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Administrative Law

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ARTICLES

ADMINISTRATIVE LAW

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I. INTRODUCTION

There were a number of Virginia legislative and judicial developments in 2002 and 2003 affecting administrative law and procedure. Legislative studies, updated rulemaking procedures, and judicial interpretations of agency decisions all affected the practice of administrative law. Notable changes include the implementation of fast-track rulemaking, the decision to allow direct shipment of alcoholic beverages to Virginia residents, and a new disciplinary standard of simple negligence for licensed health care practitioners.

This article begins by analyzing selected enactments of the 2003 Session of the General Assembly of Virginia that affect administrative law and procedure in the Commonwealth. This article also analyzes decisions of Virginia courts dealing with state administrative procedures decided between June 1, 2002 and June 1, 2003.

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II. THE GENERAL ASSEMBLY

A. *Legislative Studies*

In recent years, the General Assembly has devoted a fair amount of attention to administrative law. The General Assembly undertook a complete recodification of former Titles 2.1 and 9 in 2001, following several years of study by the Virginia Code Commission and its Administrative Law Advisory Committee.[1] Title 2.1, which contained most of the Virginia Code's general provisions relating to the organization of state government, had last been recodified in 1965.[2] Title 9, which included the former Virginia Administrative Process Act ("VAPA"), had never been recodified.[3] The VAPA now stands codified in Virginia Code sections 2.2-4000 to 2.2-4031.[4]

The Code Commission's Administrative Law Advisory Committee ("ALAC") adopted a work plan for the year that includes a proposal to study the use of a central panel of administrative law judges ("ALJs").[5] With few exceptions, Virginia agencies presently use a system of independent hearing officers that is administered by the Executive Secretary of the Supreme Court of Virginia.[6] Hearing officers under the present system are qualified private-sector attorneys.[7] Under the central panel approach, ALJs would be employees of a state agency and would be assigned to decide cases in agencies throughout the Commonwealth.[8] The ALAC proposed to study whether it would be advisable to clarify and improve the procedures related to obtaining judicial review of agency decisions.[9]

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1. REPORT OF THE VA. CODE COMM'N ON RECODIFICATION OF TITLES 2.1 AND 9 OF THE CODE OF VIRGINIA, H. DOC. 51, at 1 (2001), *available at* http://legis.state.va.us/ (last visited Sept. 22, 2003).

2. *See id.*

3. *See id.*

4. VA. CODE ANN. §§ 2.2-4000 to -4031 (Repl. Vol. 2001 & Cum. Supp 2003).

5. *See* ADMIN. LAW ADVISORY COMM., PROPOSED WORK PLAN 1 (July 17, 2002) [hereinafter ALAC PLAN], *available at* http://legis.state.va.us/ (last visited Sep. 22, 2003).

6. *Id.*

7. *Id.*

8. *Id.*; *see also* REPORT OF THE JOINT LEGISLATIVE AUDIT AND REVIEW COMM'N, REVIEW OF THE USE OF GRIEVANCE HEARING OFFICERS, H. DOC. 48, at 73–78 (2000) [hereinafter JLARC REVIEW], *available at* http://legis.state.va.us/ (last visited Sep. 22, 2003).

9. ALAC PLAN, *supra* note 5, at 2.

In 2002 the General Assembly created the Joint Commission on Administrative Rules ("JCAR")—comprised of twelve legislators[10]—to review existing regulations and agency practices, as well as regulations being promulgated, and to make recommendations to the Governor and the General Assembly.[11] The JCAR does not have the power to exercise a legislative "veto." However, the JCAR may exercise the power, previously held only by the standing jurisdictional committees of the General Assembly, to suspend a regulation with the concurrence of the Governor.[12]

The JCAR's power lies in the centralization of political power in a standing commission, rather than the jurisdictional committees of the legislature. While it has the power to review all existing and pending regulations of state agencies, it has no funding and no new staff.[13] As a result, the JCAR's process is complaint-driven.[14] Since its inception, the JCAR has reviewed five issues.[15]

Two of its interventions are notable for their effect on the regulatory process. First, the JCAR reviewed a proposed regulation of the State Corporation Commission ("SCC") authorizing state-chartered banks to acquire controlled subsidiaries engaging in real estate brokerage activities.[16] After meeting with the JCAR, the SCC continued the proceeding to allow the General Assembly to consider the issues during the 2003 Session and scheduled a hearing on the proposed regulation.[17] Second, the JCAR issued a formal objection to the Board of Health's proposed amendments relating to mass sewage disposal systems.[18] The Governor withheld approval of the amendments pending attempts by stakeholders to reach a consensus.[19]

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10. Act of Apr. 6, 2002, ch. 677, 2002 Va. Acts 976 (codified as amended at VA. CODE ANN. §§ 2.2-4014, -4015, -4033 (Cum. Supp. 2003); *id.* §§ 30-73.1 to -73.4 (Cum. Supp. 2003)).

11. VA. CODE ANN. § 30-73.1 (Cum. Supp. 2003).

12. *Id.* § 30-73.3(A)(4) (Cum. Supp. 2003); *see also id.* §§ 2.2-4014, -4015 (Cum. Supp. 2003).

13. *Id.* §§ 30-73.1 to -73.4 (Cum. Supp. 2003).

14. Honorable Frank Wagner, Remarks at the Ninth Annual Administrative Law Conference (Apr. 22, 2003). Wagner is the chairman of the JCAR and a member of the Senate of Virginia.

15. *Id.*

16. *See* 10 VA. ADMIN. CODE § 5-20-50 (2003).

17. Wagner, *supra* note 14.

18. *See* 12 VA. ADMIN. CODE § 5-610-10 (2003).

19. Wagner, *supra* note 14.

B. *Statutes*

1. Fast-Track Rulemaking

The 2003 General Assembly enacted legislation enabling so-called "fast-track rulemaking."[20] Ordinarily, a final regulation may become effective thirty days after it is published in the Virginia Register of Regulations.[21] Emergency regulations are exempted from the delayed effective date requirement.[22] Virginia Code section 2.2-4012(B), as amended, expands the exemption accorded to emergency regulations by allowing for expedition in the case of non-controversial, fast-tracked regulations.[23]

The fast-track law applies to regulations the agency expects to be non-controversial.[24] With the Governor's concurrence and after notice to the applicable standing committees of the legislature, the agency may submit a proposed regulation to the Registrar of Regulations for publication, without having first published a Notice of Intended Regulatory Action and without submitting the proposed regulation to the Department of Planning and Budget for a forty-five day economic impact analysis.[25] The proposed regulation is then subject to the standard sixty-day comment period.[26] Provided that fewer than ten people, and no member of the applicable standing legislative committees or the JCAR object, the regulation becomes effective fifteen days after close of the public comment period.[27] Should such an objection arise, the agency must publish notice of the objection and proceed with the remainder of the normal promulgation process, "with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action."[28]

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20. Act of Mar. 16, 2003, ch. 224, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 2.2-4007, -4012, -4012.1 (Cum. Supp. 2003)).

21. VA. CODE ANN. § 2.2-4013(D) (Repl. Vol. 2001).

22. *Id.* § 2.2-4011(A) (Repl. Vol. 2001).

23. *See id.* § 2.2-4012(B) (Cum. Supp. 2003).

24. *Id.* § 2.2-4012.1 (Cum. Supp. 2003).

25. *See id.* Virginia Code section 2.2-4012.1 exempts fast-tracked rules from the Notice of Intended Regulatory Action and economic impact analysis requirements by implication. *Id.*

26. *See id.* § 2.2-4007(F) (Cum. Supp. 2003).

27. *See id.* § 2.2-4012.1 (Cum. Supp. 2003).

28. *Id.*

2. Beverage Alcohol

The 2003 Session was a good year for Virginia's wineries and wine lovers. A number of amendments to the Virginia Code streamlined the regulatory process and, most notably, allowed the direct shipment of wine and beer to residents of the Commonwealth.[29]

The statutory enactments demonstrated a legislative assertion of policy supremacy on the heels of the decision of the United States District Court for the Eastern District of Virginia in *Bolick v. Roberts*.[30] There, the court held that Virginia's statutes granting in-state farm wineries the right to ship wine directly to state residents, but denying that right to out-of-state wineries, violated the Dormant Commerce Clause of the United States Constitution.[31] The court enjoined the enforcement of a number of Virginia laws regulating the sale of beverage alcohol that contained the unconstitutional in-state preference.[32] While the case was on appeal to the United States Court of Appeals for the Fourth Circuit, the 2003 General Assembly amended the Code to create a limited right of direct shipment of wine and beer to both in-state and out-of-state wineries, breweries, and retailers.[33] The General Assembly repealed the existing shipment rights and amended the existing delivery rights of Virginia retailers, wineries, and breweries, and replaced them with an open permit system.[34] Virginia Code section 4.1-112.1 allows in-state and out-of-state wineries, breweries, and beverage alcohol retailers to apply for a direct shipper's

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29. VA. CODE ANN. §§ 4.1-132, -207, -212, and -238 (Cum. Supp. 2003) (permitting off-premises bonded warehouses for Virginia wineries); *id.* § 4.1-207(5) (Cum. Supp. 2003) (increasing the number of off-premises retail licenses for Virginia farm wineries); *id.* § 4.1-201(10) (Cum. Supp. 2003) (permitting inter-winery shipments of wine in closed containers for manufacturing purposes); *id.* § 4.1-219 (Cum. Supp. 2003) (granting the Virginia Department of Agriculture and Consumer Services the ability to petition the Alcoholic Beverage Control Board to waive statutory standards for use of on-farm or Virginia-produced fruit in cases of severe weather or disease infestation).

30. 199 F. Supp. 2d 397 (E.D. Va. 2002).

31. *Id.* at 450.

32. *See id.* at 451.

33. Act of Apr. 9, 2003, ch. 1029, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 4.1-112.1, -204, -207, -208, -209, -215, -230, -231, and -310 (Cum. Supp. 2003)).

34. VA. CODE ANN. §§ 4.1-207, -208, -209, and -230 (Cum. Supp. 2003). In-state retailers, breweries, and wineries retain the right to deliver beverage alcohol under their retail licenses, provided the deliveries are made by the owner or any agent, officer, director, shareholder, or employee of the licensee. *See id.* 4.1-207, -208, -209 (Cum. Supp. 2003).

permit.[35] The permit entitles the holder to ship no more than two cases of wine or beer per month to any person in Virginia to whom beverage alcohol may be lawfully sold.[36] Shipments must be for personal consumption only, not for resale, and must be made through a common carrier approved by the Alcoholic Beverage Control Board.[37] The statute deems the sales to have occurred in Virginia and requires collection and remittance of all applicable taxes.[38] Moreover, each shipment must be specially marked to require the signature of an adult, and the common carrier must be able to refuse delivery when the recipient's age is questionable.[39]

The Commonwealth of Virginia asked the Fourth Circuit to vacate the decision of the United States District Court for the Eastern District of Virginia in *Bolick*—arguing that the legislature's action rendered the case moot, upon the statute's enactment.[40] The Fourth Circuit vacated the district court's order and remanded the case for further consideration in light of the statutory enactments and the Fourth Circuit's decision in *Beskind v. Easley*, which affirmed a district court's decision that similar North Carolina statutes were also unconstitutional.[41]

The Alcoholic Beverage Control Board promulgated emergency regulations, effective July 10, 2003.[42]

3. Horse Racing

The Virginia Racing Commission ("Commission"), already possessing "plenary power" to regulate horse racing with pari-mutuel wagering in Virginia, ostensibly gained expanded authority in 2003.[43] Virginia Code section 59.1-369(5), as amended, grants the Commission the authority to regulate account wagering, by "which an individual may establish an account with an entity,

35. *Id.* § 4.1-112.1 (Cum. Supp. 2003).
36. *Id.* § 4.1-112.1(A) (Cum. Supp. 2003).
37. *Id.* § 4.1-112.1(A)–(C) (Cum. Supp. 2003).
38. *Id.* § 4.1-112.1(D) (Cum. Supp. 2003).
39. *Id.* § 4.1-112.1(C) (Cum. Supp. 2003).
40. *See* Bolick v. Danielson, 330 F.3d 274, 276 (4th Cir. 2003).
41. 325 F.3d 506, 520 (4th Cir. 2003); *see Bolick*, 330 F.3d at 277.
42. *See* 3 VA. ADMIN. CODE § 5-40-20 (2003); *id.* § 5-70-220 (2003).
43. VA. CODE ANN. § 59.1-369 (Cum. Supp. 2003).

approved by the Commission, to place pari-mutuel wagers in person or electronically."[44] The United States Congress authorized interstate electronic wagering pursuant to the Interstate Horseracing Act,[45] but until the General Assembly acted, the Virginia statutes contained no express provision authorizing the Commission to license entities accepting on-line or telephonic orders and then placing wagers according to the orders. The new statute requires the Commission to promulgate regulations for the licensure of such entities, and requires licensees to collect revenues owed to the Commonwealth from such wagers.[46]

The General Assembly also gave the Commission expanded authority to regulate the acquisition of an ownership interest in an entity licensed to own or operate a racetrack or pari-mutuel wagering facility.[47] The new statute requires that any person who proposes to acquire actual control of a licensee must submit to the Commission specific information designed to permit the Commission to evaluate whether the licensee will, under the actual control of the applicant, "have the experience, expertise, financial responsibility and commitment to comply with" all relevant laws, regulations, and contractual obligations.[48] The statute requires the Commission to deny any application to become a partner, member, or principal stockholder of a licensee, or to acquire actual control thereof, "if in its judgment the acquisition . . . would be detrimental to the public interest or to the honesty, integrity, and reputation of racing."[49]

The Commission gained an exemption from the Government Data Collection and Dissemination Practices Act, which generally restricts the ability of state agencies to collect and disseminate personal information, and grants individuals the right to access any such data in the possession of agencies.[50] The new statute accords the Commission an exemption from those restrictions, treating data collected by the Commission equally with data collected by the Parole Board, the Crime Commission, the Judicial

44. *Id.* § 59.1-369(5) (Cum. Supp. 2003).

45. 15 U.S.C. § 3001 (1996).

46. VA. CODE ANN. § 59.1-369(5) (Cum. Supp. 2003).

47. Act of Mar. 19, 2003, ch. 705, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 59.1-386 (Cum. Supp. 2003)).

48. VA. CODE ANN. § 59.1-386(B) (Cum. Supp. 2003).

49. *Id.* § 59.1-386(A) (Cum. Supp. 2003).

50. *Id.* § 2.2-3802 (Cum. Supp. 2003).

Inquiry and Review Commission, and the Department of Alcoholic Beverage Control.[51]

4. Health Professions

The General Assembly enacted sweeping reforms to regulations governing practitioners licensed by health regulatory boards.[52] Significantly, the amended Virginia Code sections change the disciplinary standard from gross negligence to simple negligence.[53]

Virginia Code section 54.1-2400(14) also seeks to reduce the number of minor cases requiring a full hearing by giving the boards a new enforcement tool for minor violations—a confidential consent agreement that may be used "where there is little or no injury to a patient or the public and little likelihood of repetition by the practitioner."[54] The confidential consent agreement may not be used in cases where the board concludes "there is probable cause to believe the practitioner has (i) demonstrated gross negligence or intentional misconduct in the care of patients or (ii) conducted his practice in such a manner as to be a danger to the health and welfare of his patients or the public."[55]

The General Assembly broadened the Board of Medicine's mandate to develop ethical guidelines for "physicians practicing in emergency rooms, surgeons, and interns and residents practicing in hospitals, particularly hospital emergency rooms," and

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51. *Id.*

52. *See* Act of Mar. 22, 2003, ch. 762, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 32.1-27, -125.01 (Cum. Supp. 2003); *id.* §§ 54.1-111, -2400, -2400.2, -2400.3, -2401, -2408.2, -2505, -2506, -2506.1, -2906, -2908, -2909, -2911, -2915, and -3480 (Supp. 2003)).

53. VA. CODE ANN. §§ 54.1-2915(A)(4), -3480(A)(4) (Supp. 2003).

54. *Id.* § 54.1-2400(14) (Supp. 2003).

55. *Id.* Consent agreements "shall include findings of fact," and "may include an admission or a finding of a violation," and "may be [used] in future disciplinary proceedings." *Id.* A practitioner whose certificate, registration, or license to practice has been revoked is ineligible for reinstatement for three years. *Id.* § 54.1-2408.2 (Supp. 2003). The new law also expands the authority of the Department of Health Professions to regulate unlicensed practice and directs the Department of Health Professions to investigate all complaints within the jurisdiction of the relevant health regulatory board. *Id.* §§ 54.1-2505, -2506 (Supp. 2003). Hospitals and other health-care institutions and associations are required to report certain instances of unethical, fraudulent, or unprofessional conduct, with an exception for information obtained under peer review. *Id.* §§ 54.1-2906, -2907, -2908, and -2909 (Repl. Vol. 2002 & Supp. 2003). Finally, the legislation requires the executive committee of the Board of Medicine to include two citizen members. *Id.* § 54.1-2911 (Supp. 2003).

other graduate medical education programs.[56] The enhanced guidelines specifically require a health care provider to obtain informed consent from the patient, when practical, under the conditions in which health care services are being provided, or when the patient is incapable of making an informed decision, from the next of kin or a legally authorized representative.[57] However, informed consent must be obtained after informing the consenting party of which physicians, residents, or interns will perform surgery or another invasive procedure.[58] The guidelines also mandate that the attending physician be present during the surgery except in an emergency or other unavoidable situation and mandate that policies be enacted to avoid situations in which a surgeon, intern, or resident represents that he or she will perform a surgery or other invasive procedure and then fails to do so.[59] In addition, the guidelines require health care entities to create policies addressing informed consent and the ethics of appropriate care of patients in the emergency room.[60] The Virginia Code requires the board to take into consideration the American Medical Association's non-binding ban on using newly dead patients as training subjects without the consent of the next of kin or other legal representative.[61]

5. Use of Health Records in Administrative Proceedings

In 2003 the General Assembly amended the subpoena provisions in patient records law to make them consistent with federal regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"),[62] relating to standards for security and privacy of protected health information.[63] The amended statute now applies to subpoenas duces tecum for medical records in administrative proceedings, as well as

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56. *Id.* § 54.1-2961(E) (Supp. 2003).
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. 42 U.S.C. § 1320d (2001).
63. Act of Apr. 2, 2003, ch. 983, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 32.1-127.1:03 (Cum. Supp. 2003)). For a more detailed discussion of HIPAA, see Kathleen M. McCauley, *Annual Survey of Virginia Law: Health Care Law*, 38 U. RICH. L. REV. 137, 148 (2003).

judicial proceedings.[64] The provisions apply to subpoenaed medical records of parties, as well as non-party witnesses.[65] The new statute requires an agency, or party seeking medical records in an administrative proceeding, to comply with certain procedural requirements intended to safeguard patient medical records.[66]

Under the statute, a party seeking a subpoena duces tecum for medical records has an affirmative duty to determine whether the patient whose records are being sought is a pro se party or a non-party witness.[67] The party requesting or issuing a subpoena of a pro se party or non-party witness must provide the person with a copy of the subpoena and a notice informing him of his rights to file a motion to quash.[68] A copy of the subpoena and the notice must be sent to the patient's counsel, if they are represented.[69] In order to provide the patient or his counsel with a meaningful opportunity to respond to the subpoena duces tecum, including the filing of a motion to quash, no subpoena for medical records may set a return date of less than fifteen days except by order of a court or agency for good cause.[70]

A health care provider must respond in three ways. First, the provider may file a motion to quash the subpoena duces tecum within fifteen days of the date of the subpoena, provided, however, that the provider still file the records with the agency or court under seal.[71] Second, if the provider has actually received notice that a motion to quash has been filed, the provider must file the records with the agency or court under seal.[72] Third, if no motion to quash is filed, the provider must file the documents with the agency or court within the fifteen-day period or within five days after receiving a certification that the time has elapsed and no motion to quash was filed.[73] The party seeking the documents has an affirmative duty to certify that no motion to quash

64. VA. CODE ANN. § 32.1-127.1:03(H)(1) (Cum. Supp. 2003).
65. *Id.*
66. *Id.* § 32.1-127.1:03(H)(1)–(2) (Cum. Supp. 2003).
67. *Id.* § 32.1-127.1:03(H)(1) (Cum. Supp. 2003).
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* § 32.1-127.1:03(H)(2) (Cum. Supp. 2003).
72. *Id.*
73. *Id.* § 32.1-127.1:03(H)(2)–(4) (Cum. Supp. 2003).

was filed.[74] The statute also contains provisions for resolving a motion to quash, and expressly preserves the authority of courts and agencies to issue protective orders regarding medical records.[75]

III. THE COURTS

There were several notable judicial decisions during the period, and as is typical, many more decisions that were routine.[76]

A. *Standing*

The law of standing determines who may petition for judicial review of agency action. Federal judicial authority is derived from Article III of the Constitution, which grants jurisdiction to courts

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74. *Id.* § 32.1-127.1:03(H)(4) (Cum. Supp. 2003).

75. *Id.* § 32.1-127.1:03(H)(7)–(9) (Cum. Supp. 2003).

76. *See, e.g.*, Bender v. Marine Res. Comm., No. 1783-02-1, 2003 Va. App. LEXIS 253, at *3, 4–5 (Ct. App. Apr. 29, 2003) (unpublished decision) (affirming the trial court's award of attorney fees and the trial court's dismissal of the action for failure to properly serve process on the administrative agency); Ables v. Rivero, No. 0973-02-1, 2003 Va. App. LEXIS 83 (Ct. App. Feb. 19, 2003) (unpublished decision) (affirming the trial court's decision including the trial court's finding of child abuse); Motor Vehicle Dealer Bd. v. Morgan, 38 Va. App. 665, 671–72, 568 S.E.2d 378, 381 (Ct. App. 2002) (holding that the plaintiff was not entitled to recover statutory attorney's fees for the proceedings in the trial court and holding that attorney's fees could be awarded as part of the judgment by the Motor Vehicle Board and funded by the Motor Vehicle Transaction Recovery Fund Act); May Dept. Stores v. Commonwealth, No. 3356-01-2, 2002 Va. App. LEXIS 443, at *7–8 (Ct. App. Aug. 6, 2002) (unpublished decision) (reversing the trial court because the agency relied on a *post hoc* rationale on appeal and the underlying agency decision was arbitrary and capricious); Leighton v. Dept. of Health, No. 1328-01-4, 2002 Va. App. LEXIS 338, at *2 (Ct. App. June 11, 2002) (unpublished decision) (holding that the appellant lacked standing and was not an aggrieved party); Kennedy v. Comm'r of DMV, 61 Va. Cir. 294, ____ (Cir. Ct. 2003) (Fairfax County) (holding that the court had no authority to hear the plaintiff's petition); Dick's Inn v. Alcoholic Beverage Control Bd., 60 Va. Cir. 407, 410-12 (Cir. Ct. 2002) (Richmond City) (holding that the Virginia Alcoholic Beverage Control Board did not abuse its discretion to deny a request for license modification within twelve months after the license is issued); Stearns v. Va. Marine Res. Comm., 60 Va. Cir. 296, 298-99 (Cir. Ct. 2002) (Norfolk City) (holding that the court had no authority to reinstate the case, to thwart possible agency review by the Norfolk Wetlands Board on remand, because the court entered a final order dismissing the case more than twenty-one days prior); Bryden v. Motor Vehicle Dealer Bd., 60 Va. Cir. 279, 284-85 (Cir. Ct. 2002) (Arlington County) (dismissing the appeal of a motor vehicle dealer's license revocation); Riverside Hosp. v. Stroube, 61 Va. Cir. 331, ____ (Cir. Ct. 2002) (Williamsburg City and James City County) (refusing to modify an agreed-upon briefing order in order to permit rebuttal brief in appeal of an agency decision).

over "cases" and "controversies."[77] In Virginia, standing is conferred by statute, rather than by constitution, and the legislature has typically meted out standing in small doses.

However, the distinction between federal Article III standing and standing in a Virginia state court is no longer quite so sharp. A recent decision of the Supreme Court of Virginia evidences that shift.

Virginia Code section 62.1-44.29 essentially adopts Article III standing for regulations and permits adopted or issued by the State Water Control Board ("SWCB").[78] The law provides in pertinent part:

> [a]ny owner aggrieved by, or any person who has participated, in person or by submittal of written comments, in the public comment process related to, a final decision of the [State Water Control] Board . . . is entitled to judicial review thereof in accordance with the provisions of the Administrative Process Act . . . if such person meets the standard for obtaining judicial review of a case or controversy pursuant to Article III of the United States Constitution. A person shall be deemed to meet such standard if (i) such person has suffered an actual or imminent injury which is an invasion of a legally protected interest and which is concrete and particularized; (ii) such injury is fairly traceable to the decision of the Board and not the result of the independent action of some third party not before the court; and (iii) such injury will likely be redressed by a favorable decision by the court.[79]

State Water Control Board v. Crutchfield[80] provided the Supreme Court of Virginia with a perfect example to illustrate the first prong of this analysis—whether the injury is "actual or imminent."[81]

In *Crutchfield,* Hanover County sought a Virginia Pollution Discharge Elimination System Permit from the SWCB to discharge up to ten million gallons of wastewater per day into the Pamunkey River, adjacent to an historic farm owned by Mrs. Crutchfield and her son.[82] The Crutchfield farm stretched along several miles of the Pamunkey River and contained the relics of a

77. U.S. CONST. art. III, § 2, cl. 1.
78. *See* VA. CODE ANN. § 62.1-44.29 (Repl. Vol. 2001).
79. *Id.*
80. 265 Va. 416, 578 S.E.2d 762 (2003).
81. *Id.* at 426, 578 S.E.2d 767.
82. *Id.* at 421–22, 578 S.E.2d at 765.

colonial village listed as a Virginia Historic Landmark and a former plantation listed in the National Historic Landmark Registry.[83] To effectuate the project, Hanover County acquired, by condemnation, a fifty-foot wide easement through the center of the farm.[84] The easement was planned to accommodate a thirty-six-inch diameter wastewater pipeline.[85] The project required obtaining river frontage from the farm to construct discharge structures.[86] Wastewater would be pumped from eight miles away and discharged to the river bottom, fifty yards upstream from the landowners' boat ramp, irrigation pump, and "'picnic-swimming area.'"[87]

The landowners were not pleased with this prospective development. They participated in the public hearing held by the SWCB, and submitted written comments in opposition to the project.[88] The written comments alleged that the project would interfere with existing recreational uses of the river.[89] They stated the area immediately downstream from the discharge point had been used "'for swimming for many years. Those using [the river] are not limited to the property owners.'"[90] Their letter noted the "'significant, documented historic resources that would indeed be adversely affected by [the project].'"[91]

Against this backdrop, the Board requested to depose the petitioners as to their standing.[92] Mrs. Crutchfield testified that she would "no longer swim, fish, or canoe in the river" if the project went forward, and that the enjoyment she derives from camping adjacent to the river would be "impaired."[93] Her son testified that the presence of the pipeline would "hinder his enjoyment of" the farm's recreational amenities and cause him to "abandon or decrease the frequency of his recreational activities in the river."[94]

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83. *Id.* at 421, 578 S.E.2d at 764.
84. *Id.* at 422, 578 S.E.2d at 765.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 422–423, 578 S.E.2d at 765.

The circuit court dismissed the appeal, holding that the petitioners failed to demonstrate "'any actual or imminent injury,'" and holding that their claims were no more than "'abstract distress.'"[95] The Court of Appeals of Virginia reversed and remanded for hearing on the merits, holding in an unpublished opinion that the petitioners had standing.[96]

On writ to the Supreme Court of Virginia, the Board assailed the court of appeals' conclusion as to standing and its alleged failure to defer to the circuit court's "'factual findings.'"[97] The supreme court disagreed and held that the petitioners established standing under the statute.[98]

The court held that the language of Virginia Code section 62.1-44.29 "reflects the holdings of the United States Supreme Court regarding the requirements of standing under the 'case' or 'controversy' provisions of Article III of the United States Constitution."[99] Citing to volumes of Supreme Court of the United States' precedent, the court held that the "injury in fact" required in recreational and aesthetics interests cases must be personal, not just environmental. The injury "need not be a large one"—an "'identifiable trifle'" is enough.[100] Moreover, the court held it sufficient for a plaintiff to establish that he "uses" the area and that he is "a person 'for whom the aesthetic and recreational values of the area will be lessened'" if the project succeeds.[101]

The *Crutchfield* case is not purely a statutory analysis decision. It borrows an element of Virginia common law—the notion of riparian rights dating from the Magna Charta and perhaps before. At common law, the *jus privatum* (private rights) rest in the landowner adjoining public waters, including the rights to "make reasonable use of the water flowing past their land" and "to enjoy

95. *Id.* at 421, 578 S.E. 2d at 764.

96. *Id.*

97. *Id.* at 426, 578 S.E.2d at 767.

98. *Id.* at 428, 578 S.E.2d at 768.

99. *Id.* at 426, 578 S.E.2d at 767 (citing Mattaponi Indian Tribe v. Commonwealth, 261 Va. 366, 376, 541 S.E.2d 920, 925 (2001)); *see also* VA. CODE ANN. § 62.1-44.29 (Repl. Vol. 2001 & Cum. Supp. 2003).

100. *Crutchfield*, 265 Va. at 427, 578 S.E.2d at 768 (citations omitted).

101. *Id.* (citations omitted).

the recreational and aesthetic advantages that are conferred on such land adjoining a watercourse."[102]

In *Yamaha Motor Corp. v. Quillian*,[103] the Supreme Court of Virginia entertained a certified question from the United States District Court for the Eastern District of Virginia regarding the standing of an existing motorcycle dealer to challenge a franchise for a new (and competing) dealer of the same line and make of motorcycles.[104] The Commissioner interpreted Virginia Code section 46.2-1993.67(5) to permit existing dealers to protest new dealerships only if they offered the same line and were made in the county, city, or town in which the proposed new dealer was to be located.[105] While the supreme court deferred generally to the Commissioner's interpretation of the statute, it held that limiting standing to dealers with the particular county, city, or town of the proposed new dealer "'invites absurd outcomes,'" such as the case where a new dealer would be located only a few blocks away, but in a different jurisdiction than, the existing dealer.[106] Accordingly, the court held that the proper construction of the statute would be to limit standing to dealers in the market area likely to be served by the new dealer.[107]

B. *Evidentiary Standards and Standards of Review*

Administrative law practitioners argue over the applicable evidentiary standard and standards of review as a matter of course. This is especially true because agency findings are accorded "great deference."[108]

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102. *Id.* at 427–28, 578 S.E.2d at 768 (citing Cann v. Kidd, 261 Va. 81, 95, 540 S.E.2d 884, 892–93 (2001); Thurston v. City of Portsmouth, 205 Va. 909, 910–11, 140 S.E.2d 678, 680 (1965); Taylor v. Commonwealth, 102 Va. 759, 773, 47 S.E. 875, 880–81 (1904)).

103. 264 Va. 656, 571 S.E.2d 122 (2002). For additional discussion of *Yamaha Motor Corp.*, see Michael F. Urbanski et al., *Annual Survey of Virginia Law: Antitrust and Trade Regulation Law*, 38 U. RICH. L. REV. 59, 78 (2003).

104. *Yamaha Motor Corp.*, 264 Va. at 660, 571 S.E.2d at 123–24.

105. *Id.* at 660, 571 S.E.2d at 124; *see also* VA. CODE ANN. § 46.2-1993.67(5) (Repl. Vol. 2002 & Supp. 2003).

106. *Yamaha Motor Corp.*, 264 Va. at 666, 571 S.E.2d at 127.

107. *Id.* at 665, 571 S.E.2d at 127.

108. Atkinson v. Virginia Alcoholic Beverage Control Comm'n, 1 Va. App. 172, 178, 336 S.E.2d 527, 531 (Ct. App. 1985).

In *Goad v. Virginia Board of Medicine*,[109] the Court of Appeals of Virginia confronted the Board of Medicine's decision to take disciplinary action against a physician for "unprofessional conduct."[110] The basis of the alleged conduct was sexual harassment.[111] Following informal counseling and interim reviews by the hospital where he was a resident, the hospital found the respondent to be "'very good'" in his clinical performance, but the hospital closely monitored him.[112] Upon further allegations of "improper conduct," the hospital disciplined him, and the Board of Medicine brought charges.[113] The court, assuming that a preponderance of the evidence was necessary to establish the respondent's guilt,[114] held that the Board of Medicine established no evidence it had promulgated any standards of ethics applicable to the respondent's case, including standards adopted by the American Medical Association or the American Psychiatric Association, both of which were introduced by the Commonwealth as exhibits, but neither of which were asserted to be binding on the Board of Medicine.[115] The court of appeals reversed the circuit court and remanded with instructions to set aside the Board of Medicine's order, finding no substantial evidence to support the agency decision.[116]

Little and Tall, Inc. v. Alcoholic Beverage Control Board[117] presented similar issues concerning construction of the statutory evidentiary standard and judicial deference to the agency's findings.[118] There, the Alcoholic Beverage Control Board conducted a series of undercover operations in licensed establishments to determine whether illegal drug use was occurring on the premises.[119] The evidence consisted of five alleged instances where government informants purchased drugs on the premises or made arrangements for purchases outside the premises.[120] In three of

109. 40 Va. App. 621, 580 S.E.2d 494 (Ct. App. 2003).
110. *Id.; see also* VA. CODE ANN. § 54.1-2914(A)(7) (Repl. Vol. 2002).
111. *Goad*, 40 Va. App. at 624–28, 580 S.E.2d at 496–97.
112. *Id.* at 626, 580 S.E.2d at 496–97.
113. *Id.* at 626–28, 580 S.E.2d at 497.
114. *Id.* at 635 n.10, 580 S.E.2d at 501 n.10.
115. *Id.* at 636–37, 580 S.E.2d at 501–02.
116. *Id.* at 638, 580 S.E.2d at 502–03.
117. 59 Va. Cir. 212 (Cir. Ct. 2002) (Richmond City).
118. *Id.* at 213–14.
119. *Id.* at 212.
120. *Id.* at 213.

the five cases, the informant simply entered the premises and made the purchases or arrangements to purchase; in two, the informant pre-arranged to meet an alleged dealer there to make the buy.[121] There was no evidence that the licensee/respondent had any knowledge of the transactions—in fact the evidence showed that he had "significant security" and had undertaken reasonable efforts to prevent illegal conduct from occurring on the premises.[122]

The Alcoholic Beverage Control Board charged the respondent with maintaining "a meeting place or rendezvous for illegal users of narcotics and/or habitual law violators."[123] The court did not defer to the agency's interpretation of "meeting place or rendezvous," instead resorting to plain English statutory construction and prior case law to find that both "meeting place" and "rendezvous" imply that the parties must have prearranged or predesignated the place in order for it to be such.[124] In addition, the court drew an analogy to the crime of conspiracy and held that a government informant cannot supply an essential element of the crime.[125] The court held that "it is inherent that one person cannot meet or rendezvous alone."[126] Thus there was insufficient evidence in the record to support the charges and the agency was reversed.[127]

Kirin Brewery of America v. Virginia Imports Ltd.[128] involved the idiosyncrasies of Virginia's alcoholic beverage franchise laws.[129] Generally speaking, once a manufacturer appoints a distributor, it may terminate the appointment only for good cause and in good faith and after exhausting its administrative reme-

121. *See id.*

122. *Id.*

123. *Id.* at 212; *see also* VA. CODE ANN. § 4.1-225(2)(c) (Cum Supp. 2002). The General Assembly subsequently amended Virginia Code section 4.1-225(2)(c) to add, as a grounds for a violation, that the place occupied by the licensee "has become a place where illegal drugs are regularly used or distributed." Act of Mar. 18, 2003, ch. 594, 2003 Va. Act ___ (codified as amended at VA. CODE ANN. § 4.1-225(2)(c) (Cum. Supp. 2003)).

124. *Little and Tall, Inc.*, 59 Va. Cir. at 214.

125. *Id.* at 214–15.

126. *Id.* at 214.

127. *Id.* at 215.

128. 60 Va. Cir. 151 (Cir. Ct. 2002) (Fairfax County). For additional discussion of *Kirin*, see Urbanski et al., *supra* note 103, at 79.

129. *See* VA. CODE ANN. §§ 4.1-500 to -577 (Rep. Vol. 1999 & Cum. Supp. 2003).

dies at the Alcoholic Beverage Control Board.[130] In application, this is a difficult standard.

In *Kirin,* the brewery alleged that one of its distributors failed to adequately service the account by leaving stale beer on retail shelves, among other things.[131] The brewery notified the distributor that it intended to terminate the distributorship agreement for cause and complied with the statutory requirement to serve a copy on the Alcoholic Beverage Control Board.[132] The distributor responded to the brewery that it had cured the deficiencies cited in the termination letter, but failed to mail a copy of the cure letter to the Board, as required by statute.[133] The brewery requested a hearing before the Board under the statute.[134] The Secretary of the Board ("Secretary"), not having received a copy of the statutorily mandated cure letter within the ninety-day period, advised the brewery that the distributorship agreement was effectively terminated and that the brewery was free to appoint other distributors.[135]

The distributor protested and, after neither the Secretary nor the Board agreed to reinstate the distributor, the Secretary referred the matter to a hearing panel.[136] The panel found for the distributor, and the Board later found that the distributor had substantially complied with the brewery's freshness policy, that the brewery consequently lacked "good faith" to terminate, and that the brewery had acted in bad faith by terminating the distributor when it had received the distributor's cure letter and, nonetheless, proceeded to terminate the agreement.[137] The circuit court reversed, holding that the brewery had complied with the specific statutory procedures for terminating the agreement and that the distributor's failure to provide the Board with a copy of the cure letter was jurisdictional.[138] Consequently, the agreement

130. *Id.* §§ 4.5-505, -506 (Repl. Vol. 1999 & Cum. Supp. 2003).
131. *Kirin,* 60 Va. Cir. at 152.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 153.
136. *Id.*
137. *Id.*
138. *Id.* at 157.

terminated by operation of law, and the Board lacked jurisdiction to hear the matter.[139]

IV. CONCLUSION

The General Assembly and the courts of the Commonwealth of Virginia continued developing and interpreting administrative law and procedure in 2002 and 2003. Statutory changes made by the General Assembly include the implementation of fast-track rulemaking, direct shipment of alcoholic beverages being permitted to residents of the Commonwealth, expanded authority of the Virginia Racing Commission, a new disciplinary standard of simple negligence for licensed health care practitioners, and updated subpoena provisions in patient records law. The courts of Virginia reviewed the issues of standing, evidentiary standards, and standards of review in an ongoing effort to resolve the debate over who can challenge agency decisions and how those decisions should be considered upon judicial review.

139. *Id.*

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