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From Animal Control to Zoning: 2019 Local Government Law Update

Tyler C. Southall

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FROM ANIMAL CONTROL TO ZONING: 2019 LOCAL GOVERNMENT LAW UPDATE

Tyler C. Southall *

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INTRODUCTION

The goal of this Article is to review significant recent developments in Virginia local government law. First, this Article discusses a number of Supreme Court of Virginia and Fourth Circuit Court of Appeals cases published between July 1, 2018 and July 1, 2019. These cases involve questions of the First Amendment and social media, the First Amendment and employment law, attorney-client privilege and Freedom of Information Act requests, vested rights issues in zoning ordinances, the powers of the Virginia State Corporation Commission, and public finance. Second, this Article addresses new laws from the 2019 General Assembly. It is impossible to cover every important case and every relevant statutory amendment, so this Article focuses on the most important and/or interesting new cases and new laws.

I. NEW CASES¹A. *Free Speech, Viewpoint Discrimination, and Governmental Social Media Pages: Davison v. Randall*

In a fascinating case, a panel of the Fourth Circuit Court of Appeals held that the Chair of the Loudoun County Board of Supervisors abridged the First Amendment rights of a citizen in a dispute arising out of actions taken on Facebook.²

1. Facts of *Davison*

Prior to becoming Chair of the Loudoun County Board of Supervisors, in addition to her personal Facebook page and a political campaign Facebook page, Phyllis Randall created a Facebook page entitled: “Chair Phyllis J. Randall” (“Chair Randall Page”).³ On Randall’s campaign page, she encouraged “ANY Loudoun citizen” to post “ANY issues, request, criticism, complement or just your

1. The author is grateful for the Bill of Particulars, which as the Reporter of the Local Government of Attorneys of Virginia, Inc., provides case summaries of cases relevant to the practice of local government law. The author reviewed issues of the Bill of Particulars in choosing which cases to highlight in this Article. Steven G. Friedman, Ed., BILL OF PARTICULARS, vol. 44, no. 7, 9–12; vol. 45, no. 1–7.

2. *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019).

3. *Id.* at 672–73.

thoughts.”⁴ Randall used the Chair Randall Page to disseminate information about public issues, including snow removal, zika virus, floodplains, and school safety issues.⁵ The Chair Randall Page allowed for other Facebook users to post comments on Randall’s posts.⁶

On February 3, 2016, following an exchange with Randall at a town hall meeting, Davison posted a comment through his Virginia SGP Page, apparently alleging corruption by the Loudoun County School Board,⁷ on a post by Randall about the town hall meeting.⁸ Randall responded by removing her post regarding the town hall, which also removed Davison’s comment, and Randall banned Davison’s Virginia SGP Page from further comments on the Chair Randall Page.⁹ Although Randall reconsidered her action the following day and “unbanned” Davison’s Virginia SGP Page from making further comments on the Chair Randall Page, she continued to hold the position that she could ban other Facebook users from commenting on the Chair Randall Page based on their views if she so desired.¹⁰

2. Procedural History of *Davison*

Davison brought suit under 42 U.S.C. § 1983 against (1) Randall, both personally and in her official capacity; and (2) the Loudoun County Board of Supervisors, alleging that the ban on commenting on the Chair Randall Page amounted to viewpoint discrimination.¹¹ He further argued that the ban violated his Fourteenth Amendment due process rights because he had no prior notice of the decision or opportunity to appeal the ban.¹²

Four days before discovery closed and about two months prior to the trial, Davison sought to amend his pleading to add (1) claims

4. *Id.* at 673.

5. *Id.* at 673–74.

6. *Id.* at 673.

7. *Id.* at 675 (noting that “[a]lthough neither Davison nor Randall remember the precise content of Davison’s comment, Randall testified that it contained ‘accusations’ regarding” conflicts of interest by the school board, including that the school board had been “taking kickback money.”). *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 676, 678–79.

11. *Id.* at 676.

12. *Id.*

under the Constitution of Virginia to parallel the federal constitutional claims; and (2) a First Amendment claim against the Loudoun County Board of Supervisors.¹³ The First Amendment claim against the Loudoun County Board of Supervisors “theorized that the County violated [Davison’s] free speech rights by choosing to use Facebook Pages as public forums, when Facebook allows private users to restrict access to their posts, including posts” on municipal Facebook pages.¹⁴ The district court denied Davison leave to amend for the latter First Amendment claim.¹⁵ At the summary judgment stage, the district court dismissed the Loudoun County Board of Supervisors from the suit.¹⁶ At trial, the district court found that Davison’s First Amendment and procedural due process rights had been abridged and granted declaratory judgment that the Chair Randall Page constituted a public forum.¹⁷ Both Randall and Davison appealed.¹⁸

3. Fourth Circuit Analysis of Randall’s Appeal

Randall argued: (1) Davison did not have standing, (2) Randall did not act “under ‘color of state law’” by banning Davison’s Virginia SGP Page from the Chair Randall Page, and (3) Randall’s ban of Davison’s Virginia SGP Page did not abridge Davison’s First Amendment rights.¹⁹

a. Did Davison Have Standing?

In challenging Davison’s standing, Randall argued that Davison did not suffer an “injury in fact.”²⁰ The court noted that a lower

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 723–24 (E.D. Va. 2017).

18. *Davison*, 912 F.3d at 677.

19. *Id.*

20. *Id.* Of the three prongs necessary to show standing, Randall challenged only the injury in fact provision. With respect to all three prongs, the court noted:

To establish Article III standing, a plaintiff must prove that: “(1) he or she suffered an ‘injury in fact’ that is concrete and particularized, and is actual or imminent; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) the injury likely will be redressed by a favorable decision.”

Id. (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 396 (4th Cir. 2011)).

burden exists to establish standing in First Amendment cases.²¹ The court proceeded to apply a two-part test from *Kenny v. Wilson* and *Babbitt v. United Farm Workers Nat'l Union*, which states as follows: “[T]here is a sufficiently imminent injury in fact if plaintiffs allege [1] ‘an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [2] there exists a credible threat of prosecution thereunder.’”²² Because (1) the Fourth Circuit found that Randall continued to post on the Chair Randall Page and (2) Randall maintained that she had the right to ban others from posting on the Chair Randall Page as if it were her personal page without consideration of First Amendment concerns, the court found that Davison had standing.²³

b. Did Randall Act “Under Color of State Law”?

In order for a plaintiff to successfully bring a 42 U.S.C. § 1983 claim, the defendant must have acted “under color of . . . state law.”²⁴ The court noted that “[t]he traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’”²⁵ The court continued that “no specific formula” existed to determine whether or not an official acted under color of state law,²⁶ and courts must determine the “totality of the circumstances.”²⁷ If “the official ‘use[d] the power and prestige of his state office to damage the plaintiff,’”²⁸ a finding that the official acted under the color of state law is “likely.”²⁹ Further, the court noted the Fourth Circuit had previously held that “a challenged action by a governmental official is fairly attributable to the state when ‘the sole intention’ of the official in taking the action was ‘to

21. *Id.* at 678 (citing *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013)).

22. *Id.* (quoting *Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018) and *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

23. *Id.* at 678–79.

24. *Id.* at 679 (quoting *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009)).

25. *Id.* (quoting *West v. Atkins*, 487 U.S. 42, 49 (1988)).

26. *Id.* (quoting *Holly v. Scott*, 434 F.3d 287, 292 (4th Cir. 2006)).

27. *Id.* at 680 (quoting *Holly*, 434 F.3d at 292).

28. *Id.* (alteration in original) (quoting *Harris v. Harvey*, 605 F.2d 330, 337 (7th Cir. 1979)).

29. *Id.*

suppress speech critical of his conduct of official duties or fitness for public office.”³⁰

The Fourth Circuit noted with approval the district court’s holding that Randall had acted under color of state law because the Chair:

[S]wathe[d] the [Chair Randall Page] in the trappings of her office. Among other things, (1) the title of the page includes [Randall]’s title; (2) the page is categorized as that of a government official; (3) the page lists as contact information [Randall]’s official County email address and the telephone number of [Randall]’s County office; (4) the page includes the web address of [Randall]’s official County website; (5) many—perhaps most—of the posts are expressly addressed to “Loudoun,” [Randall]’s constituents; (6) [Randall] has submitted posts on behalf of the [Loudoun Board] as a whole; (7) [Randall] has asked her constituents to use the [Chair Randall Page] as a channel for “back and forth constituent conversations”; and (8) the content posted has a strong tendency toward matters related to [Randall]’s office.³¹

Based on the findings of the district court and the fact that Randall was attempting to suppress speech critical of her, the Fourth Circuit found that under the “totality of the circumstances,” Randall had acted under color of state law.³²

c. Did Randall Abridge Davison’s First Amendment Rights?

i. Fourth Circuit Holds That the Chair Randall Page Constituted a Public Forum

Randall’s third contention raised the interesting question of whether a social media page, such as the Chair Randall Page, constituted a public forum, which, at that time, had previously been addressed by neither the Supreme Court of the United States nor any Federal Circuit Court of Appeals.³³ The Fourth Circuit began by noting that “[u]nder long-established First Amendment law, governmental entities are ‘strictly limited’ in their ability to regulate private speech in public fora.”³⁴ The court further noted that

30. *Id.* (quoting *Rosignol v. Voorhaar*, 316 F.3d 516, 524 (4th Cir. 2003)).

31. *Id.* at 680–81 (quoting *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 714 (E.D. Va. 2017)).

32. *Id.*

33. *Id.* at 682. On July 9, 2019, the Second Circuit addressed a similar question, holding that a Twitter account belonging to the President of the United States could not block other users of Twitter. *Knight First Amendment Inst. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019).

34. *Id.* at 681 (quoting *Pleasant Grove v. Summum*, 555 U.S. 460, 468 (2009)).

“‘[t]raditional’ public forums—‘such as streets, sidewalks, and parks’—‘have the characteristics of a public thoroughfare, a purpose that is compatible with expressive conduct, as well as a tradition and history of being used for expressive public conduct.’”³⁵ On the other hand, “a non-public forum is one that has not traditionally been open to the public, where opening it to expressive conduct would ‘somehow interfere with the objective use and purpose to which the property has been dedicated.’”³⁶

Based on (1) Randall’s invitation for “‘ANY Loudoun citizen’ . . . to post[] . . . ‘[about] ANY issue[] request, criticism, complement or just your thoughts,’”³⁷ (2) the premise that the Chair Randall Page was “compatib[le] with expressive activity” (like a “traditional” public forum),³⁸ (3) a recognition by Congress that the internet offers “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity,”³⁹ and (4) an analogy between traditional public fora and social media sites made by the Supreme Court of the United States in *Packingham v. North Carolina*,⁴⁰ the Court identified the Chair Randall Page as a public forum.⁴¹

ii. Court Rejects Randall’s Arguments That the Chair Randall Page Was Not a Public Forum

The court proceeded to reject Randall’s contentions that (1) the Chair Randall Page was on a privately owned website (Facebook) and therefore could not be a public forum, and (2) the Chair Randall Page amounted to “government speech” under *Pleasant Grove v. Summum*.⁴²

35. *Id.* (quoting *Am. Civil Liberties Union v. Mote*, 423 F.3d 438, 443 (4th Cir. 2005)). The court also discussed “limited” public forums as “forums that are ‘not traditionally public, but [that] the government has purposefully opened to the public, or some segment of the public, for expressive activity.’” *Id.* (alteration in original) (quoting *Mote*, 423 F.3d at 443).

36. *Id.* at 681–82 (quoting *Mote*, 423 F.3d at 443).

37. *Id.* at 682.

38. *Id.* (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

39. *Id.* (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

40. *Id.* (citing to *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017)).

41. *Id.* at 682, 687–88 (noting that there was no need to address whether the Chair Randall Page constituted a traditional public forum as the court found “viewpoint discrimination,” which is not permitted in any public forum).

42. *See id.* at 682–88.

The court first stated that it made little sense to have a bright-line rule under which a public forum existed if the property was owned by the government but did not exist if the property was privately owned and leased or controlled by a governmental entity.⁴³ Factually, the court underscored this by noting that the Chair Randall Page was (1) created and controlled by Randall (including the power to ban others);⁴⁴ (2) classified as “belonging to a governmental official;”⁴⁵ and (3) “clothed . . . in the trappings of her public office.”⁴⁶

The court second addressed Randall’s argument that the Chair Randall Page was “government speech” under *Pleasant Grove v. Summum*.⁴⁷ In *Pleasant Grove v. Summum*, the Supreme Court of the United States held that a city could not be compelled to place a monument stating the Seven Aphorisms of Summum alongside other monuments including monuments for the Ten Commandments, a fire station, and September 11, among others, because “the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.”⁴⁸ The court distinguished *Pleasant Grove v. Summum*, stating that, unlike the park in *Pleasant Grove*, Chair Randall’s page contained unlimited space in which commenters could post.⁴⁹ Finally, the court noted that because Randall had participated in “viewpoint discrimination,” it did not matter whether the Chair Randall Page “constitutes a traditional public forum or [a] designated or limited public forum.”⁵⁰ The court held Randall violated Davison’s right to free speech under the First Amendment.⁵¹

4. Fourth Circuit Analysis of Davison’s Appeal

Davison’s cross appeal centered on two contentions: (1) that the district court erred in dismissing the case against Randall in her official capacity, and (2) that the district court erred in refusing to

43. *Id.* at 685.

44. *Id.* at 683–84.

45. *Id.* at 683 (quotation marks omitted).

46. *Id.*

47. *Id.* at 686–87; see *Pleasant Grove v. Summum*, 555 U.S. 460, 464 (2009).

48. *Pleasant Grove*, 555 U.S. at 464–65.

49. *Davison*, 912 F.3d at 686–87.

50. *Id.* at 687.

51. See *id.* at 687–88.

allow Davison to amend his pleading to include a claim against Loudoun County that alleged Loudoun County violated the First Amendment by having pages on Facebook because Facebook allows “requesting” users to block other users, resulting in blocked users not seeing “requesting” users’ comments.⁵² The Fourth Circuit dismissed Davison’s first contention, essentially stating that the Loudoun County Board of Supervisors—and not Randall—held the power to regulate Loudoun County social media pages and did so with a social media policy that governed official county social media pages.⁵³ The Fourth Circuit dismissed the second contention, interestingly noting that the amendment to the pleading—if allowed—would not have been futile,⁵⁴ but amending the pleading would have been prejudicial to Loudoun County as the amendment to the pleading would have been after the close of discovery.⁵⁵

5. Judge Keenan’s Concurrence

Judge Keenan concurred with the opinion “join[ing] the well-reasoned majority opinion in full”; however, she noted that there were two issues “that do not fit neatly into our precedent.”⁵⁶ Judge Keenan (1) “question[ed] whether any and all public officials, regardless of their roles, should be treated equally in their ability to open a public forum on social media”; and (2) stated that “the Supreme Court should consider further the reach of the First Amendment in the context of social media,” particularly noting that private ownership of social media companies “blurs the line” of who is responsible for the speech in question.⁵⁷

52. *Id.* at 688, 691.

53. *Id.* at 689–90. In fact, the court notes that “Davison identifies no evidence that the Loudoun Board knew of the [Chair Randall Page] On the contrary, . . . Randall made a one-off, ‘unilateral decision to ban [Davison] in the heat of the moment, and reconsidered soon thereafter.’” *Id.* at 690 (quoting *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 715 (E.D. Va. July 25, 2017)).

54. *See id.* at 690–91. Interestingly, the Fourth Circuit could “conceive of a colorable legal argument that a governmental actor’s decision to select a private social media website for use as a public forum—and therefore select that website’s suite of rules and regulations—could violate the First Amendment, if the private website included certain types of exclusionary rules.” *Id.* at 691. The example that the court gave of such a situation envisioned that only members of one political party would be able to view the social media site. *Id.*

55. *Id.* at 690.

56. *Id.* at 692 (Keenan, J., concurring).

57. *Id.* at 692–93.

B. *Employment Law: Free Speech and Political Association*
Rights of Deputy Sheriff: McCaffrey v. Chapman

In *McCaffrey v. Chapman* the Fourth Circuit applied the *Elrod-Branti* and *Pickering-Connick* tests, holding that a sheriff did not abridge the First Amendment free speech and political association rights of a deputy in not reappointing the deputy after the deputy supported an opposing candidate during an election.⁵⁸

1. Facts of *McCaffrey v. Chapman*

McCaffrey began employment with the Loudoun County Sheriff's Office in 2005, received a promotion to a lead detective on major crimes, and supported Sheriff Chapman's election campaign in 2011.⁵⁹ However, in 2015, despite warnings from fellow deputy sheriffs, McCaffrey opposed Sheriff Chapman's re-election campaign, including (1) placing a yard sign in his yard for Sheriff Chapman's opponent; and (2) serving as a delegate at the convention that chose the Republican candidate for sheriff, and Sheriff Chapman declined to renew McCaffrey's appointment as a deputy sheriff.⁶⁰ Furthermore, Sheriff Chapman lowered McCaffrey's score on his performance evaluation to prevent him from receiving a bonus and interfered with McCaffrey's attempt to secure another law enforcement position related to the Loudoun County Sheriff's Office.⁶¹ The district court dismissed McCaffrey's claims that alleged a violation of his federal and state constitutional free speech and political association rights.⁶²

2. *Elrod-Branti* Exception

The Fourth Circuit noted that although public employees generally enjoy First Amendment free speech and political association rights, the *Elrod-Branti* exception (if it applies) allows a public employee to be terminated for supporting a political opponent, and the

58. 921 F.3d 159, 170 (4th Cir. 2019).

59. *Id.*

60. *Id.* at 162–63. Interestingly, the court noted that McCaffrey had not worn (1) campaign apparel, (2) spoken publicly about the campaign, or (3) used his position to campaign against the Sheriff. *Id.* at 162.

61. *Id.* at 163.

62. *Id.*

Pickering-Connick exception (if it applies) allows for a public employee to be terminated for certain speech.⁶³

The court addressed the *Elrod-Branti* exception first, noting that (1) “[i]n *Elrod v. Burns*], a plurality of the Supreme Court established the general rule that dismissing public employees for political affiliation violates their First and Fourteenth Amendment rights by limiting their political belief and association”; and (2) the exception to this general rule is that employees who hold a policy-making position can be terminated for their political affiliation, so that the mandate of the electorate can be carried out.⁶⁴ The Fourth Circuit continued to note that a second Supreme Court of the United States case—*Branti v. Finkel*—clarified *Elrod*, holding that “the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.”⁶⁵ The Fourth Circuit noted the existence of a two-step test that (1) asks “whether the position at issue relates to partisan political interests”;⁶⁶ and if the answer to the first step is yes, (2) “examine[s] the particular responsibilities of the position to determine whether it resembles . . . [an] office holder whose function is such that party affiliation is an equally appropriate requirement.”⁶⁷

The Fourth Circuit noted that in *Jenkins v. Medford* it applied the *Elrod-Branti* exception, holding that a North Carolina sheriff could terminate a deputy for supporting the sheriff’s political opponent.⁶⁸ This reasoning was based on the function and legal status of deputies in North Carolina.⁶⁹ As for the function of deputies, they (1) “play a special role in implementing the sheriff’s policies and goals,”⁷⁰ (2) “exercise significant discretion and make decisions that create policy,”⁷¹ (3) are relied upon to “foster public confidence in law enforcement,”⁷² and (4) provide truthful reports to the sheriff.⁷³ Furthermore, under North Carolina law, sheriffs (1) are of

63. *Id.* at 164.

64. *Id.* at 164–65 (discussing *Elrod v. Burns*, 427 U.S. 347, 354, 356 (1976)).

65. *Id.* at 165 (citing *Branti v. Finkel*, 445 U.S. 507, 518 (1980)).

66. *Id.* (citing *Stott v. Haworth*, 916 F.2d 134, 141 (4th Cir. 1990)).

67. *Id.* (alteration in original) (quoting *Stott*, 916 F.2d at 142).

68. *Id.* (citing *Jenkins v. Medford*, 119 F.3d 1156, 1164 (4th Cir. 1997)).

69. *Id.* at 165–66 (citing *Jenkins*, 119 F.3d at 1162–63).

70. *Id.* at 165 (quoting *Jenkins*, 119 F.3d at 1162).

71. *Id.* (quoting *Jenkins*, 119 F.3d at 1162).

72. *Id.* (quoting *Jenkins*, 119 F.3d at 1162).

73. *Id.* (citing *Jenkins*, 119 F.3d at 1162).

special importance; (2) cannot delegate their duties to deputies, but ;can hire deputies to assist them; (3) can be held liable for the actions of their deputies; and (4) may terminate deputies.⁷⁴ Because the Fourth Circuit found that the function and legal status of deputies in Virginia was similar to that of North Carolina deputies, the court held that the *Elrod-Branti* exception applied, leaving deputy sheriffs in both states subject to termination for political disloyalty.⁷⁵ The court did note that jailers were less important to carrying out the sheriff's mandates than a deputy sheriff, and therefore, the *Elrod-Branti* exception does not apply to jailers.⁷⁶

3. *Pickering-Connick* Exception

Because the Fourth Circuit found Chapman's speech dealt with a matter of public concern and was not made pursuant to his official duties, it proceeded to the balancing test under the *Pickering-Connick* exception.⁷⁷ Although, the *Pickering-Connick* balancing test would usually balance "the government's interest in the efficiency of the public service it performs . . . weighed against the community's interest in hearing the employee[']s[] informed opinions on important public issues,"⁷⁸ the court noted that "[o]nce we have found that the *Elrod-Branti* policymaker exception applies, the *Pickering* balance generally tips in favor of the government because of its overriding interest in ensuring an elected official's ability to implement his policies through his subordinates."⁷⁹ Thus, the Fourth Circuit affirmed the dismissal of Chapman's suit.⁸⁰

4. Judge King's Dissent

In a wide-ranging dissent, Judge King expressed concern that the *Elrod-Branti* exception was being construed too broadly, arguing that *Jenkins v. Medford* should not be extended to Virginia be-

74. *Id.* (citing *Jenkins*, 119 F.3d at 1163–64).

75. *Id.* at 165–69.

76. *Id.* at 166–67.

77. *Id.* at 169–70.

78. *Id.* at 169 (citing *Borzilleri v. Mosby*, 874 F.3d 187, 193–94 (4th Cir. 2017)).

79. *Id.* at 170 (quoting *Borzilleri*, 874 F.3d at 194).

80. *Id.* at 170. The court did note that the facts of the case "might support a state law claim such as interference with prospective contractual relationship or other theories." *Id.* at 169.

cause North Carolina law governing sheriffs had significant differences from Virginia law.⁸¹ He also noted that Virginia law gave special protection to political activities of deputy sheriffs, including: “displaying a political picture, sign, sticker, badge, or button”; ‘participating in the activities of . . . a political [sic] candidate or campaign’; [and] ‘attending or participating in a political convention.’”⁸²

C. *Freedom of Information Act Requests, Attorney-Client Privilege, and Attorney Work-Product: Bergano v. City of Virginia Beach*

In *Bergano v. City of Virginia Beach*, the Supreme Court of Virginia addressed the breadth of the attorney-client privilege and attorney work-product exemptions to the Virginia Freedom of Information Act (“FOIA”), ultimately holding that the City of Virginia Beach had applied the exemptions too broadly.⁸³

1. Facts and Procedural History of *Bergano*

Dr. Bergano, who was involved in litigation with the City of Virginia Beach, made a FOIA request for “all legal fees and expert invoices relating to all of the [City’s] expenses related to the litigation” between Dr. Bergano and the City.⁸⁴ The City provided approximately seventy-nine pages of records in response to the request, but the City—citing Virginia Code sections 2.2-3705.1(2) and (3)—redacted all information except for the date the work was performed, the attorney’s name, time billed, and the hourly rate.⁸⁵ Dr. Bergano sought a writ of mandamus to compel the City to provide the requested records, but following an in camera review of

81. *See id.* at 170–80 (King, J., dissenting).

82. *Id.* at 180 (quoting VA. CODE ANN. § 15.2-1512.2(B)–(C) (Repl. Vol. 2018)).

83. 296 Va. 403, 406, 410–11, 821 S.E.2d 319, 320, 323 (2018).

84. *Id.* at 406, 821 S.E.2d at 320–21.

85. *Id.* at 406–07, 821 S.E.2d at 321. Virginia Code section 2.2-3705.1 states:

The following information . . . is excluded from the mandatory disclosure provisions of [FOIA], but may be disclosed by the custodian in his discretion:

. . . .

2) Written advice of legal counsel to state, regional or local public bodies or the officers or employees of such public bodies, and any other information protected by the attorney-client privilege.

3) Legal memoranda and other work product compiled specifically for use in litigation

VA. CODE ANN. § 2.2-3705.1 (Repl. Vol. 2017).

the records, the Virginia Beach City Circuit Court held that the redactions were proper under FOIA.⁸⁶ Dr. Bergano appealed to the Supreme Court of Virginia.⁸⁷

2. Supreme Court of Virginia Holding and Analysis in *Bergano*

The Supreme Court of Virginia addressed the attorney-client privilege, noting that “[a]s a general rule, confidential communications between an attorney and his or her client made in the course of that relationship . . . are privileged from disclosure”⁸⁸ and that “[t]he objective of the attorney-client privilege is to encourage clients to communicate with attorneys freely, . . . thereby enabling attorneys to provide informed and thorough legal advice.”⁸⁹ As for attorney work-product, the court noted that “Rule 4:1(b)(3) [of the Supreme Court of Virginia] generally shields from disclosure all otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial absent a showing of substantial need and the absence of access to other equivalent sources of information without undue hardship.”⁹⁰

Noting that it had conducted a review under seal of the redacted materials, the Supreme Court of Virginia held that some of the redacted materials deserved protection under neither the attorney-client privilege nor the attorney work-product exceptions.⁹¹ In particular, the court singled out entries labelled “[t]rial preparation and document review” and “[a]ttend trial (Day One),” noting that revealing such information “would not in any way reveal confidential client communications, analytical work product, motives for litigation, or compromise litigation strategy.”⁹² As such, the Supreme Court of Virginia reversed the circuit court decision in favor of the City and remanded the case to the circuit court (1) for an in camera review to determine which redactions were permissible; and (2) whether the City would be liable for Bergano’s legal fees.⁹³

86. *Bergano*, 296 Va. at 407, 821 S.E.2d at 321.

87. *Id.* at 407, 821 S.E.2d at 321.

88. *Id.* at 408, 821 S.E.2d at 322 (quoting *Walton v. Mid-Atl. Spine Specialists, P.C.*, 280 Va. 113, 122, 694 S.E.2d 545, 549 (2010)).

89. *Id.* at 408, 821 S.E.2d at 322 (quoting *Walton*, 280 Va. at 122, 694 S.E.2d at 549).

90. *Id.* at 408–09, 821 S.E.2d at 322.

91. *Id.* at 410, 821 S.E.2d at 323.

92. *Id.* at 411, 821 S.E.2d at 323.

93. *Id.* at 411, 821 S.E.2d at 323.

D. Zoning Law: Two Vested Rights Cases

Two opinions of the Supreme Court of Virginia in zoning cases dealt with vested rights under Virginia Code section 15.2-2307. *Prince William Board of County Supervisors v. Archie* concerned the rights of a current property owner to continue a vested use when a prior property owner had intended for such use to end.⁹⁴ In *Fairfax County Board of Supervisors v. Cohn*, the supreme court held that the protections afforded by Virginia Code section 15.2-2307(D)(ii) apply only to structures and not to uses.⁹⁵

1. Intent Versus Actual Use: *Prince William Board of Supervisors v. Archie*

a. Facts of *Archie*

In 2015, Henry Archie, Jr. asked Prince William County to confirm that he had a lawful nonconforming use of an automobile junkyard on three parcels of land in Prince William County.⁹⁶ The zoning administrator granted his request on the back parcel and the front parcel, but denied Archie's request on the middle parcel, even though Prince William County had certified the parcel as part of a "nonconforming [sic] auto[mobile] graveyard" in 1982.⁹⁷ In support of her decision, the zoning administrator noted the existence of a 1991 decree of the Prince William County Circuit Court wherein only two of the parcels were found to have a lawful nonconforming use.⁹⁸ The zoning administrator argued that the same 1991 decree found that no cars existed on the third parcel, and, therefore, the zoning administrator forbade further use of the third parcel as an automobile junkyard.⁹⁹

Archie appealed the decision of the zoning administrator to the Prince William County Board of Zoning Appeals.¹⁰⁰ During the Board of Zoning Appeals hearing, testimony established that Archie's family sold the middle parcel in 1987 before reacquiring it

94. 296 Va. 1, 2–4, 817 S.E.2d 323, 324 (2018).

95. 296 Va. 465, 477, 821 S.E.2d 693, 699 (2018).

96. *Archie*, 296 Va. at 3, 817 S.E.2d at 324.

97. *Id.* at 3–4, 817 S.E.2d at 324–25.

98. *Id.* at 3, 817 S.E.2d at 324.

99. *Id.* at 3–4, 817 S.E.2d at 324.

100. *Id.* at 4, 817 S.E.2d at 324.

in 1992, after which Archie acquired the middle parcel in 1995.¹⁰¹ In 1990, the Prince William Circuit Court ordered Archie to clear the middle parcel of cars.¹⁰² However, Archie testified that he had left over 100 cars on the middle parcel.¹⁰³ Six other witnesses testified that the middle parcel was never actually cleared of cars during the 1987 to 1995 time period, and three other citizens stated at the public hearing that “they had ‘never seen a part of that land cleared of any vehicles.’”¹⁰⁴ The Board of Zoning Appeals upheld the decision of the zoning administrator by a vote of three-to-two.¹⁰⁵

Archie appealed the decision of the Board of Zoning Appeals to the Prince William Circuit Court.¹⁰⁶ Although the circuit court acknowledged the intervening owner’s “intent to discontinue the nonconforming use” of the third parcel, the circuit court found that the middle parcel had been used as an automobile junkyard since prior to the enactment of the Prince William County Zoning Ordinance in 1958 and such use was never discontinued.¹⁰⁷ Thus, the circuit court held that the automobile junkyard was a legal nonconforming use and allowed that use to continue.¹⁰⁸

b. Procedural History of *Archie*

The Supreme Court of Virginia granted two assignments of error, both relating to the period of time between 1987 and 1992 when Archie did not own the middle parcel, did not have permission to use the middle parcel as an automobile junkyard, and during which time period the then-owner did not continue the storage of automobiles in the junkyard.¹⁰⁹ The supreme court began its analysis by noting that it would defer to the factual findings of the circuit court in an appeal from a board of zoning appeals decision, but would perform a de novo review of the application of the law to the facts.¹¹⁰ The supreme court stated that “[i]t is undisputed that

101. *Id.* at 4–6, 817 S.E.2d at 324–26.

102. *Id.* at 5, 817 S.E.2d at 325.

103. *Id.* at 5, 817 S.E.2d at 325.

104. *Id.* at 7, 817 S.E.2d at 326.

105. *Id.* at 8, 817 S.E.2d at 326.

106. *Id.* at 8, 817 S.E.2d at 326.

107. *Id.* at 8, 817 S.E.2d at 326–27.

108. *Id.* at 8, 817 S.E.2d at 327.

109. *Id.* at 8–9, 817 S.E.2d at 327.

110. *Id.* at 9, 817 S.E.2d at 327 (citing *W&W P’ship v. Prince William Cty. Bd. of Zoning*

a lawful nonconforming use was established in the first instance”¹¹¹ and narrowed the issue down to “whether the lawful nonconforming use of [the middle parcel] as an automobile graveyard, confirmed by the County in 1982, was somehow terminated.”¹¹²

c. Supreme Court of Virginia Analysis and Holding in *Archie*

The supreme court turned to the Prince William Zoning Ordinance, noting that it permitted vested rights to be terminated if they were either (1) discontinued for at least two years; or (2) intentionally abandoned.¹¹³ Because Prince William had not appealed the issue of whether the automobile junkyard was intentionally abandoned, the supreme court only addressed the issue of whether the use had been discontinued for at least two years.¹¹⁴ The supreme court then noted that the term “discontinue” was not defined in the Prince William County Code and turned to the dictionary definition to determine that “[d]iscontinue means ‘to break off: give up: terminate: end the operations or existence of: cease to use.’”¹¹⁵ Section 32-601.11 of the County Code stated that “[t]he nonconforming status of any nonconforming use . . . shall adhere solely to the use of the land, and not to the owner, tenant, or other holder of any legal title to the property or the right to make use thereof.”¹¹⁶ Thus, the fact that Archie was not the legal owner of

Appeals, 279 Va. 483, 486, 689 S.E.2d, 739, 741 (2010)).

111. *Id.* at 11, 817 S.E.2d at 328.

112. *Id.* at 11, 817 S.E.2d at 328.

113. *Id.* at 11, 817 S.E.2d at 328. The supreme court relied upon PRINCE WILLIAM COUNTY, VA. CODE § 32-601.21:

A nonconforming use can be terminated by intentional abandonment or discontinuance of the use:

1. If any nonconforming use is *discontinued for a period of two years, it shall lose its nonconforming status*, and any further use shall conform to the provisions of this chapter.

2. For the purposes of this section, cessation of a nonconforming use for the aforesaid period shall be conclusively presumed to establish discontinuance.

3. Any nonconforming use which is intentionally abandoned, without regard to the length of time which shall have passed, shall be terminated, and any further use shall conform to this chapter.

Archie, 296 Va. at 10–12, 817 S.E.2d at 327–28.

114. *Id.* at 12, 817 S.E.2d at 328–29.

115. *Id.* at 12, 817 S.E.2d at 329 (quoting *Discontinue*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE ABRIDGED 646 (Philip Babcock Gove et al. eds., 2002)).

116. *Id.* at 12, 817 S.E.2d at 329 (quoting PRINCE WILLIAM COUNTY, VA. CODE § 32-601.11 (2018)).

the property between 1987 and 1992 was irrelevant.¹¹⁷ After noting that “[t]here is no intent element in the relevant nonconforming use termination ordinance,” the supreme court went on to hold that the middle lot was a legal nonconforming use and ruled in favor of Archie.¹¹⁸

2. Uses Versus Structures: *Fairfax County Board of Supervisors v. Cohn*¹¹⁹

a. Facts of *Cohn*

The Cohn family owned a residentially zoned lot in Fairfax County, Virginia.¹²⁰ The lot contained three structures: (1) a main house constructed in 1962; (2) a detached garage constructed in 1963; and (3) a detached garden house constructed in 1972.¹²¹ Each of the structures contained kitchens, which effectively turned each structure into its own dwelling under the Fairfax County Zoning Code.¹²² The Cohns received a notice of violation from the Fairfax County Zoning Administrator requesting that they maintain only one dwelling on their lot and convert the garage and the garden house back to their original uses, including removing the kitchens, as well as plumbing, electrical wiring, and gas piping.¹²³

b. Procedural History of *Cohn*

The Cohns brought an appeal before the Fairfax County Board of Zoning Appeals.¹²⁴ The Cohns argued that the garage and garden house were “grandfathered” because they were constructed with a septic connection to the main house and a septic tank, respectively, and prior to purchasing the house in 1998, they had been told that the garage and the garden house “had been rented

117. *Id.* at 12–13, 817 S.E.2d at 329.

118. *Id.* at 12–13, 817 S.E.2d at 329–30.

119. The author is a member of the Amicus Committee of Local Government Attorneys of Virginia, Inc. In such capacity, the author supported the Local Government Attorneys of Virginia, Inc.’s decision to file an amicus brief in support of the position of the Board of Supervisors of Fairfax County, Virginia in *Board of Supervisors of Fairfax County v. Cohn*.

120. *Bd. of Supervisors v. Cohn*, 296 Va. 465, 468, 821 S.E.2d 693, 694–95 (2018).

121. *Id.* at 468, 821 S.E.2d at 694–95.

122. *See id.* at 468–69, 821 S.E.2d at 695.

123. *Id.* at 468–69, 821 S.E.2d at 695.

124. *Id.* at 469, 821 S.E.2d at 695.

to other people long before.”¹²⁵ The zoning administrator argued to the Board of Zoning Appeals that the original building permits for the garage and garden house had not included bathrooms or kitchens.¹²⁶ In 2008, Fairfax County changed its tax records to reflect the bathrooms and kitchens in the garage and garden house, but the taxes owed did not change as a result.¹²⁷ Finally, the Cohns raised the issue of Virginia Code section 15.2-2307(D), arguing that they had a vested right in their use of the garage and garden house as dwellings because they paid taxes on the structures for fifteen years.¹²⁸ The Board of Zoning Appeals ruled against the Cohns.¹²⁹ The Cohns appealed to the Fairfax County Circuit Court, which ruled in the Cohns’ favor on the basis of Virginia Code section 15.2-2307(D)(ii), and Fairfax County appealed to the Supreme Court of Virginia.¹³⁰

c. Supreme Court of Virginia Analysis and Holding in *Cohn*

The Supreme Court of Virginia began its analysis of the case by noting that Virginia courts should interpret statutes pursuant to their plain meaning so that the legislative intent can be accomplished,¹³¹ and statutes should be read (1) in such a way that no language is rendered superfluous; and (2) in *pari materia*, or in harmony with each other.¹³² In this light, the court turned to analyzing Virginia Code section 15.2-2307, noting that its purpose was to allow property owners uses of their land to be protected by vested rights if their land was the beneficiary of a significant affirmative governmental act.¹³³ The court noted that section 15.2-2307 differentiated between “the rights to the use of land, structures, and buildings, and the right to maintain buildings and structures on land,”¹³⁴ noting that section 15.2-2307(C) protected “land,

125. *Id.* at 469, 821 S.E.2d at 695.

126. *Id.* at 469–70, 821 S.E.2d at 695.

127. *Id.* at 470, 821 S.E.2d at 696.

128. *Id.* at 471, 821 S.E.2d at 696.

129. *Id.* at 471, 821 S.E.2d at 696.

130. *Id.* at 471–72, 821 S.E.2d at 696.

131. *Id.* at 472, 821 S.E.2d at 697 (citing *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 426, 722 S.E.2d 626, 629 (2012)).

132. *Id.* at 473, 821 S.E.2d at 697.

133. *Id.* at 473–74, 821 S.E.2d at 697.

134. *Id.* at 473, 821 S.E.2d at 697.

buildings, and structures, *and the uses thereof*.”¹³⁵ The court compared this broad protection offered to uses under section 15.2-2307(C) with the protection claimed by the Cohns under section 15.2-2307(D)(ii), which states: “if . . . (ii) the owner . . . has paid taxes . . . for such building or structure for . . . more than the previous [fifteen] years, a zoning ordinance shall not provide that such building or structure is illegal and subject to removal”¹³⁶ Because section 15.2-2307(D)(ii) only protected buildings or structures and not the uses thereof, and in light of the doctrine of *in pari materia*, the supreme court ruled in favor of Fairfax County.¹³⁷

E. *Powers of Virginia State Corporation Commission to Levy Waste and Wastewater Infrastructure Surcharges: City of Alexandria v. State Corporation Commission*

City of Alexandria v. State Corporation Commission addressed the powers of the Virginia State Corporation Commission (the “SCC”) to approve waste and wastewater infrastructure surcharges and emphasized both the broad powers of the SCC and the deference to which its factual findings are given.¹³⁸

1. Facts and Procedural History of *City of Alexandria*

a. Virginia-American Water Company’s Surcharge Application

In 2015, Virginia-American Water Company (the “Company”), concerned about aging water and wastewater infrastructure, sought a base rate increase, as well as a water and wastewater infrastructure surcharge (the “Surcharge”) before the SCC.¹³⁹ The Surcharge sought by the Company was in addition to a requested base rate increase and allowed the Company to embark on a multi-year infrastructure replacement campaign with money raised from the Surcharge instead of having to fund infrastructure replace-

135. *Id.* at 474, 821 S.E.2d at 698 (quoting VA. CODE ANN. § 15.2-2307(C) (Repl. Vol. 2018)).

136. *Id.* at 475–76, 821 S.E.2d at 698–99 (quoting VA. CODE ANN. § 15.2-2307(D)(ii) (Repl. Vol. 2018)).

137. *Id.* at 473, 477–78, 821 S.E.2d at 697, 699–700.

138. *City of Alexandria v. State Corp. Comm’n*, 296 Va. 79, 94, 103, 818 S.E.2d 33, 40, 45 (2018).

139. *Id.* at 84–85, 818 S.E.2d at 35.

ments from ordinary base rate increases, in which case (1) improvements needed to have an expected completion date in the same year as the increase,¹⁴⁰ and (2) there may have been more volatility in rates.¹⁴¹ In support of its application, the Company offered evidence that the average time of replacement for the Company's mains was 430 years—nearly three and one-half centuries longer than the expected average life of those assets.¹⁴² The Cities of Alexandria and Hopewell (the “Cities”) objected to the Surcharge before the SCC, arguing among other things that (1) depreciation expense could be used to replace infrastructure without impacting the Company's return on equity, and (2) there needed to be a “true up” so that the Company did not earn more than its allowed-for return on equity.¹⁴³

b. The SCC Decision

The SCC approved the Surcharge as a pilot project with conditions, notably: (1) the Surcharge would be approved for three years; (2) there would be an “earnings test” and if more money was earned than the allowed-for return on equity, then the Company would have to refund ratepayers the excess with interest; (3) the Surcharge would be limited to the Alexandria District; and (4) there would be a cap on the Surcharge equal to 7.5% of the revenues of the Company in the Alexandria District, which would result in an increase in the monthly bill of a residential customer of about \$0.32.¹⁴⁴

2. Virginia Supreme Court Analysis and Holding in *City of Alexandria*

The Cities appealed the SCC's decision to the Supreme Court of Virginia, arguing that (1) the SCC did not have statutory authority to approve the Surcharge, and (2) there was no evidence to support the SCC's decision.¹⁴⁵ The court rejected both arguments.¹⁴⁶

140. *Id.* at 85–87, 818 S.E.2d at 35–36.

141. *Id.* at 87–88, 818 S.E.2d at 36–37.

142. *Id.* at 86, 818 S.E.2d at 36.

143. *Id.* at 84, 88–90, 818 S.E.2d at 35, 37–38.

144. *Id.* at 91–93, 818 S.E.2d at 38–39.

145. *Id.* at 94, 101, 818 S.E.2d at 40, 44.

146. *Id.* at 94, 103–04, 818 S.E.2d at 40, 45.

a. The SCC Had Statutory Authority to Approve the Surcharge

The court addressed the Cities' challenge to the SCC's statutory authority to approve the Surcharge, first noting that under applicable statutory provisions, including Virginia Code sections 56-235 and 56-235.2, the SCC possessed broad power to approve rates "without limitation as to the type of rate mechanism set."¹⁴⁷ Although the Cities argued that the court should invalidate the SCC's ruling because it did not consider how much profit the Company would make from the infrastructure replacement program funded by the Surcharge, the court upheld the SCC decision because the SCC's review was "not disconnected" to the factors set forth in the statutory framework, notably in the SCC's inclusion of a cap on the Surcharge at 7.5% of the Company's revenue in the Alexandria District.¹⁴⁸ The court noted that rate mechanisms such as the Surcharge program were not unprecedented.¹⁴⁹ The court previously upheld an "escalator clause" tied to the price of natural gas and an "automatic adjustment clause" tied to the price at which an electric utility obtained electric power from a supplier.¹⁵⁰

The Cities' most compelling argument perhaps involved the Steps to Advance Virginia's Energy Plan Act, which was lobbied for by natural gas companies and granted the SCC "statutory authority to approve rate-adjustment clauses in its regulation of natural gas companies."¹⁵¹ Because the "Constitution of Virginia expressly authorizes SCC-regulation of 'railroads, telephone, gas and electric companies' but authorizes SCC regulation of other entities only when the SCC is exercising 'powers and duties not inconsistent with [the Virginia] Constitution as may be prescribed by law,'"¹⁵² the Cities argued that it must follow that a water and wastewater utility must need express statutory authorization to receive a rate adjustment clause such as the Surcharge.¹⁵³ The

147. *Id.* at 95–96, 818 S.E.2d at 40–41.

148. *Id.* at 96–98, 818 S.E.2d at 41–42. The SCC's power is not unlimited. The court noted that "[i]f the SCC approved a rate while wholly ignoring the decision-making factors required by [Virginia] Code § 56-235.2, we would declare the approval to be ultra vires." *Id.* at 97, 818 S.E.2d at 41.

149. *Id.* at 98, 818 S.E.2d at 42.

150. *Id.* at 98–99, 818 S.E.2d at 42 (citing *City of Norfolk v. Va. Elec. & Power Co.*, 197 Va. 505, 506, 90 S.E.2d 140, 141 (1955) and *Old Dominion Power Co. v. State Corp. Comm'n*, 228 Va. 528, 323 S.E.2d 123 (1984)).

151. *Id.* at 99, 818 S.E.2d at 43.

152. *Id.* at 99, 818 S.E.2d at 43 (quoting VA. CONST. art. IX, § 2).

153. *Id.* at 99, 818 S.E.2d at 43.

court noted that this argument did not apply in the context of the instant case because “[w]hen a statute delegates such authority to the [SCC], [the court] presume[s] that any limitation on the [SCC]’s discretionary authority by the General Assembly will be clearly expressed in the language of the statute.”¹⁵⁴

b. Given the Deference SCC Is Afforded, the Evidence Was Sufficient to Support the SCC’s Decision

Lastly, the court addressed the Cities’ argument that there “was *simply no evidence* showing that the [Surcharge] program was needed to serve the public interest.”¹⁵⁵ The court noted that it “may not ‘overrule the [SCC]’s findings of fact unless . . . its determination is contrary to the evidence or without evidence to support it”¹⁵⁶ and stated that the court could not “substitute its judgment [for the SCC’s judgment] in matters within the province of the [SCC].”¹⁵⁷ The court found the decision of the SCC to approve the Surcharge to be “‘just and reasonable’ under [Virginia Code section] 56-235.2,” noting that there was conflicting expert testimony and that the SCC had imposed a number of conditions on the Surcharge program.¹⁵⁸

F. *Public Finance, Bonds, and Appropriations: ACA Financial Guarantee Corporation v. City of Buena Vista*

In a public finance case applying Virginia law, the Fourth Circuit upheld the district court’s dismissal of a lawsuit brought against the City of Buena Vista by ACA Financial Guarantee Corporation (“ACA”) and UMB Bank, N.A., which had provided bond insurance related to the refinancing of a golf course in the City of Buena Vista.¹⁵⁹

154. *Id.* at 100, 818 S.E.2d at 43 (quoting *Va. Elec. & Power Co. v. State Corp. Comm’n*, 284 Va. 726, 741, 735 S.E.2d 684, 691 (2012)).

155. *Id.* at 101, 818 S.E.2d at 44.

156. *Id.* at 94, 818 S.E.2d at 40 (quoting *Va. Elec. & Power Co.*, 284 Va. at 735, 735 S.E.2d at 688 and *Bd. of Supervisors v. Appalachian Power Co.*, 216 Va. 93, 105, 215 S.E.2d 918, 927 (1975)).

157. *Id.* at 94, 818 S.E.2d at 40 (quoting *Va. Elec. & Power Co.*, 284 Va. at 735, 735 S.E.2d at 688).

158. *Id.* at 102, 103, 818 S.E.2d at 44, 45.

159. *ACA Fin. Guar. Corp. v. City of Buena Vista*, 917 F.3d 206 (4th Cir. 2019).

1. Facts of *ACA Financial Guarantee Corporation*

The bonds, originally issued in 2003, were refinanced in 2005.¹⁶⁰ The refinancing deal documents included a Trust Agreement and a Lease Agreement under which the City, subject to future appropriation, was to pay the Public Recreational Facilities Authority (the “Authority”) the amount due under the bonds, which the Authority was to, in turn, pay to the bondholders.¹⁶¹ The Authority and the City each entered into deeds of trust, under which the Authority pledged its interest in the golf course and the City pledged its interest in city hall and the police station.¹⁶²

After the City failed to make appropriations for the bonds in 2010 and 2011, it entered into a forbearance agreement, under which ACA was to make bond payments if the City failed to appropriate funds.¹⁶³ In January 2015, the City refused to appropriate funds, resulting in plaintiffs bringing suit against the City and the Authority for breach of contract claims, including: (1) breach of a third-party beneficiary agreement;¹⁶⁴ (2) breach of the trust agreement,¹⁶⁵ deeds of trust,¹⁶⁶ and forbearance agreement;¹⁶⁷ and (3) making misrepresentations in connection with the forbearance agreement.¹⁶⁸ The plaintiffs also asserted equitable claims, including: (1) “breach of the implied covenant of good faith and fair dealing”;¹⁶⁹ (2) restitution, unjust enrichment, and quantum meruit;¹⁷⁰ and (3) constructive fraudulent inducement.¹⁷¹

160. *Id.* at 210.

161. *Id.*

162. *Id.* at 211. The court explained in a footnote that since the City could not incur debt without a referendum, the payments had to be subject to future appropriations. *Id.* at 210 n.3.

163. *Id.* at 211.

164. *Id.* at 212.

165. *Id.* at 213.

166. *Id.* at 214.

167. *Id.* at 215.

168. *Id.*

169. *Id.* at 212, 215.

170. *Id.* at 216–17.

171. *Id.* at 217.

2. Fourth Circuit Holding and Analysis in *ACA Financial Guarantee Corporation*

The Fourth Circuit panel first addressed breach of the third-party beneficiary agreement, under which the plaintiffs argued that (1) they were third party beneficiaries to the lease agreement between the City and the Authority; and (2) that the City was legally required to pay rent.¹⁷² The court dismissed this claim because the lease agreement clearly made the City's payments subject to future appropriations.¹⁷³ Furthermore, the court noted that in *Dykes v. Northern Virginia Transportation District Commission* the Supreme Court of Virginia held that "subject to appropriation" financing does not create constitutional cognizable debt "because it does not impose any enforceable duty or liability on the County."¹⁷⁴ Because the trust agreement, deeds of trust, and forbearance agreement each contained clear subject to future appropriations language in them, the Fourth Circuit ruled that each agreement was, in fact, subject to future appropriations, and the City's failure to appropriate funds was not a breach of contract.¹⁷⁵ The last breach of contract claim was an allegation that the City made misrepresentations in connection with the forbearance agreement; however, because no actual misrepresentations were specified, that claim was dismissed.¹⁷⁶

Next the court turned to the equitable claims, beginning with the claim for "breach of the implied covenant of good faith and fair dealing."¹⁷⁷ The court showed little patience for this claim, noting that (1) "the 'subject to appropriation' language is not ambiguous,"¹⁷⁸ and (2) the plaintiffs "are to be bound by the plain and unambiguous terms of their contracts."¹⁷⁹ Next, the court dismissed the claim for restitution, unjust enrichment, and quantum meruit, concluding that the parties entered into enforceable agreements,

172. *Id.* at 212.

173. *Id.* at 213.

174. *Id.* at 213 (quoting *Dykes v. N. Va. Transp. Dist. Comm'n*, 242 Va. 357, 375, 411 S.E.2d 1 (1991)).

175. *Id.* at 213–15.

176. *Id.* at 215. (referring to the standards for Rule 12(b)(6) Motions to Dismiss as set forth in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009)).

177. *Id.*

178. *Id.* at 216.

179. *Id.* at 216 (citing *Quadros & Assocs., P.C. v. City of Hampton*, 268 Va. 50, 54, 597 S.E.2d 90, 93 (2004)).

and those agreements expressly subjected the City's obligations to future appropriations.¹⁸⁰ The court last dismissed the claim for constructive fraudulent inducement, noting again that the claim failed to identify specific misrepresentations.¹⁸¹ Thus, the Fourth Circuit panel upheld the dismissal of the suit against the City and the Authority.¹⁸²

II. NEW LEGISLATION¹⁸³

A. *Planning and Community Development*

Zoning, which is almost always a hot topic in the General Assembly, was joined this year with new laws aimed at extending broadband coverage to rural areas of Virginia. Developments in both areas are worthy of discussion.

1. Zoning

a. Senate Bill 1373 and House Bill 2342: Conditional Rezoning Proffers

In 2016, the General Assembly passed Senate Bill 549, a piece of legislation the full description and analysis of which is beyond the scope of this Article, creating Virginia Code section 15.2-2303.4, which imposed significant statutory constraints affecting how localities handled proffers, including allowing courts to award attorneys' fees to a developer who successfully brought suit under section 15.2-2303.4.¹⁸⁴ Localities found this bill to be so concerning

180. *Id.* at 216–17.

181. *Id.* at 217.

182. *Id.* at 218.

183. The author is grateful to the Virginia Association of Counties for preparing an excellent annual list of legislation affecting local governments together with short summaries of each piece of legislation. VA. ASS'N OF CTYS., 2019 LEGISLATIVE SUMMARY 17-104 <https://www.vaco.org/wp-content/uploads/2019/04/LegSummary19.pdf> [https://perma.cc/C9UD-CFXV]. This annual publication is an excellent resource for local governments reviewing the most recent General Assembly session.

184. S.B. 549, Va. Gen. Assembly (Reg. Sess. 2016) (enacted as Act of Mar. 8, 2016, ch. 322, 2019 Va. Acts 584–85). Proffers are essentially voluntarily binding promises by developers to mitigate impact of their developments, given as part of receiving a rezoning.

that many localities significantly curtailed discussions with developers about rezoning cases and proffers for fear that it could open the localities to legal liability under section 15.2-2303.4.¹⁸⁵

After 2016, two of the parts of Virginia Code section 15.2-2303.4 that concerned localities were the following. First, section 15.2-2303.4(B) prohibited localities from “request[ing] or accept[ing] any unreasonable proffer,”¹⁸⁶ so localities were concerned that a developer could offer an unreasonable proffer and later legally challenge the proffer that the developer offered. Under Senate Bill 1373 and House Bill 2342 localities may not *require* an unreasonable proffer, but section 15.2-2303.4(B) no longer prohibits a locality from *accepting* an unreasonable proffer.¹⁸⁷ Furthermore, a new section, 2.2-2303.4(D), allows an applicant or owner to submit reasonable and appropriate proffers “as conclusively evidenced by the signed proffers,” indicating that the developer would have to believe a proffer was reasonable and appropriate to offer it.¹⁸⁸

Second, section 15.2-2303.4(D)(2), as created by S.B. 549 in 2016, stated:

In any action in which a locality has denied a rezoning or an amendment to an existing proffer and the aggrieved applicant proves by a preponderance of the evidence that it refused or failed to submit an unreasonable proffer or proffer condition amendment that it has proven was suggested, requested, or required by the locality, the court shall presume, absent clear and convincing evidence to the contrary, that such refusal or failure was the controlling basis for the denial.¹⁸⁹

Many localities understandably read this provision to mean that the mere *suggestion* of an unreasonable proffer by an employee or single board member of the locality would be viewed as being suggested by the locality, and significantly curtailed conversations with developers about ongoing cases. Senate Bill 1373 and House Bill 2342 removed the words *suggested* and *required* from section 15.2-2303.4(D) and changed references to “locality” in section 15.2-2303.4 to “local governing body,” implying that only the board of

185. See Michael R. Vanderpool & Karen L. Cohen, *Finding Common Ground on Proffer Reform*, 39 FEE SIMPLE 19 (2018), https://www.vfnlaw.com/wp-content/uploads/2018/12/FeeSimple_Fall2018.pdf [<https://perma.cc/MYL3-FBBS>].

186. S.B. 549.

187. H.B. 2342, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Mar. 5, 2019, ch. 245, 2019 Va. Acts __); S.B. 1373, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Feb. 21, 2019, ch. 129, 2019 Va. Acts __).

188. H.B. 2342; S.B. 1373.

189. S.B. 549.

supervisors, city council, or town council—and not employees of the locality—could require the proffer, triggering a section 15.2-2303.4 violation.¹⁹⁰ Together these changes might slightly ease localities’ apprehension about engaging in discussions with developers about proffers.¹⁹¹ Senate Bill 1373 and House Bill 2342 further state that nothing in section 15.2-2303.4 “shall be deemed or interpreted to prohibit or to require communications between an applicant or owner and the locality.”¹⁹²

Finally, the enactment clauses of Senate Bill 1373 and House Bill 2342 allow a developer who filed an application before either the July 1, 2016 changes or the July 1, 2019 changes to proceed under the law as it existed at the time of their application.¹⁹³ It will be interesting to see how developers choose to proceed and how localities react to the more relaxed version of section 15.2-2303.4.

b. Senate Bill 1091 and House Bill 2621: Solar Farm Decommissioning Requirements

In recent years, rural localities across Virginia have seen significant interest in permitting solar farms. Virginians have raised concerns that the countryside not be littered with decaying solar farms after they reach the end of their economic life.¹⁹⁴ Senate Bill 1091 and House Bill 2621 address that concern and require localities as part of the process of approving a solar farm to impose requirements concerning the decommissioning of the solar farm, which would “include[] the reasonable restoration of the real property upon which such solar [farm is] located, including (i) soil stabilization and (ii) revegetation.”¹⁹⁵ The solar farm owner, lessee, or

190. H.B. 2342; S.B. 1373.

191. Even without the provisions of Virginia Code section 15.2-2304.3, localities still have reason to use caution if and when discussing or negotiating proffers with developers. Although a discussion of the federal and Virginia constitutional law surrounding proffers is outside of the scope of this Article, localities must remain mindful of these provisions. See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013), especially *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 631 (2013) (Kagan, J., dissenting) (acknowledging concerns that local officials may have in engaging in negotiations with developers).

192. H.B. 2342; S.B. 1373.

193. H.B. 2342; S.B. 1373.

194. Scott Shenk, *As Public Hearing Looms, Questions Remain About Spotsylvania Solar Farm Proposal*, FREE LANCE-STAR (Dec. 1, 2018), https://www.fredericksburg.com/news/local/as-public-hearing-looms-questions-remain-about-spotsylvania-solar-farm/article_22cd2871-510f-5ece-b7dd-838c135cf9fb.html [https://perma.cc/2HMH-6QTL].

195. H.B. 2621, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Mar. 21, 2019,

operator is also responsible to post a bond or other financial surety in the event that the owner, lessee, or operator does not properly decommission the solar farm.¹⁹⁶

2. Broadband

An estimated 660,000 Virginians have no broadband access.¹⁹⁷ This lack of internet access results in dramatically negative impacts on economic growth and education in many rural areas of Virginia.¹⁹⁸ Although there is much more work to be done, the following two bills aim to increase broadband availability in Virginia.

a. House Bill 2141: Local Service Districts for Broadband and Communications

House Bill 2141 authorizes local governments that create a service district “[t]o contract with a nongovernmental broadband service provider who will construct, maintain, and own communications facilities and equipment required to facilitate delivery of . . . broadband services to unserved areas of the service district.”¹⁹⁹ Such contracts are only permitted in areas of service districts where “less than [ten] percent of residential and commercial units” can receive broadband service, which is presently defined as ten megabits per second download and one megabit per second upload.²⁰⁰

ch. 743, 2019 Va. Acts __); S.B. 1091, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Mar. 21, 2019, ch. 744, 2019 Va. Acts __).

196. H.B. 2621; S.B. 1091.

197. John Crane, *Economic Successes Win Praise at Summit; Regional Collaboration Celebrated in Job Growth, Mega Park*, DANVILLE REGISTER & BEE (Mar. 13, 2019) https://www.godanriver.com/news/local/economic-successes-win-praise-at-summit-regional-collaboration-celebrated-in/article_3bef429e-45dc-11e9-9375-b3a890ce8e90.html [<https://perma.cc/23AX-KEP8>] (quoting Evan Feinman, Chief Broadband Advisor to the Governor of Virginia).

198. *See id.*

199. H.B. 2141, Va. Gen. Assembly (Ex. Sess. 2019) (enacted as Act of Apr. 3, 2019, ch. 828, 2019 Va. Acts __).

200. *Id.* Interestingly, although in the author’s view existing language may be broad enough to allow for a tax to be imposed to pay for contracts with broadband services providers because broadband efforts could fall under “economic development services” and/or “promotion of business . . . services” in Virginia Code section 15.2-2403(1), H.B. 2141 failed to add a direct reference to broadband in subsections 15.2-2403(1), (2), (6), and (11), which are the paragraphs that discuss the types of projects for which taxes in a service district can be levied. *Id.*

b. House Bill 2691: Electric Utilities and Areas Unserved with Broadband

House Bill 2691 allows certain large investor owned electric utility companies in Virginia (presently Dominion Energy and Appalachian Power) to apply to the State Corporation Commission for pilot programs that would expend up to \$60 million a year in bringing broadband internet to areas that are presently unserved.²⁰¹ Any net losses attributable to such a pilot program can be recovered from customers as part of an electric grid transformation project.²⁰² It will be interesting to see how these projects proceed, how successful they are, and whether or not similar programs might be allowed in the future on a larger scale for investor owned utilities and electrical cooperatives.

B. *Education and School Safety*

A number of bills to emerge from the 2019 General Assembly addressed various topics related to school safety. Remarkably, the Virginia Association of Counties gathered fourteen changes under the heading of “school safety” in its 2019 Legislative Summary.²⁰³ Although this Article will only address two representative bills, each local school board in Virginia should review all fourteen bills.

1. Senate Bill 1220 and House Bill 1737: Emergency Response Plans

Virginia Code section 22.1-279.8 requires school boards to “annually review the written school crisis, emergency management, and medical emergency response plans.”²⁰⁴ Senate Bill 1220 and House Bill 1737 now require the “chief law-enforcement officer, the fire chief, the chief of the emergency medical services agency, the executive director of the relevant regional emergency medical services council, and the emergency management official of the locality, or their designees” to also review the plans.²⁰⁵

201. H.B. 2691, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Mar. 19, 2019, ch. 619, 2019 Va. Acts __); 2019 VA. ASS'N OF CTYS., *supra* note 183, at 21.

202. H.B. 2691.

203. VA. ASS'N OF CTYS., *supra* note 183, at 27–29.

204. VA. CODE ANN. § 22.1-279.8 (Repl. Vol. 2016).

205. H.B. 1737, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Feb. 22, 2019, ch. 141, 2019 Va. Acts __); S.B. 1220, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of

2. Senate Bill 1130 and House Bill 2609: Required Training for School Resource Officers

These identical bills require school resource officers to receive training in working with students in a school environment and require at least one administrator at each public school to have received school safety training.²⁰⁶

C. *Animal Control*

The 2019 General Assembly session resulted in three notable changes to animal control law.

1. House Bill 1874 and Senate Bill 1604: Felony Animal Cruelty Cases

Following two heart-wrenching cases of animal abuse, one involving a dog named Sugar surviving an alleged beating with a machete in 2016, and the second involving the alleged burning of a dog named Tommie by being covered in fuel and lit on fire in February 2019, the General Assembly approved “Tommie’s Law.”²⁰⁷ “Tommie’s Law” makes certain causing of “serious bodily injury” to dogs and cats that are companion animals a class six felony.²⁰⁸ Previously, certain cruelty constituted a class one misdemeanor, unless the animal died as a result of the cruelty, in which case the cruelty constituted a class six felony.²⁰⁹ “Serious bodily injury” is defined as “bodily injury that involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ or mental faculty.”²¹⁰

Mar. 14, 2019, ch. 410, 2019 Va. Acts __).

206. S.B. 1130, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Mar. 18, 2019, ch. 488, 2019 Va. Acts __); H.B. 2609, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Mar. 18, 2019, ch. 487, 2019 Va. Acts __).

207. H.B. 1874, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Mar. 18, 2019, ch. 536, 2019 Va. Acts __); S.B. 1604, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Mar. 18, 2019, ch. 537, 2019 Va. Acts __); Morgan Windsor, *Virginia Governor Signs ‘Tommie’s Law,’ Making Animal Cruelty a Felony Offense*, ABC NEWS (Apr. 2, 2019), <https://abcnews.go.com/US/virginia-governor-signs-tommies-law-making-animal-cruelty/story?id=62113054> [<https://perma.cc/SE5A-QU9H>].

208. H.B. 1874; S.B. 1604.

209. See VA. CODE ANN. § 3.2-6570 (Repl. Vol. 2016).

210. H.B. 1874; S.B. 1604.

2. House Bill 2745: Courts Given More Discretion with Dangerous Dog Cases

House Bill 2745 amended Virginia Code section 3.2-6540 to allow a court to defer a dangerous dog proceeding and impose conditions upon the owner of the dog.²¹¹ If the owner follows the conditions, the dangerous dog proceeding can be dismissed.²¹² If the owner fails to follow the conditions, the court may find the dog to be a dangerous dog.²¹³ This amendment gives courts greater latitude to apply judgment and sympathy to dangerous dog cases rather than reaching a mechanical conclusion, as a dangerous dog finding can practically be a death sentence for a dog.²¹⁴

3. Senate Bill 1367: Changes Imposed on Local Running at Large Ordinances

Senate Bill 1367 amended Virginia Code section 3.2-6538, which enables local ordinances to prohibit dogs from running at large, to create exemptions for hunting dogs.²¹⁵ Section 3.2-6538 now states that a local ordinance may “prohibit the running at large of all or any category of dogs, except dogs used for hunting.”²¹⁶ Furthermore, the act of “self-hunting” (where a dog hunts on its own off of its owner’s property) is no longer enough to deem a dog to be running at large.²¹⁷ Senate Bill 1367 further (1) imposed a civil penalty with a cap of \$100 per dog found running at large in a pack;²¹⁸ and (2) directed that all money paid as a penalty for violating section 3.2-6538 be used for animal-related purposes by the locality.²¹⁹

Interestingly, depending on how it is interpreted by courts, Senate Bill 1367 may have inadvertently opened up a significant loop-

211. H.B. 2745, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Mar. 5, 2019, ch. 190, 2019 Va. Acts __).

212. *Id.*

213. *Id.*

214. See VA. CODE ANN § 3.2-6540(P) (Cum. Supp. 2019) (stating that if the owner does not comply with the requirements regarding dangerous dogs, the court “shall order the dog to be disposed of by a local governing body”).

215. S.B. 1367, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Mar. 18, 2019, ch. 562, 2019 Va. Acts __).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

hole whereby owners of dogs that would otherwise be found running at large could claim self-hunting at the time it was apprehended or that their dog was used for hunting.

D. State and Local Conflict of Interests Act and Freedom of Information Act

The 2019 General Assembly amended two pillars of local government law: the State and Local Conflict of Interests Act and FOIA. These changes (1) enhance training requirements under both laws, (2) expand penalties for violating FOIA, and (3) give additional weight to advisory opinions of the Freedom of Information Advisory Council.

1. Senate Bill 1430: Required State and Local Government Conflict of Interests Act Training

Local elected officials are now required to complete a training session on the State and Local Government Conflict of Interests Act within two months of taking office and at least once every two years thereafter.²²⁰ Local elected officials who are in office as of July 1, 2019, are required to take such training by December 31, 2019.²²¹ The training is to be provided by the Virginia Conflict of Interest and Ethics Advisory Council.²²² Interestingly, the amendment expressly states that there is no penalty for failing to take the training.²²³

2. Senate Bill 1431: Required Virginia Freedom of Information Act Training

While Senate Bill 1430 imposed training requirements for the State and Local Government Conflict of Interests Act, Senate Bill 1431 imposes FOIA training requirements on local elected officials.²²⁴ Senate Bill 1431 states that “[t]he Virginia Freedom of Information Advisory Council . . . or the local government attorney

220. S.B. 1430, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Mar. 18, 2019, ch. 530, 2019 Va. Acts __).

221. *Id.*

222. *Id.*

223. *Id.*

224. S.B. 1431, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Mar. 18, 2019, ch. 531, 2019 Va. Acts __).

shall provide online training sessions for local government officials on the provisions of [FOIA].”²²⁵ The training has a delayed effective date of July 1, 2020, and local elected officials holding office as of that date have until the end of 2020 to complete the training.²²⁶ Otherwise, local elected officials are required to undergo training within two months of taking office and at least every two years thereafter.²²⁷ Like Senate Bill 1430, there is no penalty for failing to take the training.²²⁸

3. Senate Bill 1554: Expanded Penalties for Violations of the Virginia Freedom of Information Act

Civil penalties (1) of up to \$100 per page may be levied if records are not provided in response to a FOIA request because such records were “altered or destroyed . . . with the intent to avoid the provisions of [FOIA]” and (2) of up to \$1,000 may be levied against a public body that falsely certifies a closed session.²²⁹ These penalties have been added to Virginia Code section 2.2-3714, which already imposed civil penalties for violations of FOIA of between \$500 and \$2000 for a first violation and \$2000 to \$5000 for second violation, if the violation is willful and knowing.²³⁰

4. House Bill 1772: Effect of Advisory Opinions of Freedom of Information Advisory Council

House Bill 1772 allows FOIA defendants to introduce “relevant advisory opinion[s]” by the Freedom of Information Advisory Council as evidence that the defendant relied in good faith on such opinion, and, as such, there was not a willful and knowing violation.²³¹

225. *Id.* The author is puzzled as to why local government attorneys would provide online training sessions to clients with whom they regularly interact in person. The author wonders whether a future session of the General Assembly may want to consider rewording this provision.

226. *Id.*

227. *Id.*

228. *Id.*

229. S.B. 1554, Va. Gen. Assembly (Ex. Sess. 2019) (enacted as Act of Apr. 3, 2019, ch. 843, 2019 Va. Acts __). For an overview of requirements regarding closed meeting certifications, see Tyler C. Southall, *Closed Meetings Under FOIA Turn Fifty: The Old, the New, and What To Do*, 53 U. RICH. L. REV. 203 (2018).

230. See VA. CODE ANN. § 2.2-3714(A) (Cum. Supp. 2019).

231. H.B. 1772, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Mar. 12, 2019, ch. 354, 2019 Va. Acts __).

E. *Voting and Elections*

Two notable new laws in the realm of voting and elections dealt with (1) election security; and (2) in a significant change for Virginia, allowing for no excuse, in-person absentee voting.

1. House Bill 2178: Election Security

House Bill 2178 (1) requires the State Board of Elections to “promulgate regulations and standards necessary to ensure the security and integrity of the Virginia voter registration system and the supporting technologies utilized by the counties and cities to maintain and record registrant information”; and (2) requires each local electoral board “that utilizes supporting technologies to maintain and record registrant information” to “develop and annually update written plans and procedures to ensure the security and integrity of . . . supporting [electoral] technologies.”²³² Local electoral boards must adopt written security plans and procedures and file an annual report concerning its security plans and procedures with the Department of Elections.²³³ Local electoral boards that fail (1) to abide by the regulations promulgated by the State Board of Elections; (2) to prepare written security plans and procedures; or (3) file the annual report with the State Board of Elections can be prohibited from using the Virginia voter registration system.²³⁴

2. Senate Bill 1026 and House Bill 2790: No Excuse, In-Person Absentee Voting

At present, Virginia law only allows absentee voting for certain enumerated reasons that include, among other things, active military service and travel.²³⁵ In a significant change, beginning with the 2020 presidential election, beginning the second Saturday before election day, all registered voters may cast absentee ballots so long as such ballots are cast at the office of the local general registrar.²³⁶

232. H.B. 2178, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Mar. 18, 2019, ch. 426, 2019 Va. Acts __).

233. *Id.*

234. *Id.*

235. VA. CODE ANN. § 24.2-700 (Cum. Supp. 2019).

236. S.B. 1026, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Mar. 21, 2019, ch. 669, 2019 Va. Acts __); H.B. 2790, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of

F. *Taxation*

Two notable new tax laws this year dealt with (1) sales tax for remote sellers, and (2) the real estate tax exemption for surviving spouses of disabled veterans.

1. House Bill 1722 and Senate Bill 1083: Sales Tax for Remote Sellers

In *South Dakota v. Wayfair*, the United States Supreme Court finally issued an opinion on the long running question of whether out-of-state sellers can be subjected to sales tax, holding that South Dakota could impose sales tax on out-of-state sellers that either “deliver[ed] more than \$100,000 of goods or services into South Dakota or engage[d] in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis.”²³⁷ The 2019 General Assembly approved legislation modeled after South Dakota’s sales tax on out-of-state sellers, with the same 200 separate transaction and \$100,000 annual thresholds.²³⁸ This is significant for local governments because in Virginia, counties and cities receive a share of this tax amounting to at least one percent of the purchase price.²³⁹

2. Senate Bill 1270 and House Bill 1655: Real Estate Tax Exemption for Surviving Spouses of Disabled Veterans

Veterans who have “[one hundred] percent service-connected, permanent, and total disability” are eligible for an exemption from local real estate taxes if they own their Virginia residence, as are their surviving spouses.²⁴⁰ Senate Bill 1270 and House Bill 1655 codified a constitutional amendment that was approved by Virginia voters in 2018, which allowed a surviving spouse to continue to benefit from the tax exemption, even if the surviving spouse changes residences.²⁴¹ Prior to this change in law, surviving

Mar. 21, 2019, ch. 668, 2019 Va. Acts __).

237. 138 S. Ct. 2080, 2088, 2099 (2018).

238. S.B. 1083, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Mar. 26, 2019, ch. 816, 2019 Va. Acts __); H.B. 1722, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Mar. 26, 2019, ch. 815, 2019 Va. Acts __).

239. See VA. CODE ANN. §§ 58.1-603.2(D)(2), -605(B), -605.1 (Cum. Supp. 2019).

240. VA. CONST. art. X, § 6-A(a); VA. CODE ANN. § 58.1-3219.5 (Cum. Supp. 2019).

241. H.B. 1655, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of Feb. 15, 2019, ch. 15, 2019 Va. Acts __); S.B. 1270, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as Act of

spouses who moved residences would have lost the tax exemption.²⁴²

CONCLUSION

In conclusion, this Article discussed a number of new cases and legislation that affect Virginia's localities. Looking at the past allows us to look forward, and the author is particularly interested to see (1) how the future First Amendment jurisprudence related to social media pages and sites of government officials emerges, (2) how localities and developers react to Senate Bill 1373 and House Bill 2342, and (3) how the Commonwealth of Virginia solves the lack of broadband internet access in rural areas and what role legislation plays in that effort.

Local government is a complicated business. The reader of this Article has seen the breadth of the legal issues that impact local government. Laws change and new technologies present new legal challenges, but the goal of local government must always be to serve its citizens in an ethical, empathetic, and efficient manner. Many local governments serve their citizens with remarkably limited resources, and the author hopes that this Article serves as a useful tool for Virginia local governments to review some of the most important changes in the last year.

Mar. 25, 2019, ch. 801, 2019 Va. Acts __).

242. See H.B. 1655; S.B. 1270.