Register, or at such later time specified in the final regulation.¹⁰⁰ Thus, such regulations will become effective during the same time-frame governing regulations promulgated pursuant to VAPA. Final emergency regulations are effective upon their filing with the Registrar of Regulations.¹⁰¹

Another housekeeping provision in this bill empowers the Regis-

95. See Va. Code Ann. § 9-6.14:4.1 (Cum. Supp. 1988).

96. *Id.*

97. Act of April 20, 1988, ch. 820, 1988 Va. Acts 1638 (codified as amended at VA. CODE ANN. § 9-6.14:4.1(C)(3) (Cum. Supp. 1988)).

98. Act of March 29, 1988, ch. 364, 1988 Va. Acts 440 (codified as amended at VA. CODE ANN. § 9-6.14:4.1(C)(5) (Cum. Supp. 1988)).

99. VA. CODE ANN. § 9-6.14:4.1(C)(5) (Repl. Vol. 1985).

100. Act of March 29, 1988, ch. 364, 1988 Va. Acts 440 (codified as amended at VA. CODE ANN. § 9-6.14:4.1(C)(5) (Cum. Supp. 1988)).

101. *Id.*

trar to avoid publishing the complete text of the final regulation in the Virginia Register of Regulations if there is no change from the previously published proposed regulation. Also, if the changes can be clearly and concisely explained and reference is made to the issue and page numbers of the Virginia Register where the proposed regulation was previously published,¹⁰² the Registrar need not publish the complete text.

B. Standards for Inspection of Buildings for Asbestos Exempt from VAPA

The Director of the Department of General Services is required to promulgate standards for the inspection of buildings of all types, including public school buildings, for the purpose of identifying the presence of asbestos and the relative health or safety hazard posed by any asbestos found.¹⁰³ Until the 1988 session of the General Assembly took action, it was assumed that such standards came within the VAPA definition of a regulation requiring adherence to VAPA procedures for their promulgation.¹⁰⁴ The General Assembly, however, has specifically exempted the promulgation of such standards from VAPA.¹⁰⁵ The Director is required, however, to adopt procedures providing for written public comment and the consideration of such written comment prior to the adoption of the asbestos inspection standards.¹⁰⁶

These asbestos inspection standards will be applicable to inspections in public schools, hospitals,¹⁰⁷ buildings to be renovated or demolished,¹⁰⁸ condominium conversions,¹⁰⁹ and child-care centers.¹¹⁰ The reason for this VAPA exemption is not clear. It should be noted, however, that recently promulgated asbestos licensing regulations have also been excluded from the public notice and comment requirements of VAPA.¹¹¹

102. Act of March 29, 1988, ch. 364, 1988 Va. Acts 440 (codified as amended at VA. CODE ANN. § 9-6.14:22 (Cum. Supp. 1988)).

103. VA. CODE ANN. § 2.1-526.14 (Repl. Vol. 1987 & Cum. Supp. 1988); *see also* Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. §§ 2641-54 (Supp. IV 1986).

104. VA. CODE ANN. § 9-6.14:4(F) (Repl. Vol. 1985).

105. *Id.* § 2.1-526.14 (Cum. Supp. 1988); *Id.* § 9-6.14:4.1(A)(12).

106. VA. CODE ANN. § 2.1-526.14 (Cum. Supp. 1988).

107. *Id.* § 32.1-126.1.

108. *Id.* § 36-99.7.

109. *Id.* § 55-79.94(A)(5).

110. *Id.* § 63.1-198.01 (Repl. Vol. 1987 & Cum. Supp. 1988).

111. 4 Va. Regs. Reg. 1768-91 (1988).

C. *Appellate Courts Empowered to Transfer Appeal*

In *Commonwealth v. Yeatts*,¹¹² the Virginia Supreme Court held that the proper appellate forum for an appeal from a state agency decision was the court of appeals, not the supreme court.¹¹³ The supreme court found itself without jurisdiction to entertain the Virginia Department of Highways and Transportation's (VDHT) appeal from an adverse trial court decision reversing the state agency's final decision. On oral argument, VDHT asked the court to remand the case to the court of appeals. The supreme court declared itself without sufficient authority to grant the request and dismissed VDHT's appeal.¹¹⁴

The General Assembly supplied the gap in authority by enacting a new statute.¹¹⁵ The statute directs that no appeal, otherwise properly and timely filed, shall be dismissed for want of jurisdiction solely due to filing in the wrong appellate court. According to the statute, the appeal shall be transferred to the appellate court having appropriate jurisdiction, and the transferor court shall allow a reasonable time for the parties to file such amended pleadings as may be necessary for the transferee appellate court to consider the appeal.¹¹⁶ This common sense statute should avoid the harsh result of *Yeatts* and ensure that otherwise meritorious appeals are not dismissed due to confusion as to the jurisdiction of the Commonwealth's appellate courts.

D. *VAPA Applies to Chesapeake Bay Criteria*

The General Assembly attracted considerable attention when it enacted the Chesapeake Bay Preservation Act during the 1988 session.¹¹⁷ The Act established a new agency, the Chesapeake Bay Local Assistance Department, with broad powers to require local governments in "Tidewater Virginia"¹¹⁸ to incorporate general water

112. 233 Va. 17, 353 S.E.2d 717 (1987).

113. *Id.* at 24, 353 S.E.2d at 721.

114. *Id.*

115. Act of March 30, 1988, ch. 382, 1988 Va. Acts 462 (codified as amended at VA. CODE ANN. § 8.01-677.1 (Cum. Supp. 1988)).

116. *Id.*

117. Act of April 9, 1988, ch. 608, 1988 Va. Acts 738, (codified as amended at VA. CODE ANN. §§ 10.1-2100 to -2115 (Cum. Supp. 1988)).

118. "Tidewater Virginia" includes the "Counties of Accomack, Arlington, Caroline, Charles City, Chesterfield, Essex, Fairfax, Gloucester, Hanover, Henrico, Isle of Wight, James City, King George, King and Queen, King William, Lancaster, Mathews, Middlesex,

quality protection measures into their comprehensive plans, zoning ordinances, and subdivision ordinances so as to define and protect areas within Tidewater Virginia designated as "Chesapeake Bay Preservation Areas."¹¹⁹

Of particular interest to administrative lawyers is the fact that the new Department must promulgate all of its regulations, including the criteria to establish the Preservation Areas, in accordance with VAPA.¹²⁰ All enforcement actions taken by the new Department against the affected localities to ensure compliance with the Act must be in accordance with VAPA.¹²¹ The Act requires the Department to develop the criteria and regulations by July 1, 1989, an extraordinary task for a brand new agency.¹²² In order to meet this statutory deadline, the new Department will not have extra time to develop what are certain to be controversial regulations and still be able to navigate the procedural shoals of VAPA.

IV. CONCLUSION

In the past year, Virginia's appellate courts have added greater certainty to the law of judicial review of agency action. The identification of factual versus legal issues and the degree of deference to be accorded agency decisions regarding those issues provides a light to illuminate the dark path lawyers travel when seeking to set aside agency action. In addition, it is reasonably clear that per se constitutional due process challenges to decision making will be unsuccessful. It appears that a challenge to the impartiality of the tribunal will fail in the absence of evidence of actual bias or prejudice. This ruling in particular, may result in attorneys seeking collateral hearings to prove the impartiality of agency-employed hearing officers.

By comparison, the legislative arena was relatively quiet. The General Assembly should be commended for allowing appellate courts to transfer improperly filed appeals. The list of agency and/

New Kent, Northampton, Northumberland, Prince George, Prince William, Richmond, Spotsylvania, Stafford, Surry, Westmoreland, and York, and the Cities of Alexandria, Chesapeake, Colonial Heights, Fairfax, Falls Church, Fredericksburg, Hampton, Hopewell, Newport News, Norfolk, Petersburg, Poquoson, Portsmouth, Richmond, Suffolk, Virginia Beach, and Williamsburg." VA. CODE ANN. § 10.1-2101 (Cum. Supp. 1988).

119. *Id.* §§ 10.1-2103(7)-(8), -2107(A), -2109.

120. *Id.* § 10.1-2103(4).

121. *Id.* § 10.1-2103(10).

122. *Id.* § 10.1-2107(E).

or subject matter exclusions from VAPA for the adoption of regulations has expanded. Surprisingly, asbestos inspection standards—a matter with the potential to arouse public controversy—have been removed from the public notice and comment procedures guaranteed by VAPA. Reconsideration should be given to the criteria employed by the General Assembly when authorizing agencies to foreclose the public from participating fully in the adoption of regulations which will govern them.

In the next several years, attention will remain focused on the clean up of the Chesapeake Bay. The establishment of the Chesapeake Bay Local Assistance Department is a cooperative effort by the State and political subdivisions to protect and reclaim an important national resource. By application of VAPA the State will regulate land use matters that have traditionally been left to local government. This is an experiment that bears watching.

