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## Local Government Law

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## LOCAL GOVERNMENT LAW

*Andrew R. McRoberts* \*

### I. INTRODUCTION

With this article, for the first time, the *University of Richmond Law Review* includes a survey of Virginia local government law in its esteemed *Annual Survey of Virginia Law*, now celebrating its twenty-sixth anniversary of publication. This article is intended to be an “annual” survey and accordingly discusses decisions by the Supreme Court of Virginia from June 2010 through June 2011 and bills passed by the 2011 Virginia General Assembly, which affect local government law.

Not every Supreme Court of Virginia case involving local government is discussed. Some cases which have local governments or their officials as parties do not involve “Virginia local government law” in its purest sense but rather real property, contracts, employment, civil procedure, or some other area of the law in which the governmental nature of the party is incidental or at best secondary. Those cases are omitted. Instead, this article includes cases in which the underlying substance of the law dealt with topics essential to the operation of government—e.g., taxation, legislative immunity, adoption of ordinances, and zoning.

Writing a survey of 2011 legislative activity affecting local government law required even more selectivity due to space limitations and the enormous number of local government-related bills. The 2011 Virginia General Assembly considered 2692 individual bills or resolutions and passed 1599 of them.<sup>1</sup> Hundreds of these

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1. Virginia General Assembly Division of Legislative Services, *Session Statistics*, <http://leg1.state.va.us/cgi-bin/legp504.exe?111+oth+STA> (last visited Oct. 12, 2011).

directly affected Virginia local government entities and officials or how citizens deal with them. The large number of local government-related bills is partly due to the significant role that local government plays in the lives and commerce of Virginians. However, a primary reason for the large number of local government bills is the strict application of the Dillon Rule in the authority of local governments.<sup>2</sup>

Under the Dillon Rule, a locality has only the “powers expressly granted by statute, those necessarily implied therefrom, and those that are essential and indispensable to the exercise of those expressly granted.”<sup>3</sup> This rule necessarily places the General Assembly and the state law at the core of how local governments work. Counties, cities, and towns must go to the General Assembly frequently for changes in authority or procedure, even if the changes are minor or non-controversial.<sup>4</sup> In addition, citizens, businesses, and others aggrieved by ordinances, procedures, or policies at the local government level, or by court decisions in local government cases, often attempt to change the statutes on which they are based by appealing to the state legislature.<sup>5</sup>

Out of the hundreds of local government bills, this article addresses a select number of bills that seem to be significant and interesting, or at least the most discussed by local government attorneys and officials. Undoubtedly, others could choose a different list. This article deals with timely topics such as gambling, guns, fraud, taxation, zoning, and eminent domain. Omitted entirely is any discussion of the annual budget,<sup>6</sup> the largest piece of legislation from 2011. The budget significantly affects all local governments but does not typically affect local government *law* in the traditional sense.

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2. See Deirdre Fernandez, *Why Do Virginia Cities Need State Blessing to Act? Blame This Guy*, VIRGINIAN-PILOT, Feb. 26, 2011, at 3.

3. *Advanced Towing Co. v. Fairfax Cnty. Bd. of Supervisors*, 280 Va. 187, 193, 694 S.E.2d 621, 624 (2010) (citing *Cnty. Bd. v. White*, 259 Va. 708, 710 n.1, 712, 528 S.E.2d 706, 707 n.1, 708 (2000); *City of Virginia Beach v. Hay*, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999); *Commonwealth v. Cnty. Bd.*, 217 Va. 558, 573–74, 232 S.E.2d 30, 40 (1977)).

4. See Fernandez, *supra* note 2.

5. See David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2286–87 (2003); Louis V. Csoka, *The Dream of Greater Municipal Autonomy: Should the Legislature of the Courts Modify Dillon's Rule, A Common Law Restraint on Municipal Power?*, 29 N.C. CENT. L. REV. 194, 209–10 (2007).

6. 2011 Appropriation Act of May 2, 2011, ch. 890, 2011 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 58.1-301 (Cum. Supp. 2011)).

## II. CASE LAW SUMMARIES

Selected opinions of the Supreme Court of Virginia in the area of local government law from June 2010 through June 2011 are discussed below.

### A. *Taxation*

#### 1. *Riverside Owner, L.L.C. v. City of Richmond*<sup>7</sup>

The *Riverside Owner, L.L.C.* case involved the appropriate amount for a tax exemption earned by a developer under Virginia Code section 58.1-3221 and Richmond City Code section 27-83.<sup>8</sup> These laws provided for a partial exemption of the real estate taxes under the City's Tax Abatement Program for Rehabilitated Real Estate.<sup>9</sup> Qualifying properties earned an exemption under the ordinance if the "assessment" of the rehabilitated property increases by 40% after rehabilitation.<sup>10</sup>

Under the facts of the case, Richmond Power Plant, L.L.C. developed a site located on Brown's Island, which was originally valued at \$500.<sup>11</sup> After significant rehabilitation and development, the mixed-use property was subsequently sold to Riverside Owner, L.L.C.<sup>12</sup> At issue was the proper amount of the tax exemption.<sup>13</sup>

Rather than use the property's actual assessment after rehabilitation, the staff had applied its longstanding Chandler policy to calculate the exemption, using only the part of the assessment due to the rehabilitation.<sup>14</sup> The purpose and effect of the Chandler policy was "to eliminate from the final estimate of value any enhancement created by something other than rehabilitation or physical improvement."<sup>15</sup> The City Assessor assessed the rehabilitated offices after rehabilitation for real estate tax purposes at

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7. 282 Va. 62, 711 S.E.2d 553 (2011).

8. *Id.* at 65, 711 S.E.2d at 534-35.

9. *Id.* at 65, 69-70, 711 S.E.2d at 534-35, 537.

10. *Id.* at 65, 711 S.E.2d at 534-35.

11. *Id.* at 66, 711 S.E.2d at 535.

12. *See id.*

13. *Id.* at 65, 711 S.E.2d at 534-35.

14. *Id.* at 66-67, 711 S.E.2d at 535.

15. *Id.* at 66, 711 S.E.2d at 535 (internal quotation marks omitted).

\$63.8 million.<sup>16</sup> However, in applying the Chandler policy, the City staff only awarded an exemption to Riverside Owner, L.L.C. in the amount of \$45.2 million, rather than the actual assessment of the offices.<sup>17</sup>

Riverside Owner, L.L.C. sued for erroneous assessment under Virginia Code section 58.1-3984 due to the lower-than-expected exemption.<sup>18</sup> The Richmond Circuit Court agreed with Riverside Owner, L.L.C., holding in a letter opinion that the Chandler policy departed from the statutory and ordinance requirements for the exemption program because it “relie[d] on values other than assessed ones” to determine the amount of the exemption.<sup>19</sup>

On appeal, the Supreme Court of Virginia reasoned that the City Council, not the staff, had the authority to set the criteria for the exemption program,<sup>20</sup> and the language of the City ordinance required that a partial exemption be based on the “first assessed value of the rehabilitation.”<sup>21</sup> The relevant assessed value is the first fair market value “assessment” after the rehabilitation (in this case \$63.8 million), which the court reasoned had a statutory and well-settled meaning.<sup>22</sup> Therefore, the court held that the amount calculated under the Chandler policy, \$45.2 million, was far less than the City’s “assessment” of \$63.8 million, which Virginia Code section 58.1-3221 and Richmond City Code section 27-83 require be used.<sup>23</sup>

While the intent of the statute and the ordinance may (or may not) have been precisely what the Chandler policy did, the City staff was limited by the plain meaning of the law and therefore forced to use the full “assessment” in granting the tax exemption.<sup>24</sup>

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16. *Id.*

17. *Id.* at 66–67, 711 S.E.2d at 535.

18. *Id.* at 67, 711 S.E.2d at 535–36.

19. *Id.* at 67–68, 711 S.E.2d at 536 (internal quotation marks omitted).

20. *Id.* at 71–72, 711 S.E.2d at 538.

21. *Id.* at 71, 711 S.E.2d at 538.

22. *Id.*

23. *Id.* at 72–73, 711 S.E.2d at 539.

24. *Id.*

## 2. *Ford Motor Credit Co. v. Chesterfield County*<sup>25</sup>

The court ruled in favor of petitioner Ford Motor Credit Company's ("FMCC") application for a refund of over \$1 million in Business, Professional, and Occupational License ("BPOL") taxes levied by Chesterfield County pursuant to Virginia Code sections 58.1-3702 and -3703(A).<sup>26</sup> Under Virginia Code section 58.1-3703.1(A), a locality may only levy taxes upon a licensee when their services are performed at "a definite place of business" within that locality.<sup>27</sup> The issues presented on appeal were: (i) whether "gross receipts" from loans originating from the County Branch of FMCC's nationwide automobile installment and inventory financing operations could be attributable to services outside the County, and (ii) whether it was "'impractical [or] impossible' to attribute the gross receipts to the performance of services at a specific, definite place of business."<sup>28</sup> The court held the taxes were not permitted by the statute because FMCC's financing operations were conducted across multiple, albeit dependent offices; therefore, "the operations of the [County] Branch did not produce 100% of the gross receipts that the County taxed."<sup>29</sup>

This decision may affect the tax liability of any corporation whose revenue generating operations span across multiple localities, and whose revenue streams may not be attributed directly to any single office. However, the court's holding depends on the specific facts of the case; and therefore, applications of the case may be limited to very similar fact patterns.

## 3. *TB Venture, L.L.C. v. Arlington County*<sup>30</sup>

At issue in the *TB Venture* case was whether a twenty-one unit block of condominiums could be assessed on a pro-rata basis by allocating or dividing the value of the whole block into a number of individual units, rather than having each unit assessed individually.<sup>31</sup> *TB Venture* argued they were unable to fairly deter-

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25. 281 Va. 321, 707 S.E.2d 311 (2011).

26. *Id.* at 325–26, 707 S.E.2d at 313.

27. VA. CODE ANN. § 58.1-3703.1(A) (Repl. Vol. 2009 & Cum. Supp. 2011).

28. *Ford Motor Credit Co.*, 281 Va. at 337, 707 S.E.2d at 319.

29. *Id.* at 339–40, 707 S.E.2d at 321.

30. 280 Va. 558, 701 S.E.2d 791 (2010).

31. *Id.* at 558, 560, 562, 564, 701 S.E.2d at 791, 792–94.

mine the market value of each unit on a fee simple basis, as is required by law, because the apartments were subject to a forty-year covenant restricting the property to rent-only.<sup>32</sup> In the words of TB Venture's expert: "There is no market for [a] 'one rent-restricted unit as an investment.'"<sup>33</sup> However, Virginia law requires that "[a]ll assessments of real estate . . . shall be at their fair market value," and when disputing a property value assessment, "a taxpayer must necessarily establish the property's fair market value."<sup>34</sup> The court found TB Venture's assessment methodology inadequate to determine the fair market value and affirmed the circuit court's decision to strike TB Venture's evidence.<sup>35</sup>

While the decision was much discussed in the real estate community, this opinion merely followed (and frequently cited) the 2008 Supreme Court of Virginia decision in *West Creek Associates, L.L.C. v. County of Goochland*.<sup>36</sup> The two cases involve the same basic point of assessment law. Both cases held that each taxable parcel or unit of real estate (a tax parcel in *West Creek* and a condominium unit in *TB Venture*) must be assessed at its individual fair market value, not as a collection of taxable units (a business parcel in *West Creek* and a building in *TB Venture*).<sup>37</sup> Perhaps understandably, the taxpayers in each of these cases sought to lower their assessed value by using a collective or

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32. *Id.* at 561–62, 701 S.E.2d at 793.

33. *Id.*

34. VA. CONST. art. X, §§ 1–2; *TB Venture*, 280 Va. at 563, 701 S.E.2d at 794; *West Creek Assocs., L.L.C. v. Cnty. of Goochland*, 276 Va. 393, 417, 665 S.E.2d 834, 847 (2008); see also VA. CODE ANN. § 58.1-3201. (Repl. Vol. 2009 & Cum. Supp. 2011).

35. *TB Venture*, 280 Va. at 564–65, 701 S.E.2d at 794–95.

36. *Id.* at 563–65, 701 S.E.2d at 794–95; *West Creek*, 276 Va. at 393, 665 S.E.2d at 834. The author was the Goochland County Attorney from 2001 to 2009 and counsel in these consolidated cases, related cases, and predecessor cases. All told, the collective litigation lasted for over eight years. See Amy Condra, *Va. Supreme Court Upholds County Assessments*, GOOCHLAND GAZETTE, Sept. 17, 2009, [http://www.goochlandgazette.com/index.php/news/article/va\\_supreme\\_court\\_upholds\\_countys\\_tax\\_assessments/](http://www.goochlandgazette.com/index.php/news/article/va_supreme_court_upholds_countys_tax_assessments/); Andrew McRoberts, *West Creek Associates v. County of Goochland, Part One*, VA. LOCALITY LAW (Aug. 7, 2009, 10:53 AM), <http://valocalitylaw.com/2009/08/07/west-creek-associates-v-county-of-goochland-part-one/>; Andrew McRoberts, *West Creek Associates v. County of Goochland Part Two*, VA. LOCALITY LAW (Aug. 11, 2009, 3:45 AM), <http://valocalitylaw.com/2009/08/11/west-creek-associates-llc-v-county-of-goochland-part-two/>; Andrew McRoberts, *West Creek Associates, LLC v. County of Goochland, Part Three*, VA. LOCALITY LAW (Aug. 14, 2009, 10:05 AM), <http://valocalitylaw.com/2009/08/14/west-creek-associates-llc-v-county-of-goochland-part-three/>.

37. *TB Venture*, 280 Va. at 564, 701 S.E.2d at 794; *West Creek*, 276 Va. at 414–15 n.8, 665 S.E.2d at 845–46 n.8.

wholesale valuation methodology.<sup>38</sup> However, these two opinions make clear that Virginia law does not allow a collective or wholesale valuation and then allocation or division of that valuation for assessment purposes.

#### 4. *County of Albemarle v. Keswick Club, L.P.*<sup>39</sup>

In *County of Albemarle v. Keswick Club L.P. (Keswick II)*, the supreme court was petitioned to determine whether the taxpayer had met its burden of proof on remand after the court held in *Keswick I* that an assessor had failed to consider, and properly reject, alternate valuation methodologies.<sup>40</sup> Experts on both sides testified to the value of the property and described the methodologies they used to achieve their results.<sup>41</sup> The court deferred to the circuit court's judgment regarding the weight and credibility given to each expert witness and affirmed its factual valuation of the property.<sup>42</sup> In the court's majority opinion, the evidence presented by the taxpayer was sufficient to demonstrate that the assessed value of the property exceeded the fair market value required by law.<sup>43</sup>

In her dissent, Justice Kinser asserted that the circuit court erred, because: (i) the lower court misinterpreted the *Keswick I* holding by equating erroneousness with a failure to consider and properly reject alternate valuation methods, and (ii) the taxpayer failed to meet its burden to prove that the assessment was erroneous.<sup>44</sup> She reasoned that the circuit court could not have found the assessment erroneous after rejecting the testimony of the taxpayer's valuation expert at trial.<sup>45</sup> Without such evidence, according to Justice Kinser, it was error to conclude that "Keswick [Club's] evidence concerning the value of the property was suffi-

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38. *TB Venture*, 280 Va. at 561–62, 701 S.E.2d at 793; *West Creek*, 276 Va. at 600, 665 S.E.2d at 837.

39. 280 Va. 381, 699 S.E.2d 491 (2010).

40. *Id.* at 383–84, 699 S.E.2d at 492; *Keswick Club, L.P. v. Cnty. of Albemarle (Keswick I)*, 273 Va. 128, 140, 639 S.E.2d 243, 250 (2007).

41. *Keswick II*, 280 Va. at 384–85, 699 S.E.2d at 492–93.

42. *Id.* at 388, 699 S.E.2d at 495.

43. *Id.* at 388–90, 699 S.E.2d at 495–96.

44. *Id.* at 390–91, 699 S.E.2d at 496 (Kinser, J., dissenting).

45. *Id.* at 394, 699 S.E.2d at 498.



cient to demonstrate that the County's assessment exceeded fair market value."<sup>46</sup>

Importantly, this opinion is one of the few Supreme Court of Virginia cases dealing with the question of what happens after a court finds that an assessor has failed to consider, and properly reject, alternate valuation methods. After a court finds such a "failure" occurred, what is the burden of the taxpayer? Importantly, such a "failure" does not, in and of itself, mean that the valuation is erroneous. The court did not hold in either *Keswick* case that merely failing to consider and properly reject alternate valuation methods was itself error but rather held it to be a "failure."<sup>47</sup> There are plenty of Supreme Court of Virginia cases describing what happens after "manifest error."<sup>48</sup> But what happens after this sort of "failure"? The taxpayer must still prove the assessment is erroneous.<sup>49</sup> The *Keswick II* case turned on the issue of whether the taxpayer bore its burden of proving the erroneousness of the value.<sup>50</sup> The majority held that the taxpayer's evidence presented by the club manager was sufficient to prove the erroneousness of the valuation; given the lower court's rejection of the taxpayer's expert, Justice Kinser strongly disagreed.<sup>51</sup>

##### 5. *FFW Enterprises v. Fairfax County*<sup>52</sup>

The underlying issue in *FFW Enterprises* is the constitutionality of a statute levying a tax upon commercial and industrial property to fund the Dulles "Metrorail" extension project.<sup>53</sup> FFW, a business subject to the tax, complained the tax was unconstitu-

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46. *Id.* at 394, 699 S.E.2d at 498 (internal quotation marks omitted).

47. *Id.* at 387–88, 699 S.E.2d at 494–95 (majority opinion); *Keswick I*, 273 Va. at 140, 639 S.E.2d at 250.

48. *See, e.g.*, *Bd. of Supervisors v. Telecomm. Indus.*, 246 Va. 472, 476, 436 S.E.2d 442, 444 (1993) ("If the trial court finds that a manifest error in the assessment exists, it may properly find the presumption rebutted and fix the fair market value of the property in accordance with the evidence."). For the Virginia Code section that provides the action of the court see VA. CODE ANN. § 58.1-3987 (Repl. Vol. 2009 & Cum. Supp. 2011).

49. *See Bd. of Supervisors v. HCA Health Servs., Inc.*, 260 Va. 317, 329–30, 535 S.E.2d 163, 169–70 (2000) (ruling for the taxpayer, the court went on to hold that erroneousness was also proven).

50. *Keswick II*, 280 Va. at 387–88, 699 S.E.2d at 494–95.

51. *See generally id.* at 390–95, 699 S.E.2d at 496–99 (Kinser, J., dissenting) (challenging the rationale of the majority in determining whether the assessed value exceeded the property's fair market value).

52. 280 Va. 583, 701 S.E.2d 795 (2010).

53. *Id.* at 586, 589, 701 S.E.2d at 797, 799.

tional because article X of the Virginia Constitution “requires the General Assembly to treat all real property within a given jurisdiction as a single indivisible class for purposes of taxation.”<sup>54</sup> They argued the General Assembly possessed no power to create tax classifications for certain types of real property, and even if they did, these classifications lacked no “reasonable basis.”<sup>55</sup>

The court disagreed with FFW. First, the Virginia Constitution grants the General Assembly the express authority to create separate tax classifications.<sup>56</sup> Second, there was a “reasonable basis” behind the classification, namely the disproportionate benefit that commercial and industrial properties would derive from the project, which provided the uniformity required by article X, section 1 of the Virginia Constitution.<sup>57</sup> FFW argued that there existed no “reasonable basis” because the taxes “by their terms, collect revenues for the purpose of funding transportation improvements that either benefit the entire taxing locality or the general public as a whole.”<sup>58</sup> FFW cited the *City of Hampton v. Insurance Co. of North America*, in which a tax on fire insurance providers used solely to fund a fireman’s relief fund was ruled unconstitutional.<sup>59</sup> The transportation tax was constitutional because, unlike the tax in *Insurance Co. of North America*, the beneficiary class is much larger and multiple justifications were offered by the County.<sup>60</sup>

This opinion is significant, because it confirms the discretion given to state and local governments when classifying for taxation purposes.<sup>61</sup> Also, special taxes such as the one mentioned above are becoming ever more critical in today’s society due to the lack of state funding allocated for large-scale transportation and development projects.

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54. VA. CONST. art. X, § 1; 280 Va. at 589–90, 701 S.E.2d at 799.

55. 280 Va. at 589–90, 701 S.E.2d at 799.

56. *Id.* at 592, 701 S.E.2d at 801.

57. *Id.* at 587, 701 S.E.2d at 798.

58. *Id.* at 594–95, 701 S.E.2d at 802.

59. *Id.* at 595, 701 S.E.2d at 795, 802; *see* *City of Hampton v. Ins. Co. of N. Am.*, 177 Va. 494, 496, 508, 14 S.E.2d 396, 396, 401 (1941).

60. *FFW Enterp.*, 280 Va. at 596, 701 S.E.2d at 803.

61. *Nageotte v. Bd. of Supervisors*, No. 09053, slip op. at 1, 3 (Va. Nov. 4, 2010) (applying *FFW Enterprises* to a locality’s service district ordinance adopted pursuant to VA. CODE ANN. § 15.2-2403 (Repl. Vol. 2008)).

B. *Legislative Immunity—Defamation: Isle of Wight County v. Nogiec*<sup>62</sup>

Nogiec, a former employee of Isle of Wight County, brought suit against the County for breach of a severance contract and against the assistant administrator individually for defamation after disparaging remarks were made concerning Nogiec's failure to act in response to warnings about flooding at a local museum.<sup>63</sup> Two issues were raised on appeal. The first issue was whether Nogiec met "his burden of proving with reasonable certainty the damages that resulted from [the breach of contract]."<sup>64</sup> Nogiec's failure to present any evidence showing that he lost job opportunities because of the disparaging remarks meant he could not prove "with reasonable certainty the damages that resulted from its breach."<sup>65</sup> As a result, the court ruled that the "circuit court erred in denying the County's motions to strike and set aside the verdict on that claim."<sup>66</sup>

The second issue on appeal addressed whether the disparaging remarks made by an assistant administrator to a member of a county board of supervisors during an official meeting are protected by an absolute privilege.<sup>67</sup> Although statements made during legislative session may be absolutely privileged, in this case of first impression, the court held that absolute privilege only applies when the statements are made during the "creation of legislation."<sup>68</sup> The court found insufficient evidence to prove that these statements were made in that context and affirmed the circuit court's ruling denying the County's motion to strike the defamation claim.<sup>69</sup>

This case is significant, because it limits the privilege entitled to county officials, employees, and perhaps the public when speaking at board meetings. Remarks made during session but outside of the legislative context are now no longer entitled to ab-

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62. 281 Va. 140, 704 S.E.2d 83 (2011).

63. *Id.* at 144–45, 704 S.E.2d at 84–85.

64. *Id.* at 144, 150, 704 S.E.2d at 84, 87.

65. *Id.* at 150, 704 S.E.2d at 87.

66. *Id.* at 151, 704 S.E.2d at 88.

67. *Id.* at 144, 153, 704 S.E.2d at 84, 89.

68. *Id.* at 153, 155, 704 S.E.2d at 89–90.

69. *Id.* at 155, 704 S.E.2d at 90.

solute privilege protection.<sup>70</sup> It is important to note the court passed on deciding the secondary issue of whether county boards are even legislative bodies that may invoke absolute privilege in the first place.<sup>71</sup> A challenge on this issue is likely to occur in the future.

In the author's opinion, it will be difficult for courts to parse the intermingled roles of local governing bodies and to determine where a legislative role starts and stops. Based on this author's experience, rarely is a local governing body completely outside of a legislative role as any agenda item could potentially result in the initiation of an ordinance amendment. Most questions asked by an elected official could be a starting point for a referral for legislative drafting to staff or for the planning commission. As a practice point, this case magnifies the need to introduce evidence of the parameters of the legislative role of the governing body when raising an immunity defense to defamation.

C. *Ordinances*—“*Fairly Debatable Standard*”: Town of Leesburg v. Giordano<sup>72</sup>

The Supreme Court of Virginia's ruling in *Giordano* addressed the sufficiency of evidence necessary to challenge the “fairly debatable” standard used to measure the reasonableness of a local legislative action.<sup>73</sup> Complainants in this case were a group of out-of-town Loudon County residents whose water and sewage utilities were supplied by the Town of Leesburg.<sup>74</sup> In response to a rate study performed by a private utility pricing service, the Town passed an ordinance in response to a “cost of service” study performed by a private utility pricing service that charged out-of-town customers a 100% surcharge on their water and sewage.<sup>75</sup>

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70. *Id.* at 154, 704 S.E.2d at 89 (“We therefore believe that application of the privilege should be limited to proceedings before a legislative body in which the public interest in free speech outweighs the potential harm to an individual's reputation.”).

71. *Id.* at 155, 704 S.E.2d at 90.

72. 280 Va. 597, 701 S.E.2d 783 (2010). The author co-wrote the amicus brief filed in this case on behalf of the Virginia Municipal League supporting the application of the fairly debatable standard to review the reasonableness of a locality's utility rate ordinance. See Brief for Virginia Municipal League as Amicus Curae Supporting Appellants, Town of Leesburg v. Giordano, 280 Va. 597, 701 S.E.2d 783 (2010) (Nos. 091455, 092329), 2010 WL 5795225.

73. 280 Va. at 599, 701 S.E.2d at 784.

74. *Id.* at 599–600, 701 S.E.2d at 784.

75. *Id.* at 600, 701 S.E.2d at 784.

The issue presented was whether the Town put forth “some evidence of reasonableness” to support the legislative action and to satisfy the “fairly debatable” standard.<sup>76</sup> The setting of water and sewage rates is a non-delegable legislative function and enjoys a presumption of validity, so the governing body needs only to proffer “any evidence in the record sufficiently probative to make a fairly debatable issue.”<sup>77</sup> Complainant’s expert presented compelling evidence showing the increased rates were unreasonable, but the Town was only required to present minimal proof of reasonableness.<sup>78</sup> Evidence from the Town supporting reasonableness included an opinion of reasonableness from one of its experts, and testimony that most localities serving customers out of its boundary have a rate differential—many of which are in excess of the Town’s 100% rate differential.<sup>79</sup>

Senior Justice Russell, in a spirited dissent, raised the interesting issue of whether the “fairly debatable” standard should even apply to legislative acts imposed upon constituents outside of the governing body’s jurisdiction.<sup>80</sup> Senior Justice Russell’s dissent, joined by newly appointed Justice Mims, asserted that if the “fairly debatable” standard were to apply in this situation, “the out-of-town customers are left to the mercies of an unregulated monopoly against which they have no redress at the polls or in the courts.”<sup>81</sup> Senior Justice Russell suggested a preponderance of the evidence standard instead.<sup>82</sup>

#### D. *Constitutional Challenges to Ordinances*

##### 1. *Advanced Towing Co. v. Board of Supervisors*<sup>83</sup>

The court was asked to address the legality of a Fairfax County ordinance requiring towing companies to store towed vehicles within the county limits.<sup>84</sup> *Advanced Towing* and several other

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76. *Id.* at 605, 701 S.E.2d at 787.

77. *Id.* at 605–06, 608, 701 S.E.2d at 787, 789 (citing *Bd. of Supervisors v. Stickley*, 263 Va. 1, 11, 556 S.E.2d 748, 754 (2002)).

78. *Id.* at 601–05, 607, 701 S.E.2d at 785–88.

79. *Id.* at 603–04, 701 S.E.2d at 786–87.

80. *Id.* at 608–09, 701 S.E.2d at 789–90 (Russell, J., dissenting).

81. *Id.* at 610, 701 S.E.2d at 790.

82. *Id.* at 611, 701 S.E.2d at 790.

83. 280 Va. 187, 694 S.E.2d 621 (2010).

84. *Id.* at 189–90, 694 S.E.2d at 622–23.

towing companies argued that the ordinance violated their equal protection rights guaranteed under both the Virginia and United States Constitutions, and that the ordinance exceeded the scope of power allowed to municipal corporations under the Dillon Rule.<sup>85</sup>

Applying the rational basis test, the court held the ordinance did not violate the towing company's equal protection rights because the Board of Supervisors offered sufficient justification for the ordinance.<sup>86</sup> The ordinance in question contained several provisions requiring towing facilities to take steps to protect the safety of the vehicles they tow.<sup>87</sup> These provisions were not applicable to towing facilities outside the county line, so keeping the vehicles within the county was the only way to enforce the ordinance.<sup>88</sup> Responding to petitioner's Dillon Rule argument, the court found the municipality's right to regulate towing under Virginia Code section 46.2-1232(A) necessarily implies the power to prescribe the location where the vehicles are stored.<sup>89</sup> Under the Dillon Rule, "municipal corporations have only those powers expressly granted to them by statute,"<sup>90</sup> but local governments are permitted to "exercise discretionary authority when a statutory grant is expressly made but is silent upon the mode or manner of its execution."<sup>91</sup> The statute granting the county the power to regulate towing is silent on storage, but prescribing the manner in which vehicles are stored is necessary to exercising the general regulatory power.<sup>92</sup>

## 2. *Covel v. Town of Vienna*<sup>93</sup>

Petitioners challenged the circuit court's ruling in three consolidated cases concerning the validity of two town ordinances: Vienna Town Code sections 18-258 through 18-280 ("Historic Districts Ordinance") and Vienna Town Code sections 18-280.1

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85. *Id.* at 190, 694 S.E.2d at 623.

86. *See id.* at 192, 694 S.E.2d at 624.

87. *Id.*, 694 S.E.2d at 622-23.

88. *See id.* at 191-92, 694 S.E.2d at 622-24.

89. *Id.* at 193, 694 S.E.2d at 625.

90. *Id.*, 694 S.E.2d at 624.

91. *Id.* (citing *Commonwealth v. Arlington Cnty. Bd.*, 217 Va. 558, 574-75, 232 S.E.2d 30, 40-41 (1977)).

92. *See* VA. CODE ANN. § 46.2-1232 (Repl. Vol. 2010).

93. 280 Va. 151, 694 S.E.2d 609 (2010).

through 18-280.13 (“Windover Heights Historic District Ordinance” or “WHHD Ordinance”).<sup>94</sup> Petitioners filed suit after the Town refused Michael Covel’s certificate of appropriateness request to erect a fence on his property and subsequently refused Covel’s and other landowners’ requests to remove their parcels from the Windover Heights Historic District.<sup>95</sup> Specifically, petitioners argued that: “(a) the WHHD Ordinance was unconstitutionally vague, (b) the Historic Districts Ordinance was enacted in violation of Code § 15.2-2306, and (c) the WHHD Ordinance was enacted in violation of [Code] § 18-261.”<sup>96</sup>

The court affirmed the circuit court’s decisions for three reasons.<sup>97</sup> First, the WHHD Ordinance did not violate Virginia Code section 15.2-2306, because the plain language of the statute allows “localities to create historic districts without landmarks, buildings, or structures.”<sup>98</sup> Therefore, petitioners’ argument that the statute required the presence of a historic building to qualify was unfounded.<sup>99</sup> Second, petitioners could not attack the adoption of Vienna Town Code section 18-261, because the ordinance was adopted before Virginia Code section 15.2-1427(C), which expressly precludes all non-constitutional challenges to the adoption of all previously adopted ordinances.<sup>100</sup> Finally, the constitutional vagueness argument failed, because neither Michael Covel nor the other petitioners objected to the circuit court’s dismissal of the vagueness claim incorporated in its consolidation order.<sup>101</sup> Also, Covel lacked standing to challenge the ordinance on constitutional grounds, because he failed to follow the appropriate procedure required for petitioning the Town to erect the fence.<sup>102</sup>

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94. *Id.* at 154, 694 S.E.2d at 611.

95. *Id.* at 155–56, 694 S.E.2d at 612.

96. *Id.* at 155, 694 S.E.2d at 612.

97. *Id.* at 165, 694 S.E.2d at 618.

98. *Id.* at 160, 694 S.E.2d at 615; *see also* VA. CODE ANN. § 15.2-2306 (Repl. Vol. 2008 & Cum. Supp. 2011).

99. *Covel*, 280 Va. at 160, 694 S.E.2d at 615.

100. *Id.* at 160–61, 694 S.E.2d at 615; *see also* VA. CODE ANN. § 15.2-1427(C) (Repl. Vol. 2008 & Cum. Supp. 2011).

101. *Covel*, 280 Va. at 162–63, 694 S.E.2d at 616.

102. *Id.* at 163, 694 S.E.2d at 616.

E. *Civil Procedure: Davis v. County of Fairfax*<sup>103</sup>

The court in *Davis* was asked to address whether an animal case appealed to the Circuit Court of Fairfax County and subsequently nonsuited must be re-filed in the circuit court.<sup>104</sup> *Davis* appealed a district court's decision declaring her an unfit pet owner to circuit court.<sup>105</sup> The County filed a motion to nonsuit the case in circuit court and thereafter filed a second petition to the district court pursuant to the predecessor to Virginia Code section 3.2-6569.<sup>106</sup> When the general district court ruled that it lacked jurisdiction because of the original appeal, the County appealed to circuit court again.<sup>107</sup> The circuit court held a trial and also found *Davis* to be an unfit pet owner.<sup>108</sup> *Davis* appealed, arguing that the district court did not have subject-matter jurisdiction because the case should have been re-filed in the circuit court after the original non-suit.<sup>109</sup> The Supreme Court of Virginia agreed and dismissed the \$51,504.64 fine against *Davis*.<sup>110</sup>

Virginia Code section 8.01-380(A) states that, “[a]fter a nonsuit no new proceeding on the same cause of action or against the same party shall be had in any court other than that in which the nonsuit was taken, unless that court is without jurisdiction or not a proper venue, or other good cause is shown.”<sup>111</sup> Although the County was correct that the general district court had original jurisdiction over unfit owner cases, after the matter had been appealed to circuit court for the first time, its jurisdiction was transferred to the circuit court by way of the original appeal.<sup>112</sup> The circuit court's jurisdiction on appeal from the general district court is derivative of the lower court's.<sup>113</sup> Therefore, since general district court lacked subject-matter jurisdiction in the second suit

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103. 282 Va. 23, 710 S.E.2d 466 (2011).

104. *Id.* at 26, 710 S.E.2d at 467.

105. *Id.*

106. *Id.* at 26–27, 710 S.E.2d at 467; see Act of Apr. 23, 2008, ch. 860, 2008 Va. Acts 2251, 2458–60 (codified as amended at VA. CODE ANN. § 3.2-6569 (Repl. Vol. 2008 & Cum. Supp. 2011)).

107. 282 Va. at 26–27, 710 S.E.2d at 467.

108. *Id.* at 27, 710 S.E.2d at 467.

109. *Id.* at 27–29, 710 S.E.2d at 467–69.

110. *Id.* at 27, 29, 32, 710 S.E.2d at 467, 469–70.

111. VA. CODE ANN. § 8.01-380(A) (Repl. Vol. 2007 & Cum. Supp. 2011).

112. *Davis*, 282 Va. at 29–30, 710 S.E.2d at 468–69.

113. *Id.* at 30, 710 S.E.2d at 469.



filed by the County, the fine levied by the circuit court against Davis was also invalid for lack of subject-matter jurisdiction.<sup>114</sup>

Although a specific procedural statute was at issue here, this case is an important reminder of the derivative nature of appellate jurisdiction. Another issue, unaddressed by the court, is whether the non-suit and re-filing in the circuit court was permissible at all. This second issue does not appear to have been assigned as error. The Supreme Court of Virginia has held, in the context of an appeal to a circuit court from a board of zoning appeals, that “[Virginia] Code § 8.01-380 applies to trial, not appellate, proceedings.”<sup>115</sup>

## F. Zoning

### 1. *Arogas v. Board of Zoning Appeals*<sup>116</sup>

In this appeal, the Supreme Court of Virginia was asked to determine whether an amended proffer for the zoning of real property made after a public hearing was enforceable.<sup>117</sup> Virginia Code section 15.2-2285(C) states, “[b]efore approving and adopting any zoning ordinance or amendment thereof, the governing body shall hold at least one public hearing thereon . . . after which the governing body may make appropriate changes or corrections in the ordinance or proposed amendment.”<sup>118</sup> The plain language of the statute makes clear that no additional meeting or hearing is required after an initial hearing is held on the matter, and the Board of Supervisors is entitled to make any subsequent amendments.<sup>119</sup>

In 2006, subsequent to the public hearing at issue, the General Assembly amended Virginia Code sections 15.2-2297, 15.2-2298, and 15.2-2303, which added the language: “The governing body may also accept amended proffers once the public hearing has begun if the amended proffers do not materially affect the overall

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114. *Id.* at 31–32, 710 S.E.2d at 470.

115. *Bd. of Zoning Appeals v. Bd. of Supervisors*, 275 Va. 452, 459, 657 S.E.2d 147, 150 (2008).

116. 280 Va. 221, 698 S.E.2d 908 (2010).

117. *Id.* at 223, 698 S.E.2d at 909.

118. VA. CODE ANN. § 15.2-2285(C) (Repl. Vol. 2008 & Cum. Supp. 2011).

119. *See id.*

proposal.”<sup>120</sup> Interestingly, since the *Arogas* opinion allows for post-hearing amendments under section 15.2-2285(C),<sup>121</sup> the “if” clause contained in the 2006 amendment may have the unintended effect of limiting a governing body’s power to accept amended proffers.

## 2. *James v. City of Falls Church*<sup>122</sup>

Petitioners appealed a planning commission’s denial of an application requesting to consolidate seven contiguous lots into a single larger lot.<sup>123</sup> The trial court struck petitioners’ evidence at the conclusion of their case, because they failed to show the planning commission’s refusal to approve the proposed consolidation was neither based on the applicable ordinances nor arbitrary and capricious.<sup>124</sup> The “primary issue” presented on appeal, however, was whether the planning commission was bound under Virginia Code section 15.2-2311(C) by the zoning administrator’s letter approving of consolidation.<sup>125</sup> Virginia Code section 15.2-2311(C) is a statutory exception to the prevailing rule that estoppel does not apply to local government when acting in a governmental capacity.<sup>126</sup>

The court held that Virginia Code section 15.2-2311(C) did not restrain the discretion of the planning commission.<sup>127</sup> First, the court held that, by its terms, Virginia Code section 15.2-2311(C) only limits the subsequent actions of the “zoning administrator or other administrative officer,” a singular term, when a planning commission contains many officials.<sup>128</sup> The court then noted that the “administrative officer” referred to here administers or

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120. See Act of Mar. 31, 2006, ch. 450, 2006 Va. Acts, 570, 570–73 (codified as amended at VA. CODE ANN. §§ 15.2-2297, -2298, -2303(A) (Repl. Vol. 2008 & Cum. Supp. 2011)).

121. 280 Va. at 228–29, 688 S.E.2d at 912.

122. 280 Va. 31, 694 S.E.2d 568 (2010).

123. *Id.* at 34, 36, 694 S.E.2d at 569–70.

124. *Id.* at 37, 694 S.E.2d at 571.

125. *Id.* at 42, 694 S.E.2d at 574.

126. See VA. CODE ANN. § 15.2-2311(C) (Repl. Vol. 2008 & Cum. Supp. 2011); *Wolfe v. Bd. of Zoning Appeals*, 260 Va. 7, 18, 532 S.E.2d 621, 622 (2000) (citing *Westminster-Canterbury v. City of Va. Beach*, 238 Va. 493, 503, 385 S.E.2d 561, 566 (1989); *Gwinn v. Alward*, 235 Va. 616, 621, 369 S.E.2d 410, 413 (1988)).

127. *James*, 280 Va. at 43, 45, 694 S.E.2d at 574, 576.

128. *Id.* at 43, 694 S.E.2d at 575 (citing VA. CODE ANN. § 15.2-2212) (Repl. Vol. 2008)) (internal quotation marks omitted).

enforces article 7 (Zoning) of title 15.2 of the Virginia Code.<sup>129</sup> In contrast, a planning commission exercises authority under article 2 (Planning Commission) of title 15.2.<sup>130</sup> Thus, the court held, “the Planning Commission cannot be an ‘administrative officer’” under Virginia Code section 15.2-2311(C).<sup>131</sup> In addition, the court held that the zoning administrator’s approval of consolidation was a “zoning interpretation” and not a “written order, requirement, decision or determination” under the meaning of Virginia Code section 15.2-2311(C).<sup>132</sup> This case, along with the other recent cases strictly applying Virginia Code section 15.2-2311(C),<sup>133</sup> signal the court’s unwillingness to apply this narrow statutory exception to the “no estoppel” rule beyond the express terms of the statute.

### III. LEGISLATIVE SUMMARIES

The 2011 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.

#### A. *Gambling: House Bill 1584*<sup>134</sup>

This bill was enacted to clarify the rules regulating illegal gambling within Virginia, after significant concerns were raised by many Virginia Commonwealth Attorneys and others about so-called “free spin” internet gambling.<sup>135</sup> In 2010, the Virginia Attorney General issued two opinions addressing the subject under the former law. The opinion first approved the practice as legal, and the second opinion, under a different set of facts, found that it might be illegal.<sup>136</sup> Given this uncertainty, the Virginia General

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129. *Id.*, 694 S.E.2d at 575.

130. *Id.* at 43–44, 694 S.E.2d at 575.

131. *Id.* at 44, 694 S.E.2d at 575 (citing VA. CODE ANN. § 15.2-2311(C) (Repl. Vol. 2008 & Cum. Supp. 2011)).

132. *Id.*, 568 S.E.2d at 575 (citing *Bd. of Supervisors v. Crucible, Inc.*, 278 Va. 152, 160–61 & n.2, 677 S.E.2d 283, 287–88 & n.2 (2009)).

133. *See, e.g., Crucible, Inc.*, 278 Va. at 161, 677 S.E.2d at 287–88; *Goyonaga v. Bd. of Zoning Appeals*, 275 Va. 232, 244, 657 S.E.2d 153, 160 (2008).

134. Act of Apr. 29, 2011, ch. 879, 2011 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 18.2-325 (Cum. Supp. 2011)).

135. *See id.*

136. *Compare* 2010 Op. Va. Att’y Gen. to Hon. Bill Janis (July 30, 2010) (explaining that no illegal gambling occurs when the element of consideration is missing), *with* 2010

Assembly was asked to clarify the law regarding “free spin” internet gambling.

The bill expands the definition of what constitutes “consideration” under the gambling statute, Virginia Code section 18.2-325. The definition was expanded to include “a product, Internet access, or other thing” for which a person receives “free points or other measureable units” that may be used to gamble and subsequently redeemed for actual money.<sup>137</sup> Also, the bill expands the definition of a “[g]ambling device” to include any “electronic or video versions” of instruments that may be used to gamble.<sup>138</sup> Gambling enterprises can no longer allow the opportunity to win actual money through the risking of “free” points procured through the purchase of other points or a product or service (e.g., phone card, internet access, DVD rental) that, in and of itself, would not justify the purchase.<sup>139</sup> The bill also repeals Virginia Code section 18.2-325.1, which was effective July 1, 2010, and made “free spin” internet gaming permissible but led to many concerns.<sup>140</sup> This bill provides important clarity for local law enforcement officials and local governing bodies faced with complaints.

#### B. *Pneumatic Guns: Senate Bill 757*<sup>141</sup>

This bill broadens rights to fire pneumatic guns, which use air to fire a projectile, on private property so long as reasonable care is taken.<sup>142</sup> The bill expressly forbids localities from enacting ordinances that restrict the use of these weapons outside of designated shooting areas.<sup>143</sup> Now, a landowner may fire pneumatic weapons on his own property so long as he does so without threatening the safety of his neighbors.<sup>144</sup> Shooters must “take

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Op. Va. Att’y Gen. to Hon. R. Edward Houck (Oct. 15, 2010) (explaining that whether a scenario is illegal “gambling” is fact-dependent, and the scenario presented would constitute illegal gambling because the elements of prize, chance, and consideration are present).

137. Ch. 879, 2011 Va. Acts \_\_\_\_.

138. *Id.*

139. *Id.*

140. *Id.*

141. Act of Apr. 6, 2011, ch. 757, 2011 Va. Acts \_\_\_\_ (codified as amended at VA. CODE ANN. § 15.2-915.4 (Cum. Supp. 2011)).

142. *Id.*

143. *Id.*

144. *Id.*

reasonable care to prevent the projectile from crossing the bounds of the property.”<sup>145</sup> This bill significantly limits the authority of local governments under Virginia Code section 15.2-915.4(A) and allows the discharge of these guns anywhere on private property with the permission of the owner—even in dense areas within cities, near property boundaries, or within a small condominium unit. Some have asked whether the lack of an exception for dense areas makes any sense,<sup>146</sup> or if the bill’s “reasonable care” requirement is enforceable, as a practical matter, before an accident has occurred.<sup>147</sup> There is no question that it extends private guns rights and reduces local government regulation of these activities.

### C. *Virginia Fraud Against Taxpayers Act*

#### 1. A Waiver of Sovereign Immunity: House Bill 1399<sup>148</sup>

This bill, patroned by Delegate Bill Janis, waives sovereign immunity for claims brought under the Virginia Fraud Against Taxpayer’s Act (“VFATA”), Virginia Code sections 8.01-261.1, *et seq.*<sup>149</sup> The bill’s Fiscal Impact Statement explains the intent of the bill:

[T]he language in the [VFATA] be changed to contain an explicit waiver of sovereign immunity so that an employee of the Commonwealth, its agencies, or any political subdivision can create a cause of action against its employer if an adverse employment action is taken against the employee by his employer because the employee has opposed any practice by his employer prohibited by [§ 8.01-261.3 of the Act] or participated in an investigation, action, or hearing under the Act.<sup>150</sup>

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145. *Id.*

146. See Dan Casey, *Tuesday’s Column: Not Your Grandfather’s BB Gun*, ROANOKE TIMES (July 4, 2011, 8:39 AM), <http://blogs.roanoke.com/dancasey/2011/07/tuesdays-column-new-air-rifles-not-the-old-pea-shooters/>.

147. See Fredrick Kunkle, *Fairfax Backs Down on BB Guns, Passes Ordinance in Line with General Assembly*, VA. POL. BLOG (July 26, 2011, 12:19 PM), [http://www.washingtonpost.com/blogs/virginia-politics/post/fairfax-backs-down-on-bb-guns-passes-ordinance-in-line-with-general-assembly/2011/07/26/gIQAeKrsaI\\_blog.html](http://www.washingtonpost.com/blogs/virginia-politics/post/fairfax-backs-down-on-bb-guns-passes-ordinance-in-line-with-general-assembly/2011/07/26/gIQAeKrsaI_blog.html).

148. Act of Mar. 26, 2011, ch. 651, 2011 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 8.01-216.2, -216.8 (Cum. Supp. \_\_\_)).

149. *Id.*

150. H.B. 1339, Fiscal Impact Statement, Va. Gen. Assembly (Reg. Sess. 2011) (enacted as Act of Mar. 26, 2011, ch. 651, 2011 Va. Acts \_\_\_).

The Act made changes in Virginia Code sections 8.01-261.3 and 8.01-263.8 to affect this waiver.<sup>151</sup> The bill was enacted in response to the Supreme Court of Virginia's decision in *Ligon v. County of Goochland*, which relied upon the longstanding rule that waivers of sovereign immunity must be express and clear.<sup>152</sup> The court held that merely because the Commonwealth or a local government is an "employer" does not mean that VFATA's liabilities for "employers" under the Act apply to the Commonwealth or a local government.<sup>153</sup> This bill expressly supersedes this decision and waives sovereign immunity in instances where government employees suffered adverse employment decisions, because they reported fraudulent activity in the workplace. While intended to help the taxpayers, this bill may significantly increase claims brought on behalf of disgruntled current and former government employees and, with no cap on recovery as in the Virginia Tort Claims Act,<sup>154</sup> could even cost the taxpayers more than the alleged fraud under certain circumstances.

## 2. Conforming the VFATA to the Federal False Claims Act: Senate Bill 1262<sup>155</sup>

This bill conforms the VFATA to the federal False Claims Act, amended in 2010.<sup>156</sup> This change is important, because any state whose false claims statute matches the federal statute is entitled to a bonus on Medicaid money.<sup>157</sup> This bill clarifies and expands the definition of "claim" under the Act, introduces a materiality requirement, adds "contractors and subcontractors" as protected from retaliation, clarifies the procedure for Commonwealth to intervene, allows the Commonwealth to prevent dismissal of a claim under certain circumstances, allows information sharing

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151. Ch. 651, 2011 Va. Acts \_\_\_\_.

152. *Ligon v. Cnty. of Goochland*, 279 Va. 312, 317, 689 S.E.2d 666, 669 (2010).

153. *Id.* at 319, 689 S.E.2d at 670.

154. VA. CODE ANN. § 8.01-195.3 (Repl. Vol. 2007 & Cum. Supp. 2011) (capping the liability of the Commonwealth, transportation district, or locality for damages in certain cases).

155. Act of Mar. 26, 2011, ch. 676, 2011 Va. Acts \_\_\_\_ (codified as amended and reenacted at VA. CODE ANN. §§ 8.01-216.2, -216.3, -216.8, -216.9, -216.10, -216.17 (Cum. Supp. 2011)).

156. See Zachery Kitts, *Two Major—and Historic—Events in the Past Seven Days . . .*, VA. QUI TAM LAW (Apr. 2, 2011, 9:41 AM), <http://vaquitamlaw.com/2011/04/02/two-major-historical-events-in-the-past-seven-days.aspx>.

157. *Id.*

with a realtor under the Act, and extends the application of the Act in many other ways.<sup>158</sup> The Senate Bill 1262 amendments are intended to make the VFATA more workable, clear, and consistent with the federal False Claims Act.

D. *Family Subdivisions: Senate Bill 873*<sup>159</sup>

This bill amends the family subdivision statute, Virginia Code section 15.2-2244,<sup>160</sup> to allow beneficiaries of a trust, who are all family members as defined by the statute, to subdivide a parcel of property held in trust for the purpose of selling or gifting the property to family members.<sup>161</sup> Any group of beneficiaries intending to subdivide property held in trust must meet the following three requirements: (1) they must be immediate family members; (2) there must be unanimous agreement to subdivide the property; and (3) they must agree to place a restrictive covenant upon the property preventing the sale of the property to a non-immediate family member for fifteen years.<sup>162</sup> The statute also gives the locality in which the property lies the ability to modify any restrictive covenant created by the beneficiaries.<sup>163</sup> This bill recognizes that a family trust can be a preferred means to hold title to family lands but that the family members may still desire to utilize a family subdivision option.

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158. Ch. 676, 2011 Va. Acts \_\_\_\_.

159. Act of Mar. 15, 2011, ch. 141, 2011 Va. Acts \_\_\_\_ (codified as amended at VA. CODE ANN. § 15.2-2244.2 (Cum. Supp. 2011)).

160. VA. CODE ANN. § 15.2-2244(B)–(C) (Cum. Supp. 2011). While automatically applicable in many counties, these and other statutory family subdivision requirements are optional or may be varied reasonably in counties having the urban county executive form of government, those meeting certain growth requirements, or those proximate to other eligible counties. *See id.*

161. Ch. 141, 2011 Va. Acts \_\_\_\_.

162. *Id.*

163. *Id.*

### E. *Eminent Domain*

#### 1. More Restrictions on the Exercise of Eminent Domain: House Bill 2161<sup>164</sup> and Senate Bill 1436<sup>165</sup>

House Bill 2161 and Senate Bill 1436 are identical, and both alter the existing law surrounding the government's ability to invoke eminent domain in Virginia, codified in title 25 of the Virginia Code.<sup>166</sup> There are several significant amendments. First, the bills require a condemner to provide copies of "all appraisals of the real property . . . that the state agency obtained prior to making an offer to acquire."<sup>167</sup> The previous version of the Code only required that the condemner provide a copy of one appraisal.<sup>168</sup> Second, the bills amend the Act by placing the definitions of "appraisal" and "state agency" in the first section in order to make them applicable to the entire statute.<sup>169</sup> Third, the bills change the procedures necessary for the government to sell the property back to the previous owner.<sup>170</sup> These situations occur when the government's intended use for the property has not been executed, or the government is stuck with a surplus of land beyond what is necessary for a project.<sup>171</sup> In these situations, the government will be required to send an offer by registered mail to the prior owner and publish the offer in a local newspaper for two consecutive weeks.<sup>172</sup> Fourth, the bills list what information is required for a valid publication.<sup>173</sup> Finally, the bills list parties that are exempted from the statute including railroads, public service corporations, municipal corporations, local government units, and political subdivisions.<sup>174</sup> These amendments are the latest in a se-

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164. H.B. 2161, Va. Gen. Assembly (Reg. Sess. 2011) (enacted as Act of Mar. 15, 2011, ch. 117, 2011 Va. Acts \_\_\_\_).

165. S.B. 1436, Va. Gen. Assembly (Reg. Sess. 2011) (enacted as Act of Mar. 15, 2011, ch. 190, 2011 Va. Acts \_\_\_\_).

166. Compare H.B. 2161, with S.B. 1436.

167. Acts of Mar. 15, 2011, ch. 117, 190, 2011 Va. Acts \_\_\_\_ (codified as amended at VA. CODE ANN. §§ 25.1-100, -108, -204, -400, -410, -411, -414, -417 (Cum. Supp. 2011)).

168. VA. CODE ANN. § 25.1-204(C) (Repl. Vol. 2006).

169. Ch. 117, 190, 2011 Va. Acts \_\_\_\_.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*



ries of restrictions on the exercise of eminent domain in the last several years.

## 2. First Step to a Constitutional Amendment: House Joint Resolution 693<sup>175</sup>

House Joint Resolution 693 is the first adoption of a resolution for a proposed amendment of the Virginia Constitution. If re-adopted in the same form in 2012 and thereafter approved by Virginia voters in a statewide referendum, the Virginia Constitution will be amended as provided in House Joint Resolution 693.<sup>176</sup> This joint resolution contains some very significant limitations to the government's rights to exercise eminent domain outlined in article I of the Virginia Constitution.

First, the proposed amendment would forbid the condemnation of property "if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development."<sup>177</sup> This resolution may have serious effects on economic development within the commonwealth.<sup>178</sup> All public improvement projects benefit someone economically, and quite often, significant transportation or utility improvements are needed to attract top prospects to the commonwealth, develop a rural "greenfield," or redevelop an urban area.<sup>179</sup> Is the "primary use" of a road or utility right of way under these circumstances to attract "economic development" or to "increase jobs?"<sup>180</sup> This amendment, if placed in the Virginia Constitution, may bar many uses of eminent domain critical to the economic future of the commonwealth and place the commonwealth at a competitive disadvantage with other states.

Second, the proposed amendment would require compensation for "lost profits" and "lost access" caused by the condemnation.<sup>181</sup>

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175. H.J. Res. 693, Va. Gen. Assembly (Reg. Sess. 2011)).

176. VA. CONST. art. XII, § 1.

177. H.J. Res. 693.

178. Virginia Municipal League Legislative Staff, *General Assembly 2011: Temporary Budget Cuts Look More Permanent Now*, VA. TOWN & CITY, Mar. 2011, at 13 (discussing how the new limit in the amendment would prohibit invoking eminent domain and raise constitutional issues—all of which would lead to litigation and eventually hamper development).

179. *Id.*

180. *Id.*

181. *Id.*

These terms will be defined later by the General Assembly but would require the government to compensate landowners not only for the fair market value of the take plus damages to the residue (the current award in a condemnation case),<sup>182</sup> but also for “lost profits” from business and “lost access” damages resulting from the condemnation.<sup>183</sup> This is a new concept, heretofore uncompensated, and will likely cause appraisals to differ widely depending upon the appraiser’s view of: (i) what exactly caused the “lost profits,” and (ii) how much the “lost access” really damaged the landowner.<sup>184</sup> If placed in the Virginia Constitution, this amendment will certainly have the effect of driving up the cost of needed public projects, often delaying or eliminating them entirely.

F. *Zoning Order, Requirement, Decision, or Determination:*  
*House Bill 1844*<sup>185</sup>

This bill requires that landowners be notified when third parties apply for a written order, requirement, decision, or determination from the zoning administrator regarding their property.<sup>186</sup> The bill requires that the zoning administrator or the applicant give written notice to a landowner within ten days of the application.<sup>187</sup> This notice requirement is satisfied by written notice via mail to the landowner’s address listed in the tax assessment books.<sup>188</sup> Without this notice, a board of zoning appeals decision on an appeal of a zoning administrator order, requirement, decision, or determination is not binding on the landowner.<sup>189</sup> Without a similar written notice, a decision by the governing body on an appeal of an interpretation of a proffer under Virginia Code section 15.2-2299 is also not binding on the landowner.<sup>190</sup> This bill is intended to ensure that landowners know of zoning applica-

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182. See, e.g., *Commonwealth Transp. Comm’r v. Glass*, 270 Va. 138, 145–47, 155, 613 S.E.2d 411, 415–16, 421 (2005) (calculating compensation in a condemnation case).

183. H.J. Res. 693.

184. See Virginia Municipal League Legislative Staff, *supra* note 178.

185. Act of Mar. 24, 2011, ch. 457, 2011 Va. Acts \_\_\_\_ (codified as amended at VA. CODE ANN. §§ 15.2-2204, -2301, -2311 (Cum. Supp. 2011)).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

tions affecting their property and have a more obvious opportunity to participate.

G. *Tax Assessment Appeals: House Bill 1588*<sup>191</sup> *and Senate Bill 1350*<sup>192</sup>

Effective beginning in tax year 2012, these identical bills amend the provisions of Virginia Code sections 58.1-3331 (access to certain assessment records), 58.1-3379 (board of equalization appeals), and 58.1-3984 (circuit court tax assessment appeals) in three primary ways.<sup>193</sup>

First, notices of the appealing taxpayer's rights to documents are now required, and the bills set forth the form, timing, and means for such notices.<sup>194</sup> Second, in all real property tax appeals at a board of equalization or circuit court, proof of the taxpayer's case now requires a statutory "preponderance of the evidence" standard<sup>195</sup> rather than the common law "clear preponderance" standard previously required.<sup>196</sup> Third, for appeals involving an "assessment of residential property filed by a taxpayer as an owner of real property containing less than four residential units," if the assessing official fails to provide the notices referenced above, or fails to timely produce the assessment documents referenced in the notices, there is a shift in the order of presentation of evidence at the board of equalization and in circuit court.<sup>197</sup> If this shift occurs, the assessing official is required to

191. H.B. 1588, Va. Gen. Assembly (Reg. Sess. 2011) (enacted as Act of Mar. 18, 2011, ch. 232, 2011 Va. Acts \_\_\_).

192. S.B. 1350, Va. Gen. Assembly (Reg. Sess. 2011) (enacted as Act of Mar. 15, 2011, ch. 184, 2011 Va. Acts \_\_\_).

193. See Act of Mar. 18, 2011, ch. 232, 2011 Va. Acts \_\_\_ (codified as amended in scattered sections of VA. CODE ANN. tit. 58.1 (Cum. Supp. 2011)); Act of Mar. 15, 2011, ch. 184, 2011 Va. Acts \_\_\_ (codified as amended in scattered sections of VA. CODE ANN. tit. 58.1 (Cum. Supp. 2011)).

194. See Act of Mar. 18, 2011, ch. 232, 2011 Va. Acts \_\_\_ (codified as amended in VA. CODE ANN. § 58.1-3379; codified at *id.* § 58.1-3331(E) (Cum. Supp. 2011)); Act of Mar. 15, 2011, ch. 184, 2011 Va. Acts \_\_\_ (codified as amended in VA. CODE ANN. § 58.1-3379; codified at *id.* § 58.1-3331(E) (Cum. Supp. 2011)).

195. See Act of Mar. 18, 2011, ch. 232, 2011 Va. Acts \_\_\_ (codified at as amended in VA. CODE ANN. § 58.1-3984; codified at *id.* (Cum. Supp. 2011)); Act of Mar. 15, 2011, ch. 184, 2011 Va. Acts \_\_\_ (codified as amended in VA. CODE ANN. § 58.1-3984; codified at *id.* (Cum. Supp. 2011)).

196. See, e.g., *West Creek*, 276 Va. at 409, 665 S.E.2d at 842-43 (explaining the common law "clear preponderance" standard).

197. See Act of Mar. 18, 2011, ch. 232, 2011 Va. Acts \_\_\_ (codified at as amended in VA. CODE ANN. § 58.1-3984; codified at *id.* (Cum. Supp. 2011)); Act of Mar. 15, 2011, ch. 184,

present certain basic information as to how the assessment was prepared and how it conforms with certain assessment standards.<sup>198</sup> Thereafter, the case proceeds as any other real property assessment appeal.

These bills were introduced in response to concerns that individual landowners were overmatched by the assessor at the board of equalization (H.B. 1588) and to adjust the burden on taxpayers in circuit court (S.B. 1350).<sup>199</sup> As conformed to each other and adopted, these bills alter well-settled law to introduce new procedures, requirements, and perhaps a shift in the presentation of evidence. The bills do not appear to eliminate the common law requirement for the taxpayer/plaintiff to prove “manifest error,” as this longstanding requirement arises from the presumption of correctness of the assessment, a separation of powers concern, and unamended statutory text. However, the extent to which the law of assessment appeals has truly been altered will only be known after years of litigation.

#### H. *Agricultural and Forestal Districts: House Bill 2078*<sup>200</sup>

This bill amends various sections in title 15.2 of the Virginia Code that deal with the Agricultural and Forestal District Act.<sup>201</sup> The bill formally creates the role of local program administrator, appointed by the governing body, and streamlines procedures, eliminates duplicative steps, and broadens some eligibility requirements.<sup>202</sup> Under this bill, the program administrator (rather than the governing body) is the first step in the creation of districts, as well as additions to or deletions from existing dis-

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2011 Va. Acts \_\_\_ (codified as amended in VA. CODE ANN. § 58.1-3984; codified at *id.* (Cum. Supp. 2011)).

198. See Act of Mar. 18, 2011, ch. 232, 2011 Va. Acts \_\_\_ (codified as amended in VA. CODE ANN. § 58.1-3984; codified at *id.* (Cum. Supp. 2011)); Act of Mar. 15, 2011, ch. 184, 2011 Va. Acts \_\_\_ (codified as amended in VA. CODE ANN. § 58.1-3984; codified at *id.* (Cum. Supp. 2011)).

199. Andrew McRoberts, *Tax Assessment Appeals Affected—How Much?* (Virginia General Assembly 2011), VA. LOCALITY LAW (Mar. 2, 2011, 6:14 PM), <http://valocalitylaw.com/2011/03/02/tax-assessment-appeals-affected-how-much-virginia-general-assembly-2011/>.

200. Act of Mar. 22, 2011, ch. 344, 2011 Va. Acts \_\_\_ (codified as amended in scattered sections of VA. CODE ANN. tit. 15.2 (Cum. Supp. 2011)).

201. *Id.*

202. *Id.*

tricts.<sup>203</sup> The process of creating new districts and adding or removing parcels is shorter and simpler. As amended, an application goes from the administrative level (program administrator), through the Agricultural and Forestal Districts Advisory Committee, to the planning commission for a public hearing, and finally to the governing body for another public hearing.<sup>204</sup> Previously, applications went to each public body twice, starting at the governing body, then down the line to the advisory committee, before reversing course and ending at the governing body.<sup>205</sup> Under this bill, the governing body may further simplify the process by allowing the planning commission to act in lieu of the Agricultural and Forestal Districts Advisory Committee if the commission contains at least four landowners engaged in agricultural or forestal production.<sup>206</sup> Finally, the bill allows the locality to select which maps or aerial photographs accompany the application.<sup>207</sup> This bill makes the application for and administration of agricultural and forestal districts far simpler, and therefore encourages them.

#### IV. CONCLUSION

The past year has been a significant one for Virginia local government law. For Virginia's local governments, their officials and attorneys, the Supreme Court of Virginia offered some needed guidance and wins that seemed offset by losses. The General Assembly clarified or simplified some statutes governing local government but also reversed results in court favorable to local government, favored individual rights, and in many cases made the business of local government more expensive for local taxpayers. We will see what the coming year of 2011 through 2012 has in store.

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203. Compare Act of Mar. 22, 2011, ch. 344, 2011 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 15.2-4307 (Cum. Supp. 2011) (referring to program administrators), *with id.* § 15.2-4307 (Repl. Vol. 2008) (referring to the local governing body).

204. Ch. 344, 2011 Va. Acts \_\_\_.

205. See VA. CODE ANN. §§ 15.2-4307 to -4309 (Repl. Vol. 2008).

206. Ch. 344, 2011 Va. Acts \_\_\_.

207. See *id.*