Bill of Particulars

THE REPORTER OF THE LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC.

National Legal Research Group, Inc. Steven G. Friedman, Editor

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LGA PRESIDENT'S MESSAGE
By Roderick B. Williams

As you know, last year, LGA's long-standing administrative services relationship with the Weldon Cooper Center came to an end, following the Cooper Center's decision to begin exiting that business. While the LGA anticipated that the Cooper Center would eventually move in that direction, the decision nonetheless came sooner than expected. For the LGA, this meant moving quickly to identify an alternative to the Cooper Center and we found Eisenman & Associates to step in for us.

Through our transition this last year, Eisenman & Associates performed good work for us. Perhaps the best proof of that came at our Fall Conference at Lansdowne. In many respects, except for the new faces, a great deal pretty much seemed the same. Of course, even at that point, part of the larger issue for the LGA in undertaking the transition from the Cooper Center was evaluating our entire administrative services structure and making sure everything made the most sense. So, the LGA Board took the opportunity to better test the market and consider proposals from a number of venders. After a thorough review of the proposals, the LGA Board decided it best to move to another administrative services provider.

Effective May 1, Easter Associates will begin serving as LGA's administrative

services provider, working hand in hand with our Administrative Director, Susan Custer. We are looking forward to a smooth transition. Notably, the website and the listserv will not be affected by this transition. We are also looking forward to stability—the new contract with Easter is for a three-year term.

Easter has offices in Richmond and Charlottesville and provides services for a number of associations throughout Virginia. Our lead representative from Easter will be Amy Sales, who is based in Easter's Richmond office. Amy has been with Easter for about two years, but some of you may know her from VaCo, where she was for the previous six years.

Easter will officially begin working for us on April 1, to begin the transition from Eisenman, with Eisenman in the lead through April 30. Eisenman will be responsible for the upcoming Spring Conference in Norfolk, but we do anticipate that Amy will be in attendance as well, to see how everything works and to meet our members. So, please welcome Easter and Amy Sales to the LGA team and, as well, be sure to thank the Eisenman folks, and Zach Eisenman in particular, for their good work for the LGA over the last year.

LGA Nominating Committee Recommends Slate of Candidates

On Thursday, April 4, 2019, at the LGA's Annual Business Meeting, to be held in conjunction with the LGA 2019 Spring Conference, at the Hilton Norfolk The Main, the LGA will elect new officers (one-year terms) and directors (two-year terms) to serve in the upcoming fiscal year beginning September 1, 2019.

Having previously requested suggestions for qualified candidates from the membership, the 2019 LGA Nominating Committee discussed a number of well-qualified candidates and agreed to refer the following slate to be placed into nomination at the April 4, 2019 business meeting:

Officers:

President—Timothy R. Spencer, City of Ronoake
Vice President—Lola Rodriguez Perkins, City of Hampton
Treasurer—Michelle R. Robl, Prince William County Secretary—
Mark C. Popovich, Guynn, Waddell, Carroll & Lockaby

Directors Returning for a Second Two-Year Term on the Board:

Helivi L. Holland, City of Suffolk
Lesa J. Yeatts, Town of Herndon

New Directors for a First Two-Year Term on the Board:

George Lyle, Henry County
Courtney R. Sydnor, Loudoun County

Please note that the following board members will continue in office in fulfillment of their existing terms:

Rebecca B. Randolph, Hanover County
Kelly J. Lackey, City of Chesapeake

And last but not least, Roderick B. Williams, Frederick County, will automatically roll over to the one-year position of Immediate Past President.

LGA Spring 2019 Conference
By Kalli Jackson, Chair

The LGA Spring 2019 Conference from April 4 to 6, 2019, at the Hilton Norfolk The Main, is fast approaching! The registration deadline is Thursday, March 14, 2019. For more information, including registration forms and schedule of events, please visit the "Conferences" menu tab on the LGA website, www.lgava.org.

ABA Government and Public Sector Lawyers Division
By Sharon E. Pandak, Chair-Elect

As Chair-Elect of the ABA Government & Public Sector Lawyers Division, I invite you to consider nominating colleagues for national recognition. The Hodson Award for Public Service recognizes sustained, outstanding performance or specific and extraordinary service by a government or public sector law office. Units within an office are eligible for this award, but individuals are not. Nominations for the awards are due by 5:00 pm on April 8, 2019. For more information about this award, and others for which LGA'ers may be eligible, please visit the ABA GPSLD awards page at https://www.americanbar.org/groups/government_public/awards/ or contact me directly at spandak@gtpslaw.com.

RECENT CIRCUIT COURT VICTORY

Adam Kinsman and Maxwell Hlavin, James City County Attorney and Deputy Attorney, respectfully, wish to share of a recent court victory in his office. They wrote as follows:

> In response to the 2016 proffer legislation, [the Board of Supervisors of James City County] adopted an ordinance stating that the County would no longer accept proffers associated with residential rezonings. As you may recall from prior listserv discussions, a decision by the Board in 2017 to refuse to rezone a residential parcel was appealed. The plaintiffs challenged the denial as arbitrary and the ordinance as both illegal and prejudicial to residential developers. Deputy County Attorney Max Hlavin argued the case for the County over a two day trial . . . Judge Maxfield (retired, Fairfax County) ruled for the County on all counts, upholding the County's ordinance and the rezoning denial.
>
> The style was *Parke at Westport, LLC and Eagle Construction of VA., LLC v. James City County, Virginia and Board of Supervisors of James City County, Virginia*, and the case number was CL18-000052-00 in the Williamsburg-James City County Circuit Court. Unfortunately, the judge rebuffed my request that he consider issuing a letter opinion and also rejected my suggestion that the order incorporate written findings and conclusions, preferring instead to dispose of the matter "based on the reasons stated in the record." . . . The outline below briefly identifies the major themes of the court's reasoning on the three counts:
>
> <u>Count I - Denial was arbitrary and capricious</u>
>
> - Board deliberation involved reasonable legislative considerations (traffic, citizen concerns, school impacts, stormwater, fit with surrounding area, broader community benefit) and decision was not arbitrary.
>
> - Although maybe not the highest and best use, existing zoning was debatably reasonable in context on Comp Plan and surrounding area.
>
> - Court will not substitute its judgment for that of the elected officials.
>
> - Agreed with *Gregory v. Board of Supervisors*, 257 Va. 530 (1999) and *Board of Supervisors v. Lerner*, 221 Va. 30 (1980).
>
> - Distinguished *Board of Supervisors v. Allman*, 215 Va. 434 (1975), *Board of Supervisors v. Williams*, 216 Va. 49 (1975), and *Vienna Council v. Kohler*, 218 Va. 966 (1978).

Count II—Denial was arbitrary because solely based on a policy of denying all residential rezonings

- Clearly no adopted policy to reject all residential rezonings.
- Evidence did not support existence of de facto policy.
  - Allegations based on a statements made by one board member and those statements were refuted by another board member.
  - The Board considered two residential rezonings after adoption of the resolution and ordinance; one was approved and one was denied.

Count III—Ord. 31A-304 is discriminatory and not authorized by state law

- Ordinance not discriminatory
  - Applies to all properties and owners.
  - Owners seeking commercial/industrial rezonings are not similarly situated to owners seeking residential rezonings.
  - Localities have broad authority to characterize uses and regulate them differently. Judge relied on reasoning in *Schefer v. City Council of Falls Church*, 279 Va. 588 (2010).
  - If any discrimination occurred, it was by the General Assembly when 15.2-2303.4 was codified.
- Consistent with state law
  - Conditional zoning authority is permissive. *Note:* JCC enacted conditional zoning under 15.2-2303 so ordinance "may include reasonable regulations and provisions for conditional zoning as defined in § 15.2-2201."
  - Avoiding potential litigation and protecting public dollars are legitimate general welfare concerns.
  - Language of distinction based on explicit language in state law enabling statutes (15.2-2303.4).

If you would like a copy of the complaint, the County's adopted resolution and ordinance, or final order in the case, please feel free to contact Max directly at maxwell.hlavin@jamescitycountyva.gov.

RECENT FEDERAL DISTRICT COURT VICTORY

Jacob P. Stroman, Chesapeake City Attorney, wishes to share of a recent court victory in his office. Jay writes:

> I am happy to report that the Chesapeake City Attorney's Office received a full award of attorney's fees for a litigant's improper removal under 28 U.S.C. § 1447(c). The E.D. Va. opinion is authored by the Honorable Raymond A. Jackson.
>
> The City initiated a zoning enforcement action in Circuit Court against the tenant, Boasso American Corporation, d/b/a/ Greensville Transport Company ("Greensville"), a Louisiana Corporation, and the property owner, Mid-Atlantic Leasing Corporation ("Mid-Atlantic), a Virginia Corporation, because Greensville refused to obtain a conditional use permit to lawfully operate, despite an adverse decision before the Chesapeake Board of Zoning Appeals ("BZA") and the dismissal of Greenville's certiorari appeal due to its failure to name City Council, a necessary party, within 30 days of the BZA's decision, pursuant to Va. Code Ann. § 15.2-2314.
>
> The City's Complaint alleged a cause of action against Mid-Atlantic because it was permitting a zoning violation on its property. Mid-Atlantic filed a demurrer, which the City opposed. The Circuit Court sustained Mid-Atlantic's demurrer and provided the City with leave to amend within 10 days. However, that same day, based on Mid-Atlantic's successful demurrer, Greensville removed the case to federal court on the basis of complete diversity, 28 U.S.C. § 1332. The City filed a motion to remand the case, asserting that complete diversity did not exist under the Fourth Circuit's involuntary dismissal rule. Essentially, that rule stands for the proposition that unless a plaintiff voluntarily dismisses a non-diverse defendant, complete diversity does not exist because an appeal could overturn the non-diverse party's dismissal, reinstating the party and destroying diversity. The federal court agreed, ruling that Greensville did not have an objectively reasonable basis for its removal because the involuntary dismissal rule was controlling precedent in the Fourth Circuit. The Court awarded the City its full request for attorney's fees.
>
> Kudos to Assistant City Attorneys Ellen Bergren and Meredith Jacobi for this excellent result!

If you would like a copy of the 8-page Memorandum and Order in the matter, please feel free to contact either Ellen (ebergren@cityofchesapeake.net) or Meredith (mjacobi@cityofchesapeake.net).

MEMBER NEWS

Amelia County recently joined the LGA as an active member. The County's Chief Legal Counsel is someone already familiar with the LGA—Jeffrey S. Gore of HeftyWiley & Gore PC. Jeff can be reached at jeff@heftywiley.com.

The Honorable Angela Lemmon Horan, former President of the LGA while serving as Prince William County Attorney, was recently elevated from the Prince William County General District Court to the Prince William County Circuit Court. Congratulations Judge Angela!

RECENTLY PUBLISHED OPINIONS

The *Bill of Particulars* often discusses cases and opinions that are so new that they do not yet have an official citation when the *Bill* goes to press. For your convenience, below is a list of citations to recently published decisions that were discussed in past issues of the *Bill*.

Davison v. Randall, 912 F.3d 666 (4th Cir. 2019) (discussed in Feb. 2019 issue, pp. 22-24).

Williamson v. Stirling, 912 F.3d 154 (4th Cir. 2018) (discussed in Feb. 2019 issue, pp. 24-27).

Battle v. Ledford, 912 F.3d 708 (4th Cir. 2019) (discussed in Feb. 2019 issue, pp. 27-28).

U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

FIRST AMENDMENT • ESTABLISHMENT CLAUSE • SCHOOLS • VOLUNTARY BIBLE INSTRUCTION PROGRAM

Deal v. Mercer Cnty. Bd. of Educ., 911 F.3d 183 (4th Cir. 2018) (Motz, J.).

HOLDINGS: The plaintiff's lawsuit, alleging that a public school's voluntary Bible program ran afoul of the Establishment Clause, (1) pled ongoing injuries-in-fact; (2) alleged injuries could be redressed by an injunction; and (3) was not mooted by the school's mere suspension of the program.

DISCUSSION: An elementary school student and her mother brought an action against the Mercer County, West Virginia, Board of Education alleging that its "Bible in the Schools" program (BITS) ran afoul of the Establishment Clause. The program offers weekly Bible instruction for elementary and middle school students. Participation is voluntary, but since nearly all students take part, the elementary school student faced harassment from other students when she elected not to participate. This prompted the student's mother to enroll her in a neighboring school district and file this action, seeking injunctive relief. During the briefing period, the County suspended BITS for at least a year to review the curriculum. The district court dismissed the complaint, reasoning that the student and her mother lacked standing to sue and that, as a result of the program's suspension, their claims were no longer ripe. This appeal followed.

The court held first that the student and her mother alleged injuries-in-fact, which were sufficient to grant them standing. The plaintiffs alleged: (1) while the student was enrolled in school in Mercer County, they suffered direct, unwelcome contact with BITS; (2) they continued to avoid BITS by enrolling the student in a neighboring school district; and (3) they suffered ongoing feelings of marginalization and exclusion. The County conceded that the injuries were cognizable, but argued that they were not sufficiently "imminent" to permit a court to grant injunctive relief. However, the court has previously recognized that public school students alleging First Amendment violations can satisfy the injury-in-fact requirement for prospective relief either by demonstrating an imminent injury-in-fact or by demonstrating an ongoing injury. Thus, the allegation of two ongoing injuries constituted actual injuries for the purposes of Article III standing.

The court held second that an injunction would meaningfully redress the plaintiffs' injuries. The court reasoned that if the district court were to enjoin the County from offering BITS to students in the future, the mother would no longer feel compelled to send her daughter to a neighboring school district in order to avoid what she viewed as state-sponsored religious instruction. Moreover, an injunction would also alleviate their ongoing feelings of marginalization.

The court held third that the district court erred when it held that the claims were moot due to the program's suspension. By asserting mootness, the County bore the burden of persuading the court that after voluntarily ceasing the challenged practice, subsequent events had made it "absolutely clear" that the conduct could not reasonably be expected to occur. However, the County consistently described BITS as "suspended," rather than eliminated, and it retained the authority to reinstate the program at any time. Thus, "the County did not even attempt to meet this standard."

Therefore, the court reversed the district court's judgment dismissing the complaint and remanded the case for further proceedings.

FIRST AMENDMENT • RETALIATION • EMPLOYMENT • FOURTH AMENDMENT • REMOVAL FROM PREMISES

McClure v. Ports, 2019 WL 350375 (4th Cir. Jan. 29, 2019) (Motz, J.).

HOLDINGS: (1) The plaintiffs failed to establish a First Amendment retaliation claim against a government agency based on the agency's revocation of the plaintiffs' privilege to access restricted areas of the agency's premises because such was not sufficiently adverse to the plaintiffs' free speech rights. (2) Under Maryland law, the police acted reasonably when removing the plaintiff from the agency's premises.

DISCUSSION: A Union and its president (the "Union President") brought suit against the Maryland Transit Administration (MTA) alleging that it had acted in retaliation to protected speech by revoking access to restricted premises, and violated the Fourth Amendment when having the Union President removed from the premises. The collective bargaining agreement governing the MTA and its employees permits Union Officers to conduct union business on its property, provided that they comply with MTA regulations. The Union President had received broad keycard access to MTA premises, and two other Union Officers had retained residual access, consistent with their former positions. In July 2016, the Union launched a public advocacy campaign warning against allegedly unsafe MTA policies and operations. In September 2016, the Union President got into an argument with an MTA hearing officer, questioning her competence. As a result, the MTA requested assurances that the Union President would behave in a professional manner when conducting union business on MTA property, and if not, then he would be required to obtain permission before entering MTA offices. The Union President did not provide the requested assurances and continued to appear at Union hearings on restricted MTA property without obtaining permission. On two occasions, the Union President was escorted off the premises by the police. In June 2017, the MTA revoked the Union President's keycard access, as well as residual access that the other Union Officers had maintained. The district court granted summary judgment to the MTA. This appeal followed.

The court held first that, although the MTA's actions were taken in retaliation to protected speech, the revocation of the Union Officers' privilege to access restricted areas was not sufficiently adverse to their free speech rights to support a First Amendment retaliation claim. Although the Union Officers had an interest in accessing MTA property to conduct union business, this was only a temporary, discretionary privilege of special access; they were never "entitled" to uninhibited access. By contrast, the MTA possessed inherent authority to regulate its restricted areas. In this case, "the government's legitimate interests in managing its own functions are so strong that they dwarf the opposing private interests." Because the Union Officers remained free to obtain authorization to enter MTA offices, or conduct hearings off-site, the effect of the MTA's response was not sufficiently adverse to support this action.

The court held second that the police acted reasonably when removing the Union President from the premises. Maryland law criminalizes a person's refusal or failure to leave a specific part of a public building during regular business hours if "(1) the surrounding

circumstances would indicate to a reasonable person that the person who refuses or fails to leave. . . has no apparent lawful business to pursue . . . and (2) an authorized employee of the government unit asks the person to leave." Md. Code, Crim. Law § 6-409(b). Here, "[w]hen [the Union President] sought to enter the MTA building without permission and refused to leave when asked to do so by an authorized person, a reasonable person considering the totality of circumstances would conclude that there was probable cause to believe [he] had violated § 6-409."

Therefore, the court affirmed the district court's grant of summary judgment in favor of the MTA.

FIRST AMENDMENT • ESTABLISHMENT CLAUSE • GOVERNMENT-COMPELLED SPEECH • WORLD HISTORY CLASS

Wood v. Arnold, 2019 WL 507543 (4th Cir. Feb. 11, 2019) (Keenan, J.).

HOLDINGS: (1) The challenged classroom materials must be evaluated in the context in which they were presented. As such, the materials passed the three-part *Lemon* test in that (2) the school had a predominantly secular purpose in teaching world history; (3) a reasonable observer would not have viewed the challenged materials as endorsing religion; and (4) the school's conduct did not result in an excessive entanglement with religion. (5) The school assignment, making a statement of a tenant of the Muslim faith, did not compel the student to profess a religious belief.

DISCUSSION: A public high school student in Charles County, Maryland (the "Student"), brought § 1983 claims against her principal and vice principal (together, the "Principals"), alleging First Amendment violations. The Student was required to take a world history course which contained teaching on the Muslim world. She objected to a statement in a slide that read: "Most Muslim's [sic] faith is stronger than the average Christian," as well as a fill-in-the-blank assignment which included part of a Muslim statement of faith, reading: "There is no god but Allah and Muhammad is the messenger of Allah." The Student contended that each of these violated the Establishment Clause, and that the second violated the Free Speech Clause because it constituted government-compelled speech. The district court granted summary judgment to the Principals, and the Student appealed.

The court held first that the challenged materials must be evaluated in the context of the world history course in which they were presented; not in isolation, as the Student contended. In evaluating an Establishment Clause claim, courts apply the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which considers whether the government conduct (1) was driven in part by a secular purpose, (2) had a primary effect that neither advanced nor inhibited religion, and (3) did not excessively entangle Church and State. Federal courts have repeatedly emphasized that context is crucial

when conducting this inquiry, especially in the arena of public schools, because, inter alia, common sense requires consideration of the academic framework in which those materials are presented, and micromanaging school curricula to parse singular statements made by teachers would frustrate the academic freedom required for education.

The court held second that the school had a predominantly secular purpose in teaching world history, thereby clearing the "fairly low hurdle" posed by the first prong in the *Lemon* test. The Supreme Court has recognized the secular value of studying comparative religion, and nothing in the record indicated that the challenged materials were presented in a fashion so as to advance Islam over any other faith. Rather, the written assignment was "precisely the sort of academic exercise that the Supreme Court has indicated would not run afoul of the Establishment Clause."

The court held third that a reasonable observer would not have viewed the challenged materials as endorsing religion, thereby satisfying *Lemon*'s second prong. Indeed, the challenged practices "involved no more than having the class read, discuss, and think about Islam. [They] did not suggest that a student should adopt those beliefs as her own."

The court held fourth that school's conduct did not result in an excessive entanglement with religion, thus satisfying the third prong of the *Lemon* test. Excessive entanglement typically involves the government's invasive monitoring of certain activities in order to prevent religious speech, or providing funding for religious instruction. Here, the record contained no evidence that either of these indicia of entanglement existed.

The court held fifth that the fill-in-the-blank assignment did not deprive the Student's right to be from government-compelled speech because it did not require the Student to profess or accept the tenets of Islam. The court found the Third Circuit's reasoning to be on point: "[W]hile a public educational institution may not demand that a student profess beliefs or views with which the student does not agree, a school may in some circumstances require a student to state the arguments that could be made in support of such beliefs or views." *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 187 (3d Cir. 2005).

Therefore, the court affirmed the district court's summary judgment in favor of the school Principals.

ZONING • RLUIPA • SUBSTANTIAL BURDEN • RELIGIOUS DISCIMRINATION • MOTION TO DISMISS

Jesus Christ is the Answer Ministries, Inc. v. Baltimore County, 2019 WL 469715 (4th Cir. Feb. 7, 2019) (Diaz, J.).

HOLDINGS: An African-heritage church's suit pursuant to the Religious Land Use and Institutionalized Persons Act (1) sufficiently pled that the dismissal of its second petition for the use of its property as a church imposed a substantial burden on its religious practice; and (2) plausibly alleged a prima facie claim of religious discrimination.

DISCUSSION: A church with ties to Kenya and the Seychelles filed suit in federal district court, alleging that the Baltimore County Board of Appeals' dismissal of its second petition to approve a church use violated the Religious Land Use and Institutionalized Persons Act (RLUIPA). The church purchased the plot of residential property with the intent of using it for church services, with assurances from its realtor that this was a permitted use. In this zoning district, churches are permitted as of right, subject to certain setbacks for parking lots and structures. These conditions do not apply to new churches whose site plans have been approved after a public hearing finding that compliance with the conditions would be maintained "to the extent possible," and that the plan could "otherwise be expected to be compatible with the character and general welfare of the surrounding residential premises." Baltimore County Zoning Regulations § 1B01.1.B.1.g.(6).

After purchasing the property and holding a church service, neighbors complained, and a County Inspector notified the church that it could not hold services on the property until complying with zoning laws. The church filed a petition with the County to use the property as a church, seeking relief from the zoning requirements. The County's Planning Department Director did not oppose the petition, but an Administrative Law Judge denied it following a hearing at which several neighbors complained, displaying "open hostility" to the church's distinctly African heritage and customs. While the petition was pending appeal, the church filed a second petition that included a modified site plan which very nearly complied with the zoning requirements, and also sought approval under the provision governing existing churches. The People's Counsel for the County initially sought to dismiss the second petition, but withdrew this motion after considering the differences between the two petitions. Nevertheless, the Board dismissed the second petition, holding that it was barred by res judicata and collateral estoppel. The district court dismissed the church's complaint for failure to state a claim, and the church appealed.

The court held first that the church's complaint sufficiently pled that the Board's dismissal of the second petition imposed a substantial burden on its religious practice, in violation of RLUIPA. Where a zoning ordinance poses a substantial impediment to religious practice, courts consider, inter alia, whether the religious organization had a reasonable expectation of religious land use. The court found that the church's expectation to use the property for church services was reasonable based on the realtor's assurances and the "broadly and permissibly phrased conditions" set forth in the Zoning Regulations. The church's efforts to meet these conditions, however, were frustrated when the Board dismissed the second petition, which was based on a site plan that substantially differed from, and attempted to address the shortcomings of, its first petition. "The Board failed to recognize these differences when it dismissed the petition."

The court held second that the church plausibly alleged a prima facie claim of religious discrimination. RLUIPA prohibits land use regulations that discriminate "on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2). To determine whether discriminatory intent is present, courts may consider the sequence of events leading to the challenged decision. "Such impermissible influence may be inferred where expressions of community bias are followed by irregularities in government decision-making." That

is exactly what happened here. After neighbors publicly expressed animus toward the predominantly African church, displaying ethnic and religious bias, the Board denied the church's first petition even though the County's Planning Department Director, who served as the Board's formal advisor, did not oppose it. The Board's subsequent decision to dismiss the church's second petition ran counter to the position of its own legal expert, the People's Counsel. The court found that these irregularities lent plausibility to the inference that the Board's decision to dismiss the second petition was based on improper motives.

Therefore, the court vacated the district court's decision to dismiss the complaint and remanded the case for further proceedings.

CIVIL PROCEDURE • APA • SUBJECT MATTER JURISDICTION • LEGALLY REQUIRED ACTION

City of New York v. United States Dep't of Def., 913 F.3d 423 (4th Cir. 2019) (Wilkinson, J.).

HOLDING: Multiple cities brought suit against an agency of the federal government under the Administrative Procedure Act but the case was dismissed because there was no subject matter jurisdiction.

DISCUSSION: The City of New York, the City of Philadelphia, and the City and County of San Francisco (the "Cities") brought this action against the United States Department of Defense (DOD), under the auspices of the Administrative Procedure Act (APA), seeking a court order to compel the DOD to more thoroughly comply with the reporting requirements of the NICS Improvement Amendments Act of 2007 (NIAA). The National Instant Criminal Background Check System (NICS) is a database managed by the Federal Bureau of Investigations that contains records for individuals who are prohibited from possessing a firearm. It draws from many distinct federal databases that contain disqualifying records and relies on information submitted from across the federal government. In the military context, the DOD provides information regarding current and former service members who are disqualified from owning a gun because of a prior conviction. Congress passed the NIAA, following the Virginia Tech shooting, to impose new reporting requirements, and further amended the law in 2018 to improve compliance. The DOD admitted to struggling to comply with the NIAA's affirmative reporting provision, but has taken various actions to improve. The district court granted the DOD's motion to dismiss on the grounds that the Cities failed to allege a cognizable injury sufficient to establish standing, and because the court lacked subject matter jurisdiction to hear the matter.

The court held that the Cities failed to establish subject matter jurisdiction under the APA, which permits aggrieved parties to "compel agency action unlawfully withheld or unreasonably delayed." The Supreme Court has explained that this requires a plaintiff to

identify some action that is "legally required." The APA defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." This definition limits the scope of judicial review to acts which are discrete in character. Furthermore, the Fourth Circuit has held that the definition of "agency action" is limited to those governmental acts that determine "rights and obligations." Thus, "[r]eview is available only when acts are discrete in character, required by law, and bear on a party's rights and obligations."

The Cities failed to establish two of these requirements. First, rather than challenge a discrete agency action, the complaint asked the court to supervise the DOD's compliance with a broad statutory mandate. Second, the Cities failed to demonstrate that the DOD's reporting requirements in any way determined their rights and obligations. The court summarized the case as follows: "What the [Cities] are ultimately asking for is a judicial decree making the assistance of the federal government more useful to them than it is now. While their motives for wanting to see improvement to the NICS are laudable, they point to no case suggesting that the APA countenances such an action."

Therefore, the court affirmed the district court's judgment dismissing the complaint.

TAXATION • STORMWATER MANAGEMENT CHARGE • FEE • 4-R ACT

Norfolk S. Ry. Co. v. City of Roanoke, 2019 WL 637988 (4th Cir. Feb. 15, 2019) (Diaz, J.).

HOLDING: The city's stormwater management charge was a fee, not a tax.

DISCUSSION: A railway company sued the City of Roanoke alleging that the City's stormwater management charge was a tax, thereby violating the prohibition in the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act) against imposing any "tax that discriminates against a rail carrier." Since 2013, the City has operated a stormwater management system pursuant to regulations promulgated by the federal Clean Water Act and the Environmental Protection Agency. The City's permit requires it to implement certain control measures in order "to reduce the discharge of pollutants to the maximum extent practicable." To facilitate compliance, Virginia law authorizes municipalities to enact charges in order to fund certain enumerated purposes related to stormwater management. Localities must provide full or partial waivers of these charges to property owners who engage in certain stormwater management practices. The City's stormwater management charge is proportionate to the amount of impervious surface on the property owner's parcel, reasoning that more impervious surface results in more stormwater runoff that must be treated by the system. A City ordinance imposes this charge on all parcels with at least 250 square feet of impervious surface, which covers approximately 86 percent of the City's parcels. The railway company is one of the City's

largest property owners, and in 2017 was assessed a stormwater management charge of over $400,000. The district court found that the charge was not a tax, but a fee, and therefore not subject to the 4-R Act's requirements. The railway company appealed this decision.

The court held that the stormwater management charge was a fee. Its ruling was guided by the three-factor test: "(1) what entity imposes the charge; (2) what population is subject to the charge; and (3) what purposes are served by the use of the monies obtained by the charge." Under the first factor, a charge is more likely to be a tax than a fee if it is imposed by a legislature, rather than an administrative agency. This suggested that the City's charge was a tax because it was imposed by the City Council. Under the second factor, a charge is more likely to be classified as a tax if it is imposed upon a broad segment of the public, and a fee if it is imposed only upon persons subject to regulation by a particular agency. The inquiry with regard to this factor led to an inconclusive result because the charge applied to a broad class of property owners (suggestive of a tax), but its amount was assessed relative to the square footage of impervious surface on the property of owners who could receive credits if they engaged in certain stormwater management practices (suggestive of a fee).

Under the third factor, a charge is more likely a tax if its primary purpose is to raise revenue for general government activity, and a fee if it is used to provide individualized benefits, defray an agency's cost of regulating, or manage conduct by making it more expensive. The third factor was the most important in close cases. Although the court recognized that stormwater management benefits the general public by reducing water pollution and improving flood control, it concluded that the charge's purpose was more consistent with that of a fee because it formed part of a comprehensive regulatory scheme in which the legislature's discretion as to how to allocate the funds it received was severely limited by the stringent restrictions imposed by federal and state law. "[A] classic regulatory fee is designed to address harmful impacts of otherwise permissible activities, and to ensure that the actors responsible for those impacts bear the costs of addressing them. That is exactly the function served by [the City]'s stormwater management charge, which ensures that owners of impervious surfaces bear the cost of managing stormwater runoff."

Therefore, the court affirmed the district court's decision that the City's stormwater management charge was a fee rather than a tax.

(Wilkinson, J., concurring): "In seeking to avoid paying a fee that the City uses to fund its stormwater clean-up scheme, [the railway company] . . . is seeking to absolve itself of responsibility What we have here is the irony of a railroad seeking a free ride. This is unacceptable."

(Wynn, J., concurring): "[D]etermining whether an assessment amounts to a tax or fee turns on 'all the facts and circumstances.'" "I write separately to point out that reducing a 'totality-of-the-circumstances' inquiry into a 'three-factor test' poses substantial

risks. It elevates the significance of enumerated factors, relative to non-enumerated factors. It suggests that the enumerated factors warrant equal significance in the ultimate weighing. It also discourages courts from considering factors that are not enumerated in the test, but may be highly relevant in a particular case."

ATTORNEY GENERAL'S OPINIONS

The following are the summaries of recent Attorney General's Opinions that may be of interest to local government attorneys. As far as possible, we have indicated both the subject of the opinion and the conclusion reached by the Attorney General. If you would like a copy of any of the opinions summarized here, they are available for review and downloading, in PDF format, from the Attorney General's website. Go to www.oag.state.va.us (look under "Citizen Resources," then "Opinions and Legal Resources," and then "Official Opinions") or just click on the hyperlinked opinion number at the conclusion of the summaries below.

TAXATION • COAL & GAS SEVERANCE TAXES • IMPROVEMENT TO WATER & SEWER SYSTEM • VA. CODE §§ 58.1-3713 AND 58.1-3713.01

Whether Dickenson County is authorized to appropriate a portion of the revenues derived from local coal and gas road improvement severance taxes to the Town of Clintwood to fund the repair of a water system or lines that are owned and operated by the Town.

The severance taxes that are authorized pursuant to Code §§ 58.1-3741(B) and 58.1-3713, often referred to as local coal and gas road improvement and Virginia Coalfield Economic Development Authority severance taxes, may be assessed by a county or city at a rate of one percent of gross receipts for coal and up to one percent of gross receipts for gas. The revenue from these taxes must be distributed as provided for under Code §§ 58.1-3713 and 58.1-3713.01.

For localities that are members of the Virginia Coalfield Economic Development Authority, such as Dickenson County, Code § 58.1-3713 directs that three-fourths of the proceeds of these taxes be paid into the locality's Coal and Gas Road Improvement Fund, a special fund designated for road improvement projects, and one-fourth of the proceeds be paid into the Virginia Coalfield Economic Development Fund.

With respect to the portion of the taxes paid into the locality's Coal and Gas Road Improvement Fund, Code § 58.1-3713 provides that a locality that is a member of the Virginia Coalfield Economic Development Authority is not limited to using these funds

solely for road improvement projects. Rather, the locality has the option of expending "one-fourth of such revenue" for public utility improvements as set out in the statute, including "the construction of new water or sewer systems and lines and the repair or enhancement of existing water or sewer systems and lines in areas with natural water supplies that are insufficient from the standpoint of quality or quantity."

Further, an "additional one-fourth allocation" from the portion paid into the locality's Coal and Gas Road Improvement Fund may be used to fund such water and sewer projects, provided the locality adopts an annual plan establishing the priority of funding for the projects as directed under Code § 58.1-3713.01. Such an annual plan may provide funding for "regional water or sewer projects," which are defined in Code § 58.1-3713.01 as "projects involving two or more public water [or] sewer service providers located in the same or neighboring political subdivisions."

As neighboring political subdivisions with separate public water service providers, Dickenson County and the Town of Clintwood may, pursuant to Code § 58.1-3713.01, approve and agree to a regional project to repair a water system or lines that are owned and operated by the Town of Clintwood. Revenues from an "additional one-fourth allocation" of severance taxes paid into Dickenson County's Coal and Gas Road Improvement Fund therefore may be used to fund the project, in accordance with an annual plan developed by the County under § 58.1-3713.01.

(February 15, 2019) (Addressed to Stephen W. Mullins, Esquire, Dickenson County Attorney) (Op. No. 18-011).

PROPERTY ASSESSED CLEAN ENERGY • PRIVATE LENDING INSTITUTIONS • ADMINISTRATION & ENFORCEMENT OF LOANS • VA. CODE § 15.2-958.3

Section 15.2-958.3 of the *Code of Virginia* authorizes localities, by ordinance, to approve contracts providing Property Assessed Clean Energy (PACE) loans for "the initial acquisition and installation of clean energy improvements with free and willing property owners of both existing properties and new construction." The statute requires that certain provisions be included in the ordinance but otherwise gives localities broad discretion in drafting such an ordinance.

Loudoun County is considering the adoption of an Ordinance to create a PACE loan program under the authority given in Code § 15.2-958.3. The proposed Ordinance would (i) allow private lending institutions ("private capital providers") to participate in the program by making loans directly to eligible property owners; (ii) authorize the County to place a voluntary special assessment lien to secure each PACE loan; and (iii) authorize the County to contract with third parties for professional services to administer the loan program and collect loan payments. No County funds would be used for the program, and all administrative costs would be passed to the borrowers.

(1) Whether Code § 15.2-958.3(B) requires a locality to assume responsibility for billing and collecting PACE loan payments on behalf of a private capital provider making the loan, or whether the local PACE Ordinance may authorize these functions to be handled by the private capital provider or a third party administrator.

Section 15.2-958.3(C) requires those localities that adopt PACE Ordinances to "offer private lending institutions the opportunity to participate in local loan programs established pursuant to this section." Under this unrestricted statutory direction, a local ordinance may authorize private capital providers to make PACE loans directly to qualifying property owners, secured by a financing agreement, and to service and enforce such loans through billing and collection activities. In addition, Code § 15.2-958.3(A)(5) expressly provides that a "locality may contract with a third party for professional services to administer [the] loan program." Administration of the loan program by a third party administrator may include a myriad of services, such as determining whether an applicant qualifies for a PACE loan, working with such applicants to secure the loan from the private capital provider, keeping records on behalf of the local government, and if so assigned, billing and collection of the loan payments. Thus, either the private capital provider or the "third party" referenced in Code § 15.2-958.3(A)(5) may be directed by the local ordinance to collect a PACE loan.

(2) Whether, in the event of default, the private capital provider may enforce a voluntary special assessment lien on its own behalf, or whether Code § 15.2-958.3(E)(3) requires that enforcement be taken only by the locality.

Section 15.2-958.3(D) allows the use of voluntary special assessment liens to secure PACE loans. The statute further provides that a voluntary special assessment lien "[m]ay be enforceable by the local government in the same manner that a property tax lien against real property may be enforced by the local government." While the authority to record and enforce a special lien is granted to the local government, Code § 15.2-958.3 does not prohibit a locality from adopting an ordinance to allow the assignment of the special assessment lien to the private capital provider. Thus, the statute permits the local governing body to assign to the private capital provider its right to record and enforce the voluntary special assessment lien, subject to such terms, conditions and restrictions the local governing body deems appropriate.

(February 1, 2019) (Addressed to Leo P. Rogers, Esquire, Loudoun County Attorney) (Op. No. 18-056).

LEGAL AID ORGANIZATION • MIGRANT LABOR CAMP • PRIVATE PROPERTY • CRIMINAL TRESPASS

Whether representatives of a legal aid organization not appointed or retained as counsel to any individual or group may provide information about legal resources and services to migrant workers living in a migrant labor camp owned or controlled by the workers' employer without committing criminal trespass.

A previous official advisory opinion of the Attorney General of Virginia, 1979-1980 Op. Va. Atty. Gen. 391 ("1979 Opinion"), concluded that legal representatives of migrant workers are not trespassing in violation of Code § 18.2-119 merely by entering a migrant labor camp in the performance of their duties. The opinion uses the term "legal representatives" with reference to the Legal Services Corporation established under the federal Legal Services Corporation Act (LSCA), but neither the opinion nor the LSCA define the term "legal representatives."

The 1979 Opinion also relies upon *State vs. Shack,* 277 A.2d 369 (N.J. 1971), in which a staff attorney employed by a non-profit legal aid organization entered private property to communicate with migrant farmworkers who were employed and housed by a farmer. The court held that the staff attorney's conduct was beyond the reach of the state's trespass statute. In so ruling, the court made the following conclusions:

> [W]e see no legitimate need for a right in the farmer to deny the worker the opportunity for aid available from federal, State, or local services, or from recognized charitable groups seeking to assist him. Hence representatives of these agencies and organizations may enter upon the premises to seek out the worker at his living quarters. . . .
>
> [W]e are mindful of the employer's interest in his own and in his employees' security. Hence he may reasonably require a visitor to identify himself, and also to state his general purpose if the migrant worker has not already informed him that the visitor is expected. But the employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens. These rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties[.]

Both the conclusion and reasoning underpinning the 1979 Opinion were sound then and remain sound today. Moreover, since the issuance of the 1979 Opinion, the legislature has not enacted any relevant laws or amended any applicable statutes that would alter the conclusion reached therein. Additionally, no Virginia courts have issued contrary decisions.

Also, there is no implication in the 1979 Opinion or in the authorities cited therein that the term "legal representative" of migrant workers is limited to only those individuals formally appointed or retained as legal counsel by an individual or group. In fact, the references to the LSCA and *Shack* suggest that the terminology "legal representative" as used in the 1979 Opinion is more expansive and also encompasses representatives of legal aid organizations seeking to access and assist low income individuals and groups, including migrant workers living in a migrant labor camp.

Legal assistance provided by civil legal aid programs includes not only legal representation by retained or appointed counsel but also free or low-cost access to legal information and advocacy for low income individuals, including migrant workers.

Therefore, legal aid representatives who enter migrant labor camp property for the purposes described herein do so under a bona fide claim of right, and it is well established that one who enters another's property under a bona fide claim of right has not committed a willful trespass under Code § 18.2-119. That includes such representatives attempting to visit workers in locations they in good faith and sincerely, but mistakenly, believe are migrant labor camps open to access under law.

Moreover, such representatives may communicate freely with migrant workers during hours when the migrant workers are at their living quarters in the migrant labor camp and not working, and the owner, employer or other persons in control of the migrant labor camp may not interfere with or place unreasonable restrictions, such as advance notice or similar overly burdensome requirements, on those communications.

(February 22, 2019) (Addressed to the Honorable David L. Doughty Jr., Northampton County Sheriff) (Op. No. 18-044).

POSITIONS AVAILABLE

HANOVER COUNTY
COUNTY ATTORNEY

The County of Hanover operates under the traditional Board-Administrator form of government where the seven-member Board appoints the County Administrator and the County Attorney. The attorney oversees the provision of legal services and counsel to the Board of Supervisors, County Administration and Departments, School Board, School Administration, Constitutional Officers, and other boards, commissions, and agencies of the County. The position oversees a staff of five attorneys and two legal assistants. The County culture is one of teamwork and collaboration, which starts with a strong partnership between the County Attorney, County Administrator, and School Superintendent.

The successful candidate must have graduated from an accredited school of law and must be a member in good standing with the Virginia State Bar. A minimum of ten years' experience with comprehensive knowledge of general and government law, Virginia and federal laws and regulations, and the functions of local governments and school boards is required. The compensation and benefit package is highly competitive and depending upon the experience and qualifications of the successful candidate, salary may

be negotiated. Qualified candidates should submit their cover letter and résumé online by visiting the Springsted-Waters website at https://springsted-waters.recruitmenthome.com/postings/2246. For more information, please contact Steve Miner at richmond@springsted.com or (804)726-9748. EOE.

LOUDOUN COUNTY
DEPUTY/ASSISTANT COUNTY ATTORNEY

The Loudoun County Attorney's Office is seeking a Deputy or Assistant County Attorney, depending on experience, to focus on land use, zoning, and development. Responsibilities may include reviewing proffers and special exception conditions; drafting and reviewing proposed ordinance amendments; negotiating, drafting and/or reviewing deeds, easements, and land development agreements; and drafting or reviewing staff reports for the Board of Supervisors and Planning Commission. This attorney may also represent the County and its officials in land use litigation, zoning appeals, and Code enforcement proceedings. The successful candidate must be able to communicate effectively with clients and third parties (including land development applicants), manage multiple projects timely and efficiently, supervise paralegal's work, and attend evening meetings as needed. Strong legal analysis, written and oral communication and advocacy, problem solving, time management, and organizational skills are required. Demonstrated experience concerning Virginia local government law and/or zoning and land development law is preferred. Applicants must have a Juris Doctor degree from an accredited law school, be a member of the Virginia State Bar, and have at least nine years of experience to be considered for the Deputy Attorney position. Applicants with less than nine years of experience may be considered for an Assistant County Attorney position at a lower classification and salary range. **The position will remain open until filled.** For more information, please visit the County's website at www.loudoun.gov and click on the "Residents" tab, then "Jobs," and search for Recruitment #19-A4A-1470.

CITY OF NORFOLK
ASSISTANT/DEPUTY CITY ATTORNEY

The Norfolk City Attorney's Office seeks applicants for a position as an Assistant or Deputy City Attorney. The successful candidate will provide legal services to City departments, agencies, and City Council in a wide variety of practice areas particular to local government. Duties may involve litigation, prosecution, and enforcement of matters of interest to the City, including proceedings concerning violations of the City Code, proceedings pertaining to regulatory matters, and other administrative proceedings. Duties may also involve general business matters, including drafting and negotiating contracts, leases, and franchise agreements, the acquisition and sale of real property, and providing advice regarding and interpretation of contracts, codes, statutes, regulations, ordinances, and policies. Admission to the Virginia State Bar with at least two years of experience in the practice of Virginia law is required. Local government experience is preferred.

The position and salary will be commensurate with experience and includes a generous benefits package. **The position will remain open until filled.** Applicants should submit a résumé and cover letter addressed to Heather A. Mullen, Deputy City Attorney, by email to heather.mullen@norfolk.gov or by mail to the Office of the City Attorney, 810 Union Street, Suite 900, Norfolk, VA 23510.

AUGUSTA COUNTY
ASSISTANT COUNTY ATTORNEY

The County of Augusta is accepting applications for the position of Assistant County Attorney. The Assistant County Attorney serves as assistant to the County Attorney in providing general legal services for the Board of Supervisors, County administration, and all other boards, commissions, and agencies of the County. This position will be assisting in handling of all legal matters, including court representation, drafting of legal opinions, ordinances and contracts, and advising County staff on legal matters. The preferred candidate will have graduated from an accredited law school and will have minimum of two years' of experience as a practicing attorney, a considerable amount of which shall have been in the practice of local government law or any equivalent combination of experience and training. The candidate must be licensed to practice law in the Commonwealth of Virginia and must be admitted to practice before the Virginia Supreme Court or federal district courts, or be able to obtain admission within two months of employment. The starting salary range is $60,445 to $93,946, and is negotiable depending upon qualifications. Benefits include VRS retirement, group life insurance, health insurance, other voluntary benefits, and paid time off leave. The county application can be downloaded from the County's website at www.co.augusta.va.us. Please send the completed county application and résumé to County of Augusta, Attn: Human Resources Office, P. O. Box 590, Verona, VA 24482-0590 [Tel: (540)245-5617; Fax: (540)245-5175]. **This position will remain open until filled.** EEO.

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