

Review of Virginia Local Government Law 2022-23

Virginia Municipal League – Mayor’s Institute

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Norfolk, Virginia

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Virginia Supreme Court

City of Hampton v. Williamson, No. 210988 (Supreme Court of Va., June 8, 2023)

- The City of Hampton's Division of Fire and Rescue fired a lieutenant after alleged racist comments. The ex-lieutenant then went through the City's grievance procedures. In advance of the grievance panel hearing, the ex-lieutenant requested all written correspondence the City relied on in its decision to terminate.
- The City withheld 17 pages of letters and witness statements on the grounds that Va. Code § 15.2-1507(A)(10)(b)(3) only requires the City to produce documents it plans to introduce at the grievance panel. The ex-lieutenant filed a mandamus against the City to produce the documents.
- The Circuit Court granted the mandamus, but the Supreme Court reversed.
- The Supreme Court was concerned that compelling City's to produce all relevant documents would result in fishing expeditions.
 - There was a strong dissent, however, citing to SCOTUS precedent. This rule may change in the future.

Suffolk City School Board v. Wahlstrom, No. 220116 (Supreme Court of Va., April 27, 2023)

- The Suffolk City School Board held a meeting in a classroom. A citizen wished to be present in the classroom during the meeting, but due to size and other issues, was directed to a separate room down the hall where citizens were allowed to watch via live feed. The Circuit Court held that the School Board violated FOIA's free entry requirements and the Supreme Court affirmed, holding that:
 - If desired, general public must have free physical entry to meetings absent statutorily defined special circumstances not present here.
 - Courts can issue injunctions regardless whether the FOIA violation was willful or knowing.
 - Attorney fees and costs were appropriate in this case.
 - Courts can award civil penalties against officials in their personal capacity for willful or knowing FOIA violations.

Gloss v. Wheeler, No. 210779

(Supreme Court of Va., May 18, 2023)

- A riot broke out in Prince William County on May 30, 2020, in response to the death of George Floyd. The next day, May 31, the Citizen's Advisory Board and the Chief of Police held a meeting at 1PM. Five members of the Board of Supervisors were in attendance. That evening, at 4PM, all eight members of the Board of Supervisors met in an advertised meeting. The former was not considered a "meeting" under FOIA; the second one was, of course.
- Several citizens filed a FOIA suit, arguing that the 1PM meeting violated FOIA's advertising requirements. The Circuit Court dismissed the case but the Supreme Court reversed.
- The majority opinion held that the gathering of two or more board members was a FOIA "meeting" if it discussed public business.
 - The minority argued that this was an inappropriate expansion of FOIA because it conflates the topic of the meeting with the actions that the governing body is taking or contemplating.

Berry v. Board of Supervisors, No. 2111423 (Supreme Court of Va., March 23, 2023)

- The Fairfax County Board of Supervisors revised the zoning ordinance (Z-Mod) during an electronic meeting on March 21, 2021, during the COVID-19 pandemic.
- A group of citizens sued the County, alleging that amending the zoning ordinance over video conference violated FOIA and was unauthorized by either state's 2020-21 budget language or County's Continuity of Government Ordinance, both adopted to allow certain electronic meetings in the pandemic.
- The Z-Mod had been under consideration for five years. The zoning ordinance it replaced had been used by Fairfax for decades.

Berry v. Board of Supervisors, No. 2111423 (Supreme Court of Va., March 23, 2023)

The Supreme Court agreed, and found:

- As written, the County’s Continuity of Government Ordinance defined “[c]ontinuity in Fairfax County government” as including only those actions, and the coordination of actions, that are “necessary” to assure the continuation of the County’s essential functions and services. It found replacing an old zoning ordinance with the new one after a 5-year consideration was not “necessary” to continue government.
- The state budget language similarly was restricted to allowing actions deemed essential to continue government in a pandemic, such as budget adoption.
- Code §§ 2.2-3707 and 3708.2 only permitted the County to use electronic meetings to address the state of emergency identified in the Governor’s order (i.e., the pandemic)—not to address other topics related to the continuity of government.

Berry v. Board of Supervisors, No. 2111423 (Supreme Court of Va., March 23, 2023)

- On remedy, the Va. Supreme Court held that ordinance was void ab initio.
- Court relied on several cases filed under Va. Code 15.2-2285(F) in which notices were not properly given as required under 15.2-2204. Caselaw in that area had always held that the remedy for failure to follow these procedure rendered a legislative action void. No remedy specifically stated in 15.2-2204 or in 15.2-2285(F).
- Here, however, the key holding was that a violation of FOIA rendered the actions of the legislature void ab initio, which had never been held to my knowledge. In fact, body of law holding that remedy is not available for FOIA violation. *See, e.g., Trevilians* (C'ville statues case; cir ct ruling on demurrer).

Berry v. Board of Supervisors, No. 2111423 (Supreme Court of Va., March 23, 2023)

- Significantly, Supreme Court did not cite or distinguish the many cases in which the Supreme Court has held repeatedly where – as in FOIA – a statute gives rights and provides remedies for the vindication of those rights, the remedies in the statute are exclusive. *Concerned Taxpayers of Brunswick County* (1995) (Procurement Act); *Cherrie v. Health Servs.* (2016)(regs providing access to health policies); *Stoney v. Anonymous* (2020)(Statute allowing removal of war memorials). FOIA has several stated remedies; striking down a legislative act is not one of them.

Hawkins v. Town of South Hill, No. 210848 (Supreme Court of Va., October 20, 2022)

- Hawkins, an attorney, made a FOIA request against the Town of South Hill in regard to an employment dispute. South Hill withheld several documents under the personnel information exemption in Va. Code § 2.2-3705.1.
- The Supreme Court defined personnel information as:
 - “...date, facts, or statements with a public record relating to a specific government employee, which are in the possession of the entity solely because of the individual’s employment relationship with the entity, and are private, but for the individual’s employment with the entity.”
- Arguably shrunk common understanding of personnel information
- Supreme Court held Circuit Court was best situated to determine whether information was private and directed in camera review of 7 disputed documents.

FOIA Advisory Council Consideration

- *Hawkins v. South Hill*, *Gloss v. Wheeler*, and *Berry v. Fairfax County* results are all being studied by the FOIA Council.
- Legislation may result therefrom, clarifying FOIA on the issues presented in *Hawkins* (defining personnel information), *Wheeler* (represented in the minority opinion), and in *Berry* (primarily the remedies problem).
- Keep an eye out for legislation to support or oppose.

Morgan v. Board of Supervisors, No. 211021 (Supreme Court of Va., February 2, 2023)

- A group of citizens sued the Hanover County Board of Supervisors after the Board granted a grocery store chain's application to change the proffers on the property and request a special exception to increase the maximum building height. The citizens alleged the Board's actions would result in a violation of the Chesapeake Bay Preservation Act, and create an unlawful nuisance due to semi-trailer traffic and light pollution.
- The Circuit Court dismissed the suit due to the citizen's lack of standing and the speculative nature of the harm.
- Supreme Court reversed and remanded, finding that the citizens did have standing and that the citizens had alleged a direct cause-and-effect between the Board's actions and the alleged harm.

County of Isle of Wight v. International Paper Company, No. 211032 (Sup.Ct.of Va., Dec. 29, 2022)

- Isle of Wight levied a Machinery and Tools tax at \$.70 per \$100 between 2012-2015. A court ruled that Isle of Wight COR's assessment methodology overvalued M&T property due to no depreciation. In 2016, Isle of Wight COR corrected methodology and \$millions in refunds for prior years resulted. BOS raised 2016 rate to \$1.75/\$100 to equalize the amount of revenue from taxes.
- One year only, BOS increased its 2017 M&T rate to \$4.24 per \$100 to make up the refunded revenues – to fill the “hole in the general fund.”
- Isle of Wight attempted to offset concerns over the 2017 tax increase by a business-friendly grant program applicable that year:
 - BOS approved and appropriated grants based on (i) 2017 M&T tax liability, (ii) the TY 2013-2016 refund, if any received, and (iii) the “base” new rate of \$1.75/\$100. (2017 Liability less Base Rate less Refund if Any = Grant)
 - COR calculated grant amount because COR had confidential tax info.
 - County Administrator chose to deduct grant amount from the 2017 M&T tax bill, using the car tax relief form on the computer. In other words, reflected on tax bill like a tax credit, not a grant.

Isle of Wight continued

- International Paper sued, alleging that the three-pronged approach created a non-uniform tax rate.
- The first time at the Circuit Court, it struck the company's case on the grounds that it was outside the scope for challenging "assessments" under Virginia law. The Supreme Court reversed and remanded.
- The second time at the Circuit court, the Court found for International Paper and awarded the company a full refund of its 2017 M&T taxes, plus interest. This was approximately \$5.5 million.
- The Supreme Court affirmed the Circuit Court's ruling that the program resulted in non-uniform taxation in violation of Article X, Section 1 of Virginia's Constitution.
 - "The presumption of constitutionality does not mean that a circuit court is required to disbelieve evidence and argument showing that the enactment in question is unconstitutional."

Isle of Wight continued

Key takeaways from International Paper case:

- Grant programs authorized, held the Va. Supreme Court.
- Tax increases to react to revenue losses, even from major tax assessment loss, authorized.
- Careful not to integrate grant program and taxation process.
- Beware of non-uniform results in taxation process of grant programs.

Virginia Court of Appeals

KSS One, LLC v. Henrico County, Virginia, et al., No. 0294222 (Va. App. March 7, 2023)

- A condominium owner sued the Board of Supervisors over a development plan that included a daycare center. The Circuit Court dismissed the condominium owner's filing and the Court affirmed.
- Planning Commission afforded the condominium owner due process even though Planning Director both reviewed the development plan in an advisory capacity and then served as the final decisionmaker on behalf of the Board. Without any adequate allegations of bias, courts will presume that public officials adjudicate controversies fairly.
- Condominium did not have a vested right to the open space taken up by the day care because the land was always zoned for day care use and staff's approval was not a "subsequent amendment" of zoning.

The Manors LLC and Darrick Harris v. Board of Supervisors of Albemarle County, No. 0513222 (Va. App. February 28, 2023)

- Darrick Harris bought a property in Albemarle County, north of Charlottesville, made substantial improvements to the property, and applied for a special exception under the homestay ordinance to allow five short term rentals on the property.
- The staff produced a report on the initial application. Additionally, neighbors and community members made comments on the initial application. Harris withdrew that application, amended it, and submitted a second application.
- The Board of Supervisors voted to deny the application. Harris appealed to the Circuit Court, which sustained the Board's decision. Harris then appealed to the Court of Appeals, arguing 4 points.
 - "Public welfare" does not include enjoyment of the neighborhood or quality of life and only refers to food, water, shelter, etc.
 - "Public welfare" is unconstitutionally vague.
 - The Board had the burden of proof to demonstrate the use was against the public welfare.
 - The Board was not allowed to consider the staff report or the comments on the initial application.

Darrick Harris (cont.)

- The Court of Appeals sustained the Circuit Court and denied all of Harris's arguments:
 - “[U]nder Code § 15.2-2283, creating convenient, attractive, and harmonious communities is a component of the public health, safety, and welfare.”
 - The ordinance was not unconstitutionally vague because: 1) the Board's decisions were subject to judicial review; 2) the County and Virginia Codes both provided guidance for the Board's decision; and 3) the Board did not delegate its legislative powers to an administrative agency.
 - The property owner carries the burden of proof to obtain a special exception to a zoning ordinance. The locality does not have the burden of proof to deny a special exception.
 - The Board is entitled to review any evidence it wants when making a determination, and is presumed to make a reasonable decision.
- Takeaway: 1) retain control over highly subjective decisions at the governing body; 2) applicants for special exceptions are asking for a favor and have burden to carry; applicants not entitled to a right.

Aundrey Hubbard v. Scott H. Jenkins, No. 056224 (Va. App. February 7, 2023)

- Culpeper County's Sheriff signed a contract with the Piedmont Regional Jail Authority for detention services: PRJA would house and care for certain inmates and the Sheriff's office would pay for certain health care costs.
- Hubbard was an inmate at PRJA under this arrangement. Several other inmates attacked Hubbard, requiring his hospitalization and extensive medical treatment. Hubbard won a settlement in the ensuing lawsuit.
- Hubbard then sued the Sheriff, arguing that Hubbard was a third-party beneficiary to the Sheriff's contract with PRJA. Winning this suit would permit Hubbard to avoid paying taxes on the settlement money.

Hubbard (Cont.)

- The Circuit Court dismissed Hubbard’s case and the Virginia Court of Appeals sustained.
- The Court of Appeals put substantial weight on the facts that:
 - The contract did not have a recital declaring the contract for the benefit of the inmates.
 - The contract did not identify benefits for specific inmates but instead addressed cost sharing between the Sheriff and PRJA.
- Takeaway: inter-departmental or inter-agency agreements do not create third-party beneficiaries—if drafted carefully. *See Ogunde*, 274 Va. 55 (2007) (finding inter-governmental contract created third-party beneficiaries).

Virginia Attorney General Opinions

Va. Attorney General Opinion No. 22-046 (January 26, 2023)

- Under Va. Code § 15.2-926.3, a locality cannot regulate the use of § 19.2-60.1 unmanned aircraft systems (i.e. drones).
- Locality can regulate the taking off and landing of drones from locality owned property.

Va. Attorney General Opinion No. 22-036 (January 12, 2023)

- Under Va. Code § 15.2-2288.6, a locality cannot use zoning laws to regulate a short-term rental if it is part of an agritourism activity.
- A property must meet 3 criteria to be an agritourism activity:
 - It must be zoned agricultural or be engaged in a § 3.2-300 agricultural operation;
 - The activity must be on a “farm or ranch” as defined by statute; and,
 - The activity makes its “rural activities” available to the general public.

Questions?

Thank you for your time!



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