

11-1-2012

## Local Government Law

Andrew R. McRoberts

*Sands Anderson, P.C., Richmond, Virginia*

Steven V. Durbin

*Sands Anderson, P.C., Christianburg, Virginia*

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>



Part of the [State and Local Government Law Commons](#)

---

### Recommended Citation

Andrew R. McRoberts & Steven V. Durbin, *Local Government Law*, 47 U. Rich. L. Rev. 257 (2012).

Available at: <https://scholarship.richmond.edu/lawreview/vol47/iss1/12>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

## LOCAL GOVERNMENT LAW

*Andrew R. McRoberts* \*

*Steven V. Durbin* \*\*

### I. INTRODUCTION

This article reviews select legislation from the 2012 session of the General Assembly and opinions handed down by the Supreme Court of Virginia and the United States Court of Appeals for the Fourth Circuit from July 2011 until June 2012. From the extension of sovereign immunity to school administrators and municipal corporations created by counties to what powers can be delegated to a planning commission, local government law encompasses a variety of topics. A survey on this topic cannot provide a comprehensive look into every bill or case over the past year; rather, what follows is a snapshot of some significant decisions and developments that seemed most significant to the authors.

### II. CASE LAW SUMMARIES

#### A. *Procurement: Low Bidder v. "Best Value," Professional Building Maintenance Corp. v. School Board*

At issue in *Professional Building Maintenance Corp. v. School Board* was the Spotsylvania County School Board's use of "best value" concepts in obtaining custodial services under the Virginia Public Procurement Act.<sup>1</sup> The school board had issued an invita-

---

\* Counsel, Sands Anderson, P.C., Richmond, Virginia. J.D., 1990, University of Richmond School of Law; B.A., 1987, College of William & Mary. Mr. McRoberts is also editor and chief author of the Virginia Local Government Law blog, <http://valocalitylaw.com>.

\*\* Associate, Sands Anderson, P.C., Christiansburg, Virginia. J.D., 2005, Marshall-Wythe School of Law, College of William & Mary; B.A., 1997, Denison University. The co-authors recognize the valuable editing assistance of former *University of Richmond Law Review* Annual Survey Editor, now Sands Anderson litigator, Sarah Warren S. Beverly. Thanks, Sarah Warren!

1. 283 VA. 747, 749-50, 725 S.E.2d 543, 545 (2012); VA. CODE ANN. §§ 2.2-4303 to

tion to bid setting forth certain criteria for selection of the successful bidder, which included but was not limited to price.<sup>2</sup> Professional Building Maintenance Corporation ("PBM") submitted the lowest bid, but was not awarded the contract.<sup>3</sup> In awarding the contract to a different bidder, the school board considered several criteria for determining "best value," including "expertise and experience relative to the scope of services (50 points); experience of personnel assigned to the project (5 points); supplies/equipment proposed for general cleaning (5 points); quality control program (10 points); and price (30 points)."<sup>4</sup>

After announcement of the school board's intention to award the contract to another bidder, PBM and school board representatives met to discuss PBM's concerns that the contract was not awarded to PBM even though PBM had been the lowest bidder.<sup>5</sup> Following the meeting, PBM filed a formal protest,<sup>6</sup> and the parties met again to discuss PBM's bid.<sup>7</sup> After the school board confirmed its intention to award the contract to another bidder, PBM filed suit, arguing that the Procurement Act demanded the contract be awarded to PBM as the lowest responsive and responsible bidder.<sup>8</sup> PBM also argued the school board impermissibly considered criteria not stated in the invitation to bid, and the failure to select PBM as the successful bidder was arbitrary and capricious.<sup>9</sup>

The court held that consideration of "best value" concepts by public bodies under the Procurement Act does not vary the statutory requirement that contracts procured using competitive sealed bidding be awarded to the "lowest responsive and responsible bidder."<sup>10</sup> In analyzing the use of "best value" under the Procurement Act, the court observed that only one provision of the act explicitly permits an award to a best value bidder, namely

---

-4377 (Repl. Vol. 2011 & Cum. Supp. 2012).

2. 283 Va. at 750, 725 S.E.2d at 545.

3. *Id.*

4. *Id.*

5. *Id.*

6. *See generally* VA. CODE ANN. § 2.2-4360 (Repl. Vol. 2011) (outlining the requirements for filing a formal protest).

7. 283 Va. at 750, 725 S.E.2d at 545.

8. *Id.* 725 S.E.2d at 545-46.

9. *Id.* at 750-51, 725 S.E.2d at 546.

10. *Id.* at 753, 725 S.E.2d at 547 (footnotes omitted) (citing VA. CODE ANN. §§ 2.2-4300, -4303(C) (Repl. Vol. 2011)).

section 2.2-4308, which applies to design-build or construction management contracts.<sup>11</sup> The court held that the requirements of “competitive sealed bidding” demand award of the contract to the “lowest responsive and responsible bidder.”<sup>12</sup>

In a concurring opinion, Justice Mims agreed that PBM had adequately alleged a cause of action, but opined that the majority’s holding would strip the provisions authorizing consideration of best value concepts of any substantive meaning.<sup>13</sup> The tension between the majority opinion and Justice Mims’s concurrence is perhaps resolved through consideration of the procurement method at issue in this case.

Critical to the court’s holding in *PBM* is the fact that the school board chose to utilize competitive sealed bidding under section 2.2-4303.<sup>14</sup> The court did not discuss what the outcome would have been had the school board instead utilized competitive negotiation; as defined in the Procurement Act, competitive negotiation for procurement of nonprofessional services does not require award to the lowest responsive and responsible offeror.<sup>15</sup> This procurement method calls for the issuance of a request for proposal, rather than an invitation to bid, and permits the public body to consider price along with other factors set forth in the request for proposal to determine the successful offeror.<sup>16</sup> Thus, it appears that the court may have reached a different result had the school board utilized competitive negotiation pursuant to a request for proposal.

---

11. *Id.* at 753 n.8, 725 S.E.2d at 547 n.8 (citing VA. CODE ANN. § 2.2-4308 (Repl. Vol. 2011)).

12. *Id.* at 752–53, 725 S.E.2d at 546–47 (citing VA. CODE ANN. § 2.2-4301 (Repl. Vol. 2011)).

13. *Id.* at 756–57, 725 S.E.2d at 548–49 (Mims, J., concurring).

14. *Id.* at 751, 725 S.E.2d at 546 (citing VA. CODE ANN. § 2.2-4303 (Repl. Vol. 2011)).

15. VA. CODE ANN. § 2.2-4301 (Repl. Vol. 2011); *see also id.* (Supp. 2012). The act defines “professional services” as “work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering.” *Id.* (Repl. Vol. 2011); *id.* (Supp. 2012). “Nonprofessional services” are defined as “any services not specifically identified as professional services in the definition of professional services.” *Id.* (Repl. Vol. 2011); *id.* (Supp. 2012). Notably, the act does not permit consideration of binding cost estimates for procurement of professional services. *Id.* (Repl. Vol. 2011); *id.* (Supp. 2012).

16. *See id.* (Repl. Vol. 2011); *id.* (Supp. 2012). In determining which offeror has made the best proposal under this procurement method, the act provides that “[p]rice shall be considered, but need not be the sole determining factor.” *Id.* (Repl. Vol. 2011); *id.* (Supp. 2012).

## B. *Sovereign Immunity/Municipal Immunity*

### 1. Immunity of County-Created Entities: *Jean Moreau & Associates, Inc. v. Health Center Commission*

In *Jean Moreau & Associates, Inc. v. Health Center Commission*, the Supreme Court of Virginia considered for the first time whether municipal corporations enjoy sovereign immunity with regard to quasi-contractual claims when acting in a governmental capacity.<sup>17</sup> The court's decision also implicates whether a municipal corporation created by a county enjoys absolute immunity and the requirements necessary for making a "contractual claim" within the meaning of the Virginia Public Procurement Act.<sup>18</sup>

The Health Center Commission for the County of Chesterfield ("HCC") was created by Chesterfield County "for the purpose of operating nursing homes, hospital or health center facilities."<sup>19</sup> The county made specific findings pursuant to the creation of HCC, including a finding "that the public health and welfare . . . require[d] the acquisition, construction, and operation of public hospital facilities."<sup>20</sup> Subsequent to its creation, HCC took over the operation of a nursing care facility previously under the management of Chesterfield County.<sup>21</sup> HCC subsequently expanded the facility to include an assisted living facility, and eventually contracted with appellant Jean Moreau & Associates, Inc., to plan and develop an independent living facility as part of the existing nursing care facility.<sup>22</sup>

The contract, initially awarded in 2004, specified that Jean Moreau was to receive certain monthly fees and provided that its continuation "beyond June 30 of any year [was] subject to its approval and ratification by [HCC]."<sup>23</sup> On May 4, 2006, HCC voted to discontinue the contract with Jean Moreau, effective June 30, 2006; HCC sent Jean Moreau notice of its decision by letter shortly thereafter.<sup>24</sup> Jean Moreau, by its president, responded by letter

---

17. 283 Va. 128, 139, 720 S.E.2d 105, 111 (2012).

18. *See id.* at 134–35, 140–42, 720 S.E.2d at 109, 112–13.

19. *Id.* at 132, 720 S.E.2d at 107.

20. *Id.* (alteration in original) (citation omitted) (internal quotation marks omitted).

21. 283 Va. at 132, 720 S.E.2d at 107.

22. *Id.* at 132, 720 S.E.2d at 107–08.

23. *Id.* at 132–33, 720 S.E.2d at 108 (alteration in original).

24. *Id.* at 133, 720 S.E.2d at 108.

on June 9, 2006.<sup>25</sup> Jean Moreau's letter claimed that HCC owed "development fees" and stated that it was giving HCC a "heads up" that Jean Moreau would "seek legal remedy" regarding the fee.<sup>26</sup> HCC responded on June 19, 2006, stating its position that Jean Moreau had been compensated fairly under the terms of the contract.<sup>27</sup> HCC's response advised that if Jean Moreau disagreed, it should have its attorney submit in writing "the amount owed [and] the contractual term giving rise to an obligation" to pay additional sums.<sup>28</sup> Shortly thereafter, Jean Moreau submitted and was paid by HCC for several invoices.<sup>29</sup>

After a breakdown in subsequent attempts to resolve the dispute, Jean Moreau filed suit against HCC, alleging breach of contract and quantum meruit.<sup>30</sup> HCC filed pleas in bar as to both claims, asserting that Jean Moreau's contractual claims were barred by Jean Moreau's failure to make a timely claim under the Procurement Act and the quasi-contractual claims were barred by sovereign immunity.<sup>31</sup> HCC contended that it was entitled to absolute sovereign immunity because it was an entity created by a county, and therefore should enjoy the same level of immunity afforded to the entity that created it.<sup>32</sup> HCC further argued that the development of the independent living facility was a governmental function, and therefore it should be immune from quasi-contractual claims.<sup>33</sup>

The Supreme Court of Virginia determined Jean Moreau had failed to timely submit its contractual claim in accordance with the terms of the Procurement Act,<sup>34</sup> specifically Virginia Code section 2.2-4363(C)(1), which provides:

Contractual claims, whether for money or other relief, shall be submitted in writing no later than 60 days after final payment. However, written notice of the contractor's intention to file a claim shall be

---

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* (alteration in original).

29. *Id.*

30. *Id.*

31. *Id.* at 134, 720 S.E.2d at 108.

32. *See id.*

33. *See id.*

34. *See id.* at 136, 720 S.E.2d at 109-10.

given at the time of the occurrence or beginning of the work upon which the claim is based.<sup>35</sup>

The court held that Jean Moreau's letter of June 9, 2006, was at most a notice of intent to file a claim, satisfying only one of the statutory requirements.<sup>36</sup> The June 9, 2006, letter was not itself sufficient to constitute a "claim" as required by the statute.<sup>37</sup>

Interestingly, the court did not set forth any precise formula or basis for determining when a "claim" is made in compliance with the Procurement Act.<sup>38</sup> Rather, the court reviewed previous cases in which it had held the "claim" requirement had been satisfied, observing that "[w]hile Code § 2.2-4363 does not prescribe exactly what a writing must contain to be considered a 'claim,' our prior cases suggest that it requires more than what [Jean] Moreau included in the June 9 letter."<sup>39</sup> Despite this lack of a precise standard, the court's holding suggests that, at minimum, *some actual monetary figure must be included* in order to constitute a "claim" under the Procurement Act.<sup>40</sup> In each of these previous cases, the writings at issue had contained actual dollar figures sought by the party making the claim.<sup>41</sup>

To address the quasi-contractual claims, the court took up HCC's assertions of sovereign immunity, observing that it never previously had addressed the issue of whether municipal corporations enjoy sovereign immunity from quasi-contractual claims when acting in a governmental capacity.<sup>42</sup> The court noted that at common law, the liability of the Commonwealth for contractual claims did not encompass liability for quasi-contractual claims.<sup>43</sup> Given previous precedent holding that "[w]hen municipal corporations exercise governmental functions, they act as arms or agencies of the State," the court concluded that municipal corporations "should be protected—like the Commonwealth—from both

---

35. VA. CODE ANN. § 2.2-4363(C)(1) (Repl. Vol. 2011 & Supp. 2012).

36. 283 Va. at 136, 720 S.E.2d at 109–10.

37. *Id.*

38. *See id.*, 720 S.E.2d at 110.

39. *Id.*

40. *See id.* (citing *Flory v. Commonwealth*, 261 Va. 230, 234, 541 S.E.2d 915, 917 (2001); *Welding, Inc. v. Bland Cnty. Serv. Auth.*, 261 Va. 218, 227, 541 S.E.2d 909, 914 (2001)).

41. *See id.* (discussing *Flory*, 261 Va. at 234, 541 S.E.2d at 917, and *Welding, Inc.*, 261 Va. at 227, 541 S.E.2d at 914).

42. *Id.* at 139, 720 S.E.2d at 111.

43. *Id.* (citing *Flory*, 261 Va. at 237, 541 S.E.2d at 918).

tort and quasi-contractual claims.”<sup>44</sup> Accordingly, if the development at issue in the litigation constituted a governmental function, then HCC would be immune from Jean Moreau’s quantum meruit claim.<sup>45</sup>

As to the issue of absolute immunity, the court rejected HCC’s argument that it should enjoy the same level of immunity as a county by virtue of the fact that HCC was created by a county.<sup>46</sup> The court noted that HCC’s line of reasoning would “lead to like entities performing the same function being treated differently.”<sup>47</sup>

Finally, the court took up the issue of whether the development at issue was, in fact, an exercise of governmental authority, or in other words, whether HCC was acting as an arm or agency of the Commonwealth.<sup>48</sup> In resolving the issue, the court noted that it previously had held that HCC’s provision of nursing services was indeed an exercise of the county’s police power for the common good and thus was governmental in nature.<sup>49</sup> The court also pointed to numerous factual findings of the trial court supporting the ruling that HCC was acting in a governmental capacity, including the fact that the independent living facility at issue was part of a larger group of facilities constituting a continuum of nursing and assisted living services.<sup>50</sup> Given that the court previously had concluded that the nursing care services constituted a governmental function, and because the facility at issue fit within the larger continuum of care, the court concluded that HCC was acting in a governmental capacity and thus was entitled to immunity with regard to Jean Moreau’s claims.<sup>51</sup>

## 2. Operation or Maintenance of Public Parks: *Seabolt v. County of Albemarle*

In *Seabolt v. County of Albemarle*, the court considered whether the limited waiver of sovereign immunity afforded to Virginia

---

44. *Id.* at 140, 720 S.E.2d at 111–12 (citing *S. Ry. Co. v. City of Danville*, 175 Va. 300, 305, 7 S.E.2d 896, 898 (1940)).

45. *See id.*, 720 S.E.2d at 112.

46. *Id.* at 140–42, 720 S.E.2d at 112–13.

47. *Id.* at 142, 720 S.E.2d at 113.

48. *See id.*

49. *Id.* at 143, 720 S.E.2d at 114 (discussing *Carter v. Chesterfield Cnty. Health Comm’n*, 259 Va. 588, 594, 527 S.E.2d 783, 787 (2000)).

50. *See id.* at 144–45, 720 S.E.2d at 114–15.

51. *Id.* at 146, 720 S.E.2d at 115.

counties under Virginia Code section 15.2-1809 acted to abrogate the otherwise blanket sovereign immunity in tort enjoyed by Virginia counties.<sup>52</sup> The court also considered whether tort claimants were required to comply with the terms of the Virginia Code by presenting their tort claims for consideration by the governing body of a county prior to initiating litigation.<sup>53</sup>

Seabolt claimed personal injuries as a result of the county's gross negligence in maintaining a public park.<sup>54</sup> Although the county did not assign error to the circuit court's refusal to consider the special plea of immunity, the court held that the county's immunity defense was a jurisdictional issue.<sup>55</sup> The court found that "if sovereign immunity applies, the court is without subject matter jurisdiction to adjudicate the claim."<sup>56</sup>

In response to the county's plea of sovereign immunity, Seabolt contended that the county's sovereign immunity was abrogated by section 15.2-1809.<sup>57</sup> In examining the immunity issue on appeal, the court observed that at common law, in the absence of a legislative waiver by the General Assembly, counties in Virginia enjoy the same absolute immunity in tort.<sup>58</sup> Such a waiver "cannot be implied from general statutory language but must be explicitly and expressly announced in the statute."<sup>59</sup> In light of this requirement, the court held that Seabolt's claim was barred by virtue of the county's sovereign immunity.<sup>60</sup> The court examined both the Virginia Tort Claims Act<sup>61</sup> and Virginia Code section 15.2-1809, noting that counties expressly are excluded from the

---

52. 283 Va. 717, 721, 724 S.E.2d 715, 717 (2012) (citing VA. CODE ANN. § 15.2-1809 (Repl. Vol. 2008 & Cum. Supp. 2011)).

53. *See id.* at 721, 724 S.E.2d at 717 (citing VA. CODE ANN. §§ 15.2-1243, -1244, -1248, -1249 (Repl. Vol. 2008); *id.* §§ 15.2-1245 to -1247 (Cum. Supp. 2011)).

54. *Id.* at 719, 242 S.E.2d at 716.

55. *Id.* (citing *Afzall v. Commonwealth*, 273 Va. 226, 230, 639 S.E.2d 279, 281 (2007)).

56. *Id.* (quoting *Afzall*, 273 Va. at 230, 639 S.E.2d at 281).

57. *Id.* at 720, 724 S.E.2d at 717. In relevant part, the statute provides immunity to cities and towns for acts of its officers and agents constituting ordinary negligence in maintaining or operating public parks, recreational facilities, and playgrounds, but provides that such cities and towns shall be liable for acts of gross negligence of its officers or agents. VA. CODE ANN. § 15.2-1809 (Repl. Vol. 2012). The statute further confers the identical immunity upon counties "in addition to, and not limiting on, other immunity existing at common law or by statute." *Id.*

58. *Seabolt*, 283 Va. at 719, 724 S.E.2d at 716.

59. *Id.* at 721, 724 S.E.2d at 717 (citing *Afzall*, 273 Va. at 230, 639 S.E.2d at 281 (internal quotation marks omitted)).

60. *Id.* at 722, 724 S.E.2d at 718.

61. VA. CODE ANN. § 8.01-195.3 (Repl. Vol. 2007).

terms of the former, and holding that the latter contains no language abrogating the blanket immunity already enjoyed by counties.<sup>62</sup> Critically, the limited grant of immunity conferred upon counties pursuant to Virginia Code section 15.2-1809 was “in addition to, and not limiting on” the sovereign immunity that counties otherwise enjoy.<sup>63</sup> Thus, the court held that the clear terms of the statute in no way operated to abrogate the common law immunity of counties.<sup>64</sup>

The court also considered whether tort claimants are required to comply with the procedural requirements of the county claims statutes as conditions precedent to bringing a legal action in tort against a county.<sup>65</sup> In resolving this question, the court reviewed its previous holdings interpreting antecedents of the present statutes and clarified that these county claims statutes apply only to suits in contract.<sup>66</sup> The court observed that the statutes contained procedural requirements for presenting contractual claims against counties, but contained no indication that the General Assembly intended to abrogate tort immunity thereby.<sup>67</sup> Accordingly, solely on this basis, the court held that section 15.2-1243 was inapplicable to Seabolt’s claim.<sup>68</sup>

### 3. School administrator immunity: *Burns v. Gagnon*

In *Burns v. Gagnon*, the court considered whether school officials have a duty to protect students from the conduct of third

---

62. *Seabolt*, 283 Va. at 720, 724 S.E.2d at 716–17; see also VA. CODE ANN. § 15.2-1809 (Repl. Vol. 2012).

63. *Seabolt*, 283 Va. at 720, 724 S.E.2d at 717 (quoting VA. CODE ANN. § 15.2-1809 (Repl. Vol. 2008 & Cum. Supp. 2011)).

64. *Id.* at 721, 724 S.E.2d at 717.

65. See *id.*

66. *Id.*, 724 S.E.2d at 717–18; see *Mann v. Cnty. Bd. of Arlington Cnty.*, 199 Va. 169, 174, 98 S.E.2d 515, 519 (1957); *Fry v. Cnty. of Albemarle*, 86 Va. 195, 197, 9 S.E.2d 1004, 1005 (1889).

67. *Seabolt*, 283 Va. at 722, 724 S.E.2d at 718.

68. See *id.* Interestingly, the Supreme Court of Virginia neither considered nor addressed the line of cases in which the court had held that this same county claims procedure within predecessor statutes was intended by the General Assembly to be a “comprehensive procedure for the presentation, auditing, challenge, defense, and judicial review of monetary claims asserted against a county.” *Nuckols v. Moore*, 234 Va. 478, 481, 362 S.E.2d 715, 717 (1987) (citing *Cnty. Sch. Bd. v. Bd. of Supervisors*, 184 Va. 700, 710, 36 S.E.2d 620, 625 (1946)); see also *Parker v. Prince William Cnty.*, 198 Va. 231, 235–36, 93 S.E.2d 136, 139–40 (1956) (applying predecessor statutes to bar claim against county for damages caused by nuisance).

persons.<sup>69</sup> The court also considered whether, and under what circumstances, school administrators enjoy immunity under Virginia Code section 8.01-220.1:2 and the common law.<sup>70</sup>

At the times relevant to the case, Gagnon was a student at Gloucester High School, where Burns was an assistant principal.<sup>71</sup> On December 14, 2006, Gagnon was involved in a fight with another student in the school cafeteria, where he sustained the injuries at issue in the litigation.<sup>72</sup> Gagnon was approached by the other student, James S. Newsome, Jr., who struck Gagnon once in the face, knocking his head against a brick pillar.<sup>73</sup>

Approximately two hours earlier, Burns was told by a friend and fellow student of Gagnon, Shannon Diaz, that Gagnon was going to get into a fight with another student, according to messages sent on the social networking website, MySpace.<sup>74</sup> Diaz did not mention the other student's name.<sup>75</sup> In response, Burns wrote down Gagnon's name and told Diaz that he would contact security and "make sure this problem gets taken care of," but Burns did not act on Diaz's report in the two-hour interval between his conversation with Diaz and the fight.<sup>76</sup>

The court considered a number of questions raised by both Burns and Gagnon. From a local government perspective, the significant questions were: (i) whether Burns, as assistant principal, owed a legal duty to Gagnon, a student; and (ii) whether Burns, as assistant principal, was entitled to sovereign immunity.<sup>77</sup>

To evaluate the first question, the court recalled its longstanding principle that negligence "is not actionable unless there is a legal duty, a violation of the duty, and consequent damage."<sup>78</sup> The court further observed that as a general proposition, "a person

---

69. 283 Va. 657, 668–69, 727 S.E.2d 634, 641–42 (2012).

70. *Id.* at 673, 727 S.E.2d at 644; *see* VA. CODE ANN. § 8.01-2201:2 (Repl. Vol. 2007).

71. *Burns*, 283 Va. at 663–64, 727 S.E.2d at 638–39.

72. *Id.* at 664, 727 S.E.2d at 639.

73. *Id.*

74. *Id.*

75. *Id.* at 665, 727 S.E.2d at 639.

76. *Id.* at 664, 727 S.E.2d at 639.

77. *See id.* at 664–65, 727 S.E.2d at 639.

78. *Id.* at 668, 727 S.E.2d at 641 (quoting *Marshall v. Winston*, 239 Va. 315, 318, 389 S.E.2d 902, 904 (1990)).

does not have a duty to protect another from the conduct of third persons.”<sup>79</sup>

Gagnon argued that Burns owed a duty based upon a “special relationship” between principal and student, arguing by analogy to the time-honored relationship between an innkeeper and guest.<sup>80</sup> The court declined to find that a special relationship exists between student and principal giving rise to a duty on the part of the principal to protect students from actions of third parties, and noted its concern that it is not in society’s best interest to expand the potential liability of public officials in this manner.<sup>81</sup> However, the court nevertheless held that school officials are subject to a duty to act reasonably for the supervision and care of their students.<sup>82</sup> The court observed that in sending a child to school, parents entrust the supervision and care of that child to school officials.<sup>83</sup> Accordingly, while not an “insurer” of a child’s safety while at school, a principal is bound to act reasonably to provide for the supervision and care of students.<sup>84</sup> The court further held that a principal may, in certain circumstances, be deemed to have assumed additional duties toward students by virtue of the common law principle of assumption of a duty; however, because no factual findings were made on the issue of whether Burns had assumed additional duties as to Gagnon, the court determined that remand was necessary.<sup>85</sup>

Having concluded that, at minimum, Burns had a common law duty to supervise and care for Gagnon, the court considered whether Burns was entitled to sovereign immunity at common-law or by virtue of Virginia Code section 8.01-220.1:2(A) and (B).<sup>86</sup> In reviewing the statutory language, the court observed that un-

---

79. *Id.* (quoting *Kellerman v. McDonough*, 278 Va. 478, 492, 684 S.E.2d 786, 793 (2009)).

80. *Id.* at 670, 727 S.E.2d at 642–43. Gagnon asserted that the principal-student relationship should give rise to a special duty of protection, because the “student, like the guest, has little ability to control his environment and thus relies on the principal to make the school safe, just as the guest relies on the innkeeper to make the inn safe.” *Id.*

81. *Id.* at 670–71, 727 S.E.2d at 643.

82. *Id.* at 671, 727 S.E.2d at 643 (citing *Kellermann*, 278 Va. at 487, 684 S.E.2d at 790) (comparing the duty of care to that of a parent supervising his child’s friend).

83. *Id.*

84. *Id.* (citing *Kellermann*, 278 Va. at 482, 684 S.E.2d at 790).

85. *Id.* at 672–73, 727 S.E.2d at 643–44 (citing *Kellermann*, 278 Va. at 489, 684 S.E.2d at 791).

86. *See id.* at 673, 727 S.E.2d at 644; VA. CODE ANN. § 8.01-220.1:2(B) (Repl. Vol. 2007).

der subsection (A), “teachers” are afforded immunity from civil damages for acts of ordinary negligence when taken in good faith with regard to acts or omissions resulting from the “supervision, care or discipline of students.”<sup>87</sup> Subsection (B) provides that “[n]o school employee or school volunteer shall be liable for any civil damages arising from the prompt good faith reporting of alleged acts of bullying or crimes against others . . . .”<sup>88</sup>

The court determined that Burns was not entitled to immunity under subsection (A) because this subsection applied only to “teachers.”<sup>89</sup> The court noted that the statute itself contains no definition of the term “teacher,” and therefore under rules of statutory construction, the ordinary meaning of the word applies.<sup>90</sup> Applying the dictionary definition of “teacher” as “one whose occupation is to instruct,” Burns was not a “teacher” under the “ordinary meaning” of the term.<sup>91</sup> Rather, as principal, Burns’s occupation was to “lead an educational institution.”<sup>92</sup>

The court likewise concluded that Burns was not immune under subsection (B) because the cause of action was not based upon the “good faith reporting of alleged acts of bullying or crimes against others.”<sup>93</sup> Rather, the cause of action was based on a failure to respond to such a report.<sup>94</sup> Accordingly, the court held that section 8.01-220.1:2 did not support Burns’ claim of immunity.<sup>95</sup>

With regard to the claim of common law immunity, the court referred to the four-factor test articulated in *Friday-Spivey v. Collier*,<sup>96</sup> and observed that the parties disagreed only as to the fourth factor: whether the alleged wrongful act was merely ministerial in nature, or involved the “exercise of judgment and discretion.”<sup>97</sup> In holding that Burns’s actions involved the exercise of judgment and discretion and that Burns therefore was entitled to

---

87. *Burns*, 283 Va. at 674, 727 S.E.2d at 644–45 (quoting VA. CODE ANN. § 8.01-220.1:2(A) (Repl. Vol. 2007)).

88. VA. CODE ANN. § 8.01-220.1:2(B) (Repl. Vol. 2007).

89. *Id.* at 674, 727 S.E.2d at 645.

90. *Id.* (citing *James v. City of Falls Church*, 280 Va. 31, 43, 694 S.E.2d 568, 575 (2010)).

91. *Id.* (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2346 (1993)).

92. *Id.* (citing WEBSTER’S, *supra* note 91, at 1802).

93. *Id.* at 675, 727 S.E.2d at 645; VA. CODE ANN. § 8.01-220.1:2(B) (Repl. Vol. 2007)).

94. 283 Va. at 675, 727 S.E.2d at 645.

95. *Id.*

96. 268 Va. 384, 387–88 n.4, 601 S.E.2d 591, 593 n.4 (2004).

97. *Burns*, 283 Va. at 676–77, 727 S.E.2d at 646.

immunity, the court remarked that Burns was confronted with a number of questions calling for the exercise of judgment.<sup>98</sup> For instance, the evidence showed that Diaz had misled Burns when questioned about an unrelated matter earlier in the day, and Burns was then called upon to exercise judgment in deciding whether to believe Diaz's report regarding Gagnon, and if so, what type of response, if any, was warranted.<sup>99</sup>

In a dissent, Justice Mims argued that once Burns had decided on his course of action to notify security and make sure the matter was "taken care of," all that remained was a ministerial act on the part of Burns, and his failure to follow through on this course of action should not be shielded by common law immunity.<sup>100</sup> Although Justice Mims acknowledged that Burns would have had discretion to change his mind, he argued that no evidence existed in the record that Burns considered changing his mind.<sup>101</sup> Therefore, Justice Mims would not have afforded Burns immunity.<sup>102</sup>

Interestingly, in light of the limited scope of the remand, the court implicitly held that common law immunity would shield Burns from acts of ordinary negligence, regardless of whether Burns's duty to Gagnon arose by virtue of the doctrine of assumption of a duty or by virtue of a school official's duty to exercise reasonable care in supervising and caring for students.<sup>103</sup>

### C. *Virginia Freedom of Information Act*

#### 1. FOIA and the SCC: *Christian v. State Corporation Commission*

In *Christian v. State Corporation Commission*, the court addressed an issue of first impression in considering whether the Virginia Freedom of Information Act<sup>104</sup> ("FOIA") is applicable to the State Corporation Commission ("SCC").<sup>105</sup>

---

98. See *id.* at 677, 727 S.E.2d at 646.

99. *Id.*

100. *Id.* at 683–84, 727 S.E.2d at 650 (Mims, J., dissenting).

101. *Id.* at 684, 727 S.E.2d at 650.

102. *Id.*

103. See *id.* at 663–77, 727 S.E.2d at 639–46 (majority opinion).

104. VA. CODE ANN. §§ 2.2-3700 to -3714 (Repl. Vol. 2011 & Supp. 2012).

105. *Christian v. State Corp. Comm'n*, 282 Va. 392, 398, 718 S.E.2d 767, 770 (2011).

In 2009, appellant Christian submitted two requests to the clerk's office of the SCC seeking information pursuant to FOIA.<sup>106</sup> Christian requested a searchable database of SCC employees, and sought public records concerning certain overpayments or unused payments for which the SCC's authority to order a refund had lapsed, as well as complaints or grievances arising therefrom.<sup>107</sup> The SCC responded in writing, taking the position that although FOIA did not apply to the SCC, by policy the SCC would provide information and documents upon request to the extent it is able, but the information requested was "not readily available."<sup>108</sup>

Subsequently, Christian filed with the SCC a pro se "Petition for Temporary Injunction and Petition for Declaratory Relief" seeking an order directing the clerk's office to produce the requested public records, as well as an award of attorney's fees and costs.<sup>109</sup> In response, the clerk's office produced a single document that it contended was responsive to Christian's petition.<sup>110</sup> The SCC subsequently followed the chief hearing examiner's recommendation, dismissing the matter on the grounds that the petition was rendered moot by production of the requested information by the clerk's office.<sup>111</sup>

In considering the question of whether the SCC is an entity governed by FOIA, the court first observed that although FOIA exempts certain records of numerous government agencies, the SCC is not one of the agencies identified in the act as exempt.<sup>112</sup> This did not end the inquiry, however, because the language of FOIA evidences a recognition that other exemptions to the public disclosure requirements may apply outside of the language of the act itself if those exemptions are "otherwise specifically provided by law."<sup>113</sup>

The SCC raised three primary arguments the court found compelling.<sup>114</sup> First, the SCC argued FOIA did not apply because the handling of information at the SCC was governed by a separate

---

106. *Id.* at 395, 718 S.E.2d at 768.

107. *Id.*

108. *Id.*

109. *See id.*, 718 S.E.2d at 768–69.

110. *Id.* at 396, 718 S.E.2d at 769.

111. *Id.*

112. *Id.* at 398, 718 S.E.2d at 770.

113. *Id.* at 398–99, 718 S.E.2d at 770.

114. *Id.* at 399, 718 S.E.2d at 770.

and parallel structure of laws.<sup>115</sup> The court noted that it was not the existence of certain parallel or even contradictory statutes governing the SCC's records disclosure, but rather the sheer multitude of statutory provisions governing the SCC's distribution of information that served to establish that FOIA did not apply to the SCC.<sup>116</sup>

Next, the SCC argued it was not a "public body" under FOIA because the SCC derives its authority directly from the Virginia Constitution, rather than from legislative or administrative action.<sup>117</sup> The court found this argument persuasive and likened the SCC to the Commonwealth Attorney's Office, which also is not subject to FOIA because its power is similarly derived from the Virginia Constitution.<sup>118</sup>

Finally, the SCC argued that FOIA lacks a constitutional enforcement mechanism applicable to the SCC.<sup>119</sup> The court previously held in *Atlas Underwriters, Ltd. v. State Corporation Commission* that it maintained "exclusive jurisdiction over all challenges to all actions of the SCC,"<sup>120</sup> yet FOIA placed venue for enforcement proceedings in the circuit courts.<sup>121</sup> The court observed that since rendering the decision in *Atlas*, FOIA had been amended frequently, yet the "Virginia legislature ha[d] not seen fit to modify the enforcement language."<sup>122</sup> Accordingly, the court held that FOIA "is functionally unenforceable against the SCC" and therefore possessed no legal weight with regard to the SCC.<sup>123</sup>

## 2. FOIA and State Citizenship: *McBurney v. Young*

The idea of state sovereignty is not dead. Rather, after *McBurney v. Young*,<sup>124</sup> it appears that lawful distinctions between states and their respective citizens in our grand republic—or at least in the Fourth Circuit—are alive and well.

---

115. *Id.*

116. *Id.* at 399–400, 718 S.E.2d at 771.

117. *Id.* at 400, 718 S.E.2d at 771.

118. *Id.*; see also *Connell v. Kersey*, 262 Va. 154, 161–62, 547 S.E.2d 228, 231–32 (2001) (holding that the trial court did not err in concluding that a Commonwealth's attorney is not a "public body" within the meaning of FOIA).

119. *Christian*, 282 Va. at 400, 718 S.E.2d at 771.

120. 237 Va. 45, 49, 375 S.E.2d 733, 735 (1989).

121. See *id.* at 47, 375 S.E.2d at 734–35.

122. *Christian*, 282 Va. at 401, 718 S.E.2d at 772.

123. *Id.*

124. 667 F.3d 454 (4th Cir. 2012).

FOIA grants citizens of the Commonwealth and representatives of media in Virginia access to public records.<sup>125</sup> Non-Virginians who had ties to Virginia only through divorce, child custody, and child support decrees (McBurney, a citizen of Rhode Island) and the business of gathering public information for sale to customers (Hurlbert, a citizen of California) challenged FOIA's "citizens-only" provision on two grounds.<sup>126</sup>

First, the appellants argued that the "citizens-only" provision of FOIA violated the Privileges and Immunities Clause of Article IV of the United States Constitution.<sup>127</sup> The United States Court of Appeals for the Fourth Circuit disagreed, holding that the rights granted under FOIA are not fundamental rights "sufficiently basic to the livelihood of the [n]ation" so as to be protected under the Privileges and Immunities Clause.<sup>128</sup> The court held that the rights asserted—the right to access courts and the right to pursue a common calling, although previously recognized as fundamental in this context—were not implicated by the "citizens-only" provision of FOIA.<sup>129</sup> The court held other rights asserted by the appellants that were implicated by FOIA—"equal access to information"—simply were not fundamental within the meaning of the Privileges and Immunities Clause.<sup>130</sup> The court also reasoned that the right to information under FOIA was not a right directly related to litigation.<sup>131</sup> The Privileges and Immunities Clause "is not a mechanism for pre-lawsuit discovery," and access to information pre-lawsuit is not a sufficient basis to be protected under the clause.<sup>132</sup>

Next, Hurlbert challenged the citizens-only provision of FOIA under the dormant Commerce Clause,<sup>133</sup> which is a negative implication of the United States Constitution's Commerce Clause empowering Congress "[t]o regulate Commerce . . . among the several States."<sup>134</sup> The dormant Commerce Clause is intended to

---

125. VA. CODE ANN. § 2.2-3704 (Repl. Vol. 2011 & Supp. 2012).

126. *McBurney*, 667 F.3d at 459–60.

127. *Id.* at 460; U.S. CONST. art. IV, § 2, cl. 1.

128. *McBurney*, 667 F.3d at 467 (quoting *Sup. Ct. of Va. v. Friedman*, 487 U.S. 59, 64 (1988)).

129. *Id.* at 463, 465, 467.

130. *Id.* at 465–66.

131. *Id.* at 467.

132. *Id.*

133. *Id.* at 468.

134. U.S. CONST. art. I, § 8, cl. 3.

stop states from erecting barriers to interstate trade either intentionally or in effect.<sup>135</sup> Thus, it has two tiers. The first tier prohibits facial discrimination, and the second tier prohibits regulatory measures which “unjustifiably . . . burden the interstate flow of articles of commerce.”<sup>136</sup>

The court held that FOIA is simply not the kind of statute to which the dormant Commerce Clause applies.<sup>137</sup> Because FOIA “is wholly silent as to commerce or economic interests . . . it does not facially, or in its effect, discriminate against interstate commerce or out-of-state economic interests.”<sup>138</sup> Moreover, the court held that Hurlbert did not adequately preserve a challenge to the district court’s use of the second tier to analyze his challenge.<sup>139</sup>

Thus, at least in the Fourth Circuit, and at least under these facts, FOIA’s “citizens-only” provision does not violate the Privileges and Immunities Clause or the dormant Commerce Clause. It is legal for the Commonwealth of Virginia to allow its citizens the right to access state and local government public documents while denying non-Virginia citizens that same right.

In a way, the Fourth Circuit reaffirmed through *McBurney* the basic sovereignty of the several states of our grand republic.<sup>140</sup>

#### D. *Standing and a City Charter: Deerfield v. City of Hampton*

*Deerfield v. City of Hampton* involved a suit by a citizen committee of petitioners seeking to prevent development of a mixed-use subdivision within the city.<sup>141</sup> The committee contended that

---

135. See *McBurney*, 667 F.3d at 468 (quoting *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996); *Brown v. Hovatter*, 561 F.3d 357, 363 (4th Cir. 2009)).

136. *Id.* (quoting *Brown*, 561 F.3d at 363). Under the second tier, the regulatory measure “will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” *Id.* (quoting *Brown*, 661 F.3d at 363).

137. *Id.* at 469.

138. *Id.*

139. *Id.* at 469–70.

140. On October 5, 2012, the Supreme Court of the United States granted a writ of certiorari to review this case, so we may see whether this view prevails in the end. *McRoberts v. Young*, 667 F.3d 454 (4th Cir. 2012), *cert. granted*, 81 U.S.L.W. 3193 (U.S. Oct. 5, 2012) (No. 12-17).

141. 283 Va. 759, 761–62, 724 S.E.2d 724, 725 (2012).

the proposed development violated the city's zoning ordinance and was unlawful.<sup>142</sup>

Interestingly, the charter of the City of Hampton contains a procedure for citizens to petition the Hampton City Council for repeal or amendment of ordinances by filing a petition with the clerk of the council within thirty days of the adoption of the ordinance to be repealed or amended.<sup>143</sup> The charter provides that the named petitioners shall be deemed to constitute a committee of petitioners for purposes of submitting the petition to city council.<sup>144</sup> In the event that city council does not amend or repeal the ordinance as requested in the petition, the charter empowers such a committee to request that the matter be presented to the circuit court for entry of an order calling for a referendum on the ordinance and fixing the date of the election.<sup>145</sup>

On June 10, 2009, the Hampton City Council adopted an ordinance rezoning certain property located in a part of the city known as Buckroe Beach, which permitted the construction of a residential subdivision by a developer, POH 2010 LLC ("POH").<sup>146</sup> In response, a group of city residents circulated and timely submitted petitions pursuant to the procedure set forth in the city charter, requesting that the ordinance be repealed or submitted for a referendum to the voters of the city.<sup>147</sup> Subsequently, the city council voted to repeal the ordinance, thereby returning the property to the previous zoning classification that would not permit POH's proposed development.<sup>148</sup> Despite this repeal, the city's zoning administrator issued a "vested rights determination" finding that POH had a vested right to develop the property.<sup>149</sup> Because the committee had failed to appeal this decision, POH argued the decision was then final.<sup>150</sup>

When the committee became concerned that POH, with the assent of the city due to the vested rights determination, intended to proceed with the development of the Buckroe Beach property

---

142. *Id.* at 762, 724 S.E.2d at 725.

143. HAMPTON CITY, VA., CHARTER § 3A-10 (2007).

144. *Id.*

145. *Id.* § 3A-11 (2007).

146. *Deerfield*, 283 Va. at 762, 724 S.E.2d at 725.

147. *Id.*

148. *Id.*

149. *Id.* at 763, 724 S.E.2d at 726.

150. *Id.*

notwithstanding the rezoning, it filed suit in the Hampton City Circuit Court.<sup>151</sup> The committee sought an injunction and a declaration pursuant to Virginia Code sections 8.01-184 and 8.01-186 “that the actions of the City and POH in furtherance of the subject development of the Buckroe Beach Property were ‘unauthorized and unlawful.’”<sup>152</sup>

To determine whether the committee had standing to pursue the declaratory action, the court examined the charter provisions under which the committee was created.<sup>153</sup> The court observed that the express language of the charter provides a limited role for committees created for purposes of submitting a petition for repeal of an ordinance.<sup>154</sup> The court noted that pursuant to the charter, the committee was authorized to submit the petition seeking repeal to the city council, and, if the city council neither amended nor repealed the ordinance, the committee could request the matter to be presented to the circuit court.<sup>155</sup> The court concluded that once the city council voted to repeal the ordinance at issue, negating in the process the need for a referendum, “the authority of the [c]ommittee to act, and its purpose to exist, came to an end.”<sup>156</sup>

The committee argued that it had standing based on the “evolving legal dispute” between the parties,<sup>157</sup> however, the court found that the committee’s authority to act extended only in relation to the ordinance for which repeal was sought pursuant to the city charter.<sup>158</sup> The substantive issue of whether the property in question could be developed as proposed by POH was beyond the scope of the committee’s limited purpose.<sup>159</sup> The committee existed solely for the purpose of fulfilling the functions set forth in the charter, i.e., submitting the petition for repeal by city council or refer-

---

151. *Id.* at 762, 724 S.E.2d at 725.

152. *Id.* at 762–63, 724 S.E.2d at 725. *See generally* VA. CODE ANN. §§ 8.01-184, -186 (Repl. Vol. 2007 & Cum. Supp. 2012) (giving the circuit court power to issue declaratory judgments and further relief deemed necessary and proper).

153. *Id.* at 764–65 n.\*, 724 S.E.2d at 727 n.\*.

154. *Id.* at 766, 724 S.E.2d at 728; *see* HAMPTON CITY, VA., CHARTER §§ 3A-10, -11 (2007).

155. *Deerfield*, 283 Va. at 766, 724 S.E.2d at 728.

156. *Id.* at 767, 724 S.E.2d at 728.

157. *Id.* at 765–66, 724 S.E.2d at 727.

158. *See id.* at 767, 724 S.E.2d at 728.

159. *See id.*

endum to the voters of the city.<sup>160</sup> Because the ordinance had been repealed, the committee had no further reason to exist and therefore did not have standing to challenge the development.<sup>161</sup>

*E. Contamination of Groundwater and Two Competing Regulatory Regimes: Campbell County v. Royal*

At issue in *Campbell County v. Royal* was the question of whether a county could be liable under the Oil Discharge Law<sup>162</sup> for the contamination of groundwater by virtue of seepage of leachate and landfill gas into groundwater beneath a solid waste facility, or whether the Virginia Waste Management Act (“VWMA”)<sup>163</sup> constitutes the exclusive statutory and regulatory framework governing such occurrences.<sup>164</sup>

Claude M. Royal and Virginia H. Royal owned, operated, and resided in a manufactured home community in Campbell County, comprising approximately 165 acres.<sup>165</sup> Bordering the Royals’ property is a landfill owned and operated by Campbell County.<sup>166</sup> The portion of the landfill at issue, known as Phase II, is a “closed capped, and unlined” disposal area.<sup>167</sup>

Pursuant to regulations in effect at the time the county was issued a permit to operate the landfill, Phase II was not required to be lined to prevent the seepage of leachate into groundwater below the landfill facility.<sup>168</sup> However, pursuant to the VWMA and the regulations promulgated pursuant thereto, known as the Virginia Solid Waste Management Regulations (“SWMR”), the county was required to install a system of groundwater monitoring wells in order to detect possible contamination of groundwater from Phase II.<sup>169</sup>

Pursuant to SWMR, when the county detected “statistically significant” levels of “solid waste constituents” in groundwater in

---

160. *See id.*

161. *Id.*

162. VA. CODE ANN. §§ 62.1-44.34:14 to -44.34:28 (Repl. Vol. 2006 & Cum. Supp. 2012).

163. VA. CODE ANN. §§ 10.1-1400 to -1457 (Repl. Vol. 2012).

164. *See* 283 Va. 4, 14–15, 720 S.E.2d 90, 95 (2012).

165. *Id.* at 8, 720 S.E.2d at 91.

166. *Id.* (footnote omitted).

167. *Id.* at 9, 720 S.E.2d at 91.

168. *See id.* at 13 n.14, 720 S.E.2d at 94 n.14.

169. *Id.* at 9, 720 S.E.2d at 91.

the area of Phase II, it initiated a “Nature and Extent Study” (“NES”) to evaluate the possibility of groundwater contamination migrating beyond the solid waste facility property.<sup>170</sup> The NES confirmed that various hydrocarbons, including benzene, had migrated onto the Royals’ property and had impacted some of the Royals’ wells supplying water to the manufactured home park.<sup>171</sup> Upon being informed by the county of the contamination, the Royals filed a motion for judgment alleging causes of action for inverse condemnation and violations of the Oil Discharge Law.<sup>172</sup>

In response, the county denied that there had been a “discharge of oil” under the Oil Discharge Law, and further denied that a taking had occurred.<sup>173</sup> After conducting an evidentiary hearing, the trial court granted summary judgment in favor of the Royals, holding the county responsible under both the Oil Discharge Law and inverse condemnation claims filed by the Royals.<sup>174</sup>

The trial court concluded that the county was liable under the Oil Discharge Law because benzene is a liquid hydrocarbon, which falls within the law’s definition of “oil.”<sup>175</sup> Likewise, the trial court concluded that the “migration of contaminants from the Landfill into the groundwater on the Royal[s]’ property” established the Royals’ inverse condemnation claim, making the county liable under that theory as well.<sup>176</sup>

On appeal, the dispositive issue as stated by the Virginia Supreme Court was

whether the trial court, in granting summary judgment, erred by holding that the contamination of groundwater beneath Phase II by the passive, gradual seepage of leachate and landfill gas and the subsequent migration of that contaminated groundwater onto the

---

170. *Id.* at 9–10, 720 S.E.2d at 91–92.

171. *Id.* at 10, 720 S.E.2d at 92 (footnote omitted).

172. *Id.* at 11–12, 720 S.E.2d at 93; VA. CODE ANN. § 62.1-44.34:18 (Repl. Vol. 2006 & Cum. Supp. 2012).

173. *Id.* at 12, 720 S.E.2d at 93.

174. *Id.* at 14, 720 S.E.2d at 94. Notably, the evidentiary hearing initially was conducted to resolve factual issues relating to a plea in bar filed by the county. The trial court’s reliance on evidence presented at this hearing in ruling on the summary judgment motions was not challenged on appeal. *Id.* at 12, n.13, 720 S.E.2d at 93, n.13.

175. *Id.* at 14, 720 S.E.2d at 94. The Oil Discharge Law defines oil as “oil of any kind and in any form, including, but not limited to . . . crude oils and all other liquid hydrocarbons regardless of specific gravity.” VA. CODE ANN. § 62.1-44.34:14 (Repl. Vol. 2006).

176. *Royal*, 283 Va. at 14, 720 S.E.2d at 94 (alterations in original) (internal quotation marks omitted).

Royals' property subjected the County to liability under Code § 62.1-44.34:18(C) of the Oil Discharge Law.<sup>177</sup>

To resolve this question, the court examined the VWMA and the Oil Discharge Law, and the regulatory regimes promulgated pursuant to each, including the SWMR.<sup>178</sup> The analysis of the regulatory framework of each revealed the "contrast between the extensive regulations under the VWMA governing a solid waste disposal facility's groundwater monitoring and leachate control and the lack of any regulations under the Oil Discharge Law . . . applicable to such a facility."<sup>179</sup> Not only did the VWMA apply specifically to the operation of landfills and provide an extensive regulatory and permitting regime for their operation, but the VWMA also empowered the Virginia Waste Management Board to extensively supervise many details of the operation and management of solid waste disposal facilities.<sup>180</sup> This included the maintenance of records and reporting systems, site cleanup, and "abating hazards and nuisances dangerous to public health, safety, or the environment."<sup>181</sup> Finally, the court noted the board had, pursuant to its authority, "promulgated extensive regulations governing solid waste management" concerning the monitoring of groundwater by owners and operators of landfills as well as requirements for corrective action and remediation in the event of statistically significant increases in certain "Groundwater Solid Waste Constituents," including benzene.<sup>182</sup>

In stark contrast to the detailed and extensive provisions of the VWMA and SWMR, the court observed that the Oil Discharge Law originally contained only two sections, and did not specifically address landfills or solid waste disposal.<sup>183</sup> Rather, as originally enacted, the Oil Discharge Law applied to owners and operators of an "oil refinery" or a "vessel," "which permits or suffers a discharge of oil into" waters of the Commonwealth.<sup>184</sup> The court noted that that the Oil Discharge Law and the regulations promul-

---

177. *Id.* at 14–15, 720 S.E.2d at 95.

178. *See id.* at 15–22, 720 S.E.2d at 95–99.

179. *Id.* at 23–24, 720 S.E.2d at 100.

180. *See id.* at 15, 720 S.E.2d at 95.

181. *Id.* (quoting VA. CODE ANN. § 10.1-1402(1), (7), (11), (19), (21) (Repl. Vol. 2006)).

182. *Id.* at 16–17, 720 S.E.2d at 95–96.

183. *Id.* at 18, 720 S.E.2d at 97; *see* Act of Mar. 15, 1973, ch. 417, 1973 Va. Acts 601 (codified as amended at VA. CODE ANN. § 62.1-44.34:1, :2 (Repl. Vol. 1973 & Supp. 1973)).

184. VA. CODE ANN. § 62.1-44.34:2 (Repl. Vol. 1973).

gated pursuant thereto “reflect[] a . . . focus on storage tanks, vessels, and facilities,” none of which apply specifically to landfill or other solid waste disposal operations.<sup>185</sup>

After its examination of the contrast between the two regulatory regimes, the court concluded that the Oil Discharge Law simply did not apply to the “passive, gradual seepage of leachate and landfill gas” at issue in the litigation.<sup>186</sup> “Given the specific and all-embracing coverage under the VWMA and SWMR of the occurrences at issue” in the case, the court concluded that the General Assembly intended the VWMA to be the exclusive regulatory framework governing discharges of leachate and landfill gas from solid waste disposal facilities.<sup>187</sup> Accordingly, the judgment of the trial court that the county was liable under the Oil Discharge Law was reversed.<sup>188</sup>

Having concluded that the Oil Discharge Law did not contemplate or regulate the type of contamination at issue, the court proceeded to examine whether the jury’s award of damages could be sustained nonetheless based upon the Royals’ inverse condemnation claim.<sup>189</sup> The county argued that the Royals “failed to proceed on their inverse condemnation claim at the jury trial on the issue of damages.”<sup>190</sup>

In reviewing the record, the court observed that the Royals had offered only one instruction on damages, which tracked almost verbatim the damages provision contained in the Oil Discharge Law.<sup>191</sup> The court concluded that the instruction offered by the Royals only applied to the measure of damages under the Oil Discharge Law and did not contain the measure of damages for an inverse condemnation claim.<sup>192</sup> Accordingly, the court held that the “Royals abandoned their inverse condemnation claim” by of-

---

185. See *Royal*, 283 Va. at 21–22, 720 S.E.2d at 98–99.

186. *Id.* at 24, 720 S.E.2d at 100.

187. *Id.*, 720 S.E.2d at 99–100.

188. *Id.*, 720 S.E.2d at 100.

189. *Id.* at 24–25, 720 S.E.2d at 100.

190. *Id.* at 25, 720 S.E.2d at 100.

191. *Id.*, 720 S.E.2d at 100–01 (citing VA. CODE ANN. § 62.1-44.34:18(c)(4) (Repl. Vol. 2006)).

192. *Id.* at 26, 720 S.E.2d at 101.

fering this instruction as the sole damages instruction and entered final judgment in favor of the county.<sup>193</sup>

In a dissent, Justice Powell, joined by Justice Lemons, argued that although landfills are undoubtedly governed by the VWMA and SWMR, nothing in the statutory scheme of the Oil Discharge Law precludes the application of the Oil Discharge Law to the facts presented on appeal.<sup>194</sup> Observing that the stated purposes of the Water Control Law, of which the Oil Discharge Law is a part, includes, *inter alia*, protection of state waters, prevention of pollution, and reduction of existing pollution, Justice Powell concluded that the broad scope of the Water Control Law was compatible with the facts at issue on appeal.<sup>195</sup> Justice Powell further noted that the General Assembly had exempted several categories of “unintentional discharges of oil” but had not seen fit to include landfills among these exemptions, concluding that the court’s holding amounted to adding an exemption for landfills to the statutory language, something beyond the power of the court to accomplish.<sup>196</sup> Accordingly, Justice Powell would have affirmed the trial court’s entry of judgment in favor of the Royals on their Oil Discharge Law claim.<sup>197</sup>

F. *Intermodal Rail and the Virginia Constitution’s “Internal Improvements” and “Credit” Clauses: Montgomery County v. Virginia Department of Rail and Public Transportation*

In *Montgomery County v. Virginia Department of Rail and Public Transportation*, the Supreme Court of Virginia was called upon to determine whether the development of an intermodal terminal for transition of cargo from heavy trucks to rail and vice-versa fell under the “public roads” exception to the internal improvements clause of the Virginia Constitution, and whether a grant of funds to a private entity for the construction of such a facility violated the credit clause, a constitutional prohibition on the

---

193. *Id.* at 27, 720 S.E.2d at 101–02.

194. *Id.* at 27–28, 720 S.E.2d at 102.

195. *Id.* at 28, 30–31, 720 S.E.2d at 102, 104.

196. *Id.* at 30, 720 S.E.2d at 103 (quoting *Jackson v. Fid. & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005)) (citing VA. CODE ANN. § 62.1-44 (Repl. Vol. 2006)).

197. *Id.* at 33, 720 S.E.2d at 105.

lending of the credit of the Commonwealth to “any person, association or corporation.”<sup>198</sup>

Pursuant to the Virginia Code, the Virginia Department of Rail and Public Transportation (“DRPT”) entered into an agreement with Norfolk Southern Railway Company for the development of an intermodal terminal to be located in Montgomery County.<sup>199</sup> Under the agreement, DRPT would provide grant funds in excess of \$26 million to Norfolk Southern, and Norfolk Southern would in turn develop the intermodal facility and undertake certain improvements to railway tunnels owned by Norfolk Southern.<sup>200</sup> The agreement was funded by the Railway Preservation and Development Fund, which was intended to relieve “staggering increases in traffic” on Virginia’s highways, especially Interstate 81, which carried more than double the amount of truck traffic than contemplated by its original design.<sup>201</sup>

Montgomery County challenged both the agreement between DRPT and Norfolk Southern and the code section creating the fund, arguing they were unconstitutional under article X, section 10 of the Virginia Constitution.<sup>202</sup> The county based its arguments upon two distinct clauses in article X, section 10: the internal improvements clause and the credit clause.<sup>203</sup> The trial court rejected both of the county’s constitutional arguments and ruled that the agreement between the DRPT and Norfolk Southern was “properly effectuated pursuant to constitutionally valid legislation” for the public purpose of improving efficiency of public roads.<sup>204</sup>

On appeal, the court explored at length the conditions giving rise to the challenged legislation and the agreement, citing numerous legislative findings concerning rapid growth in heavy freight traffic on Virginia’s highways and the resulting erosion of

---

198. 282 Va. 422, 427, 719 S.E.2d 294, 295 (2011) (quoting VA. CONST. art. X, § 10).

199. *Id.* (citing VA. CODE ANN. § 33.1-22.1-1:1.1 (Repl. Vol. 2011)).

200. *Id.* at 432–33, 719 S.E.2d at 298–99.

201. *Id.* at 429, 719 S.E.2d at 296 (quoting S.J. Res. 55, Va. Gen. Assembly (Reg. Sess. 2000)).

202. *Id.* at 427, 719 S.E.2d at 295.

203. *Id.* The internal improvements clause states that the Commonwealth shall not become involved with “any work of internal improvement, except public roads and public parks . . .” VA. CONST. art. X, § 10. The credit clause prevents the Commonwealth from granting its credit to “any person, association, or corporation.” *Id.*

204. 282 Va. at 427–28, 719 S.E.2d at 295.

public safety.<sup>205</sup> The court noted numerous statements of legislative policy in the form of joint resolutions of the General Assembly, which set forth a policy of establishing “a network of intermodal transfer facilities” to reduce heavy truck traffic on Virginia’s highways, particularly Interstate 81.<sup>206</sup>

Against this backdrop, the court examined the provisions of Virginia Code section 33.1-221.1:1.1, observing that the statute required the department, as a prerequisite to funding any project, to make a determination that the project “will result in public benefits . . . that are equal to or greater than the investment of funds” provided by the department.<sup>207</sup> Critically, the court observed that the project’s expected impact on traffic congestion was one of the public benefits to be considered by the department.<sup>208</sup>

In its review of the constitutional arguments raised by the county, the court first noted the “public roads” exception to the “internal improvements” clause, which states that the Commonwealth shall not “become a party to or become interested in any work of internal improvement, except public roads and public parks . . . .”<sup>209</sup> The court first cited settled principles of construction providing that “all actions of the General Assembly are presumed to be constitutional.”<sup>210</sup> Accordingly, the county’s challenge that the DRPT would “have an interest in a privately owned and operated railroad terminal in violation of the internal improvements clause”<sup>211</sup> would be rejected if the project could be “reasonably deemed an exercise of the Commonwealth’s governmental function of constructing, maintaining and operating its highway system,” because the “public roads” exception would apply.<sup>212</sup>

The court rejected the county’s position, citing the General Assembly’s support for the development of intermodal facilities as a

---

205. *Id.* at 428–30, 719 S.E.2d at 296–97.

206. *Id.* at 429, 719 S.E.2d at 296 (citations omitted) (internal quotation marks omitted). *See, e.g.*, H.J. Res. 704, Va. Gen. Assembly (Reg. Sess. 1999) (discussing the benefits of the train system in Front Royal and encouraging other facilities to emulate Front Royal to lower costs and eliminate trucks from overcrowded Virginia highways).

207. *Id.* at 432, 719 S.E.2d at 298; VA. CODE ANN. § 33.1-221.1:1.1(D) (Repl. Vol. 2011).

208. *Id.* at 436, 719 S.E.2d at 298.

209. *Id.*, 719 S.E.2d at 300 (quoting VA. CONST. art. X, § 10).

210. *Id.* at 435, 719 S.E.2d at 300 (quoting *Copeland v. Todd*, 282 Va. 183, 193, 715 S.E.2d 11, 16 (2011)) (internal quotation marks omitted).

211. *Id.* at 434, 719 S.E.2d at 299.

212. *Id.* at 437, 719 S.E.2d at 301.

means to alleviate highway congestion and observed that by diverting truck traffic to rail the Commonwealth had “effectively purchased a significant amount of additional capacity for traffic on Interstate 81.”<sup>213</sup> Accordingly, the court held that, given the presumption of constitutionality afforded actions of the General Assembly, the statute was constitutional and the agreement executed pursuant thereto was directly related to “the construction, maintenance and operation of Virginia’s highways,” and not in violation of the internal improvements clause.<sup>214</sup>

The county argued that the credit clause prohibited the granting of the credit of the Commonwealth to any “person, association, or corporation,” and that the grant to Norfolk Southern constituted the granting of credit by the Commonwealth “to a private railroad company.”<sup>215</sup> The court drew a distinction between providing a grant, as called for in the agreement, and the extension of the credit of the Commonwealth.<sup>216</sup> The court held that the extension of credit prohibited by the credit clause “refers to the relation of borrower and lender, in which money is borrowed to be repaid at a later date.”<sup>217</sup> The agreement provided for nothing more than a grant to Norfolk Southern.<sup>218</sup> Because the agreement did not extend credit to or guarantee any default by Norfolk Southern, it did not constitute an extension of credit that would run afoul of article X, section 10.<sup>219</sup>

---

213. *Id.* at 438–39, 719 S.E.2d at 301–02.

214. *Id.* at 439, 719 S.E.2d at 302.

215. *Id.* at 434, 440–41, 719 S.E.2d at 299, 303. The relevant language of article X, section 10 provides that:

[n]either the credit of the Commonwealth nor of any county, city, town, or regional government shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation; nor shall the Commonwealth or any such unit of government subscribe to or become interested in the stock or obligations of any company, associations, or corporation for the purpose of aiding in the construction or maintenance of its work . . . .

VA. CONST. art. X, § 10.

216. *Royal*, 282 Va. at 441, 719 S.E.2d at 303.

217. *Id.* at 441–42, 719 S.E.2d at 304 (quoting *Reasor v. City of Norfolk*, 606 F. Supp. 788, 797 (E.D. Va. 1984)).

218. *Id.* at 441, 719 S.E.2d at 303.

219. *See id.* at 442, 719 S.E.2d at 304.

G. *Authority of a Planning Commission and Exceptions/Waivers from Zoning Regulations: Sinclair v. New Cingular Wireless PCS*

At issue in *Sinclair v. New Cingular Wireless PCS* was whether the Albemarle County Board of Supervisors impermissibly delegated legislative powers to the county's planning commission by allowing the planning commission to grant modifications or waivers to the county's ordinance restricting construction on land having steep slopes.<sup>220</sup> The court's analysis emphasizes the need for localities to exercise caution in delegating duties or authority to a planning commission when such duties or authority are not explicitly authorized by statute.<sup>221</sup>

Albemarle County Code section 18-4.2 imposed certain restrictions on construction on land containing "critical slopes," defined in the ordinance as slopes of twenty-five percent or more.<sup>222</sup> Pursuant to the county code, a developer or subdivider could request a modification or waiver of the restriction by filing a written application with the planning commission.<sup>223</sup>

The planning commission was authorized to grant a modification or waiver upon consideration of certain enumerated public health, safety, and welfare factors,<sup>224</sup> and upon finding at least one additional factor.<sup>225</sup> Further, the planning commission was authorized to impose conditions deemed necessary to protect the health, safety, and welfare, and to ensure the development will be consistent with the intent and purposes of the ordinance.<sup>226</sup> Although the ordinance permitted the developer or subdivider to appeal to the board of supervisors when a waiver is either denied or approved with conditions deemed objectionable by the applicant,

220. 283 Va. 567, 574, 727 S.E.2d 40, 43 (2012).

221. See *id.* at 576, 727 S.E.2d at 44 (citations omitted).

222. *Id.* at 571, 727 S.E.2d at 41; ALBEMARLE COUNTY, VA., CODE § 18-4.2 (2012).

223. ALBEMARLE COUNTY, VA., CODE § 4.25(a) (2012).

224. *Sinclair*, 283 Va. at 571-72, 727 S.E.2d at 41-42.

Rapid and/or large-scale movement of soil and rock, excessive stormwater run-off, siltation of natural and man-made bodies of water, loss of aesthetic resources and, in the event of septic system failure, a greater travel distance of septic effluent (collectively referred to as the "public health, safety and welfare factors").

ALBEMARLE COUNTY, VA., CODE § 18.

225. *Sinclair*, 283 Va. at 572-73, 727 S.E.2d at 42.

226. *Id.* at 574, 727 S.E.2d at 43.

no provision for appeal was provided for aggrieved third parties, such as adjacent landowners.<sup>227</sup>

Plaintiff Kent Sinclair brought suit in the circuit court after the planning commission granted a waiver to an adjoining landowner and New Cingular PCS to construct a communications tower on the parcel adjoining Sinclair's property.<sup>228</sup> Sinclair alleged that the waiver provision in the county ordinance was an impermissible departure from a zoning ordinance, arguing that under Virginia law, the only permissible departures from a zoning ordinance were a variance and a special exception.<sup>229</sup> He argued that the waiver procedure contained in the ordinance unlawfully delegated to the planning commission powers reserved to a board of zoning appeals or zoning administrator to grant such departures.<sup>230</sup>

The court examined whether the power to grant or deny a request for a critical slope waiver could permissibly be delegated to a planning commission.<sup>231</sup> The issue turned upon whether the act was ministerial or legislative in nature, and if legislative, whether the delegation was authorized by statute.<sup>232</sup> In accordance with the previous holdings of the court, administrative or ministerial actions may be delegated without explicit statutory authorization; thus, if the act was ministerial, that would end the inquiry.<sup>233</sup>

The court observed that one requirement for a permissible delegation was sufficiently precise factors for consideration in order to "furnish a pattern of conduct to guide a conscientious official in

---

227. *Id.* at 573, 574, 727 S.E.2d at 42, 43.

228. *Id.* at 571, 574, 727 S.E.2d at 41, 43.

229. *Id.* at 574, 727 S.E.2d at 43.

230. *See id.* at 574-75, 727 S.E.2d at 43. Sinclair also argued that the waiver amounted to either a variance according to Virginia Code section 15.2-2201 or a zoning modification according to Virginia Code section 15.2-2286(A)(4), and because the planning commission could grant a waiver under the ordinance without making the findings necessary under these statutory provisions, the waiver provision was unlawful. *Id.* The court held that the waiver procedure was neither a variance nor a zoning modification, thus the specific criteria required for consideration of variances and zoning modifications were not required for the granting of the waiver. *Id.* at 577, 727 S.E.2d at 44-45. Curiously, although the court held that the waiver procedure at issue was "functionally analogous" to a special exception, the court specifically declined to decide that the waiver procedure *was in fact* a special exception. *Id.* at 581, 727 S.E.2d at 47.

231. *Id.* at 578, 727 S.E.2d at 45.

232. *Id.* at 581, 727 S.E.2d at 47 (citing *Helmick v. Town of Warrenton*, 254 Va. 225, 229, 492 S.E.2d 113, 115 (1997)).

233. *See id.* at 578, 727 S.E.2d at 45.

the performance of his duties."<sup>234</sup> The court then noted that under the ordinance, the planning commission was empowered to consider *inter alia*, "loss of aesthetic resources" as part of its decision-making process, and concluded that this factor did not provide adequate guidance for ministerial decision-making.<sup>235</sup>

Additionally, the court observed that the ordinance did not provide process for an aggrieved third party to appeal the planning commission's decision, only allowing waiver applicants an opportunity to appeal to the board of zoning appeals.<sup>236</sup> Finally, the court found it significant that not only was the planning commission empowered to reject applications for a waiver based upon public health, safety, and welfare, but it could actually prescribe measures to mitigate the potential adverse effects of a proposed development.<sup>237</sup> The waiver provisions of the ordinance therefore vested the planning commission with policy-making authority, rather than administrative or ministerial duties.<sup>238</sup>

Having determined that consideration of critical slope waivers were legislative in nature, the court held that this function could not be delegated lawfully to the planning commission.<sup>239</sup> Invoking the Dillon Rule, the court observed that planning commissions are primarily advisory bodies, generally without authority for enforcement and administration of zoning measures.<sup>240</sup> Indeed, the court noted that after reviewing seventy code sections pertaining to planning commissions, it could not find a single instance where a planning commission was authorized to approve departures from zoning ordinances or otherwise administer or enforce the requirements of a zoning ordinance.<sup>241</sup> Accordingly, the court found the delegation of authority to the planning commission to be unlawful.<sup>242</sup>

---

234. *See id.* at 579, 727 S.E.2d at 46 (quoting *Ours Props., Inc.*, 198 Va. 848, 853, 96 S.E.2d 754, 758 (1957)).

235. *See id.* (citation omitted).

236. *Id.* at 580, 727 S.E.2d at 46 (citing VA. CODE ANN. § 15.2-2311(A) (Cum. Supp. 2011)).

237. *Id.*, 727 S.E.2d at 46-47 (citation omitted).

238. *Id.* at 581, 727 S.E.2d at 47.

239. *Id.* at 582, 727 S.E.2d at 47.

240. *See id.* at 582, 584 n.10, 727 S.E.2d at 45, 49 n.10.

241. *Id.* at 583, 727 S.E.2d at 48.

242. *Id.* at 584, 727 S.E.2d at 49.

The court subsequently considered similar issues with a different result in *Town of Occoquan v. Elm Street Development, Inc.*<sup>243</sup> In *Elm Street*, the court held that the Town of Occoquan could not require a special use permit for construction on critical slopes when the proposed use was a residential use permitted by right in the applicable zoning district.<sup>244</sup> The court held that approval of site plans for development of “steep slopes” within the town must be a ministerial, rather than a “political” decision.<sup>245</sup> Writing separately, Justice McClanahan pointed out the apparent contradiction between this holding and the holding in *Sinclair* that approvals of steep slope development under Albemarle County’s zoning ordinance were legislative, rather than ministerial.<sup>246</sup>

#### H. *Retirement Benefits: Eberhardt v. Fairfax County Employees’ Retirement Systems Board of Trustees*

In *Eberhardt v. Fairfax County Employees’ Retirement Systems Board of Trustees*, the court explored the difference between statutory language as codified in the Code of Virginia and the actual language of the General Assembly’s enactments contained in the Acts of Assembly.<sup>247</sup> The case arose in the context of a dispute between Eberhardt, an employee of the Fairfax County School Board, and the board of trustees of Fairfax County Employees’ Retirement Systems (“FCERS”).<sup>248</sup>

In January 2007, Eberhardt suffered back and neck injuries while at work that arose out of and were in the course of her employment.<sup>249</sup> The injuries left her totally disabled from performing her work responsibilities for a six-month period.<sup>250</sup> As an employee of the Fairfax County School Board, Eberhardt was a member of the FCERS.<sup>251</sup> She applied to the board of trustees for service-connected disability retirement benefits, which the board denied,

---

243. See No. 110075, 2012 Va. LEXIS 104 (Va. Apr. 6, 2012).

244. *Id.* at \*5–6.

245. *Id.* at \*6–7.

246. *Id.* at \*10.

247. 283 Va. 190, 194, 721 S.E.2d 524, 526 (2012).

248. *Id.* at 192–93, 721 S.E.2d at 525.

249. *Id.* at 192, 721 S.E.2d at 525.

250. *Id.*

251. *Id.*

instead ultimately awarding her ordinary disability retirement benefits.<sup>252</sup>

Eberhardt subsequently filed what she termed as an appeal of the decision of the board of trustees to the circuit court.<sup>253</sup> The issue there was whether the court had subject matter jurisdiction over the dispute under Virginia Code section 51.1-823; the circuit court found it did not and dismissed the case.<sup>254</sup> The statutory language provides: "An appeal of right from the action of the retirement board of any county having an urban county executive form of government on any matter in which the board has discretionary power shall lie to the circuit court of the county which has jurisdiction of the board."<sup>255</sup>

Eberhardt argued that the trial court erred in considering legislative history in interpreting the statute when the statutory language was unambiguous.<sup>256</sup> At root, Eberhardt contended that the term "board" as used in the statute referred to *any* retirement board of any county having an urban county executive form of government, and therefore the circuit court erred in holding that the term "board" referred only to the board of a *police officers'* retirement system in such a county.<sup>257</sup>

The court observed that although the Virginia Code "is often regarded as the complete statutory law of the Commonwealth, that is not the case."<sup>258</sup> Accordingly, when a statute is "clear and unambiguous," and a court must "look only to the words of the statute to determine its meaning," it is the Acts of Assembly, rather than the Virginia Code, that is the "complete and accurate statutory law of the Commonwealth."<sup>259</sup> "Simply put, the language of the Acts of Assembly is the plain language of the statute," and any divergence from the language contained in the Virginia Code is to be resolved in favor of the Acts of Assembly.<sup>260</sup>

---

252. *Id.* at 193, 721 S.E.2d at 525.

253. *Id.*

254. *Id.* (citing VA. CODE ANN. § 51.1-823 (Repl. Vol. 2009)).

255. VA. CODE ANN. § 51.1-823 (Repl. Vol. 2009).

256. *Eberhardt*, 283 Va. at 193, 721 S.E.2d at 525.

257. *See id.* (emphasis added).

258. *Id.* at 194, 721 S.E.2d at 526.

259. *Id.* (quoting *Hubbard v. Henrico Ltd. P'ship*, 255 Va. 335, 339, 497 S.E.2d 335, 337 (1998)).

260. *Id.* at 194 & n.3, 721 S.E.2d at 526 & n.3 (quoting *Algar v. Commonwealth*, 267 Va. 255, 257 n.1, 590 S.E.2d 563, 564 n.1 (2004)).

Turning to the language contained in the Acts of Assembly, therefore, the court observed that the language codified as Virginia Code section 51.1-823 was a portion of chapter 832 of the Acts of Assembly of 1990 (the "Recodification Act").<sup>261</sup> Noting that "when a term is used in different sections of a statute, we give it the same meaning in each instance unless there is a clear indication the General Assembly intended a different meaning," the court looked to the remaining language contained in the Recodification Act to determine if the meaning of "board" would be clarified therein.<sup>262</sup> In so doing, the court observed that a related provision of the Recodification Act specifically referenced the Fairfax Police Retirement System Enabling Act and concluded that the term "board" as used in Virginia Code section 51.1-823 referred only to the board of the Fairfax Police Retirement System and did not provide Eberhardt with a right to appeal the decision of the board of trustees to the circuit court.<sup>263</sup> Furthermore, the court noted that the report of the Virginia Code Commission on the recodification of title 51.1 specially provided that the right of appeal set forth in section 51.1-823 was the same as that which had formerly been provided under one section of the Fairfax Police Retirement System Enabling Act.<sup>264</sup> Although the language, read out of context of the article in which it is found, may have supported Eberhardt's contention, the entirety of that article, as set forth in the authoritative text of the Acts of Assembly, dictated the opposite conclusion.<sup>265</sup>

### III. LEGISLATIVE SUMMARIES

The 2012 Virginia General Assembly passed a large number of bills that affect the practice of local government law in Virginia. What follows are some of the most significant, interesting, or simply talked-about bills or resolutions adopted this year.

---

261. *Id.* at 195, 721 S.E.2d at 526.

262. *Id.*, 721 S.E.2d at 527; see Act of Apr. 9, 1990, ch. 832, 1990 Va. Acts 1369 (codified as amended in scattered sections of VA. CODE ANN.).

263. *Eberhardt*, 283 Va. at 195-97, 721 S.E.2d at 527-28 (examining ch. 832, 1990 Va. Acts 1369).

264. *Id.* at 196-97, 721 S.E.2d at 527 (discussing REPORT OF THE VA. CODE COMM'N ON THE REVISION OF TITLE 51 OF THE CODE OF VIRGINIA, H. Doc. No. 52, at 52 (1990)).

265. See *id.* at 197, 721 S.E.2d at 527-28.

A. *Proposed Constitutional Amendment on Eminent Domain (S.B. 3 and H.B. 3), Related Ballot Bills (S.B. 240 and H.B. 5), and Related "Companion" Bills Which Defined "Lost Profits" and "Lost Access" (S.B. 437, H.B. 597, and H.B. 1035), and Stated that Local Government Condemnation for Utilities Are "Inherently Public" (S.B. 653)*

As expected, the General Assembly readopted the language from 2011's resolution calling for an amendment to the Virginia Constitution significantly restricting the exercise of eminent domain by the state and local governments.<sup>266</sup> The matter was set to go to the voters of Virginia in November 2012 to approve or reject. There are a number of interesting questions for the voters to consider.

1. Is the Proposed Amendment Necessary?

First, there is the question of whether such an amendment is at all necessary, given the recent statutory reforms of 2007, which have yet to be implemented fully and address much of the same ground as the constitutional amendment.<sup>267</sup> Opponents point out these significant statutory reforms (which exist without any constitutional amendment):

Defined the right to private property as a "fundamental right."

Better defined "public uses" and "blighted property" for which eminent domain could be used.

Excluded the use of eminent domain where public interest did not dominate private gain and where the primary purpose was for "private financial gain, private benefit, an increase in tax base or tax revenues, or an increase in employment."

Established that property in a redevelopment area must be blighted at condemnation and not just when a redevelopment plan was

---

266. See H.J. Res. 3, Va. Gen. Assembly (Reg. Sess. 2012) and S.J. Res. 3, Va. Gen. Assembly (Reg. Sess. 2012). Interestingly, public utilities and railroads are exempted from these restrictions: "A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services." S.B. 240, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Apr. 4, 2012, ch. 564, 2012 Va. Acts \_\_\_); H.B. 5, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Apr. 9, 2012, ch. 684, 2012 Va. Acts \_\_\_). However, this exemption will not appear on the ballot for the voters to see. See S.B. 240; H.B. 5.

267. Craig Wilson, Op-Ed., *Eminent-Domain Reform: Amendment Unnecessary in Virginia*, RICH. TIMES-DISPATCH, Mar. 5, 2011, at A9.

adopted, and completely eliminated the taking of non-blighted property simply for the purpose of the plan.<sup>268</sup>

One certainly can argue that something as significant as a constitutional amendment should be reserved to address real existing problems, not some future, as yet unseen, problem.

When faced with this argument, amendment proponents have asserted that a future General Assembly always could amend the statute to change these reforms.<sup>269</sup> They point out that when localities and others complained about the scope of the 2007 legislative amendments, they were advised by members of the General Assembly that problems always could be fixed by the legislature when needed.<sup>270</sup> Proponents of the proposed amendment also criticize local governments opposing the amendment, essentially claiming that local governments were opposed to the statute currently in force and always will be opposed to eminent domain reform.<sup>271</sup> Such proponents see this as a logical re-ordering of priorities and the first true reconsideration of Virginians' constitutional property rights in one hundred years.<sup>272</sup>

A constitutional amendment takes years to happen.<sup>273</sup> If the language of the amendment causes no problems, and sets the right balance between private property rights on the one hand and the good of the Commonwealth and its taxpayers on the other, then this would be a positive change. If not, and the economic well-being of the Commonwealth and its taxpayers suffer, then this would be a detrimental development. The inability of the General Assembly to fix any issues in the wording is a significant argument against the amendment, or for the amendment, depending upon one's perspective.

---

268. *Id.*

269. See, e.g. Press Release, Commonwealth of Virginia, Office of the Attorney General, Attorney General Cuccinelli Talks Eminent Domain Abuses, Property Rights at NAACP Event (Oct. 29, 2011), available at [http://www.ag.virginia.gov/Media%20and%20News%20Releases/News\\_Releases/Cuccinelli/102911\\_Eminent\\_Domain.html](http://www.ag.virginia.gov/Media%20and%20News%20Releases/News_Releases/Cuccinelli/102911_Eminent_Domain.html). "Although this law was a major step forward in the protection of private property rights, because it's only a law, it can be chipped away by future sessions of the General Assembly." *Id.*

270. *Id.*

271. See Jeremy Hopkins, *Debunking Property Rights Amendment Fears; Virginians Need Measure to Temper Eminent Domain*, WASH. TIMES, Jan. 23, 2012, at B3.

272. *Id.*

273. VA. CONST. art. XII, § 1 (requiring adoption of identical amendment language to be adopted by two successive general assemblies, with an intervening election, before a voter referendum).

## 2. Issues in the Wording of the Proposed Amendment

The inability of the General Assembly to easily cure any problems in the wording directly affects the next significant issue—whether there are significant flaws in the wording that were not addressed by the General Assembly. Opponents of the amendment contend that “the specific language and provisions of the pending proposal are seriously flawed. If approved as currently drafted, this amendment will cost Virginia taxpayers dearly and will severely hamper economic development in the commonwealth. . . . The General Assembly owes it to the taxpayers to get this right.”<sup>274</sup>

Perhaps the three most significant flaws discussed by local government attorneys include (i) leaving the definition of “public use” up to the courts, (ii) requiring compensation for “lost profits” and “lost access”—previously not recognized as compensable, let alone a “right”—while inexplicably not limiting the reach of these terms to the exercise of eminent domain, and (iii) prohibiting any use of eminent domain if the “primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property” because valuable economic development in the Commonwealth often hinges on the ability of localities to provide a needed utility line or access road.<sup>275</sup>

In response to these criticisms, “companion bills” were introduced by the General Assembly defining the terms “lost profits” and “lost access” and attempting to deal with some of the concerns over scope,<sup>276</sup> as well as addressing complaints that the proposed amendment may outlaw acquisitions for plainly public improvements such as water, sewer, electrical, and gas lines by localities.<sup>277</sup> These bills appear to be concessions by the General

---

274. Sterling Rives, III, *Eminent Domain Amendment Needs More Work*, RICH. TIMES-DISPATCH, Jan. 8, 2012, at E6.

275. *Id.*

276. S.B. 437, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Apr. 9, 2012, ch. 719, 2012 Va. Acts \_\_\_); H.B. 1035, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Apr. 9, 2012, ch. 699, 2012 Va. Acts \_\_\_); H.B. 597, Va. Gen. Assembly (Reg. Sess. 2012) (incorporated into H.B. 1035).

277. S.B. 653, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Apr. 18, 2012, ch. 832, 2012 Va. Acts \_\_\_) (amending VA. CODE ANN. § 15.2-1902, which now allows condemnation by localities for “lands or easements for (i) streets and roads, (ii) drainage facilities,

Assembly of some of the shortcomings of the proposed amendment. Critics complained that these companion bills may be of little assistance, since statutes undoubtedly cannot amend the constitution.<sup>278</sup> However, perhaps these companion bills can—at the very least—provide important contemporaneous legislative intent, if needed in future battles over interpretation if the proposed amendment is adopted. The Supreme Court of Virginia has held that various enactments should be construed together to determine legislative intent,<sup>279</sup> and that the General Assembly “does not perform meaningless, useless, or vain acts when enacting legislation.”<sup>280</sup> To the contrary, “every act of the legislature should be read so as to give reasonable effect to every word . . .”<sup>281</sup> However, the fact that a statute cannot amend the Virginia Constitution necessarily limits the good these companion bills can do.

In addition, the attorney general issued a formal opinion on January 26, 2012.<sup>282</sup> In this opinion, Virginia Attorney General Cuccinelli responded to some of the criticisms and made his case in favor of the proposed amendment.<sup>283</sup> He opined, among other points, that compensation for lost profits will not be payable to an affected business owner if his land is not taken, and that, assum-

---

(iii) water supply and sewage disposal systems, including pipes and lines, and (iv) water, sewer and governmentally owned [] electricity, telephone, telegraph and other utility lines and pipes and related facilities except to the extent otherwise prohibited by law . . . because the foregoing enumerated uses are inherently public uses when undertaken by a locality.”). The bill also seems to put localities on a more equal footing with public service companies which are exempted from the constitutional amendment and provide similar services.

278. See VA. CONST. art. XII, § 1.

279. See *Alston v. Commonwealth*, 274 Va. 759, 769, 652 S.E.2d 456, 462 (2007) (quoting *Prillaman v. Commonwealth*, 199 Va. 401, 406, 100 S.E.2d 4, 8 (1957) (“It is a cardinal rule of construction that statutes [or rules] dealing with a specific subject must be construed together in order to arrive at the object sought to be accomplished.”).

280. *Nationwide Mut. Ins. Co. v. Hous. Opportunities Made Equal, Inc.* 259 Va. 8, 37, 523 S.E.2d 217, \_\_\_ (2000), *withdrawn and reh'g granted by Nationwide Mut. Ins. Co. v. Hous. Opportunities Made Equal, Inc.*, No. 990733, 2000 Va. LEXIS 56 (Va. Mar. 3, 2000).

281. *Doss v. Jamco, Inc.*, 254 Va. 362, 371, 492 S.E.2d 441, 446 (1997) (quoting *Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984)).

282. Op. to Hon. Jackson H. Miller (Jan. 26, 2012).

283. The attorney general also appeared before a house subcommittee to lobby in favor of the proposed amendment. In response to concerns over the estimated \$36 million annual cost, he argued that this expense now is absorbed by private business owners. He asserted that the current law was “morally wrong” not to compensate the business owners for their losses. See Chelyen Davis, *Cuccinelli Says \$36 Mill Eminent Domain Costs Now Borne by Landowners*, FREDERICKSBURG.COM (Feb. 1, 2012, 7:21 PM), <http://blogs.fredericksburg.com/on-politics/2012/02/01/cuccinelli-says-36-mill-eminent-domain-costs-now-borne-by-landowners/>.

ing the government's proposed use meets the new definition of "public use," a locality may continue to use condemnation to replace a sprawling development with a mixed-use, compact one.<sup>284</sup> Of course, that definition prohibits any condemnation if the "primary" use is to increase jobs or for economic development.<sup>285</sup>

### 3. Increases in Costs to Taxpayers

A fundamental criticism of this proposed amendment more difficult to address is the likely cost to the taxpayers. If the amendment is adopted, additional moneys will be required to condemn anything, even for scenarios in which the public purpose is unquestioned, like a condemnation for a needed school or an improvement to a crowded intersection. Additional awards to landowners will be mandated for "lost profits" and "lost access," heretofore not recognized as a property right (except for a complete or "unreasonable" loss of access).<sup>286</sup>

A *Roanoke Times* editorial entitled "An Overreach on Condemnation" stated it bluntly: "State lawmakers must take a more discerning approach and defeat this amendment. The constitution should be reserved for long-standing principles, not used as a test tube for untried feel-good measures. This is one experiment Virginia taxpayers cannot afford."<sup>287</sup>

Under current Virginia law, "lost profits" are not real property and therefore not part of the condemned property.<sup>288</sup> They are incidental costs to a landowner's business and very difficult to discern given the variety of factors in determining a "profit."<sup>289</sup> "Lost access" is typically not real property either, as a landowner only

---

284. Op. to Hon. Jackson H. Miller.

285. *Id.*

286. See Editorial, *An Overreach on Condemnation*, ROANOKE TIMES, Jan. 13, 2012, at A13. And, of course, the new requirements may well cause costly and time-consuming litigation as condemnors and property owners fight over the legal effect of the amendment and its companion bills. *Id.*

287. *Id.*

288. State Hwy. & Transp. Comm'r v. Lanier Farm, Inc., 233 Va. 506, 510, 357 S.E.2d 531, 533 (1987) ("Although a 'complete extinguishment and termination of all the landowners' rights of direct access' to an abutting highway constitutes a compensable 'taking' within the eminent domain clause of the Virginia Constitution, a mere partial reduction or limitation of an abutting landowner's rights of direct access, imposed by governmental authority in the interest of traffic control and public safety, constitutes a valid exercise of the police power and is not compensable in condemnation proceedings." (citations omitted)).

289. See VA. CODE ANN. § 25.1-100 (Repl. Vol. 2011 & Cum. Supp. 2012).

has a right to “reasonable” access to a public street.<sup>290</sup> The government’s police power to provide for safe, effective transportation for the public trumps any particular mode or route of access.<sup>291</sup> The proposed amendment may make these non-realty business interests compensable in a taking of land for the first time.

Although there is likely no real way to know the total fiscal impact, or the impact on individual projects being delayed or canceled because of additional costs, the official state fiscal impact study gives a glimpse. The state study, issued by the Virginia Department of Planning and Budget, estimated that the annual cost to taxpayers would be at least \$36 million and noted that the federal government would not reimburse the state for any lost profits or lost access paid to landowners on federal highway projects, thus reducing money available for other projects.<sup>292</sup> This is solely due to the requirement that new sources of damage awards not recognized by the federal government will be added—lost profits and lost access.<sup>293</sup>

For all of these reasons, many business and economic development organizations have raised the same concerns as local governments “about the wording and the harm that may befall the Commonwealth’s economic development efforts if a necessary access road or utility easement for a major potential user cannot be promised in a timely fashion (or at all).”<sup>294</sup> In response, propo-

---

290. See *State Hwy. Comm’r v. Linsley*, 223 Va. 437, 443, 290 S.E.2d 834, 837-38 (1982).

291. *Id.* at 441, 290 S.E.2d at 837.

292. VA. DEPT. OF PLANNING AND BUDGET, 2012 FISCAL IMPACT STATEMENT ON S.B. 437 (Feb. 1, 2012).

293. *Id.*

294. Andrew McRoberts, *Proposed Constitutional Amendment on Eminent Domain: Cons and Pros*, VIRGINIA LOCALITY LAW (Feb. 2, 2012), <http://valocalitylaw.com/2012/02/02/proposed-constitutional-amendment-on-eminant-domain-cons-and-pros/>. For example, the Northern Virginia Chamber Partnership—composed of the Dulles Regional, Greater Reston and Loudoun County chambers of commerce—announced the formation of a broad coalition of business organizations across Virginia to oppose the proposed eminent domain constitutional amendment. In a press release, Tony Howard, president and chief executive officer of the Loudoun County Chamber of Commerce, stated that

all Virginians agree that private property rights are fundamental; however, the proposed constitutional amendment suffers from serious flaws that have the potential to stop critical infrastructure in its tracks and to jeopardize Virginia’s economic recovery. . . . In the current economic climate, Virginia can ill afford to diminish its competitiveness with other states and reduce its ability to attract the investments that will create much needed jobs for Virginians.

nents see the constitutional amendment as simply enshrining existing property rights and call the opponent's concerns and arguments about soaring costs "hollow."<sup>295</sup>

#### 4. The Full Amendment Language Is Not on the Ballot

A fundamental procedural concern is that, as passed by the General Assembly, the language of the actual constitutional amendment will not be on the ballot at all. The actual constitutional amendment states in significant part:

[t]hat the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use. Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking. The term[s] "lost profits" and "lost access" are to be defined by the General Assembly. A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services. In all other cases, a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing

---

*NOVA Chamber Partnership Leads Charged Against Constitutional Amendment on Eminent Domain*, LEESBURG PATCH (Jan. 25, 2012), <http://leesburg.patch.com/articles/nova-chamber-partnership-leads-charged-against-constitutional-amendment-on-eminent-domain>. In addition, a large number of business-related organizations sent a letter dated January 18, 2012, to the members of the General Assembly opposing passage of the proposed amendment. These organizations included American Council of Engineering Companies of Virginia, Apartment and Office Building Association of Metropolitan Washington, CenturyLink, Community Planning Partners, Greater Richmond Association for Commercial Real Estate, Hampton Roads Association for Commercial Real Estate, Home Builders Association of Virginia, NAIOP Northern Virginia, Northern Virginia Building Industry Association, Northern Virginia Chamber Partnership, Northern Virginia Transportation Alliance, Old Dominion Highway Contractors Association, Portsmouth Partnership, Prince William Chamber of Commerce, The Virginia Society—American Institute of Architects, Virginia Association for Commercial Real Estate, Virginia Association of Realtors, Virginia Beach Vision, Virginia Society of Professional Engineers, Virginia Telephone Industry Association, and Virginia Transportation Construction Alliance. McRoberts, *supra*.

295. See, e.g., Mark Obenshain, Op-Ed., *Property Rights Need Constitutional Protection*, RICH. TIMES-DISPATCH, Jan. 22, 2012, at E6.

on the property. The condemnor bears the burden of proving that the use is public, without a presumption that it is.<sup>296</sup>

However, this language was *not* to appear on the ballot. Instead, the ballot only was to include the following question:

Question: Shall Section 11 of Article I (Bill of Rights) of the Constitution of Virginia be amended to eliminate the General Assembly's authority to define a public use for which private property may be taken or damaged and to provide that no private property shall be taken or damaged for a public use without just compensation to the property owner and that only so much of the property as is necessary to achieve the public use is taken or damaged?<sup>297</sup>

One can argue that this proposed ballot text is not fairly descriptive of the amendment's actual language, let alone describe its various parts or legal effects. Several of the more problematic parts of the amendment<sup>298</sup> were not to be referenced in the ballot question at all. One might fairly ask: Do we trust the voters to know exactly what they are voting upon?

## 5. A Final Decision by the Voters

In summary, if this amendment takes effect, private landowners will gain new rights and new protections for existing rights, costs for public projects will rise significantly and likely be delayed, private business owners will get more money in awards, condemnation will be made far more difficult in many cases and legally or fiscally impossible in others, and condemnation will be unconstitutional even if for needed economic development that affects no one's home or business. No one truly knows the fiscal impacts of this proposal or the ultimate legal effect of calling property a "fundamental right" in the Virginia Constitution.

Opponents are very concerned and point out that it would take years to amend the Constitution of Virginia again if the impacts prove to be unaffordable or undesirable over time. Proponents say the opponents are alarmists on the impacts, and we need to protect private property rights and business owners to such an extreme degree.

---

296. S.B. 240, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Apr. 4, 2012, ch. 564, 2012 Va. Acts \_\_\_); H.B. 5, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Apr. 9, 2012, ch. 684, 2012 Va. Acts \_\_\_).

297. H.B. 5.

298. See, e.g., Rives, *supra* note 274.

Whether this amendment is very good or very bad depends on who you ask, and if approved, we all will know soon enough. The final decision on this constitutional amendment now rests with the voters.<sup>299</sup>

## B. *Land Use Legislation*

### 1. Proffer Amendments: Senate Bill 36 and House Bill 326

These identical bills<sup>300</sup> were perhaps in reaction to the *Town of Leesburg v. Long Lane Associates Ltd. Partnership* case, later decided June 7, 2012, by the Supreme Court of Virginia.<sup>301</sup> Curiously worded, the bills expressly allow any landowner subject to existing proffered conditions pursuant to Virginia Code sections 15.2-2297, 15.2-2298, 15.2-2303, or 15.2-2303.1 to apply to the governing body for amendments to those conditions, “provided only that written notice of such application be provided in the manner prescribed by subsection (H) of section 15.2-2204,” which requires written notice to last known address for tax purposes.<sup>302</sup> The bills also incorporate by reference the already-existing public hearing requirement of what is now subsection (B) (formerly subsection (A)) which provides that there shall be no such amendment without a public hearing, although as before, the governing body may waive the hearing if the amendment does not affect use or density.<sup>303</sup> In a nod to some of the issues arising in the *Long Lane* case, the bills also provide that an amendment of proffers does not, in and of itself, cause any other property to be nonconforming, and that no claim of vesting by another property owner can prevent such an amendment.<sup>304</sup>

### 2. Appeals of Governing Body Decisions on Proffer Appeals: House Bill 170

This bill allows for an appeal to the local circuit court by a person aggrieved by a decision of a governing body in an appeal from

---

299. See VA. CONST. art. XII, § 1.

300. S.B. 36, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Mar. 30, 2012, ch. 465, 2012 Va. Acts \_\_\_); H.B. 326, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Mar. 30, 2012, ch. 415, 2012 Va. Acts \_\_\_).

301. *Leesburg v. Long Lane Assocs. Ltd. P'ship*, 284 Va. 127, 726 S.E.2d 27 (2012).

302. S.B. 36; H.B. 326.

303. S.B. 36; H.B. 326.

304. S.B. 36; H.B. 326.

a zoning administrator enforcement decision on a proffer.<sup>305</sup> Virginia Code section 15.2-2301 always has set aside such decisions for appeal to the governing body rather than the local board of zoning appeals, which hears appeals from all other formal orders, requirements, decisions, and determinations of the zoning administrator.<sup>306</sup> Previously, there had been no statutory provision allowing for an appeal of the governing body's decision on appeal. The bill incorporates by reference the provisions of section 15.2-2285(F), which requires an appeal to be filed in the local circuit court within thirty days.<sup>307</sup>

### 3. Urban Development Areas: Senate Bill 274 and House Bill 869

These identical bills made optional the urban development areas ("UDAs") previously mandated by Virginia Code section 15.2-2223.1 for many growing or urban localities.<sup>308</sup> Interestingly, the language purports to mandate certain notices and terms if localities choose to designate a UDA.<sup>309</sup> Of course, since these are optional, and localities always had other authority to accomplish UDAs without section 15.2-2223.1,<sup>310</sup> localities always could call these areas by a different name to accomplish the goals without the mandate.

### 4. Estoppel of the Zoning Administrator: House Bill 166

House Bill 166 strikes the interesting phrase "or other non-discretionary" from the end of Virginia Code section 15.2-2311(C),<sup>311</sup> which would seemingly narrow the instances in which a local zoning administrator may alter a previously issued order,

---

305. H.B. 170, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Mar. 30, 2012, ch. 401, 2012 Va. Acts \_\_\_).

306. VA. CODE ANN. § 15.2-2301 (Repl. Vol. 2012); see, e.g., *Board of Zoning Appeals (BZA)*, FAIRFAX CNTY., <http://www.fairfaxcounty.gov/dpz/bza/#> (last visited Oct. 15, 2012).

307. H.B. 170.

308. Compare S.B. 274, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Mar. 8, 2012, ch. 192, 2012 Va. Acts \_\_\_), and H.B. 869, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of April 4, 2012, ch. 518, 2012 Va. Acts \_\_\_), with VA. CODE ANN. § 15.2-2231.1 (Repl. Vol. 2012).

309. S.B. 274; H.B. 869.

310. See VA. CODE ANN. § 15.2-2280 (Repl. Vol. 2012) (giving localities the ability to classify land as they "deem best suited").

311. H.B. 166, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Mar. 30, 2012, ch. 400, 2012 Va. Acts \_\_\_).

requirement, decision, or determination. Critics of the bill suggested that it might allow an error by a local administrative zoning official to “amend” the ordinance on a case-by-case basis without appropriate legislative action.<sup>312</sup> However, a zoning administrator has no discretion to alter the language of an ordinance and has no discretion to interpret the clear wording of a zoning ordinance to the contrary.<sup>313</sup> Any attempt to do so would be void.<sup>314</sup> Therefore, it would seem that striking this arguably unnecessary language would not appreciably change the law in this area. This interpretation seems more likely, in any event, than somehow allowing an administrative official to effectively amend the zoning ordinance on a case-by-case basis without notice or opportunity to be heard by the public or involvement by the governing body.

#### 5. Cash Proffers: House Bill 910

This bill amends Virginia Code section 15.2-2303.2 to allow a governing body to apply cash proffers to another purpose serving the public interest after a hearing if “the functional purpose for which the cash payment was made no longer exists.”<sup>315</sup> Previously, the governing body could have applied cash proffers to another purpose only if the project(s) for which the proffer had been made could not “occur in a timely manner.”<sup>316</sup> This amendment provides some needed flexibility to localities dealing with infrastructure needs and changing circumstances.

---

312. *See id.*

313. *See* *WANV, Inc. v. Houff*, 219 Va. 57, 62, 244 S.E.2d 760, 763 (1978) (“The construction of a radio tower in the residential zone in question was not a permitted use. Since it was not a use permitted by the Zoning Ordinance, there was no discretion to be exercised by the Zoning Administrator, and he was without authority to issue the permit.”). *But see* *Goyonaga v. Bd. of Zoning Appeals*, 275 Va. 232, 244, 657 S.E.2d 153, 160 (2008) (quoting *Snow v. Amherst Cnty. Bd. of Zoning Appeals*, 248 Va. 404, 407, 448 S.E.2d 606, 608 (1994) (“[Virginia] Code § 15.2-2311(C), by way of contrast, does provide for the potential vesting of a right to use property in a manner that ‘otherwise would not have been allowed.’”).

314. *See* *WANV*, 219 Va. at 57, 62–63, 244 S.E.2d at 763–64.

315. H.B. 910, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Apr. 4, 2012, ch. 521, 2012 Va. Acts \_\_\_).

316. *Id.*

C. *State Mandates on Local Government: Senate Bill 679, House Bill 1295*

One of Governor Bob McDonnell's commitments to local governments was to address the many state mandates to localities.<sup>317</sup> The governor appointed the Task Force for Local Government Mandate Review,<sup>318</sup> which worked for a year identifying mandates that could be lifted. The task force was limited to identifying mandates that would assist local governments but not harm the state fiscally,<sup>319</sup> and their recommendations prompted the introduction of House Bill 1295 and Senate Bill 679.<sup>320</sup>

These identical bills amend scattered sections of the Virginia Code and repeal section 2 of the first enactment of chapter 814 of the Acts of Assembly of 2010.<sup>321</sup>

The bills do some good in small ways, including the following: (i) removing the requirement that surplus property be offered to political subdivisions or volunteer fire and rescue squads before being sold at a public sale or auction,<sup>322</sup> (ii) raising the ceiling for professional service contracts that a locality may enter without competitive negotiation from \$50,000 to \$60,000,<sup>323</sup> (iii) eliminating the requirement that a lease of property owned by any political subdivision, or privately owned, licensed public use airport be approved by the Department of General Services,<sup>324</sup> (iv) removing the requirement for localities to obtain VDOT approval for red light camera locations,<sup>325</sup> (v) clarifying that the local courts cannot require localities to construct a new or additional courthouse,<sup>326</sup> (vi) eliminating requirements for reporting UDAs to the Commis-

---

317. Letter from Bob McDonnell, Va. Governor, to local government officials (Oct. 4, 2011) available at <http://www.dhcd.virginia.gov/GovMandateReview/October-4-2011.pdf>.

318. *Id.*

319. Report from Task Force for Local Gov't to Bob McDonnell, Va. Governor (Jan. 26, 2012), available at <http://www.governor.virginia.gov/utility/docs/First%20Interim%20Report%201%2016%2012%20w%20app.pdf>.

320. S.B. 679, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Apr. 18, 2012, ch. 836, 2012 Va. Acts \_\_\_); H.B. 1295, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Apr. 18, 2012, ch. 805, 2012 Va. Acts \_\_\_).

321. S.B. 679; H.B. 1295.

322. S.B. 679; H.B. 1295.

323. S.B. 679; H.B. 1295.

324. S.B. 679; H.B. 1295.

325. S.B. 679; H.B. 1295.

326. S.B. 679; H.B. 1295.

sion on Local Government,<sup>327</sup> (vii) removing the requirement for establishing local advisory committees on gifted education and the annual reporting by such committees,<sup>328</sup> (viii) eliminating the requirement to provide the estimated per pupil cost for public education of individual school to each parent or guardian of the enrolled child,<sup>329</sup> (ix) removing the requirement that proceeds from the sale of local education surplus property be applied to capital improvements,<sup>330</sup> (x) eliminating the requirement to establish a school health advisory board,<sup>331</sup> (xi) removing annual contract requirements for community service boards,<sup>332</sup> (xii) eliminating Internet policy mandates on local libraries,<sup>333</sup> (xiii) changing the requirement to give first priority for vending contracts to the blind from mandatory to a local option,<sup>334</sup> and (xiv) repealing the requirement for civics training for teachers in order to renew licenses.<sup>335</sup> However, these bills did nothing to stem the flood of mandates and cost-shifting by the Virginia General Assembly on local governments, from transportation, to Virginia Retirement System costs, to the budget. The mandates won again.

*D. Virginia Retirement System (VRS) Reform: Senate Bill 497,  
Senate Bill 498*

Senate Bill 497 amended Virginia Code section 51.1-144 to require that persons employed by local government or a school board be required to pay the five percent employee contribution over a maximum of five years.<sup>336</sup> In addition, the bill required local government employers and school boards to provide employees a five percent raise to offset the employee contributions, often paid as a matter of policy by local governments as an employee benefit.<sup>337</sup> Due to the mandated increase in salaries, all local gov-

---

327. S.B. 679; H.B. 1295.

328. S.B. 679; H.B. 1295.

329. S.B. 679; H.B. 1295.

330. S.B. 679; H.B. 1295.

331. S.B. 679; H.B. 1295.

332. S.B. 679; H.B. 1295.

333. S.B. 679; H.B. 1295.

334. S.B. 679; H.B. 1295.

335. S.B. 679; H.B. 1295 (repealing Act of Apr. 21, 2010, ch. 814, 2012 Acts 1712).

336. S.B. 497, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Apr. 18, 2012, ch. 322, 2012 Va. Acts \_\_\_).

337. *Id.*

ernments saw an increase in costs for employee benefits that are tied to salary.<sup>338</sup>

The second of these two bills, Senate Bill 498, amended many sections of title 51.1 to (i) create a hybrid retirement program, administered by the VRS, that contains not only a defined benefit component but also a defined contribution program,<sup>339</sup> (ii) mandate that new employees must enroll in the new hybrid plan,<sup>340</sup> (iii) and lower benefits for non-vested employees as well as early retirees.<sup>341</sup>

*E. Appeal of Tax Assessments for Residential Apartments in Excess of Four Units: Senate Bill 73, House Bill 1073*

Identical bills Senate Bill 73 and House Bill 1073 adopted a new Virginia Code section 58.1-3295.1 entitled “Assessment of real property; residential rental apartments.”<sup>342</sup> It applies to board of equalization (“BOE”) appeals of real property assessments beginning in tax year 2012 to residential rental apartments that contain more than four units.<sup>343</sup> The new code section mandates that the BOE consider the following:

- (1) The actual gross income generated from such real property and any resultant loss in income attributable to vacancies, collection losses, and rent concessions;
- (2) The actual operating expenses and expenditures and the impact of any additional expenses or expenditures; and
- (3) Any other evidence relevant to determining fair market value of such real property.<sup>344</sup>

The bills also mandate that the BOE use the income approach to value these rental apartments, with some exceptions for

- when (i) such real property has been sold since the previous assessment, in which case the board may consider the sales price of such

338. JOINT LEGISLATIVE AUDIT & REVIEW COMM’N, REVIEW OF RETIREMENT BENEFITS FOR STATE AND LOCAL EMPLOYEES 42-43 (2011), available at <http://jlarc.virginia.gov/meetings/December11/retirement.pdf>.

339. S.B. 498, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Apr. 18, 2012, ch. 823, 2012 Va. Acts \_\_\_).

340. *Id.*

341. *Id.*

342. S.B. 73, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Apr. 9, 2012, ch. 707, 2012 Va. Acts 925); H.B. 1073, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Apr. 4, 2012, ch. 536, 2012 Va. Acts 233).

343. S.B. 73; H.B. 1073.

344. S.B. 73; H.B. 1073.

property; (ii) improvements on such real property are being constructed or renovated, in which case the board may consider the market value of such property; or (iii) the value arrived at by the income approach is not otherwise in accordance with generally accepted appraisal practices and standards prescribed by the International Association of Assessing Officers (IAAO), in which case the board may consider the market value of such property.<sup>345</sup>

*F. Transportation Funding/State Transportation Mandate:  
Senate Bill 639, House Bill 1248*

The identical bills Senate Bill 639 and House Bill 1248 got media attention mostly for how little revenue they actually produced,<sup>346</sup> only from a “naming rights” provision which allows the Commonwealth Transportation Board (“CTB”) to name highways, bridges, interchanges, and other transportation facilities in exchange for a fee.<sup>347</sup> But the bills, which were passed on the last day of the regular session out of a conference committee, got the attention of local governments for their unprecedented state mandate on local government transportation planning.<sup>348</sup>

The bills amended the provisions involving local and regional transportation planning to require that changes to the transportation component of comprehensive plans be submitted to VDOT for review.<sup>349</sup> If VDOT finds an inconsistency, VDOT would request a local or regional transportation plan be amended to conform to state plans.<sup>350</sup> If localities or metropolitan planning organizations do not amend their plans when they conflict with state plans, the CTB is authorized to reallocate funding from the non-conforming project as permitted by state and federal law.<sup>351</sup> Localities and regional organizations are to reimburse VDOT for all

---

345. S.B. 73; H.B. 1073.

346. See Jeffrey C. Southard, *Toll Dependency Solves Nothing*, VIRGINIAN-PILOT, Apr. 8, 2012, at B7.

347. S.B. 639, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Apr. 9, 2012, ch. 733, Va. Acts \_\_\_); H.B. 1073, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Apr. 9, 2012, ch. 729, Va. Acts \_\_\_).

348. See, e.g., Kali Schumitz, *Fairfax Balks at Governor's Transportation Plan*, FAIRFAX CNTY. TIMES (Feb. 2, 2012), <http://www.fairfaxtimes.com/article/20120201/NEWS/702019302/1117/fairfax-balks-at-governor-s-transportation-plan&template=fairfaxTimes>.

349. S.B. 639; H.B. 1073.

350. S.B. 639; H.B. 1073.

351. S.B. 639; H.B. 1073.

expenses when terminating a project or requesting alterations that exceed ten percent of the total project cost.<sup>352</sup>

More helpful for local governments, these bills allow the VDOT-local government revenue sharing program to include secondary road maintenance projects in addition to the traditional construction projects.<sup>353</sup>

#### IV. CONCLUSION

The year 2012 was another active one in Virginia local government law. Only a select number of cases and bills could be included in this article, and the authors necessarily used their judgment to narrow those included here. The authors welcome comments and suggestions on the cases and bills which should have been included, and what developments in Virginia local government law should be included in the future.

---

352. S.B. 639; H.B. 1073.

353. S.B. 639; H.B. 1073.

\*\*\*