

17

PUBLIC UTILITIES

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17-1 INTRODUCTION

This chapter provides an overview of Virginia law pertaining to the operation and delivery of public utilities within Virginia.² For purposes of this chapter, the term “public utility” is meant to broadly encompass the delivery of essential public services such as water, sewerage, stormwater management, gas, electricity, and telecommunications, and includes the facilities and systems for such services along with their operation. This chapter focuses principally upon the provision of such services by local governments (section 17-2), authorities (section 17-3), and sanitary districts (section 17-4). A brief discussion of public service corporations and companies is also included (section 17-5), but a detailed analysis of them and their regulation by the State Corporation Commission (SCC) is beyond the scope of this chapter. Later sections address additional issues, including the duty to provide public services (section 17-6), water supply planning (section 17-7), renewable energy (section 17-8), and tort liability (section 17-9).

17-2 DELIVERY BY LOCAL GOVERNMENT

17-2.01 Power to Operate and Deliver Services

The General Assembly has authorized localities to acquire, own and operate a variety of public utilities. Virginia Code § 15.2-2109 provides in pertinent part:

A. Any locality may (i) acquire or otherwise obtain control of or (ii) establish, maintain, operate, extend and enlarge: waterworks, sewerage, gas works (natural or manufactured), electric plants, public mass transportation systems, stormwater management systems and other public utilities within or outside the limits of the locality and may acquire within or outside its limits in accordance with § 15.2-1800 whatever land may be necessary for acquiring, locating, establishing, maintaining, operating, extending or enlarging waterworks, sewerage, gas works (natural or manufactured), electric plants, public mass transportation systems, stormwater management systems and other public utilities, and the rights-of-way, rails, pipes, poles, conduits or wires connected therewith, or any of the fixtures or appurtenances thereof The provisions of this section shall not be construed to exempt localities from the provisions of Chapters 20 (§ 46.2-2000 et seq.), 22 (§ 46.2-2200 et seq.), and 23 (§ 46.2-2300 et seq.) of Title 46.2.

¹ Stanley Franklin, retired from McGuireWoods, LLP, authored previous versions of this chapter. In addition, the author thanks Doug Lamb, Dale Mullen, and Zachary Jungers for their contribution, beginning in an earlier edition, of section 17-8, “Renewable Energy.”

² Public utilities are subject also to a number of federal laws, including the Federal Power Act (16 U.S.C. § 791a et seq.), under which the federal government regulates waterpower projects and electric utilities, and the Natural Gas Act (15 U.S.C. § 717 et seq.), under which the federal government regulates natural gas companies.

Va. Code § 15.2-2109.³ The Supreme Court confirmed the constitutionality of this broad grant of authority in *Light v. City of Danville*, 168 Va. 181, 190 S.E. 276 (1937).

The recodification of Title 15.1 in 1997 resulted in a significant decrease in the public utility service distinctions between municipal corporations and counties. By operation of Va. Code §§ 15.2-2109, 15.2-1800, 15.2-1901, and 15.2-1901.1, all localities have the same condemnation power regarding public utilities, except that a county may acquire public utilities or land for them outside its boundaries by condemnation only if such authority is expressly conferred by general law or special act.⁴ See Va. Code § 15.2-1901(B);⁵ see also *Town of Purcellville v. Loudoun Cnty. Bd. of Sup'rs*, 74 Va. Cir. 417 (Loudoun Cnty. 2007) (town may not exercise the power of eminent domain to acquire public lands owned by a county absent express legislative grant). The powers in Va. Code §§ 15.1-875, 15.1-876, 15.1-877, 15.1-878 were subsumed into §§ 15.2-2143, 15.2-2122, 15.2-2109, and provide that counties have the same condemnation powers as municipalities, except that only specifically authorized counties may require mandatory connection to water and sewer service. Va. Code § 15.2-2110. Every locality has the power to regulate and inspect the systems of other entities. Va. Code § 15.2-2144. Moreover, both counties and cities are authorized to acquire a water supply or sewage system from a sanitary district. Va. Code § 15.2-2116.

17-2.02 Water and Sewer Services

Localities have express authority to establish and operate sewage disposal systems. Va. Code §§ 15.2-2122 and 15.2-2109. In connection with this authority, the governing body of each locality is empowered to, *inter alia*, acquire real property, borrow money, issue bonds, purchase and condemn property, fix charges, and collect fees. Va. Code § 15.2-2122. A locality may also enter into public-private partnerships for the establishment and operation of water and sewage systems, including customer service functions. Va. Code § 15.2-2117; see also Va. Code § 56-575.1 et seq.

Moreover, localities may regulate “sewage collection, treatment or disposal service and water service” regardless of any anticompetitive effect. Va. Code § 15.2-2111.⁶ Such regulation may include the establishment of an exclusive service area for a water or sewage system, including one owned or operated by a county, city or town, as well as the prohibition, restriction, or regulation of competition between entities providing sewage or water service, provided the exercise of such power does not alter any powers or duties of an authority created under the Virginia Water and Waste Authorities Act, or supersede or conflict with the duties of the State Water Control Board. *Id.* The Attorney General has opined that this section does not authorize one political subdivision to regulate the rates of another. 2013 Op. Va.

³ While the statute refers to Chapters 22 and 23 of Title 46.2, those chapters have been repealed and subsumed into Chapter 20.

In 2005, the General Assembly amended Va. Code § 15.2-1800 to eliminate public hearing requirements for localities that convey certain site development easements across public property. In 2006, the General Assembly clarified that utility easements obtained after July 1, 2006 “touch and concern the servient tract [and] run with the servient tract” whether or not it is appurtenant or in gross. Va. Code § 55.1-306.

⁴ The county limitation was not present under former § 15.1-292.

⁵ Article 1, § 11 of the Virginia Constitution and Va. Code § 1-219.1 strictly define the term “public use” for purposes of eminent domain. Furthermore, a government utility corporation is considered to be acting as a public service corporation or public service company when exercising eminent domain power for the provision of an authorized utility service only. Va. Code § 1-219.1(K). See Chapter 4, Condemnation Procedure, sections 4-1.02 and 4-3.01, for further discussion.

⁶ In *Shrader v. Horton*, 471 F. Supp. 1236 (W.D. Va. 1979), *aff'd*, 626 F.2d 1163 (4th Cir. 1980), a district court held that a water authority’s mandatory connection rule that displaced competition was not a violation of the Sherman or Clayton Antitrust Acts under the State Action Doctrine.

Att’y Gen. 90. The Attorney General has also opined that, because there is overlapping jurisdiction between localities under Va. Code § 15.2-2111 and the SCC under the provisions of Title 56 of the Code of Virginia, localities are required to follow the same standards as the SCC in rate-setting, and that in the event of a clear conflict, the jurisdiction of the SCC supersedes local powers. 1998 Op. Va. Att’y Gen. 117; 1995 Op. Va. Att’y Gen. 240.

Political subdivisions may also enter into agreements among themselves for the provision of sewage or water services. Under Va. Code § 15.2-2112:

[t]he governing body of any two or more counties, cities, towns, authorities, sanitary districts or other public entities may enter into agreements or contracts that create one or more exclusive service areas for the provision of sewage or water service, that fix the rates or charges for any sewage or water service provided separately or jointly by such entities, and that restrict or eliminate competition between or among such entities and any other public entity for the provision of sewage or water service.

See *also* Va. Code §§ 15.2-2124 (authorizing contracts between localities for operations of sewage systems) and 15.2-2125 (authorizing such contracts to provide for boards or commissions to supervise operations). One court has held that §§ 15.2-2109 and 15.2-2112 must be construed to authorize a municipality to operate outside its geographic limits without regard to anticompetitive effect only by agreement of the locality within which it is operating. *Fairfax Cnty. Water Auth. v. City of Falls Church*, 78 Va. Cir. 177 (Fairfax Cnty. 2009).

Any person or organization, including a municipal corporation, intending to establish a sewage system designed to serve three or more connections must notify and obtain the approval of the county in which the system is to be located. Such notice and approval are not required, however, when a town proposes to construct or expand a sewage system, and the county does not provide such services. Va. Code §§ 15.2-2126 and 15.2-2127. The Attorney General has opined that a county’s participation in a sewer authority consisting of the county and another town is not tantamount to the county itself operating a sewage system or providing sewerage services, and thus notice and approval by the county is not required. 2001 Op. Va. Att’y Gen. 57. Failure to provide statutorily required notice may be subject to misdemeanor charges and injunction. Va. Code § 15.2-2133.

A locality may require the installation, maintenance, and operation of an on-site sewage system when public facilities are not available. Va. Code § 15.2-2157. A locality may not prohibit alternative systems that are approved by the Board of Health or require maintenance standards that exceed those required by Board of Health regulations (when promulgated). *Id.*; compare 2010 Op. Va. Att’y Gen. 53 (locality cannot require an owner to obtain a special exception to a local zoning ordinance in order to install an alternative onsite sewage system if the conditions set forth in § 15.2-2157 exist) with 2012 Op. Va. Att’y Gen. 62 (locality may not require a bond for maintenance but may adopt standards in addition to or more stringent than those promulgated in regulations by the Board of Health, provided such standards or regulations do not relate to maintenance issues and do not function so as to effectively ban a system that state regulations would allow). The Attorney General clarified the confusing interpretation of a locality’s regulatory authority in these two opinions by issuing a third opinion stating that, where public sewers or sewage facilities are not available, localities cannot enact ordinances with standards or requirements greater than those of the state regulations. 2012 Op. Va. Att’y Gen. 66.

Procedures and requirements for establishment of a water supply system are similar to those for a sewage system. See Va. Code §§ 15.2-2149 and 15.2-2151. Moreover, any locality that has adopted zoning and subdivision regulations may establish standards for the provision of water and sewer services, and require compliance with those standards as a

condition precedent to the approval of an original plat of a subdivision or a development plan. Va. Code § 15.2-2121. Pursuant to this provision, localities may require developers to extend and connect to abutting or adjacent public water or sewer systems. In *Kernan v. Fairfax County Water Authority*, 70 Va. Cir. 212 (Fairfax Cnty. 2006), the court held that localities have authority under Va. Code § 15.2-2232(C) to define what a normal service extension is so that planning commission approval is not required.

17-2.02(a) Rates, Fees, and Charges

Water and sewer connection fees, as well as water supply service fees, are expressly required to be “fair and reasonable.” Va. Code § 15.2-2119(C). Localities may obtain fees and charges for water and sewer services from (i) persons contracting for such services; (ii) an owner-occupant of a property where a single meter serves multiple properties; (iii) a tenant, provided that the tenant has a rental agreement or written authorization from the property owner to obtain water and sewer services in the tenant’s name; or (iv) any user of such services with respect to combined sanitary and storm water sewer systems where the user is a resident and the charges are related to the control of such systems. Va. Code § 15.2-2119(A). Localities must “periodically” review such fees and adjust them if necessary. Va. Code § 15.2-2119; *cf.* 1996 Op. Va. Att’y Gen. 71 (water and sewer connection fees are subject to reasonableness standard) and Va. Code § 15.2-2143 (fees for water services must be “fair and reasonable”).⁷ A locality may provide a partial credit for excessive water and sewer charges where high water usage is caused by damaged pipes, leaks, accidents, or other intentional or unintentional causes. Va. Code § 15.2-2119.1; *see also* 2003 Op. Va. Att’y Gen. 36 (opining that a town has the authority to transfer surplus water and sewer utility funds to the town’s general fund for use in constructing a recreation center, provided the utility is not an independent entity). The City of Richmond, the Towns of Altavista and Louisa, and low-density localities may provide by ordinance for discounted rates for low-income, elderly, or disabled customers. Va. Code § 15.2-2119.2.

The Attorney General has opined that when a town is properly providing water services outside its boundaries to county residents, the county has no authority to impose restrictions on the rates charged by the town. The Attorney General noted that although Va. Code § 15.2-2111 authorizes a county (or any other locality) to fix the rates of *any* sewage or water services provided within its boundaries, the general language of that statute must yield to the more specific language of § 15.2-2143, which authorizes a town (or any other locality) supplying water outside its boundaries to set the rates of the water so supplied. 2013 Op. Va. Att’y Gen. 90.

The Supreme Court has held that “setting rates and fees for sewer or water services is a nondelegable legislative function.” *City of South Boston v. Halifax Cnty.*, 247 Va. 277, 441 S.E.2d 11 (1994); *Cnty. of York v. King’s Villa, Inc.*, 226 Va. 447, 309 S.E.2d 332 (1983). As such, the ordinance establishing such rates is afforded a presumption of validity and reasonableness. *Town of Leesburg v. Giordano*, 280 Va. 597, 701 S.E.2d 783 (2010). Courts will uphold the action if the issue is “fairly debatable.” *Id.*

For example, in *Eagle Harbor LLC v. Isle of Wight County*, 271 Va. 603, 628 S.E.2d 298 (2006), the Supreme Court reviewed a county’s uniform increase of water and sewer connection fees countywide to help pay off general obligation water and sewer bonds that paid for different improvements in different service districts. There, a developer filed a declaratory judgment action claiming, in part, that the county’s fees were not fair and reasonable because they did not correlate the benefits to customers with the improvements in the service district and because the improvements would benefit customers beyond the

⁷ Virginia Code § 15.2-2159 authorizes certain counties, by ordinance and after a hearing, to impose fees for solid waste disposal. Va. Code § 15.2-934 was amended in 2006 to add required findings that must be made before a locality may displace a privately operated refuse collection company.

period of the bonds. The Court upheld the county's fees. In doing so, the Court held, in part, that (1) the "reasonable correlation" test is not applied in a challenge to the reasonableness of such fees;⁸ and (2) courts must apply the "fairly debatable" test, rather than independently determining the reasonableness of challenged connection fees.⁹

Similarly, in *Town of Leesburg*, the Court found that the town's expert witness testimony presented sufficient evidence to make "fairly debatable" its policy of imposing a 100 percent surcharge on out-of-town customers and reversed the lower court's decision to the contrary. *But see Fairfax Cnty. Water Auth. v. City of Falls Church*, 80 Va. Cir. 1 (Fairfax Cnty. 2010) (when a water service fee is raised on non-residents to generate profit, it is an unconstitutional extra-territorial tax; a "reasonable correlation" requirement applies to extraterritorial service).

In *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1*, 554 U.S. 527, 128 S. Ct. 2733 (2008), the U.S. Supreme Court held that the just-and-reasonable presumption applied to the contracts in which the price for electricity was higher than historical prices because of a dysfunctional market, as it did to all purchase contracts, and that the lack of initial review of the contracts by the Federal Energy Regulatory Commission (FERC) did not preclude application of the presumption upon a subsequent challenge. Further, the standard justifying modification of the contract rates required serious harm to the public interest, and the standard was not lessened simply because the challenge was brought by the purchasers rather than sellers. However, the Court held that FERC should also consider the future burden to consumers and possible unlawful market manipulation by the sellers.

The Attorney General has opined that a locality may enact an ordinance exempting a charitable organization or association from the payment of utility charges as a donation pursuant to Va. Code § 15.2-953. 2010 Op. Va. Att'y Gen. 64.

17-2.02(b) Mandatory Connections

Only specifically authorized counties may require mandatory connection to water and sewer service. Va. Code § 15.2-2110. However, the governing body of any locality "may require local water utilities to allow connections of fire suppression systems to the water supply." Va. Code § 15.2-2113.

17-2.02(c) Lien for Charges

Certain specified counties and cities may by ordinance provide that taxes or charges for water or sewers shall be a lien on the real estate served by such water line or sewer. See Va. Code § 15.2-2118. The lien on real estate that certain localities are authorized to impose for water and sewer service charges or taxes may be imposed on property so served located outside the jurisdiction of the locality. *Id.* For such localities, the statute specifies that for residential real estate, no water and sewer charges lien shall attach unless the user of the services is also the owner of the real estate or the owner negotiated the agreement by which the services were provided. *Id.* (The latter condition appears to prohibit a lien on residential property where a tenant arranged for service without the knowledge of the owner.) The City of Charleston, West

⁸ In this regard, the Court found that the "judicial inquiry as to a reasonable correlation relating to a municipal fee is directed to whether that fee is a bona fide fee-for-service or an 'invalid revenue generating device.'" *Eagle Harbor, supra* (citation omitted). Because the developers had not challenged the county's ability to levy the fees under the county's police powers, the "reasonable correlation" test was not at issue.

⁹ Note that the special thirty-day limitation period for challenging bond resolutions under the Virginia Public Finance Act, Va. Code § 15.2-2600 et seq., does not apply to bar a challenge to an increase in water and sewer rates where the locality elects to omit the rates from the underlying bond resolution authorizing issuance of the utility bonds. *Town of Leesburg v. Giordano*, 276 Va. 318, 667 S.E.2d 552 (2008).

Virginia, challenged a similar West Virginia lien statute, alleging that it violated the Contract Clause of the U.S. Constitution because of its effect on the city's sewer revenue bond contracts, which provided for such liens regardless of ownership. The Fourth Circuit held that the state law probably did not impair the contracts, but that even if it did, it was not substantial enough to have constitutional implications. *City of Charleston v. Public Serv. Comm'n*, 57 F.3d 385 (4th Cir. 1995).

If water or sewer charges are not paid within thirty days, the property owner or tenant must be notified of the delinquency, and if the charges plus penalty and interest are not paid within sixty days, the locality may cease supplying water or sewer services (except in circumstances where to do so would be unhealthy to the occupants), provided it has given written notice at least ten business days prior to such cessation. Va. Code §§ 15.2-2119(D) and 15.2-2219.4(D).

For all localities, water and sewage disposal system fees and charges, and any penalty and interest, generally constitute a lien against the property, on par with liens for unpaid taxes, if the property owner is notified in writing at least thirty days prior to the lien recordation of the delinquency and the fact that a lien may be recorded. For property owners, a lien in the amount of the number of months of delinquent water and sewer charges, penalties, interest, and collection costs of up to 20 percent may be recorded. Va. Code § 15.2-2119(E).

With respect to rental property, when the provision of services is to the tenant directly because of the written authorization of the property owner or the rental agreement, the locality must collect a security deposit of between three to five months' estimated charges before being authorized to record a lien. Va. Code § 15.2-2119.4(B). The lien may be up to three months of delinquent water and sewer charges. *Id.* § 15.2-2119.4(F).¹⁰ Prior to imposing the lien,¹¹ the locality must employ reasonable collection efforts against the tenant, including the application of the security deposit and other measures. *Id.* § 15.2-2119.4(E). Only after collection efforts fail¹² may the locality proceed to place a lien on the property in accordance with the provisions of Va. Code § 15.2-2119(E). *Id.* § 15.2-2119.4(F).

If there is a written authorization from the property owner to obtain water and sewer services or a rental agreement, then localities may not require the services to be put in the owner's name or that the owner provide a security deposit. Va. Code § 15.2-2119.4(B). An owner can request to be notified by email when a tenant's bill has been fifteen days delinquent. *Id.* § 15.2-2119.4(H).

Unless a lien has been recorded against the property owner, a locality cannot deny service to a new tenant who is requesting service at a particular property based upon the fact that a former tenant has not paid any outstanding fees and charges. Va. Code § 15.2-2119.4(H).

17-2.02(d) Special Procedures for Locating Water Supply Impoundments in Other Localities

Impoundments for water systems to be located in another locality must be approved by the

¹⁰ Note that the lien for charges to tenants does not include an amount for interest, penalties, attorney fees, or other collection costs.

¹¹ The creation of a lien and perfection and enforcement of a lien are distinct events, and the statute clearly provides that a lien arises from the time the charges are due. *Fannie Mae v. CG Bellkor, Inc.*, 980 F. Supp. 2d 703 (E.D. Va. 2013), *aff'd in relevant part*, No. 14-1014 (4th Cir. June 23, 2014).

¹² In an apparent drafting error, Va. Code § 15.2-2119.4(F) refers to the "collection efforts set forth in subsection E of § 15.2-2119," which does not address collection efforts. The intended reference likely is to Va. Code § 15.2-2119.4(E).

host locality's governing body. Va. Code § 15.2-2134. In situations where approval is withheld, the General Assembly has established a procedure for the convening of a special court. Va. Code § 15.2-2135 directs that a special court (composed of three judges from circuit courts) shall hear cases between jurisdictions involving a dam or water impoundment. The Chief Justice of the Virginia Supreme Court designates the three judges, and the judges hear the matter without a jury.

The special court is initiated by petition to the Chief Justice. See Va. Code §§ 15.2-5122 and 15.2-2134. Once convened, any locality whose territory is affected or any person affected by the proceedings may appear and must be made a party defendant. *Id.* § 15.2-2138. Thus, the statute requires both a locality and individuals affected to be parties to the action if they want to be involved. Another statute directs the special court to "balance the equities in the case, enter an order setting forth what it deems fair and reasonable terms and conditions, and direct the land acquisition to be in conformity therewith." *Id.* § 15.2-2136. The special court is authorized, in part, to "[d]etermine the metes and bounds of the land to be acquired, and may include a greater or smaller area than that described in the petition," and "[r]equire the payment by the acquiring party of a sum to be determined by the special court, payable on the effective date of acquisition, and provide for compensation for the value of any improvements also acquired." *Id.* § 15.2-2136(1), (2).

Based on the evidence introduced, the special court will "determine the necessity for and expediency of the acquisition of land or other proposed action and the best interests of the parties." Va. Code § 15.2-2137(B). Moreover, "[i]f a majority of the special court is of the opinion that the proposed action is not necessary or expedient, the petition shall be dismissed. *Id.* § 15.2-2137(C). If a majority of the court is satisfied of the necessity for and expediency of the proposed action, it shall determine the terms and conditions of the action and shall enter an order granting the petition." *Id.*

When proceedings for the acquisition of land are pending and a petition is filed seeking acquisition of the same land, or a portion thereof, Va. Code § 15.2-2141 requires that these proceedings be consolidated and heard by the special court. Also, when land sought to be acquired lies in two or more counties, those counties must be made parties, and a motion or petition should be addressed to the circuit court of the county in which the larger part of the land is located. The statutes described above apply in this situation.

The Supreme Court held that the City of Roanoke was required to use the statutory provisions discussed above to secure approval for construction in the County of Roanoke of a water impoundment project for City use. See *Bd. of Cnty. Sup'rs of Roanoke Cnty. v. City of Roanoke*, 220 Va. 195, 257 S.E.2d 781 (1979). A locality seeking to locate an impoundment or line in another locality also must comply with its zoning and comprehensive plan. *Id.* In 1993, the Supreme Court held that the City of Virginia Beach was not required to secure Mecklenburg County's consent to use part of an existing reservoir's storage capacity. *City of Virginia Beach v. Mecklenburg Cnty.*, 246 Va. 233, 435 S.E.2d 382 (1993). There, the City had entered into a contract with the United States to use water from the John Kerr Reservoir. The County filed suit, claiming that the City was required to obtain the County's consent, and the trial court agreed. The Supreme Court reversed, holding that the reservoir had been built before the express 1976 grandfathering date provided for in the statute at issue, and the United States' change in allocation of water rights did not involve construction of the dam. Therefore, according to the Court, consent of the surrounding localities was not required.

17-2.03 Stormwater Management

Virginia Code § 15.2-2114 provides that any locality may establish by ordinance a utility or enact a system of service charges to support a local stormwater management program. Cooperative agreements between localities are also permitted for this purpose, as are public-private partnership programs. Income derived from a utility or system of charges may not

exceed the actual costs incurred by a locality operating such utility or system, and may be used only to pay or recover the costs of the exercise of eminent domain; planning, design and construction; administration, operation and maintenance; monitoring stormwater devices and water quality monitoring; and other “consistent” activities.

The charges may be assessed on property owners or occupants, including condominium unit owners or tenants (when the tenant is the party to whom the water and sewer service is billed), and must be based upon an analysis that demonstrates the rational relationship between the amount charged and the services provided. Prior to adopting such a system, a public hearing must be held after giving specified notice.

A locality adopting such a system must waive charges for public entities that hold a MS4 permit and for public roads and street rights-of-way. A locality must provide for full or partial waivers of charges to any person who (i) installs, operates, and maintains a permitted stormwater management facility that achieves a permanent reduction in stormwater flow or pollutant loadings, or (ii) has an approved stormwater management plan that provides for retention and treatment on site. The locality must base the amount of the waiver in part on the percentage reduction in stormwater flow or pollutant loadings, or both, from pre-installation to post-installation of the facility.

A locality may provide for full or partial waivers of charges to cemeteries, property owned or operated by the locality administering the program, and public or private entities that implement or participate in strategies, techniques, or programs that reduce stormwater flow or pollutant loadings, or decrease the cost of maintaining or operating the public stormwater management system.

Charges and interest may be recovered by the locality by an action at law or suit in equity and shall constitute a lien against the property, ranking on par with liens for unpaid taxes. Stormwater service charges are a fee, not a tax. *Norfolk S. Ry. v. City of Roanoke*, 916 F.3d 315 (4th Cir. 2019); see also 2010 Op. Va. Att’y Gen. 56; 2010 Op. Va. Att’y Gen. 61. Federal property is not exempt from stormwater charges. P.L. No. 111-378. The locality may combine the billings for stormwater charges with billings for water or sewer charges, real property tax assessments, or other billings. In such cases, the locality may establish the order in which payments will be applied to the different charges. No locality shall combine its billings with those of another locality or political subdivision, including an authority operating pursuant to Chapter 51 (§ 15.2-5100 et seq.) of Title 15.2, unless such locality or political subdivision has given its consent by resolution or ordinance.

In accordance with the Public Finance Act, Va. Code §§ 15.2-2600 et seq., any locality may issue general obligation bonds or revenue bonds in order to finance the cost of infrastructure and equipment for a stormwater control program.

17-2.04 Delivery of Gas and Electric Services

Despite such a broad grant of authority for the provision of utility services, a referendum is required before a locality takes over or displaces, in whole or in part, a utility’s gas or electric service to customers within the locality’s limits, unless the utility consents. Cities and towns that provided electric service as of January 1, 1994, are exempt from the referendum requirement. In no event, however, is a locality required to hold a referendum in order to provide gas or electricity to its own facilities. Va. Code § 15.2-2109(B). The General Assembly added Va. Code § 15.2-2109.3 in 2009, authorizing any municipal corporation or public service authority to purchase and provide natural gas within certain underserved areas adjacent to the boundaries of the municipal corporation or any political subdivision that is a member of the authority.

Va. Code § 15.2-2109(A) authorizes a locality to construct, maintain, and operate its own electric facilities either where no current facilities exist in the locality, or where the locality is not served by an exclusive franchisee. However, to do so within certificated territory of an exclusive franchisee is subject to constitutional challenge. 1999 Op. Va. Att’y Gen. 60. A locality may not use a public utility to act as its agent to construct the electric facilities, to maintain and repair them, or to handle the billing and customer relations regarding its customers. *Id.*¹³

A city may contractually limit liability from interruption of electric service. *Wampler Foods, Inc. v. City of Harrisonburg*, 49 Va. Cir. 149 (Rockingham Cnty. 1999).

A locality may provide that taxes or charges for gas service within or outside such locality shall be a lien on the real estate served by such gas utility. Where residential rental real estate is involved, no lien shall attach (i) unless the user of the gas utility services is also the owner of the real estate or (ii) unless the owner of the real estate negotiated or executed the agreement by which such gas utility services were provided to the property. A locality is not authorized to require that municipal gas service be contracted for in the name of the owner of residential rental real estate if the lease between the owner and any tenant for such residential rental real estate provides that the tenant shall contract for such gas service. Va. Code § 15.2-2118.1.¹⁴

The Attorney General has opined that the General Assembly may enact a general law requiring the SCC to regulate the rates, charges, and services of electric utilities operated by municipal corporations. 2015 Op. Va. Att’y Gen. 84. While Article IX of the Virginia Constitution fails to grant the SCC express authority to regulate municipal utilities, it does not bar the SCC from regulating them.

17-2.05 Delivery of Telecommunications Services

Va. Code § 15.2-1500(B) prohibits localities from establishing a governmental entity with authority to offer telecommunications equipment, infrastructure, or services for sale or lease, except for intergovernmental use.¹⁵ This legislation prohibited localities from competing in the public marketplace with commercial providers of telecommunications services and equipment. Subsequent to the federal court decision in *City of Bristol v. Earley*, 145 F. Supp. 2d 741 (W.D. Va. 2001), *vacated and dismissed as moot*, Nos. 01-1741 & 01-1800 (4th Cir. May 1, 2002), which declared the law preempted by the federal Telecommunications Act and therefore unconstitutional under the Supremacy Clause, the General Assembly authorized localities to offer telecommunications services with certain restrictions. The United States Supreme Court declared that the federal Telecommunications Act does not preempt a state’s ability to decide if its political subdivisions may provide telecommunications services. *Nixon v. Mo. Municipal*

¹³ The Supreme Court has held that a municipality has the power to grant or deny a franchise to a public utility but, once it has granted the franchise, the municipality is impressed with a duty to ensure uninterrupted utility service to the public. *Potomac Edison Co. v. Luray*, 234 Va. 348, 362 S.E.2d 678 (1987).

¹⁴ In 2009, the General Assembly adopted, as part of the Virginia Energy Plan, a process for persons operating renewable energy facilities to utilize existing rights-of-way and easements in order to deliver electricity or energy generated at such facilities, which requires, in part, consent of the local governing body. See, e.g., Va. Code § 56-614 et seq. (previously § 67-1100 et seq.).

¹⁵ The statute provided, however, that a locality or an industrial or community development authority could lease dark fiber but could not be involved in the promotion of services by a lessee. See Va. Code § 15.2-1500(C).

League, 541 U.S. 125, 124 S. Ct. 1555 (2004).¹⁶

17-2.05(a) Locality With Municipal Electric Service Providers May Provide Telecommunications

A locality that already has a municipal electric service may apply to the State Corporation Commission for a certificate to provide a wide range of telecommunication services, including local telephone services. Va. Code §§ 15.2-2160; 56-265.4:4. The geographic area for which it may provide services depends on where it was providing electric services on March 1, 2002. The locality may serve any jurisdiction for which it was providing electric services, in whole or in part, on March 1, 2002. If the locality was providing telecommunications services outside its boundaries on March 1, 2002, it may provide telecommunications services up to seventy-five miles from the range of its electric distribution system as of March 1, 2002. *Id.* § 15.2-2160(A).¹⁷

To keep the competition field level, a locality must impute into its rates taxes, fees, and similar costs incurred by a private provider. Va. Code § 56-265.4:4(B)(5). It may not subsidize its service with other funds unless no competition from private providers exists. A locality must provide a comprehensive annual report to the SCC detailing its compliance with these provisions. *Id.* § 56-265.4:4(B)(6). It also must provide open access to its permanent facilities to private telecommunications companies. *Id.* § 56-265.4:4(B)(7). It may not acquire by eminent domain the facilities or property of other telecommunication providers. *Id.* § 15.2-2160(E).

17-2.05(b) Service Gap Providers

When the private telecommunication industry is not already adequately serving a community, a locality (which includes electric commissions and industrial development authorities) may provide high-speed data and internet services. Va. Code § 56-484.7:1. The SCC must approve a petition to provide such service unless functionally equivalent service is generally available from each of three or more private providers in the geographic area the locality intends to service. *Id.* § 56-484.7:2. Functional equivalence is not defined, but analogies may be found in the regulations of the Federal Communications Commission and its decisional law. See 47 C.F.R. § 20.3. The ability to provide the service may be revoked by the SCC after five years from the initial approval if competition has entered the relevant market or the locality has not satisfactorily provided the service it proposed. *Id.* The SCC must give the locality time to get out of the business and sell its system, but the locality can continue to run the system for its own purposes. Va. Code § 56-484.7:4.

As with the municipal service providers, the locality must provide open access to its permanent facilities to private companies, it may not cross-subsidize its rates, and it may not use the power of eminent domain to obtain facilities or property from other providers. Va. Code § 56-484.7:1(B). Due to how cumbersome this process is, it has only been attempted once, in an unsuccessful petition by the City of Staunton in 2003. *Petition of the City of Staunton*, Case No. PUC-2003-00065 (Va. SCC, June 26, 2003).

17-2.05(c) Cable Service

In 2003, the General Assembly authorized municipalities that provide electric service, local

¹⁶ A prior opinion of the Attorney General states that the authority granted by Va. Code § 15.2-2109(A) for a locality to own and operate “other public utilities” does not authorize a locality to own and operate a “communications system” network which may provide cable television service, telephone service, data transmission, and other on-line services. 1995 Op. Va. Att’y Gen. 93 (analyzing former § 15.1-292(A)).

¹⁷ The City of Bristol is the only locality to have the seventy-five-mile range authority.

telephone service, or Internet services as of January 1, 2003, to provide cable services.¹⁸ Va. Code § 15.2-2108.2 et seq. (“Municipal Cable Law”).¹⁹ A county or other political subdivision of the Commonwealth is expressly prohibited from providing such service. Va. Code § 15.2-2108.3. Before providing such service, the municipality must hold a preliminary public hearing, hire a consultant to perform a feasibility study, hold public hearings on the feasibility study, and hold a referendum. Va. Code §§ 15.2-2108.5 through 15.2-2108.8. Failure to comply with these required steps makes unlawful a municipality’s attempt to own or operate cable assets. See *Martinsville Cable, Inc. v. Time Warner NY Cable, LLC*, 445 F. Supp. 2d 668 (W.D. Va. 2006). If the municipality provides cable television services, it must establish a separate department for its operation and an enterprise fund to account for the provision of such services. Va. Code § 15.2-2108.9. The municipality may not cross-subsidize its cable television services or provide itself with any advantage, and it must impute into its rates taxes, fees, and similar costs incurred by a private provider. Va. Code § 15.2-2108.11. The scope of its service area is that of its electric service, telephone service, or Internet service area as of January 1, 2003. *Id.*

Localities are authorized to grant a negotiated cable franchise in accordance with Title VI of the Communications Act of 1934 and regulate cable systems. See Cable Communications Policy Act of 1984, 47 U.S.C. § 522 et seq.; Va. Code §§ 15.2-2108.19 et seq. These regulatory powers include “the authority: (i) to enforce customer service standards in accordance with the Act; (ii) to enforce more stringent standards as agreed upon by the cable operator through the terms of a negotiated cable franchise; and (iii) to regulate the rates for basic cable service in accordance with the Act.” Va. Code § 15.2-2108.20.

Under Va. Code § 15.2-2108.21, a cable company that meets certain criteria may opt instead to enter into an “ordinance cable franchise” with a locality under terms defined by statute. An ordinance cable franchise will have a term of fifteen years and may be requested by (i) a certificated provider of telecommunications services with previous consent to use the public rights of way in a locality through a franchise; (ii) a certificated provider of telecommunications services that lacked previous consent to provide cable service in a locality but provided telecommunications services over facilities leased from an entity having previous consent to use of the public rights of way in such locality through a franchise; or (iii) a cable operator with previous consent to use the public rights of way to provide cable service in a locality through a franchise and who seeks to renew its existing cable franchise. Va. Code § 15.2-2108.21(B).

The statute sets forth the application procedures, including requirements that an applicant file with the chief administrative officer of the locality a request to negotiate the terms and conditions of a negotiated cable franchise and be available for negotiation at least forty-five calendar days prior to filing a notice electing an ordinance cable franchise. Va. Code § 15.2-2108.21(C). Thereafter, an applicant, through its president or chief executive officer, shall file notice with the locality that it elects to receive an ordinance cable franchise at least thirty days prior to offering cable in such locality. The notice shall be accompanied by a map or a boundary description showing (i) the initial service area in which the cable operator intends to provide cable service in the locality within the three-year period required for an

¹⁸ A prior court decision found that the Virginia statute provided no authority for a locality to provide cable TV services. *Marcus Cable Assocs. LLC v. City of Bristol*, 237 F. Supp. 2d 675 (W.D. Va. 2002), *vacated and dismissed as moot*, No. 01-1741 (4th Cir. May 1, 2002).

¹⁹ At first glance, the statutory provisions seem to apply to all municipalities without restriction. However, the general operating limits provision, Va. Code § 15.2-2108.11(G), states that cable service may only be offered in subscriber locations in which electric service, telephone service, or Internet service are being provided as of January 1, 2003, by the municipality. Also, note that pursuant to Va. Code § 56-265.4:4(E), the City of Bristol (the only municipality that meets the requirements) is exempt from the public hearing and referendum proceedings.

initial service area and (ii) the area in the locality in which the cable operator has its telephone facilities. *Id.*

The locality from which the applicant seeks to receive an ordinance cable franchise shall adopt any ordinance requiring adoption under this article within 120 days of the applicant filing notice. Notice of any ordinance that requires a public hearing shall be advertised once a week for two successive weeks in a newspaper having general circulation in the locality. Va. Code §§ 15.2-2108.21(E) and (F).

The ordinance shall, among other things, require a cable operator²⁰: (1) to provide the locality with access to public, educational, and governmental access channels; (2) to pay a franchise fee; (3) to pay a recurring fee (referred to as the PEG Capital Fee) to support the capital costs of public, educational, and governmental channel facilities, including institutional networks; (4) to comply with the customer service requirements imposed by the locality pursuant to federal law; (5) to adopt enforcement procedures; (6) to adopt a schedule of uniform penalties or liquidated damages that it may impose upon any cable operator with an ordinance cable franchise when the cable operator has failed to materially comply with (i) customer service standards, (ii) carriage of public, educational, and governmental channels, (iii) reporting requirements, or (iv) timely and full payment of the franchise fee or the fee assessed for the provision of public, educational, or governmental access channels, including institutional networks; (7) to adopt procedures under which the locality may inspect and audit, upon thirty days' prior written notice, the books and records of the cable operator and recompute any amounts determined to be payable under the ordinances adopted pursuant to this article; (8) to adopt reasonable reporting requirements for annual financial information and quarterly customer service information; (9) require cable operators to provide, without charge, within the area actually served by the cable operator, one cable service outlet activated for basic cable service to each fire station, public school, police station, public library, and any other local government building; (10) to adopt requirements and procedures for management of and construction in public rights of way; (11) to adopt a mandated allocation procedure if cable services subject to a franchise fee, or any other fee determined by a percentage of the cable operator's gross revenues in a locality, are provided to subscribers in conjunction with other services; and (12) to make cable service available to (i) up to all of the occupied residential dwelling units in the initial service area selected by cable operator within no less than three years of the date of the grant of the franchise and (ii) no more than 65 percent of the residential dwelling units in the area in the locality in which the cable operator has its telephone facilities, within no less than seven years of the date of the grant of the franchise. Va. Code § 15.2-2108.22.

17-2.05(d) Broadband

In 2009, the General Assembly passed the Virginia Broadband Infrastructure Loan Fund, Va. Code § 15.2-2419 et seq., which creates and provides a Fund from which local governments may obtain loans to build broadband infrastructure, including wireless broadband infrastructure in areas of the Commonwealth that are not currently served by such services. In 2021, the General Assembly authorized school boards to appropriate funds to promote and facilitate the expansion of broadband services for educational purposes. Va. Code §§ 15.2-986, 22.1-79.9. To this end, school boards may partner with private broadband service providers to implement and subsidize broadband to the households of students who would qualify for a child nutrition program or similar program for at-risk students. *Id.* § 22.1-79.9. In 2022, the General Assembly directed the Department of Housing and Community Development to convene a stakeholder advisory group to evaluate local and state policies regarding the expansion of high-speed

²⁰ The statute does not strictly require the cable operator to do all of these things; rather, it requires cable operators to do certain things and provides that the local *ordinance* must address certain other issues (e.g., adopting procedures for enforcement, penalty schedules). Effectively, however, the cable operator is required to comply with all of these elements.

broadband service and associated infrastructure in new residential and commercial development. See 2022 Va. Acts ch. 593. The [advisory group's report](#), published September 30, 2022, recommends that the General Assembly clarify the Code of Virginia to give localities express authority to expend local revenues on broadband deployment.

17-3 DELIVERY BY AN AUTHORITY

In addition to private companies and localities through their departments of public works, authorities also frequently deliver utility services in Virginia. The Virginia Water and Waste Authorities Act, Va. Code § 15.2-5100 et seq., sets forth the powers and duties of a water authority, a sewer authority, a sewage disposal authority, a stormwater control authority, a refuse collection and disposal authority, or any combination or parts thereof. Within the limits of the statute, an authority may be created by a locality or jointly by more than one political subdivision. In accordance with Va. Code § 15.2-1300, a joint authority may be created with a locality in another state. See 2004 Op. Va. Att’y Gen. 82. The purpose of the authority can be quite broad or very limited. An authority is a combination of a private corporation and a public body and has features familiar to both the public and private sectors. Like a private corporation, the authority may adopt bylaws, establish its registered office, and sue and be sued as a separate legal entity. Indeed, an authority may enter into public-private partnerships for the establishment and operation of water and sewage systems, including customer service functions. Va. Code §§ 15.2-5114(11), 56-575.1 et seq. It receives a certificate of incorporation from the SCC. *Id.* § 15.2-5107. Unless the governing body of the creating political subdivision appoints its own members to the board of an authority, the authority is managed by a board appointed by the governing body or bodies that created it.²¹

17-3.01 Powers of Authority

Va. Code § 15.2-5114 enumerates powers of an authority and deems an authority to be “an instrumentality exercising public and essential governmental functions to provide for the public health and welfare” An authority is a “body politic and corporate” and “political subdivision” of the Commonwealth. Va. Code § 15.2-5102. Included among the powers of an authority is the right to purchase, lease or acquire any water system, sewer system, sewage disposal system, garbage and refuse collection and disposal system, or any combination of such systems within, without, or partly within and partly without one or more of the political subdivisions creating the authority.²² Water and sewer authorities may own and operate stormwater control systems. They may also install, own, or lease fiber optic cable pipe or conduit, provided that such pipe or conduit and the rights of way in which it is contained are made available on a nondiscriminatory, first-come, first-served basis to retail providers of broadband and other telecommunications services to the extent there is capacity. An authority is also given the right of eminent domain pursuant to the general condemnation procedures or quick-take authority of Title 25.1. Va. Code § 15.2-5114(6). Authorities may grant security interests. *Id.* An authority also may acquire and sell intellectual property rights. *Id.* § 15.2-5114(16). An authority operating a water supply impoundment facility may also generate and provide electric power and energy at wholesale and enter into contracts for such purposes. *Id.* § 15.2-5119.

In *Virginia-American Water Co. v. Prince William County Service Authority*, 246 Va. 509, 436 S.E.2d 618 (1993), the Virginia Supreme Court held that Va. Code § 15.2-5114(6) does not require water and sewer authorities to which Va. Code §§ 15.2-2146 and 15.2-1906 are applicable (i.e., those authorities located in larger cities and counties) to secure

²¹ The General Assembly adopted special requirements for a Hampton Roads refuse and disposal system authority. Va. Code § 15.2-5102.1.

²² The Fourth Circuit affirmed that this authority was not preempted by certain federal acts pertaining to the delivery of water in Northern Virginia. See *City of Falls Church v. Fairfax Cnty. Water Auth.*, No. 07-1527 (4th Cir. Apr. 4, 2008) (unpubl.).

permission from the SCC before initiating proceedings to condemn property owned by any private or public service corporation operating a waterworks system. However, public hearings are required before an authority formed under the Water and Waste Authorities Act may contract for the operation of a garbage and refuse collection and disposal system for any political subdivision. Va. Code § 15.2-5121(D). Previously, the requirement applied to contracts with counties only. In 2006, the General Assembly amended § 15.2-1903, requiring localities and other political subdivisions to have a public hearing before adopting any resolution initiating condemnation.

Moreover, an authority may not operate a garbage and refuse collection system that displaces a private company unless it provides the company five years' notice of its decision to operate such a system or pays the company an amount equal to its preceding twelve months' gross receipts. Va. Code § 15.2-5121(B). A similar provision applies to the displacement of private companies by local governments and sets forth procedures in order to do so. *Id.* §§ 15.2-934 and 15.2-930(B).²³

In *John C. Holland Enterprises, Inc. v. Southeastern Public Service Authority of Virginia*, 273 Va. 716, 643 S.E.2d 187 (2007), the Supreme Court of Virginia considered a claim that § 15.2-5121(A) required an authority to make new findings, among other things, concerning the availability of private "refuse collection and disposal services" before offering new collection and disposal services. There, the defendant had started collecting and disposing of construction debris in addition to its existing services providing for the collection and disposal of municipal solid waste. The Court held that § 15.2-5121(A) requires only that an authority make the statutory findings before undertaking to operate its system in the first place. Nothing required the defendant to make any additional findings before expanding its pre-existing services.

17-3.02 Creation of an Authority

An authority is created by adoption by one or more localities of an ordinance or a resolution, after first holding a public hearing on the question of such adoption. The public hearing is held after publication of the proposed ordinance or resolution. At the public hearing, the governing body determines whether "substantial opposition is heard" to creation of the authority. In its discretion, the public body may call for a referendum on the question of whether to create the authority if it finds that substantial opposition is heard, but it must hold a referendum if 10 percent of the qualified voters in the creating political subdivision file a petition calling for a

²³ Authorities also appear to have exemptions from permitting by the Virginia Marine Resources Commission (VMRC). In general, any person who, in the process of providing public utility services, constructs or trespasses upon the beds of Virginia waterways must determine whether to secure a permit from VMRC for the use of such subaqueous beds. Va. Code § 28.2-1203(A)(2) requires that anyone building upon or over the beds of waters that are the property of the Commonwealth do so pursuant to either statutory authority or a permit issued by the Commission. While Va. Code §§ 28.2-1200 to 28.2-1213 confer statutory authority for a wide variety of activities, construction of public utility lines and facilities are not among the authorized uses enumerated in that section. However, Va. Code § 15.2-5146 can be construed as authorizing water and sewer authorities to encroach upon the beds. That section provides in pertinent part: "The Commonwealth of Virginia hereby consents to the use of all lands above or under water and owned or controlled by it which are necessary for the construction, improvement, operation or maintenance of any such system" A similar consent by the Commonwealth to the use of water beds by the Hampton Roads Sanitation District Commission has been construed by the Virginia Attorney General's Office to exempt the Sanitation District from the permit requirements. See 1972-73 Op. Va. Att'y Gen. 356A. But counties, cities, towns, public service corporations, sanitary districts, and private individuals providing utility services apparently have no such statutory counterparts exempting them from the permit requirement. Although counties, cities, and towns are exempt from permit fees and royalties other than the permit issuing fee, see Va. Code § 28.2-1206(E), public service corporations, sanitary districts, and private individuals apparently have no exemptions at all.

referendum with the governing body at the public hearing. Va. Code § 15.2-5105.

The ordinance or resolution that is the subject of the public hearing is required to set forth articles of incorporation giving the authority's name, the address of its principal office, the names and addresses of each incorporating political subdivision and the names, addresses, and terms of office of the first members of the board of the authority. In addition, the ordinance or resolution must state the "purposes for which the authority is being created, and to the extent . . . practicable, preliminary estimates of capital costs, proposals for any specific projects to be undertaken by the authority, and preliminary estimates of initial rates for services of such projects as certified by responsible engineers." Va. Code § 15.2-5103. The articles need not set forth the purposes if the governing body finds that it is impracticable to do so; if the articles do not set out specific purposes, the authority has all powers allowed under the Act. Va. Code §§ 15.2-5103(B), 15.2-5111. If its purposes are set forth in the initial articles, any of the localities creating the authority may, by ordinance or resolution and after a public hearing, nevertheless subsequently specify further projects for the authority to carry out. *Id.* § 15.2-5111.

After adoption or approval of the ordinance or resolution, the creating governing body files the articles of incorporation with the SCC, and the Commission issues a certificate of incorporation, whereupon the authority "shall be conclusively deemed to have been lawfully and properly created and established and authorized to exercise its powers under this chapter." Va. Code § 15.2-5108.²⁴

An existing authority may join another existing authority with the concurrence of the governing bodies of the localities that created them. No such concurrence is necessary if the localities, at the time of the creation of the authority, state that the authority is created with the intention of joining an existing authority. Va. Code § 15.2-5112. A locality or an authority that is a member of another authority may withdraw its membership upon the unanimous consent of the authority's members and, if there are any outstanding bonds, upon either posting cash or U.S. securities for their payment or receiving the unanimous consent of bondholders. *Id.*

17-3.03 Management of an Authority

Virginia Code § 15.2-5113 requires that an authority be run by a board consisting of five members or, at the election of the governing body of a county creating the authority, a number of members equal to the number of members of the governing body. One or more members of the creating governing body or directors of an economic or industrial development authority may be appointed members of the authority. Terms of office shall not exceed four years, and compensation for services as an authority board member is fixed by resolution of the governing body creating the authority.²⁵ The statute does not require that board members reside within the authority's service district. *Lee Cnty. v. Town of St. Charles*, 264 Va. 344, 568 S.E.2d 680 (2002). Members of an authority must be reimbursed for any "actual expenses necessarily incurred in performance of their duties." Va. Code § 15.2-5113(C).

The vote of a majority of board members is necessary for any action taken by the authority unless authority is clearly delegated to its chief administrative officer, usually called either the general manager or executive director. Va. Code § 15.2-5113(B), (E). In *King*

²⁴ In *Morrisette v. McGinniss*, 246 Va. 378, 436 S.E.2d 433 (1993), the Virginia Supreme Court confirmed the language of Va. Code § 15.2-5108, holding that when an authority's corporate charter is issued, such authority shall be conclusively deemed to have been lawfully and properly created, established and authorized to exercise its powers.

²⁵ Alternates for members of water and sewer authorities shall have the same qualifications as required for members, except the alternate for a public official need not be an elected official. See Va. Code § 15.2-5113.

George County Service Authority v. Presidential Service Co. Tier II, 267 Va. 448, 593 S.E.2d 241 (2004), the Court held an oral contract negotiated by an authority's general manager void ab initio because of the authority board's failure to authorize or ratify the contract. Although the board of directors has the ability to delegate certain functions such as personnel and purchasing to the general manager or executive director, it must do so in clear regulations and policies, not just by practice or usage. See Va. Code § 15.2-5114(2). *King George* is an important reminder to authorities of the need to follow proper board action procedures and to maintain minutes and records of matters presented to and acted upon by such boards.

17-3.04 Rates, Fees, and Charges

An authority is empowered to fix, charge, and collect rates, fees, and charges for the use of, or for the services furnished by, any system operated by it. Va. Code § 15.2-5114(10).

Virginia Code § 15.2-5125 authorizes the issuance of revenue bonds, and Va. Code § 15.2-5136 authorizes an authority to fix and revise rates, fees and other charges (including a penalty not to exceed 10 percent on delinquent accounts), and interest on the principal, for the services furnished by any system operated by the authority and in connection with which the authority has issued revenue bonds.²⁶ If bonds are outstanding, Va. Code § 15.2-5136 requires that the rates shall be fixed at a level sufficient to cover the cost of maintenance, repair and operation of the system, including reserves for replacements, depreciation and extensions. Rates must also be sufficient to pay the principal and interest on bonds outstanding, plus a "margin of safety." Va. Code § 15.2-5136(A). While the statute provides that these rates, fees, and charges are subject to the jurisdiction of the SCC, the Commission has taken the position that this provision is for the protection of bondholders only and not ratepayers. "That paragraph has nothing to do with the justice, fairness or reasonableness of the rates. It is concerned only with rates sufficient to pay off the bonds." *Commonwealth ex. rel. Sterling Park Dev. Corp. v. Loudoun Cnty. Sanitation Auth.*, Case No. 16516, 61 SCC Ann. Rep. 72 (1963).

Virginia Code § 15.2-5136 does, however, provide that rates, fees and charges for sewer or sewage disposal systems "shall be just and equitable," and the statute suggests several methods upon which rates can be based and computed. Water and sewer rates, fees, and charges are expressly required to be "fair and reasonable" and may be sufficient to create reserves for expansion. Authorities "shall" "periodically" review such fees and adjust them if necessary. Va. Code § 15.2-5136(D). The Attorney General has opined that the term "shall" in this statute is directory and not mandatory. 2002 Op. Va. Att'y Gen. 112.

Rates, fees, or charges are to be fixed and revised only after a public hearing at which all of the users of the systems or facilities or owners, tenants or occupants of property served by the system have been given an opportunity to be heard. Notice of the hearing must be published once a week for two successive weeks in a newspaper having a general circulation in the area, with the first notice appearing no more than fourteen days before the hearing. Va. Code § 15.2-5136(G). Until 2013, it appeared that if an authority did not have outstanding indebtedness, it could set or change rates by simple resolution without notice pursuant to Va. Code § 15.2-5114(10). However, this was amended in 2013 to require all authorities to give public notice, with a curative provision for rates adopted before 2013. 2013 Va. Acts ch. 51; Va. Code § 15.2-5136(I).

17-3.05 Mandatory Connections

Virginia Code § 15.2-5137 authorizes an authority to require water and sewer connections under certain circumstances with the concurrence of the locality in which the system is

²⁶ Note that the words "bonds" or "revenue bonds" include notes, bonds, bond anticipation notes, and other obligations. See Va. Code § 15.2-5101.

located.²⁷ Under that section, the owner, tenant, or occupant of a parcel of land upon which a building is constructed and which abuts a street or other public way containing a water main or sanitary sewer may be required to connect the building with that water main or sanitary sewer.²⁸ After connection, the owner, tenant or occupant generally must cease to use other water supplies or means of sewage disposal. Persons having a domestic supply of potable water are not required to stop using that water after connecting but may be required to pay a connection fee, a front footage fee, and a monthly nonuser service charge. Likewise, persons having a private septic system or domestic sewage system meeting standards set by the Virginia Department of Health are not required to stop using that system after connecting, but may be required to pay a connection fee, a front footage fee, and a monthly nonuser service charge. There is no statutory power, however, for an authority to impose a nonuser fee for refuse collection. 2010 Op. Va. Att’y Gen. 87.

An authority’s power to mandate connections to the water or sewer lines has been held to be constitutional as “a reasonable exercise of the police power of the State and bearing a substantial relation to the protection and preservation of the public health.” *Farquhar v. Bd. of Sup’rs of Fairfax Cnty.*, 196 Va. 54, 82 S.E.2d 577 (1954); see also *Shrader v. Horton*, 471 F. Supp. 1236 (W.D. Va. 1979) (authority’s mandating water and sewer connections did not violate federal antitrust laws or constitute an unconstitutional “taking” without due process of law), *aff’d* 626 F.2d 1163 (4th Cir. 1980).

Any connection under Va. Code § 15.2-5137 must be in accordance with the authority’s rules and regulations or a resolution calling for such connection. Further, the local government, municipality, or county must concur with the authority’s exercise of its power to require connections. See Va. Code § 15.2-5137. The Attorney General has opined that the governing body may attach reasonable conditions to its concurrence in a mandatory connection requirement and may exempt some persons from the requirement if to do so would not violate the Equal Protection clause of the Fourteenth Amendment. See 1977–78 Op. Va. Att’y Gen. 500. “Persons” entitled to such an exemption may include both commercial and residential water users. See 1984–85 Op. Va. Att’y Gen. 443.

17-3.06 Lien for Charges

Virginia Code § 15.2-5139 provides that authorities have the same power as localities to place a lien upon real property for unpaid utility service charges, but must do so in the same manner as provided by §§ 15.2-2119 and 15.2-2119.4. See section 17-2.02(c). An authority may also contract with a locality to collect amounts due on properly recorded utility liens in the same manner as unpaid real estate taxes due the locality.

17-3.07 Applicability of Federal Minimum Wage Laws to Authority Employees

The Fair Labor Standards Act is applicable to state and local employees. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S. Ct. 1005 (1985). Compensatory time off may be paid in lieu of cash overtime payments, but must be computed on the basis of time-and-one-half for each overtime hour worked. State and local employees may accrue up to 240 compensatory time-off hours, or 160 overtime hours actually worked. Additional overtime hours must be paid out at time-and-a-half. Public safety, emergency, and seasonal employees may earn up to 480 hours of compensatory time off before cash payments are required. Under the time-and-one-half measure, this means that these employees can work only 320 actual

²⁷ While municipal corporations, authorities, and sanitary districts have specific statutory authority to require connection to water and sewer facilities, no such authority is granted to most counties. See Va. Code § 15.2-2110.

²⁸ The authority may charge a reasonable connection fee to those required to connect under Va. Code § 15.2-5137. Once a mandatory connection requirement is adopted, it is to be enforced by the authority and not the local government involved. 1979–80 Op. Va. Att’y Gen. 395A.

overtime hours before becoming eligible for cash payment. See 29 U.S.C. § 207(o).

See also Chapter 6, Federal Law Employment Issues, section 6-8.

17-3.08 Control Mechanisms

An authority generally is not governed by officials directly elected by the public. This feature of an authority removes operational and policy-making decisions from direct political influence, a feature considered by many to be an advantage to the business-like delivery of utility services. Because direct political control is not available, however, governing bodies frequently seek to place controls upon an authority. If the creating public body is concerned about the autonomy of an authority and the fact that the authority's board is not directly elected by the citizens, several control mechanisms can be used.

First, the authority's purposes can be specified, as can projects to be undertaken, in the ordinance or resolution creating the authority, or in subsequent ordinances or resolutions. The authority then would be limited to undertaking only the projects specified, or such other projects as may be specified by the governing bodies of the localities creating it. See Va. Code § 15.2-5111. Second, a contract can be made between the creating political subdivision and the authority that defines the undertaking(s) of the authority and any approval mechanism required for projects or activities of the authority. However, there may be limits on the ability of an authority, and certainly a county or city, to contract away or surrender essential discretionary legislative power regarding provision of utility services. See *Byrd v. Martin, Hopkins, Lemon & Carter, P.C.*, 564 F. Supp. 1425 (W.D. Va. 1983), *aff'd mem.*, 740 F.2d 961 (4th Cir. 1984).

Third, activities or projects of an authority are subject to control by the creating governing body as part of the comprehensive plan. Only public utility facilities (except for underground gas and electric distribution lines) shown on such plans may be constructed. See Va. Code § 15.2-2232; see also Va. Code § 15.2-2121. In the event of a dispute between an authority and a creating county, the county retains the power to provide utility services in its own right pursuant to Va. Code § 15.2-2109. See also 1987–88 Op. Va. Att'y Gen. 233. Most major projects also require zoning approval by the governing body. Finally, the creating public body can appoint one or all of its members to serve as the board of the authority. See Va. Code § 15.2-5113.²⁹

17-3.09 Community Development Authority

Owners of 51 percent of the land area or assessed value of the land in any tracts in a locality may petition such locality for the establishment of a community development authority (CDA) in any city or in a town or county that has first elected to consider such petitions. Va. Code § 15.2-5153. For petitions for CDA districts located wholly within a town, the owners shall petition the town and need not petition the county. *Id.* § 15.2-5155. In counties and towns, the governing body, following a public hearing, may adopt an ordinance electing to consider such petitions. *Id.* § 15.2-5152. A public hearing must be held prior to local government approval of the creation of the CDA. See *id.* § 15.2-5156. The landowners' petition may state that the CDA's board shall consist of a majority of petitioning landowners or their designees. *Id.* § 15.2-5152.

In addition to standard authority powers, CDAs are authorized to build roads, parks, schools, fire suppression facilities, and facilities for age-restricted adult communities. They

²⁹ An authority created pursuant to the Water and Waste Authorities Act that (i) operates a refuse collection and disposal system that processes solid waste as fuel and generates electricity for sale to a federal defense agency, or (ii) that delivers from its solid waste management facility landfill gas to a single purchaser, is not subject to the Utilities Facilities Act, Va. Code § 56-265.1 et seq. See Va. Code § 15.2-5102(B). Certain counties may levy a fee for disposal of solid waste not to exceed the actual cost incurred by the county. Va. Code § 15.2-2159.

may issue revenue bonds (including refunding bonds) for such purposes, annually request a special tax to be paid over to the authority, and request that a special assessment be imposed upon the abutting landowners. A CDA may finance and fund the acquisition of land within the district. Va. Code § 15.2-5158. In 2005, the General Assembly removed population and tract size limitations for localities seeking to establish CDAs, and also provided CDAs additional powers related to financing and funding of land acquisition. See *id.* §§ 15.2-5152, 15.2-5153, 15.2-5158. Any bonds issued by a CDA shall be the debt of the authority, not the locality.³⁰ Va. Code §§ 15.2-5131(C) and 15.2-5158(A)(2). CDAs may provide a very significant reduction in the costs of public improvements and infrastructure by allowing for the issuance of tax-exempt bonds. In addition, by incorporating Virginia’s existing special assessment program, the legislation provided for comprehensive capital and operating cost funding programs. CDAs also generally are exempt from the Procurement Act. See Va. Code § 2.2-4344.

Community development authorities are political subdivisions of the Commonwealth. Va. Code § 15.2-5155.³¹

Property that abuts a portion of a system of improvements may be taxed or assessed under the CDA statutes to pay its allocable share of the cost of the entire system of improvements. In a CDA, multiple tax parcels owned by a single landowner may all be considered to abut an improvement when at the time the assessment is levied at least one such parcel abuts the improvement, each parcel adjoins another such parcel, and each parcel derives some benefit from the infrastructure improvements. The sale of one or more such adjoining parcels to a different owner after the levy of the assessment does affect the validity of the assessment and such assessment may be apportioned subsequent to sale. A parcel is considered to abut a financed improvement when it is proximate to the improvement, but physically separated by a public right of way, easement, or road. Ownership of an easement connecting property to beneficial services such as roads or water service renders the owner of such easement an abutting owner with respect to improvements to which the easement extends. 2006 Op. Va. Att’y Gen. 89.

See *also* section 10-5.04 of Chapter 10, “Delinquent Taxes,” for a discussion of delinquent special assessments and special taxes.

17-3.10 Electric Authorities

A locality or localities may create an authority for the purposes of providing facilities for the

³⁰ The governing body may contract with any state agency or state or local authority for services within the power of such agency or authority relating to the financing, construction, or operation of the facilities and services to be provided within a service district, provided that the locality does not obligate its general tax revenues. See Va. Code § 15.2-2403(12).

³¹ This legislation overruled the Virginia Supreme Court’s decision in *Short Pump Town Center Community Development Authority v. Hahn*, 262 Va. 733, 554 S.E.2d 441 (2001). There, the Court vacated a validation proceeding in which the trial court held also that a CDA may finance infrastructure improvements only if they are necessary to meet the increased demands placed upon the locality as a result of development within the district. The trial court held that a CDA is not authorized to finance infrastructure that the developer (rather than the locality) would be required to provide, such as landscaping, roads within the developer’s property, parking, lighting, utilities, and stormwater management. *Short Pump Town Center Cmty. Dev. Auth. v. Taxpayers*, 54 Va. Cir. 501 (Henrico Cnty. 2001). The Supreme Court’s decision vacating the lower court’s decision leaves unanswered many questions about the nature of infrastructure improvements permitted to be financed by a CDA. In another lawsuit, *Taubman Regency Square Associates v. Board of Supervisors of Henrico County*, No. CH00-1304 (Henrico Cnty. Cir. Ct. May 10, 2002), many of the same issues raised in the prior trial were litigated. The trial court ruled in favor of Henrico County and the Short Pump Town Center Community Development Authority, finding that the proposed improvements were within the scope of the authorizing statute. The plaintiffs’ petition for appeal to the Supreme Court was denied.

generation, transmission, and distribution of power and energy. Va. Code § 15.2-5401. The electric authority may have many of the powers typically granted to other types of authorities, including the issuance of revenue bonds, *see id.* §§ 15.2-5406 and 15.2-5412, and the power to fix, charge, and collect rates, fees, and charges for the use of or for the services furnished. *Id.* § 15.2-5406(14). It must file its articles of incorporation with the SCC in the same manner as a water and waste authority, and generally follow the same rules for its creation. *Id.* § 15.2-5405. In most respects, it functions like a regulated public service corporation, except that it need not go through SCC review as regulated public service corporations do. Va. Code §§ 15.2-5412, 15.2-5416.

An authority is created by adoption by one or more localities of an ordinance or resolution, following a public hearing on the question of such adoption. Va. Code § 15.2-5403. No government unit may participate as a member of such an authority unless a majority of voters approves such participation. *Id.* § 15.2-5403.

17-3.11 Wireless Service Authorities

A locality or multiple localities acting concurrently may create a wireless service authority. Va. Code § 15.2-5431.3. This is an alternative to the procedure provided under Va. Code § 56-484.7:1, which allows a locality to obtain a certificate from the SCC directly to provide wireless telecommunications services of the same type as localities are authorized to provide in telecommunication services. *See* section 17-2.05. A wireless services authority—often called a broadband authority or network authority—may exercise many of the powers typically granted to other types of authorities, including the issuance of revenue bonds, but does not have the powers of eminent domain, mandatory connections, to provide cable or other multi-channel television service, or to displace competitors in the market except through market-based competition. *See* Virginia Wireless Service Authorities Act, Va. Code § 15.2-5431.1 et seq. They are created and function in substantially the same manner as water and waste authorities.

Wireless service authorities have proliferated in the Commonwealth during the last decade due to the perceived need for more and better internet than is being provided by the private sector. This is not altogether dissimilar to the provision of municipal utilities in the first half of the 20th century. *See, e.g., Light v. City of Danville*, 168 Va. 181, 190 S.E. 276 (1937) (Danville provided electric power because it was otherwise unavailable in the city from the private sector). The limitations imposed by Va. Code §§ 15.2-1500(B) and 15.2-2160 and the cumbersomeness of the SCC process under Va. Code § 56-484.7:1 et seq. make a wireless service authority an appealing option for localities that wish either to provide service or to enter into public-private partnerships with the private sector to accelerate deployment in unserved or underserved areas.

Small cell and micro wireless facilities provided by any type of wireless service or wireless infrastructure provider are governed by Va. Code § 56-484.26 et seq. A locality cannot impose any conditions on such providers that are “unfair, unreasonable, or discriminatory.” A locality cannot require in-kind services or physical assets as a condition and cannot impose a moratorium on considering requests for access to public rights-of-way. Va. Code § 56-484.27. The procedure for granting locality-wide access to public rights-of-way for installation on existing structures is detailed, and restrictions on fees are imposed. Va. Code § 56-484.29. Permits for new wireless support structures are for ten years with three options for five-year renewals. Va. Code § 56-484.30. Restrictions are also placed upon the terms that a locality can impose to locate such facilities on government-owned structures. Va. Code § 56-484.31.

17-4 DELIVERY BY SANITARY DISTRICTS

Certain utility services in Virginia frequently are provided by sanitary districts³² created under Va. Code §§ 21-112.22 to 21-140.3. A sanitary district is a special entity, created pursuant to the petition of fifty or more qualified voters within a proposed district and after a hearing on the petition by the governing body of the county or city of the proposed district.

A sanitary district has essentially the same powers with respect to providing utility services as an authority, except that sanitary districts also are empowered to provide “dams, motor vehicle parking lots, water supply, drainage, sewerage, garbage disposal, heat, light, power, gas, sidewalks, curbs, gutters, streets and street name signs and fire-fighting systems,” plus community buildings and centers and other recreational facilities. Va. Code § 21-118.4(a). For a good discussion of the nature of a sanitary district as a legal entity, see *Marsh v. Gainesville-Haymarket Sanitary Dist.*, 214 Va. 83, 197 S.E.2d 329 (1973).³³ The statutory scheme generally presupposes that the districts will be encompassed by a single jurisdiction. Upon reaching an agreement with another jurisdiction, however, a sanitary district can operate outside its boundaries. 2010 Op. Va. Att’y Gen. 109.

The primary conceptual and functional differences between delivery of utility services through a sanitary district, as opposed to an authority created under the Virginia Water and Waste Authorities Act, are: (1) taxing and debt powers; and (2) governance.

17-4.01 Taxing and Debt Powers

A sanitary district has specific power to levy and collect an annual tax upon all property in the district.³⁴ Va. Code § 21-118(6). An authority has no such taxing power and must rely solely upon revenues derived from system operations. This is an important distinction. Issued revenue bonds of a sanitary district generally are included in the constitutional debt limitation applicable to the governing body where the district is located, see Va. Const. art. VII § 10, unless the maximum number of bonds to be issued is fixed in advance, the bonds are issued for a specific, revenue-producing undertaking, and the revenue generated by the undertaking is sufficient to pay for the bonds on their maturity. See Va. Code § 21-122.

In 1986, the Virginia General Assembly added Va. Code § 21-122.1, permitting the governing bodies of counties to issue bonds to satisfy improvements to water or sewage systems mandated by the State Water Control Board. The principal and interest of these bonds is paid solely from the revenue produced by the sewage system to be improved. Unlike bonds issued pursuant to Va. Code § 21-122, bonds issued under Va. Code § 21-122.1 do not require bond referenda, nor are the rules set forth in Va. Code §§ 21-122 to 21-140.3 (relating to election requirements and procedures for levy of an annual property tax) applicable.

However, Va. Code § 21-121.6, enacted to address a development timing and financing situation in Loudoun County, prohibits the issuance of bonds of a sanitary district created after January 1, 1993, in counties that have created a water and sewer authority, without the approval of the governing body of the county. A referendum on the issuance of the bonds may not be held in the district unless the county requests the referendum. If the

³² For further discussion of sanitary districts, see Chapter 11, Economic Development Incentives, section 11-5.04 and Chapter 12, Financing Local Governments, section 12-7.04.

³³ The General Assembly has also authorized the establishment of “service districts” to provide numerous services, including certain utility services such as water, sewerage, heat, and light. See Va. Code § 5.2-2400 et seq. See section 11-5.05 of Chapter 11, Economic Development Incentives, for an expanded discussion of service districts.

³⁴ A sanitary district may both levy taxes and collect service charges to finance its operation. The charge for services provided by a sanitary district may be assessed at a fixed rate and improvements to the real property may be assessed an additional charge based on the assessed value of such improvements. See 1997 Op. Va. Att’y Gen. 111.

district levies a tax to pay the expenses of a project in the district, all property in the district will be taxed at its full assessed value, regardless of any special land use assessment ordinance. Those petitioning for the creation of a sanitary district are required to provide written notice of the court hearing twenty-one days prior to the hearing to each owner of land whose property is assessed at use value. The county's lien for real estate taxes has priority over any lien for taxes levied by the sanitary district. The district may enter into agreements with the water and sewer authority regarding the construction, operation, and use of water, sewer, and other systems. The sanitary district may also issue bonds for water, sewer, and other systems, whether they are owned by the district or the water and sewer authority.

17-4.02 Governing Body

The governing body of a sanitary district is the same as the governing body of the city or county that created it. Thus, the board of supervisors that creates a sanitary district becomes the governing body of that district and must manage the business of that district. On the other hand, an authority board can be, and usually is, made up of members other than the board of the creating locality. This can be an important consideration for the governing body of a county or city that does not wish to spend its time conducting public hearings on establishing or revising utility rates within a sanitary district.³⁵

17-5 DELIVERY BY PUBLIC SERVICE CORPORATIONS

The following is a brief description of the delivery of public utility service by public service corporations and companies. As noted above, a detailed summary and analysis of the regulation of such entities is beyond the scope of this chapter. However, their regulation is discussed here briefly in the context of its bearing on local government issues.

The terms public service corporation or public service company are defined as follows:

"Public service corporation" or "public service company" includes gas, pipeline, electric light, heat, power and water supply companies, sewer companies, telephone companies, telegraph companies, and all persons authorized to transport passengers or property as a common carrier . . . and shall not include a (i) municipal corporation, other political subdivision or public institution owned or controlled by the Commonwealth; however, if such an entity has obtained a certificate to provide services pursuant to § 56-265.4:4, then such entity shall be deemed to be a public service corporation or public service company and subject to the authority of the Commission with respect only to its provision of the services it is authorized to provide pursuant to such certificate; or (ii) [any farm or aggregation of farms that own or operate facilities within the Commonwealth for the generation of electric energy from waste-to-energy technology].³⁶

³⁵ An electric utility owned or operated by a sanitary district as of July 1, 1999, is not subject to the Electric Utility Restructuring Act, Va. Code § 56-576 et seq., unless it elects to have the Act's provisions apply or the utility sells or offers electric service to a retail customer outside the geographic area served by the district as of July 1, 1999. See Va. Code § 56-580(F).

³⁶ The General Assembly added subsection (ii) in 2009. In 2009, the General Assembly also adopted, as part of the Virginia Energy Plan, a process for persons operating renewable energy facilities to utilize existing rights-of-way and easements in order to deliver electricity or energy generated at such facilities, which process requires, among other things, consent of the local governing body. See Va. Code § 56-614 et seq. (previously § 67-1100 et seq.).

Va. Code § 56-1.³⁷

17-5.01 State Corporation Commission Responsibilities

The General Assembly has vested the State Corporation Commission with the responsibility of “supervising, regulating and controlling all public service companies doing business in this Commonwealth,” including monitoring the reasonableness of their rates. Va. Code § 56-35. This statute has been construed as imposing an affirmative duty upon the SCC to maintain active control over such companies. See *Bus. Aides, Inc. v. Chesapeake & Potomac Tel. Co.*, 480 F.2d 754 (4th Cir. 1973).³⁸ The SCC is created by the Virginia Constitution and is delegated by statute the duty to regulate the rates, charges, services, and facilities of telephone, gas, and electric companies. See Va. Const. art. IX, § 2.³⁹ Its purpose is “to protect the public rights by regulating public utilities.” *Newport News & O.P. Ry. v. Hampton Roads Ry. & Elec. Co.*, 102 Va. 847, 47 S.E. 858 (1904). After notice, either in the context of or apart from a rate proceeding, the SCC may approve special rates or incentives to individual public utility customers or classes of customers where it finds such measures to be in the public interest. Va. Code § 56-235.2(A). See *City of Alexandria v. State Corp. Comm’n*, 296 Va. 79, 818 S.E.2d 33 (2018) (SCC has authority to authorize public utility’s imposition of a surcharge separate from the base rate to be used to replace infrastructure); see generally *Wal-Mart Stores E., LP v. State Corp. Comm’n*, 299 Va. 57, 844 S.E.2d 676 (2020) (regarding deference due SCC’s statutory construction balanced with court’s duty to review questions of law de novo). Accordingly, the SCC is generally responsible for, among other things, the regulation of rates and services of electric, gas, water, sewer, and telephone utilities, as defined in Title 56 of the Code of Virginia, as well as administration of the Utility Facilities Act, enforcement of programs involving jurisdictional natural gas and hazardous liquid pipeline facilities, and underground utility damage prevention.⁴⁰ A circuit court has jurisdiction to hear a claim that a private water

³⁷ Virginia Code § 56-1.2 provides that the definition of public service company does not include persons who own or operate property and provide water to residents or tenants on such property, pursuant to Chapters 1, 10, 10.1 and 10.2:1 of Title 56 (which relate to utility companies, utility facilities, and small public utilities), provided that such persons purchase the water from a public service company or other public body, and the water provider charges the resident or tenant only that portion of the utility charges for the water permitted by Va. Code § 55.1-1307 and maintains billing records. A 2006 amendment to Va. Code § 55.1-1307 (previously § 55-248.45:1) authorized manufactured home park owners to charge actual and other reasonable utility charges. The Attorney General has opined that this provision does not prevent a county, pursuant to its authority under Va. Code § 15.2-2111, from prohibiting, by ordinance, the resale of water purchased from the county water system. 1995 Op. Va. Att’y Gen. 240. For a discussion of the concurrent jurisdiction of localities and the SCC over small water and sewer utilities, see section 17-2.02.

³⁸ In general, the SCC regulates Virginia’s investor-owned electric, natural gas, water, and sewer utilities, as well as member-owned electric cooperatives and the telecommunications industry. It also administers safety programs involving jurisdictional natural gas and hazardous liquid pipeline facilities, railroads, and underground utility damage prevention. In 2009, the General Assembly excluded from the definition of “public utility” any company that provides non-utility gas service, and it adopted requirements for the delivery of such services. See Va. Code § 56-265.4:6.

³⁹ In *Old Dominion Committee for Fair Utility Rates v. State Corporation Commission*, 294 Va. 168, 803 S.E.2d 758 (2017), the Supreme Court of Virginia held that a statute that suspended the SCC’s biennial rate review and prohibited the SCC from adjusting base rates (effectively a four-year rate freeze) did not violate the Commission’s constitutional duty to regulate rates. In so ruling, the Court held that the manner of exercising the duty was subject to the power of the General Assembly to determine the criteria and specifications for its exercise.

⁴⁰ The SCC also enforces the requirements of the Underground Utility Damage Prevention Act (Va. Code § 56-265.14 et seq.), which is designed to minimize the probability of damage to underground utilities from excavation or demolition activities, and sets forth a scheme of liability. Excavators who willfully fail to notify a notification center of proposed excavation or demolition are liable to an operator whose facilities are damaged (by that excavator) for three times the cost to repair the damaged property

utility breached obligations to its customer under an SCC-approved tariff. *Ashland LLC v. Virginia-American Water Co.*, 301 Va. 362, 878 S.E.2d 378 (2022).

As noted above, the term “public services company” excludes municipalities, political subdivisions, and certain farms using waste-to-energy technology. Va. Code § 56-1; *see also id.* § 56-232 et seq. (“Heat, Light, Power, Water, and Other Utility Companies Generally”); *id.* § 56-265.1 et seq. (“Utility Facilities Act”).⁴¹ Also, the SCC has no jurisdiction to regulate the rates or terms and conditions of sewage treatment services provided by a public utility directly to persons pursuant to the terms of a franchise agreement between the public utility and a Virginia municipality. *Id.* § 56-232(A)(2). Voice over Internet Protocol (VoIP) service is excluded from SCC jurisdiction and from the definition of telephone service. *Id.* §§ 56-1, 56-1.3.

However, the SCC has authority to regulate “the utility service furnished to any municipal corporation by a natural gas pipeline transmission company, all of whose facilities are located within the Commonwealth, and the rates, charges and facilities of such company used to furnish such service.” Va. Code § 56-232.1.

The General Assembly clarified in 2006 that certain gas facilities, which are not public utilities, are subject to SCC jurisdiction regarding gas pipeline safety and enforcement. Va. Code §§ 56-232 and 56-265.1.

If a municipality desires to cross the works of a railroad company with a public utility line and the municipality and railroad company cannot agree on the manner of the crossing or the compensation to be paid or the damages, if any, occasioned by such crossing, then either party may apply to the SCC to resolve the matter, under the requirements set forth in Va. Code § 56-16.2. If the SCC grants such application, the order of the SCC shall require the railroad to grant to the municipality a license for such crossing upon compliance with the terms of the order, and shall fix a fee for the crossing and determine the damages, if any. Va. Code § 56-16.2. Construction shall not begin until permitted under an order or unless the SCC expressly authorizes it pending a final determination. *Id.*

The procedural requirements for a fiber optic broadband line crossing a railroad are set forth in Va. Code § 56-16.3.

17-5.02 Powers and Duties of Public Service Companies

In general, the basic duty of public service companies, as defined by statute, is “to furnish reasonably adequate service and facilities at reasonable and just rates to any person, firm or corporation along its lines desiring same It shall be [their] duty to charge uniformly therefor” Va. Code § 56-234. The Commission is vested with broad and discretionary

(provided the operator is a member of the notification center) and up to \$10,000 in punitive damages in any single cause of action. Va. Code § 56-265.17. Under the Act, the SCC may impose a civil penalty not exceeding \$10,000 for each violation of § 56-265.17 and \$5,000 for other violations of the Act occurring as a result of failure to exercise reasonable care. Va. Code § 56-265.32. The Act exempts counties, cities and towns from the foregoing enforcement provisions, Va. Code §§ 56-265.17, 56-265.24, 56-265.28, except that the SCC will inform such localities of reports of alleged violations and, at the request of the locality, suggest corrective action. Va. Code § 56-265.32. The Act further provides that moneys generated by enforcement of the Act be paid into a special fund to be used by the SCC for regulatory oversight and public awareness programs. *Id.* § 56-265.14 et seq. While political subdivisions are exempt from the Damage Prevention Act, they are required to join the notification center for their area, Va. Code § 56-265.16:1, and to obey strict requirements regarding the protection of private utility lines or face SCC action for recurring noncompliance. Va. Code §§ 56-265.19:1, 56-265.32.

⁴¹ In the context of SCC administration, the terms “public service corporations” and “public utilities” tend to be used interchangeably.

powers to regulate these activities. See *id.* §§ 12.1-12 to 12.1-17, 56-247, and 56-247.1.⁴²

The powers of public service corporations, set out in Va. Code § 56-49(2), are extensive and include a derived power of eminent domain to acquire lands deemed necessary for service to the public. See Va. Code § 56-49(2); see also *id.* § 56-260. Any proposed condemnation proceedings must be conducted according to the provisions of Chapter 2 of Title 25.1, the Virginia General Condemnation Act. See [Chapter 4, Condemnation Procedure](#). Public service companies may enter into partnerships, joint ventures, or other associations for purposes they could otherwise do alone, with certain equity restrictions. Va. Code § 13.1-627(B).

Virginia Code § 56-49.01, which authorizes a natural gas company to enter private property without the landowner's written permission and perform a survey for a proposed natural gas pipeline, has been held constitutional under both the U.S. and Virginia Constitutions. *Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673 (W.D. Va. 2015); *Palmer v. Atl. Coast Pipeline*, 293 Va. 573, 801 S.E.2d 414 (2017); see also *Little v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 699 (W.D. Va. 2015) (statute not void for vagueness); *Chaffins v. Atl. Coast Pipeline*, 293 Va. 564, 801 S.E.2d 189 (2017) (requirements of notice provisions).

Virginia Code § 56-265.3 requires a public utility to obtain a certificate of convenience and necessity from the SCC before it can provide services. See *VYVX, Inc. v. Cassell*, 258 Va. 276, 519 S.E.2d 124 (1999). However, utilities in operation prior to July 1, 1950, are exempted from this requirement. The certificate issued pursuant to this section grants a franchise that will be protected as private property. See *Town of Culpeper v. Va. Elec. & Power Co.*, 215 Va. 189, 207 S.E.2d 864 (1974).

By definition, a certificate of convenience and necessity is not required for companies serving fewer than fifty customers, although any company furnishing water or sewer services to ten or more customers may not abandon such services without SCC approval or unless all the company's customers agree to accept ownership of the company. Va. Code § 56-265.1(b)(1). A public utility may construct ordinary extensions and improvements outside the territory in which it is authorized to operate without obtaining a certificate. The utility must file a map with the SCC and give prior notice to any entity certified to provide service in that area. If such entity objects, the SCC can amend or prohibit such construction if it finds the construction will interfere with the entity's utility service. *Id.* § 56-265.2.

Public service corporations are subject to many of the same controls by localities that private parties are subject to, including planning, zoning, subdivision control, site plans, building permits, and the like.⁴³ The SCC approves the location of electrical transmission lines

⁴² The statutory powers of the SCC have generated a significant number of interpretive decisions. For a collection of relevant annotations, see generally 15 M.J., *Public Service and State Corporation Commissions* § 17-35.

⁴³ But see *Crown Castle NG Atlantic LCC v. City of Newport News*, No. 4:15-cv-93 (E.D. Va. Aug. 8, 2016), in which the court held that pursuant to Va. Code § 56-462(C), a locality may not single out a certificated provider of telecommunications services for more burdensome treatment based solely on the unique equipment or technology it uses. Rather, the restrictions and requirements imposed on the provider of telecommunications services must not be greater than those imposed on the other specified users of the public rights-of-way. Whether this continues to be good law in light of the FCC's recent ruling that internet and VoIP are not technically "telecommunications," and therefore are not eligible for an SCC certificate in the first place, is open to question. See *In re Restoring Internet Freedom*, 32 F.C.C.R. 5650 ¶ 2 (2018).

of 138 kilovolts or more, although a locality may require the SCC to hold a hearing.⁴⁴ Va. Code § 56-46.1(C). Whether location of other facilities of public service corporations by localities enjoys the same presumption of correctness as is accorded zoning actions in most instances is not resolved in Virginia.

17-5.03 Particular Regulatory Controls for Water and Sewer Services

Water and sewer public service companies are required to supply services and facilities sufficient for adequate fire protection and public health in cities, towns, or counties with certain population densities. See Va. Code §§ 56-261, 56-261.1, and 56-261.2.

As noted above, any entity seeking to supply water or sewer services capable of serving three or more connections still must also seek the approval of the county in which such system is to be located. Va. Code §§ 15.2-2126 and 15.2-2149. The county may require the proposed system to meet certain standards. See Va. Code § 15.2-2121.

The Attorney General has construed the Small Water or Sewer Public Utility Act (Va. Code § 56-265.13:1 et seq.) and Va. Code § 15.2-2111 as conveying authority to both the SCC and a locality to regulate the rates of a small water utility. The locality may set rates in accordance with § 56-265.13:4. After a hearing on the request of the utility, the SCC, or 25 percent of the affected customers, the Commission has the authority to supersede the locality's rates. See 1998 Op. Va. Att'y Gen. 117.

Virginia Code § 56-264.2 requires entities that provide sewage services to Virginia and an adjacent state be managed under the direction of a governing board, which may be titled a board of directors, board of trustees, or similar appellation. The governing board must be comprised of (i) two members residing in the Commonwealth for each locality of the Commonwealth wherein the multistate entity provides sewage treatment services, and (ii) a number of members residing in the adjacent state that is equal to the number of members residing in the Commonwealth. The governing body of each locality of the Commonwealth wherein the multistate entity provides sewerage services must appoint two individuals to the board, which individuals need not be residents of that locality. Va. Code § 56-264.2.

17-5.04 Particular Regulatory Controls for Electrical Services

In determining whether to grant a certificate of convenience and necessity for an electrical utility facility, the SCC is directed to consider the environmental impact of the proposed facility. Va. Code § 56-46.1.⁴⁵ See *BASF Corp. v. SCC*, 289 Va. 375, 770 S.E.2d 458 (2015) (SCC properly weighed need for the project against negative environmental, historical, and economic development impacts); see also *Rappahannock League v. Va. Elec. & Power Co.*, 216 Va. 774, 222 S.E.2d 802 (1976); *Bd. of Sup'rs of Fairfax Cnty. v. VEPCO*, 222 Va. 870, 284 S.E.2d 615

⁴⁴ For construction of any transmission line of 138 kilovolts and associated facilities, a public utility may forgo SCC review if it obtains approval pursuant to the requirements of § 15.2-2232 and applicable zoning ordinances by any locality in which the transmission line will be located. However, if SCC approval for the lines and facilities is obtained, Va. Code § 15.2-2232 is deemed satisfied. Va. Code § 56-265.2(A)(2). The Supreme Court in *BASF Corp. v. SCC*, 289 Va. 375, 770 S.E.2d 458 (2015), held that Va. Code § 56-41.1(F), which applies to transmission lines of 138 kilovolts or more, exempted transmission lines from local zoning regulations if approved by the SCC, but not a switching station. While the term "associated facilities" was added to § 56-265.2 post-*BASF*, § 56-41.1 was not so amended. Thus, *BASF* remains good law with regard to transmission lines higher than 138 kilovolts: with SCC approval the transmission lines, but not their associated facilities, are exempt from local approval.

⁴⁵ In addition to considering the environmental impact and local comprehensive plans when determining whether to approve construction of an electric utility facility, the SCC may consider the effect of the facility on economic development, and it shall consider any improvements in service reliability that may result from the construction of such facility. Va. Code § 56-46.1.

(1981); *Va. Elec. & Power Co. v. Prince William Cnty.*, 226 Va. 382, 309 S.E.2d 308 (1983).

Electric utilities must notify an affected locality prior to filing an application with the SCC to undertake construction of any electric transmission line of 150 kV or more. See Va. Code § 15.2-2202(E). In addition, in any hearing before the SCC concerning such lines, if the

local comprehensive plan of an affected county or municipality designates corridors or routes for electric transmission lines and the line is proposed to be constructed outside such corridors or routes, . . . the county or municipality may provide adequate evidence that the existing planned corridors or routes designated in the plan can adequately serve the needs of the company. Additionally, the Commission shall consider, upon the request of the governing body of any county or municipality in which the line is proposed to be constructed, (i) the costs and economic benefits likely to result from requiring the underground placement of the line and (ii) any potential impediments to timely construction of the line.

Va. Code § 56-46.1(B).⁴⁶

Special forms of public service corporations are authorized under the Utility Consumer Services Cooperatives Act, Va. Code § 56-231.15. The Act applies to not-for-profit cooperatives of five or more natural persons for the purpose of providing electrical power to members of the cooperative. The Power Supply Cooperatives Act applies to not-for-profit cooperatives for the purpose of purchasing, selling, generating, or transmitting electric energy for resale other than to the ultimate consumer. A good review of the rules governing electrical cooperatives is contained in *Central Virginia Electrical Cooperative v. State Corporation Comm'n*, 221 Va. 807, 273 S.E.2d 805 (1981).⁴⁷

17-6 DUTY TO PROVIDE WATER AND SEWER SERVICES

Localities struggle with the political and economic tensions to control or encourage growth by extending or not extending water and sewer services available to a particular area, or by withholding that service within the context of planning and zoning decisions and policies. Decisions either to provide or withhold utility services have produced case law reaching varying conclusions, some of which turn on whether the contested utility service is water or sewer, and whether that service is within a defined service area within the locality's political boundaries or whether the area is outside those boundaries.

There is some tension between prevailing trends in Virginia and those in other parts of the country. This section will attempt to deal with the trends evenhandedly, noting divergences and difficulties where relevant.

17-6.01 Sewer Service

The determination of the necessity for and the location of sewers and drains, and the power to order their construction, are generally vested in a legislative body, commission, district, authority, or similar board or agency. Eugene McQuillin, *Municipal Corporations* § 31.14 (3rd ed.) (hereinafter "McQuillin"). In the absence of a statute imposing a mandatory duty to provide

⁴⁶ The General Assembly in 2007 exempted underground natural gas and underground electric distribution facilities from the requirements of Va. Code § 15.2-2232 (which requires a substantial accord determination by the local planning commission for public utility facilities not shown on the adopted master plan).

⁴⁷ Subsidiaries of electric cooperatives may engage in the furnishing of water and sewer facilities upon the approval of the governing body of the locality in which such service is proposed and, if an authority has such facilities available in that area, the approval of that authority. See Va. Code § 56-231.16.

a sewage system, the municipality is generally the sole judge of the necessity or desirability of sewers and drains. *Id.* at § 31.17. Localities have discretion to determine dates of construction and the nature, capacity, location, number, and cost of sewers and drains, and courts will not interfere except in cases of fraud, oppression, and arbitrary action. *Id.* This discretion extends to the area covered by the sewer and the location of branch or lateral sewers. *Id.* The United States Supreme Court has held that a court should not interfere with a municipality's discretionary power to determine where to locate a sewer. *Vicksburg v. Vicksburg Waterworks Co.*, 202 U.S. 453, 26 S. Ct. 660 (1906). In *Vicksburg*, the Supreme Court stated that it had no authority to issue a mandatory injunction requiring a city to construct a sewer and that such authority is primarily vested in the municipality and not the courts. *Id.*; accord *Archambault v. Water Pollution Control Auth.*, 10 Conn. App. 440, 523 A.2d 931 (Conn. App. Ct. 1987) (denying mandamus to compel extension of sewer line to plaintiff's land even though the county had already provided sewer service to land surrounding the plaintiff's land).

Virginia statutes and case law appear to be in accord with these general principles. See Va. Code § 15.2-2109 (locality may acquire or otherwise obtain control of or establish, maintain, operate, extend and enlarge waterworks and sewer systems); § 15.2-2111 (locality may regulate sewage collection, treatment, or disposal service and water service, and such regulation may include establishment of an exclusive service area for any sewage or water system, including a system owned and operated by the locality); § 15.2-2128 ("Notwithstanding any other provision of general law relating to approval of sewage systems, the governing body of any county or town which has adopted a master plan for a sewage system is authorized to deny an application for a sewage system if such denial appears to it to be in the best interest of the inhabitants of the county or town.").⁴⁸

Several Virginia courts have recognized that extension of sewer services is a legislative function. "When a municipality plans, designs, regulates or provides a service for the common good, it performs a governmental function." *Robertson v. W. Va. Water Auth.*, 287 Va. 158, 752 S.E.2d 875 (2014) (quoting *City of Chesapeake v. Cunningham*, 268 Va. 624, 604 S.E.2d 420 (2004)); see also *Freeman v. City of Norfolk*, 221 Va. 57, 266 S.E.2d 885 (1980) (street maintenance is a proprietary function but street design is a governmental function).⁴⁹

The Virginia Supreme Court has recognized that a sewer provider must "have large discretion to determine the time and manner of accomplishing the objects for which it was created." *Hampton Rds. Sanitation Dist. Comm'n v. Smith*, 193 Va. 371, 68 S.E.2d 497 (1952). Similarly, in a drainage case, the Court stated that:

The duties of the municipal authorities, in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon consideration affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion, in the selection and adoption of the general plan or system of drainage, is not subject to revision by court or jury in a private action for not sufficiently draining a particular lot of land.

⁴⁸ A former statute provided that "owners of adjacent lands shall have the right to connect their premises with such sewers and water mains on such terms as the governing body shall prescribe." Va. Code § 15.1-300 (repealed).

⁴⁹ Planning and designing a sewer system is a governmental function when done by a city or water and waste authority, while operating and maintaining it is proprietary; it is entirely governmental when carried out by a county. *Robertson v. W. Va. Water Auth.*, 287 Va. 158, 752 S.E.2d 875 (2014); *Mann v. Cnty. Bd. of Arlington Cnty.*, 199 Va. 169, 98 S.E.2d 515 (1957). For a fuller discussion of governmental versus proprietary functions, see Chapter 20, Sovereign Immunity, section 20-2.01.

Wright v. City of Richmond, 146 Va. 835, 132 S.E. 707 (1926) (citing with approval *Johnston v. District of Columbia*, 118 U.S. 19, 6 S. Ct. 923 (1886)); see also *Robertson v. W. Va. Water Auth.*, 287 Va. 158, 752 S.E.2d 875 (2014) (a municipality cannot be liable in connection with the adoption and implementation of a plan for supplying the municipality with sewerage).

Several circuit court cases, which arose out of Fairfax County's downplanning of the Occoquan River valley out of the Fairfax County Water Authority's service area in an evident attempt to control growth in that part of the county, may elucidate probable future trends. In *NVLand v. Board of Supervisors of Fairfax County*, Ch. No. 105959 (Fairfax Cnty. Cir. Ct. Apr. 4, 1990 and June 5, 1991), the county's board of supervisors had refused to provide in its comprehensive plan for the extension of sewer to land owned by the plaintiff. In denying relief to the plaintiff, the court confirmed that a board's decision to amend a sewershed map and extend a sewer is strictly legislative in nature. *Id.* The court also noted that if the board of supervisors had agreed to extend sewer to land owned by the plaintiff, the board would have retained its discretion to deny future requests for sewer service extensions. *Id.*

In *Schwartz v. Board of Supervisors of Fairfax County*, the board of supervisors had allowed owners of lots in the Gunston/Wiley area with buildings and failing septic systems on them as of March 1994 to reserve connections to a "pump-haul" system to be built in the future. 53 Va. Cir. 163 (Fairfax Cnty. 2000). There, the plaintiff had owned twenty-one lots as of March 1994, but his lots were not eligible to reserve sewer connections because the lots were undeveloped. *Id.* The court held that the board's June 1994 amendment to the county's comprehensive plan and its approval of an expansion of the Approved Sewer Service Area did not equate to a "final action" establishing sewer service in the Gunston/Wiley area, and did not require the county's water authority to construct a sewer in the Gunston/Wiley area. *Id.* In addition, the court noted that it was within the board of supervisors' discretionary authority to allow only owners of lots in the Gunston/Wiley area with buildings on them as of March 1994 to reserve connections to a sewer that may be built in the future. *Id.*; see *McLaughlin v. Town of Front Royal*, 38 Va. Cir. 387 (Warren Cnty. 1996) (citing McQuillin § 53.119) ("The establishment of sewers and drains by a municipal corporation is the exercise of a legislative or quasi-judicial power, and the legislative body of the municipality is the sole judge of the necessity for such action. At common law, a municipal corporation is under no obligation to provide drainage or sewage for its inhabitants, unless rendered necessary by its own act")

Thus, a municipality that owns and operates its sewer system cannot be compelled by mandatory injunction to extend its sewer system because the municipality has discretion to make decisions about such governmental functions. See *Mountain Venture P'ship Lovettsville II v. Town of Lovettsville*, 42 Va. Cir. 109 (Loudoun Cnty. 1997); see also *McLaughlin v. Town of Front Royal*, 38 Va. Cir. 387 (Warren Cnty. 1996). In addition, there is no constitutional right to sewer service, and denial of sewer service equates to the failure to confer a benefit and does not equate to a taking of one's property. See *Front Royal & Warren Cnty. Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998) (applying Virginia law).⁵⁰ In one reported case, however, a court compelled the extension of service but only because the municipality had a separate duty under an annexation decree to provide sewers to the plaintiffs, which, the court found, constituted a ministerial act distinctly different from the discretionary nature of the general municipal obligation to provide sewers. *McLaughlin, supra*.

⁵⁰ Moreover, even when a landowner installs sewer lines at his own expense and the sewer lines are later accepted and used by a town in providing sewer services to a community, the landowner is not entitled to reimbursement from the town for the cost of installing the sewer lines unless the town agrees to do so. See *Westbrook, Inc. v. Town of Falls Church*, 185 Va. 577, 39 S.E.2d 277 (1946). Whether improvements such as those installed by Westbrook, Inc., should be made at the town's expense is within the discretion of the town's government. *Id.*

17-6.02 Water Service

The general rule pertaining to the establishment and extension of water services is similar to the rule for sewer services discussed above. In determining whether to establish or extend service, a locality exercises its discretion, which is not subject to judicial review in the absence of bad faith or arbitrary and capricious action. See Eugene McQuillin, *Municipal Corporations* § 35.35.25 (3rd ed.). A municipality that owns its waterworks cannot be compelled by mandatory injunction to extend a water main because the municipality has discretion to make decisions about such governmental functions. *Id.*; accord *Mountain Venture P'ship Lovettsville II v. Town of Lovettsville*, 42 Va. Cir. 109 (Loudoun Cnty. 1997) (town cannot be compelled to extend water system in annexation).

Some foreign jurisdictions have adopted the principle that “[w]ithin the geographic territory a public utility has undertaken to serve and within which it has the exclusive legal right to provide necessary services, the public utility has a legal duty to provide services on an equal basis to all users who apply for service at reasonable and nondiscriminatory rates and deposits.” McQuillin § 35.35.40. “A public utility can attach no conditions to its duty to provide services that are unlawful, improper or personal to the user.” *Id.* The duty to supply water to all the inhabitants of a municipality who apply for the service and tender the usual rates includes the establishment of a distribution system adequate to serve the needs of the municipality, and enlargement of the system to meet the reasonable demands of a growing community. See *id.* § 35.35.25.

The law in Virginia, however, appears more complicated. Older, compact cities and towns generally provide water and sewer on an equal basis within their boundaries. But counties and larger cities common in the Hampton Roads area typically designate service areas through their comprehensive planning powers, their contracting powers, and their ability to designate exclusive service areas. See Va. Code §§ 15.2-2111, 15.2-2112, 15.2-2232.⁵¹ There is broad variation in the Commonwealth in how these service areas are laid out. However, two points seem to be more or less clear. When water service is not in accordance with the comprehensive plan, there is no duty for a municipality to provide it in that area. *Bd. of Sup'rs of Culpeper Cnty. v. Greengael, LLC*, 271 Va. 266, 626 S.E.2d 357 (2006). However, within a designated service area, there likely is a duty to serve of some type, absent a valid utility-related reason not to (e.g., insufficient capacity, unreasonable cost for extensions, etc.), although the extent of the obligation likely is controlled by the language of the comprehensive plan. 1989 Op. Va. Att’y Gen. 137.

When a municipality exercises discretion concerning extension of its water system, governed largely by the need for the extension and economic considerations, that discretion must be fairly and reasonably exercised. See McQuillin § 35.35.25. “Denial of an extension for a newly developed tract, or the imposition of conditions to the grant of an extension, must not be unreasonable, arbitrary or an abuse of discretion.” *Id.* § 35.35.25.

There is authority from foreign jurisdictions, particularly in the western part of the country, that a moratorium on new water service enacted in the absence of a water shortage could violate the Equal Protection Clause of the U.S. Constitution. Dennis J. Herman, *Note: Sometimes There’s Nothing Left to Give: The Justification for Denying Water Service to New Customers to Control Growth*, 44 Stan. L. Rev. 429 (1992) [hereinafter *Nothing Left*]. In the absence of some reason other than a water shortage for its imposition, a water moratorium may be declared invalid under the Equal Protection Clause because no rational basis would exist for discriminating between existing and potential water users. *Nothing Left*, 44 Stan. L. Rev. at 453-54; see also *Robinson v. City of Boulder*, 547 P.2d 228 (Colo. 1976) (holding that a utility must furnish a utility-related reason for denying service extensions), *overruled*

⁵¹ See Chapter 1, Planning and Zoning, section 1-7, for a broader discussion of the nature and function of comprehensive plans.

on other grounds, *Bd. of Cnty. Comm'rs v. Denver Bd. of Water Comm'rs*, 718 P.2d 235 (Colo. 1986).

However, Virginia law appears to differ on this issue. A water moratorium or refusal of water or sewer service has been found not to be a taking or violation of constitutional provisions in Virginia. In *Board of Supervisors of Culpeper County v. Greengael, LLC*, 271 Va. 266, 626 S.E.2d 357 (2006), denial of a subdivision plat due to refusal of a town to provide water outside of its service area was found not to be a taking or to be unreasonable, because when a purchaser buys property for future development, he or she bears the risk of the unavailability of public utilities. Similar principles were enunciated in *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 481 S.E.2d 460 (1997), although the rule in that case has been partially overruled, as stated in *Greengael*. A more broad-based attack on these grounds in *Schwartz v. Board of Supervisors of Fairfax County*, 53 Va. Cir. 163 (Fairfax Cnty. 2000) was also denied, as is discussed in further detail below.

17-6.03 Holding Out Service Availability Outside a Service Area

The duty to furnish a supply does not exist in favor of a nonresident of a service area. See Eugene McQuillin, *Municipal Corporations* § 34.89 (3rd ed.); *Bd. of Sup'rs of Culpeper Cnty. v. Greengael, LLC*, 271 Va. 266, 626 S.E.2d 357 (2006); Va. Code §§ 56-265.2, 56-265.3. Statutes, ordinances, or comprehensive plans may specifically designate extraterritorial service areas or provide for the extension of services beyond a service area in appropriate circumstances. Under such circumstances, surplus water may be sold to those living outside the municipality's limits. McQuillin § 35.35; see also *Corp. of Mt. Jackson v. Nelson*, 151 Va. 396, 145 S.E. 355 (1928).

Otherwise, it is within a municipality's discretion as to whether it will sell its surplus water beyond the limits of the municipality, and it may not be compelled to do so. McQuillin § 35.34.30; *Town of Rocky Mount v. Wenco of Danville, Inc.*, 256 Va. 316, 506 S.E.2d 17 (1998). A municipality is not bound to serve indiscriminately all outside its territorial limits who demand service, but it can sell and dispose of its surplus water in the manner the municipality's governing body determines to be in the best interest of the municipality and its inhabitants. There is conflicting authority on whether it is proper for a municipality to transfer surpluses or profits on a water or sewer system from the water or sewer enterprise fund to the locality's general fund. The Attorney General has opined that a locality may do so. 2003 Op. Va. Att'y Gen. 36. However, a circuit court has opined that transfer of a surplus gained from extraterritorial customers is an unconstitutional tax, although it appears that it may be held in the enterprise fund as a contingency account. *Fairfax Cnty. Water Auth. v. City of Falls Church*, 80 Va. Cir. 1 (Fairfax Cnty. 2010). This may be an issue on which we must await a future decision from the Supreme Court of Virginia.

While courts generally will not interfere with a municipality's discretionary power to determine where to locate a sewer, courts may review a denial of connection to an existing system within an area being served when such action appears to be unreasonable or arbitrary. *Pritchett v. Nathan Rodgers Constr. & Realty Corp.*, 379 So. 2d 545 (Ala. 1979) (abuse of discretion because city had not adopted a moratorium on connections to the city's sewer system but was granting or denying individual connections on a case-by-case basis). Thus, a provider is required to treat property owners within its service area equally and may not deny sewer hookups unreasonably or arbitrarily. See *Stoneleigh Group, Inc. v. Town of Round Hill*, 50 Va. Cir. 42 (Loudoun Cnty. 1999) (town enjoined from treating differently applicants for sewer connections in the same area).⁵²

⁵² In contrast, a former Virginia statute provided that "owners of adjacent lands shall have the right to connect their premises with such sewers and water mains on such terms that a local governing body shall prescribe." Va. Code § 15.1-300 (repealed).

A municipal corporation providing utility services outside its territorial limits acts in a proprietary capacity and not in a governmental capacity. See *Rocky Mt.*, 256 Va. 316, 506 S.E.2d 17 (1998); see also *Corp. of Mt. Jackson v. Nelson*, 151 Va. 396, 145 S.E. 355 (1928); McQuillin § 31.10. The general rule is that a municipality has no duty to furnish sewer service to users outside its territorial limits unless it has contracted to do so. *Rocky Mt.*, *supra*; see also *Light v. City of Danville*, 168 Va. 181, 190 S.E. 276 (1937); *Bd. of Sup'rs of the Cnty. of Henrico v. City of Richmond*, 162 Va. 14, 173 S.E. 356 (1934); and *Mt. Jackson*, *supra*.

To date, the Supreme Court of Virginia has not adopted the “holding out” exception, which in essence allows creation of an extraterritorial service area for a municipality without action of the county board of supervisors to amend its comprehensive plan to establish the area. Application of the exception turns on specific circumstances, however, which may be present in future cases, so practitioners should be aware of it. Under the “holding out” exception to the general rule that a municipality has no duty to furnish sewer service to users outside its territorial limits unless it has contracted to do so, a municipal corporation that “holds itself out” as providing sewer services to an area will be treated as a public utility for purposes of serving that area. See *Town of Rocky Mt.*, 256 Va. 316, 506 S.E.2d 17 (1998); accord McQuillin § 31.17. A municipal corporation holding itself out as a provider of sewer services in a service area will be treated by the courts as a public utility and may deny sewer hookups for only utility-related reasons, such as lack of treatment capacity. The holding-out exception applies when (1) the municipal corporation has agreed to provide utility service to a general service area, or (2) actual provision of sewer service to a number of properties in a given area manifests a municipality’s consent to provide service to that area as a public utility. See *id.*

In *Rocky Mount*, *supra*, the Town of Rocky Mount had extended sewer service to a Wal-Mart outside the town’s boundaries. The plaintiff, Wenco, argued that the town’s extension of sewer service to Wal-Mart’s site amounted to the town holding out that it would provide sewer service to the general area near the Wal-Mart. *Id.* The Virginia Supreme Court held that it did not need to decide whether the holding-out exception applied to this case because the exception “applies only upon proof of either an agreement by the municipal corporation to provide utility service to a general ‘service area,’ or the actual provision of service to a number of properties in a given area manifesting the municipality’s consent to provide service to that area as a public utility.” *Id.* In this case, the town did not contractually commit to provide sewer service to any properties other than the Wal-Mart site, and the town did not actually provide sewer service to any properties in Franklin County other than the Wal-Mart site. *Id.* Thus, the Court applied the general rule that a municipal corporation’s provision of sewer services outside its territorial boundaries is a proprietary function regulated by contract principles. *Id.* In applying those principles, the Court held that the town was not obligated to use the town’s property to benefit the public in Franklin County and that the town could use its sewer facilities in Franklin County as it saw fit and as a source of revenue for the town. *Id.*

In 1999, the Circuit Court of Loudoun County held that the holding-out exception applied to the Town of Round Hill. *Stoneleigh Grp., Inc. v. Town of Round Hill*, 50 Va. Cir. 42 (Loudoun Cnty. 1999). In *Stoneleigh*, the town had historically provided sewer service outside its borders, and over 60 percent of the properties served by the town’s sewer system were located outside of the town. In April 1998, the plaintiff, Stoneleigh Group, requested sixteen sewer taps for unsold lots it owned outside the town. The town council denied the plaintiff’s request but granted requests by owners of other lots in the same subdivisions outside the town who owned twenty-two lots sold to them by the Stoneleigh Group and Fallswood Development Corporation.

The *Stoneleigh* court did not find that the town specifically agreed to provide water and sewer service in the two subdivisions involved in the *Stoneleigh* case. However, the court

held that the town had held itself out as providing sewer service to the two subdivisions because starting in 1994, the town, on more than one occasion, provided letters to Loudoun County that either specifically approved extensions of the town's sewer system to the subdivisions or indicated that the town intended to do so. In addition, the county relied on the town to provide water and sewer services in Round Hill's Urban Growth Area, which included the two subdivisions, and the town had actually placed water and sewer lines in front of all the developed lots in the two subdivisions and had actually connected or sold sewer taps for 144 lots in the two subdivisions.

Even though the *Stoneleigh* court held that the town had held itself out as providing sewer service to the subdivisions, the court found that the town had a utility-based reason to deny all requests for sewer taps in April 1998 due to capacity problems with the sewer plant that may have affected the health and safety of the people of the town. *Id.* However, the town approved sewer taps for the twenty-two previously sold lots in the subdivisions because the town council believed that denial of sewer taps to such "innocent purchasers" would create an undue economic hardship, but the town denied the plaintiff's request for sixteen sewer taps for unsold lots in the subdivisions. The court held that the town discriminated against the plaintiff without a utility-based reason when it denied the plaintiff's request for the sixteen sewer taps. To remedy this improper discrimination, the court ordered the town to treat the plaintiff's request for the sixteen sewer taps for unsold lots exactly the same as the town had treated the requests to provide sewer taps to the twenty-two previously sold lots.

Stoneleigh, however, might have turned on its specific facts. Because Round Hill had an annexation agreement with surrounding Loudoun County under Va. Code § 15.2-3231 and the comprehensive plan provided for an Urban Growth Area around the town boundaries, provision of water service was in substantial accord with the comprehensive plan. It appears, based on *Bd. of Sup'rs of Culpeper Cnty. v. Greengael, LLC*, 271 Va. 266, 626 S.E.2d 357 (2006), that if the extension is inconsistent with the comprehensive plan, the holding out rule might not apply.

In Delaware, the City of Dover was required to allow sewer and water taps for a property outside the city's limits when the water and sewer lines already existed, taps had been allowed in the past, the city and the county in which Dover is located had agreed that the county would not furnish water or sewer services in a buffer zone around and outside the city limits, and the subject property was located inside the buffer zone. *See Delmarva Enter., Inc. v. City of Dover*, 282 A.2d 601 (Del. 1971) (refusal of Delmarva Enterprises' application for sewer and water taps was discriminatory).

In Colorado, the City of Boulder was required to provide sewer and water service to the Gunbarrel Hill area outside the limits of Boulder because the city held itself out as the sole and exclusive provider of sewer and water services in the area surrounding the subject property and as such operated as a public utility in that area. *See Robinson v. City of Boulder*, 547 P.2d 228 (Colo. 1976) (holding that a utility must furnish a utility related reason for denying service extensions), *overruled on other grounds, Bd. of Cnty. Comm'rs v. Denver Bd. of Water Comm'rs*, 718 P.2d 235 (Colo. 1986). In *Robinson*, the city had extended its service to the area adjacent to Gunbarrel Hill, the Boulder Valley Sanitation District, which subsequently approved Gunbarrel Hill's application for inclusion in the District. Boulder had entered agreements with other local water and sanitation districts and municipalities that effectively precluded the other local water and sanitation districts and municipalities from serving the residents of the Gunbarrel Hill area. Boulder's overall course of conduct in providing water and sewer services to the subject area indicated that it held itself out as the one and only servicing agency in the Gunbarrel Hill area. The Colorado Supreme Court held that unless the City had a utility-related reason, such as insufficient water supplies, the City, in operating its water and sewer systems as a public utility, could not refuse to serve the Gunbarrel Hill area.

In a 2000 case, the Fairfax County Circuit Court held that the holding-out exception is limited to situations where a locality has agreed to provide sewer services to areas outside its territorial limits. See *Schwartz v. Bd. of Sup'rs of Fairfax Cnty.*, 53 Va. Cir. 163 (Fairfax Cnty. 2000). The court noted that the justification for the exception, where a locality contractually agrees to provide services to an area that it otherwise owes no duty to serve, did not apply to the facts of the *Schwartz* case because the subdivision at issue in the case was located within Fairfax County.

No reported Virginia cases analyze the “holding out” doctrine in the case of a water provider, but this author predicts that the doctrine also will be applied to the provision of water service, at least in areas where extension of services is consistent with the adopted comprehensive plan.

17-7 WATER SUPPLY PLANNING

In 2003, the General Assembly passed legislation requiring “[t]he [State Water Control] Board, with the advice and guidance from the Commissioner of Health, local governments, public service authorities, and other interested parties, [to] establish a comprehensive water supply planning process for the development of local, regional and state water supply plans consistent with the provisions of this chapter.” Va. Code § 62.1-44.38:1. This comprehensive statewide water supply planning process is to (1) ensure that adequate and safe drinking water is available to all citizens of the Commonwealth; (2) encourage, promote, and protect all other beneficial uses of the Commonwealth’s water resources; and (3) encourage, promote, and develop incentives for alternative water sources, including, but not limited to, desalinization. *Id.* In addition, the amendments require that localities prepare and submit local or regional water supply plans to the Department of Environmental Quality (DEQ) in accordance with criteria and guidelines developed by the State Water Control Board. Such criteria and guidelines must take into account existing local and regional water supply planning efforts and requirements imposed under other state or federal laws.

In 2005, the State Water Control Board adopted the Local and Regional Water Supply Planning Regulations, 9 VAC 25-780, to implement the mandates of the statute. These regulations established the planning process and criteria that all local governments use in the development of local or regional water supply plans.

Local and Regional Water Supply Plans must include, among other things: (1) detailed analysis and descriptions of existing water sources, water use and resources information; (2) a needs assessment and alternatives analysis (e.g., a projected water demand for up to fifty years in the future and assessment of the adequacy of existing water sources); (3) water demand management information (e.g., descriptions of how to more efficiently use water); and (4) drought response and contingency plans.

Regional Water Supply Plans are water plans developed and submitted by two or more cities or counties. The criteria and guidelines established by the State Water Control Board do not prohibit a town from entering into a regional water supply plan with an adjacent county. A town and an adjacent county may develop a regional water plan. Two or more towns may develop and submit a regional water plan where the plan results in the proposed development of future water supply projects that meet the water supply demands of the affected towns. Such plans developed by two or more towns may be included in regional water plans developed and submitted by counties or cities. Regional water plans must be developed and submitted in conjunction with all public service authorities operating community water systems within the regional planning unit, if applicable.

17-8 RENEWABLE ENERGY

Virginia supports the generation of electricity from a broad variety of sources. Several of the

enumerated objectives and policies of the Virginia Energy Plan⁵³ involve renewable energy, energy efficiency, and related topics. See Va. Code § 45.2-1710 (previously § 67-200 et seq.).⁵⁴ Moreover, the Clean Economy Act of 2020 brought significant changes regarding the Commonwealth's investments in renewable energy and efforts to curb carbon emissions.

17-8.01 Virginia's Renewable Portfolio Standard (RPS)

Virginia's Renewable Portfolio Standard (RPS) seeks to increase availability and demand for renewable energy. In 2020, the voluntary RPS became mandatory. Under the new standards, Dominion Energy Virginia and American Electric Power must supply 100 percent of their power from renewable sources by 2045 and 2050, respectively. Va. Code § 56-585.5. If they fail to meet these goals, they will be required to pay "deficiency payments" or purchase renewable energy certificates. *Id.* To facilitate this, Virginia joined several other states in the Regional Greenhouse Gas Initiative, a carbon cap-and-trade program. The Clean Economy Act also established a schedule for the power companies to close all carbon-emitting combustion-powered plants located in Virginia. *Id.* Although in recent history the role of localities in the provision of energy has been limited, recently the General Assembly added a provision for localities to assist landowners and energy producers in financing clean energy improvements. Va. Code § 15.2-958.3. This provision will be discussed in more detail below.

It is deemed in the public interest for a public utility to construct or purchase a facility that will provide up to 5,000 megawatts (MW) through wind or solar power generation. Va. Code § 56-585.1:4. In September 2013, the U.S. Department of the Interior granted a competitive lease to a Virginia utility for the development of a wind-energy facility off the coast of Virginia Beach. In 2012, Naval Station Norfolk completed a two MW solar facility capable of providing renewable electricity to about 200 homes.

Although wind and solar sources feature prominently in future plans, Virginia does not restrict its view of renewable fuel to wind and solar. Instead, Virginia defines "renewable energy" as energy derived "from sunlight, wind, falling water, biomass, sustainable or otherwise, energy from waste, landfill gas, municipal solid waste, wave motion, tides, and geothermal power" and includes "the proportion of thermal or electric energy from a facility that results from the co-firing of biomass." Va. Code § 56-576. It excludes energy derived from coal, oil, natural gas, or nuclear power. *Id.*

17-8.02 Renewable Energy Generator's Right to Occupy Rights of Way and Franchises—Limitations on Counties, Cities, and Towns

Virginia public policy favors the development of renewable energy from a variety of sources. The Virginia General Assembly has placed certain limitations on the restrictions that localities can impose upon occupying the right of way and the location of renewable energy generators.⁵⁵ For example, Va. Code § 56-615 (previously § 67-1101) provides:

- a. Every renewable generator shall have authority to occupy and use the public roads, works, turnpikes, streets, avenues, and alleys in any county, city or

⁵³ Each year by October 1, the Division of Renewable Energy and Energy Efficiency of the Department of Mines, Minerals and Energy must submit to the Governor and the General Assembly an Energy Plan outlining the Division's ten-year plan to meet the Commonwealth's energy objectives described in Va. Code § 45.2-1706.1, including the achievement of a net-zero carbon energy economy by 2045. Va. Code § 45.2-1710.

⁵⁴ In 2021, Title 67 (Virginia Energy Plan) was reorganized. Most sections were moved to the newly created Title 45.2 (Mines, Minerals and Energy). Some sections not appropriate for placement in Title 45.2 were moved to other titles of the Code.

⁵⁵ A "renewable generator" means a person that (i) does not have the power of a public service corporation to acquire rights-of-way, easements, or other interests in lands as provided in § 56-49 and (ii) operates a renewable energy facility. Va. Code § 56-614.

- town, with the consent of the governing body,⁵⁶ and the waterways within the Commonwealth, with the consent of the Marine Resources Commission, for the erection of distribution facilities. However, if the road or street is in the primary state highway system or the secondary state highway system, the consent of the governing authority of any county is not necessary, provided that a permit for such occupation and use is first obtained from the Department of Transportation.
- b. No locality or the Department of Transportation can impose any fees on a renewable generator for the use of public rights-of-way, except in the manner prescribed in Va. Code § 56-617 (previously § 67-1103).
 - c. No locality nor the Department of Transportation can impose on renewable generators by any means any restrictions or requirements concerning the use of the public rights-of-way that are (i) unfair or unreasonable or (ii) any greater than those imposed on providers of electric or natural gas utility service.
 - d. Any permit or other permission required by a locality pursuant to a franchise, ordinance, or other permission to use the public rights-of-way or by the Department of Transportation of a renewable generator to use the public rights-of-way must be granted or denied within forty-five days from submission. A denial must be written and include an explanation of the reasons the permit was denied and the actions required to cure the denial.
 - e. No locality receiving directly or indirectly a public rights-of-way use fee nor the Department of Transportation can require a renewable generator to provide in-kind services or physical assets as a condition of consent to use public rights of-way or easements, or in lieu of the public rights-of-way use fee.

17-8.03 Financing Clean Energy Programs

The clean energy financing program authorized by Va. Code § 15.2-958.3 allows a locality to create loan programs and to place special assessments to finance renewable energy projects. In 2022, the program was renamed the Commercial Property Assessed Clean Energy (C-PACE) financing program. Va. Code § 15.2-958.3. Localities may authorize contracts to provide the loans or may opt into the statewide C-PACE program, which is administered by a third party on behalf of the Department of Energy.⁵⁷ Va. Code § 15.2-958.3(B) and (G). The statute describes eligible projects, including improvements to energy efficiency, water efficiency, renewable energy, resiliency, stormwater management, and electric vehicle infrastructure, that can be made to assessable commercial real estate. *Id.* Localities are authorized to delegate billing, collection, and enforcement to a third party. Va. Code § 15.2-958.3(C).

There are potential conflicts between the program and the Virginia Constitution. For instance, the Debt Clause, Va. Const. art. VII, § 10, places limitations on the ability of localities, especially counties, to take on debts. The Credit Clause and the Internal Improvements Clause, both in Va. Const. art. X, § 10, also present obvious constitutional

⁵⁶ The consent required under § 56-615 “shall be by ordinance regularly adopted by the council or other governing body of the city or town or by resolution regularly adopted and spread upon the minutes by the board of supervisor or the governing authority of the county in which such line is to be located.” Va. Code § 56-620. Use of such public roads is subject to “such terms, regulations, and restrictions as may be imposed by the corporate authorities of any such city or town, or the board of supervisors or other governing authority of any such county.” *Id.*

⁵⁷ In 2021, the Department of Mines, Minerals and Energy was renamed the Department of Energy.

issues with public loans and special assessments or with the allocation of taxes to support private energy facilities. If it is possible to skirt these issues, it will require careful planning and drafting. See 2019 Op. Va. Att’y Gen. 16, addressing some of the logistical questions surrounding local ordinances to establish clean energy financing programs.

In 2021, the General Assembly authorized local governments to establish “green banks” to attract private capital for investment in clean energy technology projects, defined as “energy resources and emerging technologies that have significant potential for commercialization” and do not rely on coal combustion, petroleum products, municipal solid waste, or nuclear fission. Va. Code § 15.2-958.3:1. By ordinance, a locality may establish a green bank to provide loans for clean energy projects and stimulate demand for renewable energy. *Id.* The bank must be a public entity, quasi-public entity, depository bank, or nonprofit entity. *Id.*

17-8.04 Other Notable Topics

Virginia has legislatively addressed several other renewable energy topics that directly or indirectly relate to public utilities. Such topics include, without limitation: pilot programs for community solar development, Va. Code § 56-585.1:3; loans secured by special property assessments for clean energy projects, § 15.2-958.3; small agricultural generators, §§ 56-594 and 56-594.2; and potential property tax exemptions and reductions for certain classes of real and personal property involved in the generation of renewable energy or the manufacture of products using renewable energy. See, e.g., Va. Code §§ 58.1-3221.4, 58.1-3508.6, and 58.1-3661. The General Assembly has also provided for an increased tax rate for certain generating equipment used by wind energy producers. Va. Code § 58.1-2606(C).

17-9 TORT LIABILITY

17-9.01 Counties, Cities, and Towns

A complete discussion of tort liability and sovereign immunity is beyond the scope of this chapter and appears elsewhere in [Chapter 20, State Law Immunity for Local Governments](#). However, such immunity bears mention as it pertains to the provision of certain public utilities.

In Virginia, counties generally have absolute sovereign immunity from damages for tortious injuries resulting from the ordinary negligence of their officers, servants, and employees. A plea of sovereign immunity bars a plaintiff’s claim of recovery. On the other hand, cities and towns enjoy sovereign immunity when acting in a “governmental” capacity, but not when acting in a proprietary capacity. *Mann v. Cnty. Bd. of Arlington Cnty.*, 199 Va. 169, 98 S.E.2d 515 (1957). Governmental functions entail the exercise of an entity’s legislative or discretionary authority for the public welfare; proprietary functions are performed primarily for the benefit of the municipality.

Generally, courts have deemed a locality’s establishment of sewer service to be a governmental activity. See, e.g., *Schwartz v. Bd. of Sup’rs of Fairfax Cnty.*, 53 Va. Cir. 163 (Fairfax Cnty. 2000). The operation of sovereign immunity for the provision of water service depends upon whether the injury for which a plaintiff claims recovery arose from the design, regulation, or provision of such services or from routine maintenance or operational issues. For example, in *City of Chesapeake v. Cunningham*, 268 Va. 624, 604 S.E.2d 420 (2004), the Supreme Court held that a city’s redesign and planning of its water treatment plant and a public information campaign regarding temporary risks associated with consuming city water were governmental functions, and therefore sovereign immunity applied to bar claims for personal injury arising from water consumption. There, more than 200 female water customers had alleged that their miscarriages of pregnancies had been caused by trihalomethanes in the city’s drinking water. The Court characterized the city’s tasks of designing plant improvements to address such water treatment issues as governmental and discretionary, and thus immunized by sovereign immunity, whereas the city’s duties to maintain the system would be proprietary, nondiscretionary, and ministerial, and not shielded

by sovereign immunity. See also *Town of Rocky Mount v. Wenco, Inc.*, 256 Va. 316, 506 S.E.2d 17 (1998) (stating in dictum that when a municipal corporation provides sewer services outside its territorial limits, it is performing a proprietary function). In contrast, the Court found that sovereign immunity did not bar an action against the City of Richmond where a plaintiff was damaged by a sprinkler system malfunction after a city employee failed to turn off a water valve. See *Richmond v. Va. Bonded Warehouse Corp.*, 148 Va. 60, 138 S.E. 503 (1927); see also *Holt v. Bowie*, 333 F. Supp. 843 (W.D. Va. 1971) (city's operation of electric light and power utility held to be a proprietary function).

17-9.02 Authorities

After years of conflicting opinions pertaining to whether an authority created by a county is entitled to absolute immunity,⁵⁸ the Supreme Court held in *Jean Moreau & Assocs. v. Health Center Comm'n*, 283 Va. 128, 720 S.E.2d 105 (2012), that an entity is not entitled to absolute immunity simply because it was created by a county and not a municipality. Following years of violently conflicting circuit court decisions holding on the one hand that authorities have no sovereign immunity at all, see *Stover v. Keystone Builders, Inc.*, 36 Va. Cir. 595 (Fairfax Cnty. 1993), while others held that they have the full sovereign immunity of the Commonwealth, see *Foster v. Western Virginia Water Auth.*, 81 Va. Cir. 481 (City of Roanoke 2007), the Supreme Court of Virginia finally came down in the middle ground of holding that water and waste authorities have the sovereign immunity of municipal corporations. *Robertson v. W. Va. Water Auth.*, 287 Va. 158, 752 S.E.2d 875 (2014). See section 20-4 of Chapter 20, State Law Immunity of Local Government Entities for a full discussion of the when an entity possesses sufficient attributes to enjoy the status of a municipal corporation.

The Attorney General has opined that a municipal corporation may not waive its sovereign immunity for governmental acts in the absence of a statute authorizing such a waiver. 2006 Op. Va. Att'y Gen. 95.

17-9.03 Public Service Corporations

Public service corporations, like all other private corporations, may be liable for torts committed in the conduct of their operations. See, e.g., 6B M.J., *Electricity* § 10 and cases cited therein.

17-9.04 Directors, Members, Officers and Employees of Local Government Entities

The immunity of directors and officials stands on a different footing from the immunity of political subdivisions. The Code of Virginia limits the liability of members of local government entities, generally understood as being the members of the governing body. See 1997 Op. Va. Att'y Gen. 123. Members of the governing bodies of local political subdivisions and the members of boards, commissions, agencies, authorities, and other governing bodies are immune from suits arising from the exercise or failure to exercise their discretionary or governmental authority as members of such governing bodies, provided such suits do not involve the unauthorized appropriation or misappropriation of funds. Va. Code § 15.2-1405. However, this immunity does not extend to conduct constituting intentional or willful misconduct or gross negligence.

Officers' immunity is determined by the venerable test of *James v. Jane*, 221 Va. 43, 282 S.E.2d 864 (1980), reaffirmed in *McBride v. Bennett*, 288 Va. 450, 764 S.E.2d 44 (2014). This basic test for public officials' immunity looks to: (1) the nature of the function; (2) the extent of the state's interest and involvement in the function; (3) the degree of control and

⁵⁸ See, e.g., *Holland v. Nelson Cnty. Serv. Auth.*, 68 Va. Cir. 99 (Nelson Cnty. 2005), in which the court held that a county service authority was entitled to the same sovereign immunity granted to counties because it performs a function of county government. The court alternatively concluded that, even if the authority were only entitled to municipal sovereign immunity, establishing and operating a well and water system is a governmental and not a proprietary function.

direction exercised by the state over the employee or officer; and (4) whether the act involved judgment or discretion. From this murky test, the general outcome is that higher-up officials with discretion and control have official immunity, while lower-level employees do not.

Regardless, the vast majority of governmental utilities have insurance or a self-insurance policy. Virginia Code §§ 15.2-1518, 15.2-1520, and 15.2-2703 provide for insurance and legal defense of local government officers and directors, including officers and directors of authorities. As a practical matter, the vast majority of suits are covered by insurance or a local government self-insurance risk pool.

However, those sections of the Code of Virginia do not override the federal right of action granted by 42 U.S.C. § 1983, which provides the following:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Thus, § 1983 waives sovereign immunity for local officials in the absence of immunity arising from actions taken in a legislative, judicial, prosecutorial, or testimonial capacity. However, local officials may enjoy qualified immunity if the discretionary action alleged to be taken in violation of a plaintiff's constitutional right was taken in "good faith," and the official neither knew nor reasonably should have known that his action was in violation of another's clearly established statutory or constitutional rights. See *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982); *Wood v. Strickland*, 420 U.S. 308, 95 S. Ct. 992 (1975). Because these gaps remain under Virginia's statutory limitation of liability, local government boards, authorities and commissions continue to maintain public officials' liability insurance for their members and employees.

17-9.05 Inverse Condemnation

Because the doctrine of sovereign immunity is so well-entrenched, the new frontier in liability cases for political subdivisions that operate utilities is that plaintiffs plead their cases not as tort cases, but as inverse condemnation cases. The first major case where this occurred was *Jenkins v. County of Shenandoah*, 246 Va. 467, 436 S.E.2d 607 (1993), in which Shenandoah County was sued due to the overflow of a storm sewer system that had been dedicated to it. Although by statute the county had no duty to maintain the system, and it had absolute sovereign immunity in tort, the Court held that it was liable under an inverse condemnation theory.

In *AGCS Marine Insurance Co. v. Arlington County*, 293 Va. 469, 800 S.E.2d 159 (2017), two insurers, as subrogees of a grocery store, sued the county when its sanitary sewers overflowed into the store. The county pled sovereign immunity, and the Virginia Supreme Court recognized that the county had absolute sovereign immunity. The Court took pains to distinguish a "mere tort claim" from inverse condemnation, but was at a loss to draw a bright-line distinction that would aid counsel and judges. Because of its potential to avoid the bar of sovereign immunity, the bounds of this theory are likely to be tested over the coming years.