



# Journal of Local Government Law

Published by the Local Government Section of the Virginia State Bar

Vol. XXIX, No. 2, Winter 2019

## **Local Government Law: When the Law You Know Isn't the Law that Applies**

Andrew R. McRoberts

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## Message from the Chair

For this issue, the Board of Governors decided to do something a little different: dedicate the issue to a single article. Many aspects of local government law are counterintuitive. Those who are unfamiliar with its legal principles, statutes and case law may find the law is not at all what they expect. Many of these exceptions exist because local governmental bodies are subdivisions of the sovereign.

The following article is intended to highlight some of these counterintuitive principles. We hope you will find it helpful.

Justice McCullough of the Supreme Court of Virginia graciously agreed to write an introduction to this edition of the *Journal*. On behalf of the Board of Governors, I would like to express our gratitude to Justice McCullough for his introduction and his abiding respect for local government law.

At the end of this edition you will find information on, and an application for, our law student summer fellowship. I encourage you to bring it to the attention of any law student or law reader who may be interested.

Jan Proctor  
Chair



*Justice Stephen R. McCullough*

Local governments have an impact on the lives of Virginians in very personal and immediate ways, whether by educating their children, providing for their safety, regulating the use of land, and, of course, assessing taxes to pay for those vital services. The body of law governing the actions of local governments has grown considerably. In some instances, that growth has occurred over a period of several centuries.

There are currently few widely available treatises on local government law in Virginia to assist the practitioner in synthesizing the substantial volume of cases, constitutional provisions, statutes, opinions of the Attorney General, and

*Justice McCullough was elected to the Supreme Court of Virginia in 2016, having previously served on the Court of Appeals, as Solicitor General of Virginia, and as Opinions Counsel for the Office of the Attorney General.*

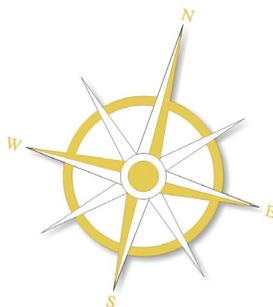
law review articles. Although the Local Government Attorneys of Virginia publishes a *Handbook of Virginia Local Government Law*, this resource is only routinely distributed to members of the association. To fill this gap, and consistent with its mission of “[p]rovid[ing] assistance and support to public and private practitioners of local government law,” the Local Government Section of the Virginia State Bar has drawn from its deep well of expertise to provide some basic guidance on a number of areas of local government law.

Roger Cramton, Dean of Cornell Law School and a scholar of sovereign immunity, observed that

The basic problem with the sovereign immunity doctrine is that it has developed by fits and starts through the series of fictions. The resulting patchwork is an intricate, complex and not altogether logical body of law.<sup>1</sup>

The publication offers a helpful overview of this area, including some aspects of the doctrine that are specific to local governments.

What is true of sovereign immunity can also be true of other areas this issue of the *Journal of Local Government Law* addresses, such as the Dillon Rule, public finance, tax assessments, and other topics of local government law. This issue provides some general guidance and a broad overview of the topics addressed. Each river and stream has its own eddies and shoals. With the assistance of this publication and other resources, practitioners and judges can more carefully navigate through these waters.



**LGA Handbook on Virginia Local Government Law and judicial membership in LGA:** The LGA Handbook is distributed as a benefit to its members, including judicial members. Judicial membership in LGA is free of charge and, in addition to the Handbook, includes receipt of the monthly legal newsletter and free registration for CLE sessions. Applications for judicial membership are available to download from this [link](#). The Handbook is available for purchase by non-members for \$225 (law students: \$50). To order the 2018 Edition, contact Susan Custer at [susan.custer@lgava.org](mailto:susan.custer@lgava.org).

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<sup>1</sup> Report of the Committee on Judicial Review of the Administration Conference of the United States, 1 Recommendations and Reports of the Administrative Conference 191, 194 (1969).

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Andrew R. McRoberts

## Local Government Law: When the Law You Know Isn't the Law that Applies

Even experienced lawyers may find they need to learn some key legal principals when first encountering local government law as some aspects of that law are counterintuitive, with origins from our days as a British colony. Legal principles that normally apply in non-governmental cases may not apply at all, or very differently, when local government is a party. This article offers guideposts to those in need of a quick roadmap to this unique body of Virginia law.

This article is intended to help members of the bar who infrequently practice local government law. It may also assist honorable members of the judiciary who do not regularly hear these types of cases in knowing when to expect the unexpected. And it may provide a few refreshers for even the experienced practitioner of local government law.

### **Sovereign Immunity—When is the King Liable?**

Perhaps the most unique of these counterintuitive principles is sovereign immunity. This principle applies to localities because they are political subdivisions or creations of the Commonwealth of Virginia, the sovereign. Under English common law, the king could not be sued and was completely immune from liability. In short, "it's good to be the King."<sup>1</sup>

Sovereign immunity is a bedrock principle that is the foundation for many of the local government legal principles discussed in this article. Even when courts do not use the term "sovereign immunity" in describing some of these principles, it is often the unique nature of the local governments as political subdivisions of the Commonwealth that underlies the policies behind the laws.

### **Sovereign Immunity, Generally**

Unless expressly authorized by the Commonwealth, one may not sue the Commonwealth or its political subdivisions without consent. *Bates v. Commonwealth*, 267 Va. 387 (2004); *Hinchey v. Ogden*, 226 Va. 234 (1983). Essentially, sovereign immunity makes the Commonwealth<sup>2</sup> and its counties immune from nearly all tort actions. The purpose of sovereign immunity is to "protect the state from burdensome interference with the performance of its governmental functions and preserve its control over state funds, property, and instrumentalities." *City of Va. Beach v. Carmichael Dev. Co.*, 259 Va. 493, 499 (2000). Sovereign immunity is "alive and well" in the Commonwealth of Virginia. *AGCS Marine Ins. v. Arlington Cnty.*, 293 Va.

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<sup>1</sup> *History of the World, Part I* (1981), Mel Brooks.

<sup>2</sup> The Commonwealth has waived a specific portion of its sovereign immunity for torts in the Virginia Tort Claims Act, but this expressly excludes any application to Virginia localities. Va. Code § 8.01-195.3 ("... nor shall any provision of this article be applicable to any county, city or town in the Commonwealth or be so construed as to remove or in any way diminish the sovereign immunity of any county, city or town in the Commonwealth.").

469, 484 (2017); *Messina v. Burden*, 228 Va. 301, 307 (1984).

Historically, when the colonists revolted and broke from England, the Virginia Convention met and authorized the Virginia resolution on independence, which led to the adoption of the Declaration of Independence. The Virginia Convention acted to have the newly formed Commonwealth of Virginia step into the shoes of the sovereign, King George III, and assume his powers and those of the Parliament. The Governor took the lead as chief executive. The colonial House of Burgesses and Governor's Council were re-formed into the Virginia General Assembly's House of Delegates and Senate. Many aspects of deference to the sovereign, however, remained. In fact, the common law of England, except as may be "repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth" or modified by the Virginia General Assembly, still controls today. Va. Code § 1-200 ("[T]he common law"). Sovereign immunity is one of many such provisions to migrate from English law to Virginia law and remain valid.

Sovereign immunity is such a powerful doctrine that a county cannot waive its tort immunity even if it wanted to. This is precisely what occurred in *Mann v. County Board of Arlington County*, 199 Va. 169 (1957). There, an Arlington County vehicle hit and injured Morris Mann. The County believed it was liable for improperly maintaining the sidewalk, and its insurer agreed to pay Mann \$15,000 in damages. After litigation ensued, the Supreme Court held that sovereign immunity applied, and the County was immune, even though the County had insurance coverage, since the General Assembly had not waived immunity or authorized it to be waived. *Mann*, 199 Va. at 174.

### ***Municipal Sovereign Immunity***

Strangely, all localities do not have the same level of immunity. Cities and towns, as municipal corporations, do not receive the same level of sovereign protection as the Commonwealth or its counties. This oddity stems from a municipal corporation's two-fold function—one governmental and the other proprietary. Although a municipality is immune from liability in the exercise of its *governmental* functions, it may be liable, just as a private individual or corporation, in the exercise of its *proprietary* functions. *Transp., Inc. v. Falls Church*, 219 Va. 1004 (1970).

Thus, the difference between governmental and proprietary functions is significantly important when analyzing potential liability of cities and towns. There is often no clear line between what constitutes a governmental and a proprietary function, and it can be difficult to discern whether a city or town can be held liable in tort. Routine maintenance or operation of a municipal service is considered a proprietary function. As such, courts have found maintenance of sidewalks and streets and failure to keep a sewer drain in repair and free of obstructions to be proprietary. Conversely, running a hospital, regulating sidewalks and streets, and maintaining a jail and police force are governmental functions. See, e.g., *City of Chesapeake v. Cunningham*, 268 Va. 624, 634-35 (2004) (description of "The Law of Sovereign Immunity in Virginia," with case citations). Distinctions between governmental and proprietary functions can be made, but they sometimes result in unexpected outcomes.

Sovereign immunity can end a tort liability case, and practitioners should avoid unwelcome surprises by learning and understanding the difference between governmental and proprietary functions.

### ***Torts Versus Inverse Condemnation***

As important as sovereign immunity is to local government law, it does have its limitations. Although sovereign immunity will protect a county against liability for all torts and a city or town against liability for many torts, the doctrine will not protect any of them against a claim of inverse condemnation.

The State and its political subdivisions are not immune from inverse condemnation actions because such actions arise not out of tort, but rather out of a quasi-contractual claim under Article 1, Section 11 of the Virginia Constitution. Specifically, an inverse condemnation action arises when a property owner can show that his or her private property has been taken for public use without just compensation. See Va. Code § 8.01-187. The line between a tort and inverse condemnation may be difficult to distinguish.

Most recently, the Supreme Court of Virginia held that flooding of a Harris Teeter grocery store by Arlington County's sewer system could be an inverse taking after Harris Teeter alleged that the county had purposefully caused the backup of the sewer system in order to keep other parts of the sewer system flowing. *AGCS Marine Ins. Co. v. Arlington Cnty.*, 293 Va. 469 (2017). In summarizing the law on inverse condemnation claims, the Supreme Court explained that “the common thread . . . is that the purposeful act [i.e. the flooding of the store] causing the taking of, or damage to, private property was for [the] public use” of keeping the rest of the sewer system running. The Court was quick to differentiate this type of claim from a simple negligence action. This government action was different because here, as alleged, “the government asked private property owners . . . to bear the cost of a public improvement.” *AGCS Marine Ins.* at 469 (citing *Livingston v. Va. DOT*, 284 Va. 140, 160 (2012)).

In other words, the Commonwealth and its political subdivisions cannot shift costs for public benefits onto a private landowner without compensating the owner. It is important to note that the plaintiff insurance companies had originally pleaded facts supporting simple negligence, and the County's demurrer raising sovereign immunity was granted. The amended complaint, however, raised new allegations of purposeful conduct that accomplished a public purpose. This claim of inverse condemnation, the Supreme Court held, should have survived a second demurrer, and the Court remanded the matter to the Arlington County Circuit Court for trial.

### **Equitable Defenses Do Not Work Against Localities**

Unlike a civil action between two private parties, equitable defenses—such as estoppel and laches—are not applicable against local governments.

The purpose of equitable relief is to support fairness and justice. Thus, it would seem logical that such relief would be available in an action against a local government, which is empowered to, among other things, enter into contracts and sue and be sued. However, this is not the case; equitable defenses cannot be raised against localities in Virginia.

As with sovereign immunity, common law under the King of England gives rise to this result. Common law was originally very rigid and created the possibility where someone was wronged but nevertheless unable to secure relief in a court at law. As a result, distinct courts of equity were formed in England to enforce equitable provisions that were not a part of the King's law. These courts could only issue equitable remedies, not judgment for monetary damages or criminal punishments. But even courts of equity could not grant equitable remedies against the King, and when the colonists crossed the Atlantic, they brought the practice of equity and law with them.

The principles protecting localities from equitable remedies are highlighted in a well-known zoning case, *Gwinn v. Alward*, 235 Va. 616 (1988), which held that estoppel cannot be used as a remedy against a locality acting in its governmental capacity. In *Gwinn*, the plaintiff, Alward, had been receiving annual trash-hauling permits from Fairfax County for over 25 years. He had expanded his once-small trash operation into a major junkyard and had received a number of zoning and building permit approvals over the years. The zoning admin-

istrator issued a notice of zoning violation for an impermissible junk yard to Alward, but he failed to appeal the zoning administrator's determination within 30 days. Later, when the County decided not to renew the trash-hauling permit because of the zoning violations and sought an injunction to force the closure of the business, Alward asserted estoppel against the County. Alward argued the County should be estopped because he had been carrying out these same activities on his property for a significant time and had relied on permits previously issued by the County. The Supreme Court of Virginia was quick to dismiss the argument because "estoppel does not apply to the government in the discharge of its governmental functions." *Id.* at 621.

There are exceptions to this rule, but as with waivers of sovereign immunity, they must be expressly provided by statute. *See Bd. of Sup'vrs v. Rhoads*, 294 Va. 43 (2017); Va. Code § 15.2-2311(C) (prohibiting zoning administrator from renegeing on prior determinations older than 60 days).

### **Adverse Possession Does Not Apply Against a Locality**

Adverse possession of property can be secured in Virginia if possession of land is 1) actual, 2) exclusive, 3) hostile, 4) open and notorious, and 5) accompanied by a bona fide claim of title against all others, for a minimum of 15 years. 1A M.J. ADVERSE POSSESSION § 3. But even if all five elements are shown, a claimant will not acquire title against the Commonwealth or its localities. *Lynchburg v. Chesapeake & Ohio Ry. Co.*, 170 Va. 108 (1938). "No title by adverse possession could be acquired to it. Time does not run against the State, nor bar the right of the public." *Buntin v. Danville*, 93 Va. 200, 208 (1896). *See also Va. Hot Springs Co. v. Lowman*, 126 Va. 424 (1919); *Bellenot v. Richmond*, 108 Va. 314 (1908).

Such an outcome seemingly cuts against the policy underlying adverse possession, namely that unused land should be put to productive use; however, the exemption makes sense because public property is held in trust for public purposes. The exemption arises due to the locality's status as a subdivision of the Commonwealth, successor to the sovereign king. As has been stated: "*nullum tempus occurit regi*, that is, time does not run against the king." *Burns v. Bd. of Sup'vrs*, 227 Va. 354 (1984). Just as the Commonwealth and its localities have the right to avoid liability for tortious acts under the doctrine of sovereign immunity, local governments are able to avoid losing title to land as a result of adverse possession. Once again, it's good to be King.

### **Suing the Sovereign - Strict Compliance Required**

One traditional common law aspect of sovereign immunity, as discussed above, is that one cannot sue or press claims against the sovereign except by permission. For this reason, when a cause of action is allowed against a locality, the plaintiff must strictly comply with the terms of that grant. *See Commonwealth v. Columbian Paper Co.*, 143 Va. 332, 342-343 (1925) ("[U]nder the common law the [taxpayer] had no right to apply for a correction of the assessment against it, and that the remedy afforded is purely statutory. This being true, it is incumbent upon one seeking statutory relief to proceed strictly according to the statute.").

This principle applies across many diverse areas of local government law, including procurement, *Sabre Construction v. County of Fairfax*, 256 Va. 68 (1998) (notices and filings mandated by statute must be complied with strictly); tax assessments, *Smith v. Board of Supervisors*, 234 Va. 250, 255 (1987) ("The procedure for correction of erroneous assessments is entirely statutory"); monetary claims against counties, *Viking Enterprise v. County of Chesterfield*, 277 Va. 104, 111 (2009) (plaintiff must strictly follow the "mode prescribed" by law to pursue its claim against a county); tort claims against localities, Va. Code § 15.2-209; and appeals of local land use decisions, *Miller v. Highland County*, 274 Va. 355 (2007) (Va. Code § 15.2-2285(F) requires filing of appeal in circuit court against the governing

body, not the locality, within 30 days). Both mode and timing are part of the cause of action itself when suing a locality, and strict compliance is required.

When a complainant does not strictly comply with the statutory grant of action against the locality, the lawsuit cannot stand. *Charlottesville Operators Ass'n v. Albemarle Cnty.*, 285 Va. 87 (2013) (Virginia Procurement Act permits suits only by actual bidders and contractors, and case brought by claimants who failed to bid because no public procurement occurred was dismissed). Thus, when bringing suit against the King, practitioners must do so *exactly* as the King instructs.

### ***Determining Who to Sue and Serve***

As discussed above, it is important that practitioners filing suit against a locality strictly adhere to statutory procedures. Pursuant to Va. Code § 15.2-1404, every locality may sue or be sued in its own name in relation to all matters connected with its duties. There are refinements to this general rule; however, and determining which entity or official to bring a suit against is one of the first and most critical procedural challenges to overcome. First, the plaintiff must ask whether to bring suit against the locality itself or its governing body. Virginia Code § 15.2-102 defines "governing body," "locality," "board of supervisors," and "council," among other terms, and these terms are not synonyms. These are distinct parties in legal actions. As an example, as previously noted, Va. Code § 15.2-2285(F) states that any action contesting a land use decision of the "local governing body" must be filed within 30 days of such decision. The statute does not indicate whether the locality or the governing body should be named as a party to the appeal. In *Miller v. Highland County*, 274 Va. 355 (2017), however, the Virginia Supreme Court decided that "locality" and "board of supervisors" are not interchangeable terms. The Court held that the board of supervisors must be named as a party to the appeal.

### ***Service of Process***

Similarly, the process by which a locality is served with a lawsuit is specifically set forth in Va. Code § 8.01-300, and is it different from typical service on a private party. This statute directs service on the city, town, or county attorney in suits brought against a city, town, or county, as the case may be. The statute also directs service on the attorney, chief administrative officer, or any member of the governing body if the case is against the political subdivision and service on each supervisor and the county attorney if the case is against a supervisor, county officer, employee, or agent of the county board, arising out of official actions of such supervisor, officer, employee or agent. In specifying these different methods of service of process, the General Assembly manifested its intent that a "locality" and its "governing body" not be interchangeable terms. Rather, localities and their governing bodies have separate legal identities that must be observed in initiating an action.

### ***Other Special Rules***

In addition to suing the correct party and serving that party as dictated by statute, other special rules exist that can surprise the unwary practitioner. As previously mentioned, Va. Code § 15.2-209 requires that a claimant file a statement of the nature of the claim, including the time and place at which the injury is alleged to occur, within six months after such cause of action accrued. Failure to provide this notice is fatal to the action unless certain officials or insurers had actual knowledge of the claim within the six-month period.

For a claim arising under a contract issued after compliance with the Virginia Public Procurement Act, service of process must be supplemented with execution of a bond and written notice of its appeal be served on the clerk to the county's governing body as required by Va. Code § 15.2-1246. See *Viking Enter., Inc. v. Cnty. of Chesterfield*, 277 Va. 104 (2009). Similarly, in *Nuckolls v. Moore*, 234 Va. 478 (1987), the Court held that statutory procedures for an appeal from a decision by a board of supervisors disallowing a monetary claim against the county must be strictly followed. See Va. Code §§ 15.2-1245 to -1248.

## **The Dillon Rule: Limiting Local Government Power Since the 19th Century**

Like sovereign immunity, the Dillon Rule is also alive and well in Virginia. It is, arguably, one of the “flip sides” to sovereign immunity. While counties, cities and towns are protected from incurring liability for certain torts and from lawsuits except as prescribed, they also have limited powers, enjoying only the powers authorized by the Commonwealth or sovereign. The Dillon Rule was named for a late 19<sup>th</sup> century jurist who believed that localities should be reined in and that the state should dictate local regulations unless the state legislature decides otherwise. Judge Dillon was motivated by his support for the construction of railroads across Midwestern states without local governmental interference.

The Dillon Rule stands in stark contrast to the law in many other states. The majority of states have instead adopted various types of “home rule” provisions that permit some or all of their local governments to undertake governmental functions that are not preempted by state or federal law.

Virginia, however, is not in the majority. Under Virginia’s Dillon Rule, localities have only those powers that are 1) specifically conferred upon them by the Virginia General Assembly, 2) necessarily or fairly implied from a specific grant of authority, or 3) essential to the purposes of government. *Advanced Towing Co., LLC v. Fairfax Cnty. Bd. of Sup’vrs*, 280 Va. 187 (2010). In seeming contrast to the legal theory underlying sovereign immunity, the support for the strict Dillon Rule in Virginia is that Virginia “localities have ‘no element of sovereignty’ and are agencies created by the Commonwealth.” *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 576 (2012).

Established local functions, such as taxation and land use, have express statutory authority. See, e.g., Va. Code § 58.1-3000 et seq. (taxation); Va. Code § 15.2-2200 et seq. (land use). Because local governments have no inherent power, they can be prevented from acting by either the presence or absence of a statute. “Accordingly, when a statute enacted by the General Assembly conflicts with an ordinance enacted by a local governing body, the [Commonwealth’s] statute must prevail.” *Sinclair* at 576.

Courts in Virginia routinely apply the Dillon Rule to determine if a locality has the authority to perform an action. As part of the Dillon Rule analysis, all delegated authority must be strictly interpreted, and “any doubt as to the existence of a power must be resolved against the locality.” *Bd. of Sup’vrs v. Reed’s Landing Corp.*, 250 Va. 397, 400 (1995).

The strict application of the Dillon Rule requires local governments to frequently ask for authority from the Commonwealth. Each year localities engage in a high-stakes game of “Mother, may I?” with the General Assembly. Larry Hinker, “[Virginia’s ‘Mother May I?’ Richmond-Centric Government](#),” *The Roanoke Times*, Apr. 26, 2018. And frequently, such requests are seemingly bizarre, but stem directly from the application of the Dillon Rule.

Good examples include *Board of Zoning Appeals v. Board of Supervisors of Fairfax County*, 276 Va. 550 (2008) (BZAs have no statutory authority to sue or be sued) and *County Board of Arlington County v. Brown*, 229 Va. 341 (1985) (county could not lease a parking lot to be abandoned for redevelopment because at the time of the lease agreement it was used for courthouse parking, and local governments only could lease “unused” lots) (result superseded by statute).

As these cases show, the Dillon Rule limits the powers of local governments and their officials, which – in a further twist – can work to the detriment of individuals and businesses dealing with local governments. For example, in the case of *County of York v. King’s Villa*, 226 Va. 447 (1983), the Dillon Rule worked to the disadvantage of a business that negotiated in good faith with a local government official. In that case, the county administrator entered into a development agreement purporting to set utility connection fees and secure other advantages to a business, which in turn agreed to relocate to the county. The connec-

tion-fees provision was held to be unenforceable, because setting utility fees is a legislative act, and the county administrator had no authority to set them despite the express contract to the contrary.

In explaining the policy behind this result, the Supreme Court stated:

Here, the County Administrator tried to do more than he was empowered to do. He never had the authority permanently to fix rates and fees. Neither the York County Board of Supervisors nor the governing body of the sanitary district could have authorized the County Administrator to freeze rates and fees indefinitely even if they had wanted to.

King's Villa is in the unfortunate position of having dealt in good faith with a public servant who exceeded the bounds of his authority. This is not an uncommon problem nor is it one which engenders goodwill on the part of citizens for governmental officials with whom they must deal. For it is true that where, as here, a contract was prepared by the County Administrator and approved as to form by the County Attorney, a citizen might easily conclude, without further inquiry or investigation, that every part of the contract was legal and binding and could be relied upon. However, we have cautioned in several cases that those who deal with public officials must, at their peril, take cognizance of their power and its limits. *Deal v. Commonwealth*, 224 Va. 618, 623, 299 S.E.2d 346, 349 (1983); *S. H. Apts. v. Elizabeth City Co.*, 185 Va. 67, 78-79, 37 S.E.2d 841, 846 (1946).

*King's Villa*, 226 Va. at 450-451(1983).

The Dillon Rule cuts both ways, for and against local government, depending on the circumstances.

### **Strict Construction of Tax Authority and Exemptions**

As a corollary to the Dillon Rule, in Virginia all taxing powers granted to a local government are strictly construed. Thus, "for a tax to be valid, it must be supported by express legislative authority." *Woodward v. City of Staunton*, 161 Va. 671, 673 (1933). Such strict interpretation can often be detrimental to the taxing authority.

For example, in *City of Richmond v. SunTrust Bank*, 283 Va. 439 (2012), the strict interpretation of Va. Code § 58.1-3606 prevented the City of Richmond from taxing properties jointly owned by SunTrust Bank and the Richmond Redevelopment and Housing Authority (RRHA) at their full value. Under Va. Code § 58.1-3606, property owned by the Commonwealth or any political subdivision is exempt from local taxation. Thus, the City was rebuffed when it attempted to tax the entire value of the buildings to SunTrust under the logic that SunTrust had access to the entire building as a tenant in common. The Court, in prohibiting the City from taxing SunTrust for the portion owned by the RRHA, held: "The City has failed to 'put [its] finger upon the statute which confers' upon it the authority to tax SunTrust for the RRHA's ownership interests in the properties. We therefore hold that it has no such authority. . ." *City of Richmond v. SunTrust Bank* at 445.

The same strict interpretation applies to tax exemptions. Taxpayers, however, have an additional hurdle because tax exemptions are the exception rather than the rule, and the taxpayer bears the burden to prove that the exemption is clear and expressly applies – any doubt denies the exemption. In short, "statutes granting tax exemptions are construed strictly against the taxpayer. When a tax statute is susceptible of two constructions, one granting an exemption and the other not granting it, courts adopt the construction which denies the exemption." *Commonwealth v. Cmty. Motor Bus*, 214 Va. 155, 157 (1973). These two rules of construction serve to restrict the ability of taxpayers to use creative readings of the tax code to avoid paying required taxes.

A prime example of strict interpretation and the presumption against the taxpayer is the case of *Palace Laundry, Inc. v. Chesterfield County*, 276 Va. 494 (2008). Here, Palace Laundry argued that it should qualify as a “processor” because it used chemicals and processes to clean linens that it offered for rent. Such a designation would qualify the business for a lower tax rate for its machinery and tools.

The Virginia Supreme Court strictly construed Va. Code § 58.1-3507(A) against Palace Laundry by holding that it was not a “processor” because the linens do not “undergo a treatment rendering the product more useful” than when originally purchased—an important aspect of processing. *Id.* at 498. The Court reasoned that even if Palace Laundry engaged in some element of processing, it was not a “processing business” because its primary business activity was renting linens, not creating new material for sale.

Thus, *Palace Laundry* provides a perfect example of how tax statutes are to be construed with a presumption against the taxpayer. While it is possible that Palace Laundry could be a processor, it was also possible it was not a processor. Thus, the Court held against the taxpayer because of the presumptions embedded in statutory interpretation.

### **Tax Assessments:**

#### **Even if Erroneous, Assessments Can Be Affirmed**

One typically expects in a civil case that the party demonstrating its case by a preponderance of the evidence will prevail. This expectation is not always met when a citizen challenges a property tax assessment.

Virginia Code § 58.1-3984 et seq. provides the method for an aggrieved taxpayer to challenge an erroneous property tax assessment. The tax assessment is presumptively correct, and the taxpayer must

[s]how by a preponderance of the evidence that the property in question is valued at more than its fair market value or that the assessment is not uniform in its application, and that it was not arrived at in accordance with generally accepted appraisal practices, procedures, rules, and standards ... and applicable Virginia law relating to valuation of property. Mistakes of fact, including computation, that affect the assessment shall be deemed not to be in accordance with generally accepted appraisal practice.

Va. Code § 58.1-3984(B).

In addition, under common law, a taxpayer must prove a “manifest error” in the assessment. *City of Norfolk v. Snyder*, 161 Va. 288 (1933). The Supreme Court has stated repeatedly that “[t]he term ‘manifest’ is defined as being ‘synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident, and self-evident. In evidence, *that which is clear and requires no proof; that which is notorious.*” *Velazquez v. Commonwealth*, 292 Va. 603, 616 (2016) (emphasis in original) (quoting *Johnson v. Anis*, 284 Va. 462, 466 (2012)) (quoting Black’s Law Dictionary 962 (6th ed. 1990)). Despite an extensive 2011 revision to the statute, manifest error still has been required by circuit courts under the current enactment of Va. Code § 58.1-3984, as it has since 1933. See *Staunton Mall Realty Mgmt., LLC v. Bd. of Supv’rs*, 92 Va. Cir. 96, 118 (Augusta Co. 2015); *PHF II Norfolk, LLC v. City of Norfolk*, 94 Va. Cir. 454 (Norfolk 2016); *Army Navy Country Club v. City of Fairfax*, Cl-2015-17941 (Fairfax Co. Cir. Ct. June 5, 2018).

A taxpayer must also prove the fair market value of the property at issue, no matter its theory of the case or the error alleged. *West Creek Assocs. v. Cnty. of Goochland*, 276 Va. 393, 417 (2008). This requirement is not explicitly set forth in the Code, although the statute does require the taxpayer in most cases to prove the assessment exceeds fair market value. Va. Code § 58.1-3984. It makes sense that a taxpayer cannot assert an assessment

is erroneous, yet offer no evidence of the correct value. At times, however, this requirement leads to unexpected results. Even if the assessment is erroneous, the locality wins if the taxpayer cannot prove the value with a credible and admissible opinion of value; since the taxpayer carries the burden of proof, the assessor is not required to produce evidence to prove the correctness of the assessment. *Western Refining Yorktown v. Cnty. of York*, 292 Va. 804, 805 (2016) ("The effect of this presumption is that even if the assessor is unable to come forward with evidence to prove the correctness of the assessment this does not impeach it since the taxpayer has the burden of proving the assessment erroneous.").

One of the unusual distinctions of tax assessment appeals is that they are always bench trials presided over and decided by a judge, in contrast to most other areas of law where a jury trial is an option. The statute also sets forth a presumption of correctness that attaches to every local government assessment. As discussed above, the statutory cause of action must be followed strictly. Va. Code § 58.1-3984.

This elevated level of judicial deference to the assessing authorities is rooted in the separation of powers as well as in the statute, but it is also practical. Without a high level of deference, courts would essentially become *de facto* appraisers. Since valuation is largely a matter of opinion, the presumption of correctness and requirement for a showing of error works to prevent courts from substituting "their judgment as to the valuation of property for the judgment of the duly constituted tax authorities." *Norfolk v. Snyder*, 161 Va. 288, 292 (Va. 1933).

### **Public Finance: When is Debt not Debt?**

Article VII, Section 10, of the Virginia Constitution permits cities in the Commonwealth to borrow up to 10% of the assessed value of the real estate in the city without voter approval. Counties, however, do not have the same broad, express authority to incur debt. A county's authority to borrow is much more limited. This results in some creative public financing.

First, the Virginia Constitution permits the General Assembly to give authority (as it has done) for counties to issue debt that (1) is secured by the upcoming fiscal year's revenues and matures within the same year, (2) is secured by the profits of a water or sewer system, or (3) refunds existing bonds. Second, a county can seek approval from the voters to issue debt. Va. Code § 15.2-2638(A). Once approved by the voters, however, the use of bond proceeds is limited to the purpose presented to the voters.<sup>3</sup> Third, a county can gain the debt privileges of cities by permanently electing to be treated as a city for debt purposes. Va. Code § 15.2-2639. This option requires a referendum of approval by the voters of the county.

Counties can also issue bonds for school purposes that are sold to the Virginia Public School Authority or other state agencies authorized by the General Assembly without holding a referendum. Va. Code § 15.2-2638(B).

Perhaps even more interesting, counties often incur long-term obligations without express authority from the voters and outside the provisions of the Public Finance Act. Va. Code § 15.2-2600 et seq. Debt incurred by a district, authority, or commission on behalf of a county is not considered "debt" under the Virginia Constitution or the Public Finance Act so long as that debt is not secured by the full faith and credit of the county.

By way of illustration, in *Dykes v. Northern Virginia Transportation District Commission*, 242 Va. 357 (1991), local taxpayers sued to invalidate bonds that were issued by the District Commission on behalf of Fairfax County. The plaintiffs alleged the bonds had been issued in an unconstitutional manner because voters had not approved the issuance in a referendum.

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<sup>3</sup> Va. Op. Atty. Gen. 12-029 (9/28/12).

In actuality, however, the Transportation District Commission issued the bonds and the County of Fairfax signed an agreement stating it intended —but was not obligated — to fund the bond payments on behalf of the District Commission. Although this agreement would appear as if the County is taking on debt, at least as a practical matter, the Virginia Supreme Court held that it did not. The Court determined that because the agreement made the bond payments “subject to appropriation” by the County, it created only a “moral obligation” to pay, not a legally binding debt.

Because there was legal obligation for Fairfax County to repay the debt, the tax was lawful. The Court stated:

We have one criterion for determining the existence of unconstitutional debt: Is the full faith and credit of the Commonwealth pledged or committed? If not, no unconstitutional debt is created.

*Dykes v. No. Va. Trans. Dist. Comm’n*, 242 Va. at 374.

The *Dykes* decision demonstrates that certain long-term financing structures, including bonds, may not always be considered “debt” subject to Virginia constitutional limitations so long as the governing body of the political subdivision is not legally obligated to continually appropriate tax revenues to support debt service. These structured deals are often called a “subject to appropriation” financing or moral obligation debt. They are often structured as leases under a county’s general power to lease property to other governmental entities. Va. Code § 15.2-1800. Although it may look like local government “debt,” it is not for purposes of applying the debt limits in the Constitution of Virginia.<sup>4</sup>

### **Statutory Causes of Action and the Nonsuit Statute**

Litigators in Virginia are no doubt aware of the revival provision contained in Va. Code § 8.01-229(E)(3), which states that a plaintiff taking a nonsuit may recommence the action within six months of the entry of the nonsuit order or within the original statute of limitations, whichever period is longer. However, the plain language of this section only operates to toll *statutes of limitations*, which creates a surprising trap for some local government zoning cases.

In *Friends of Clark Mountain Foundation, Inc. v Board of Supervisors of Orange County*, 242 Va. 16 (1991), the Virginia Supreme Court unequivocally declared that the 30-day limitation period in Va. Code § 15.2-2285(F) is not a statute of limitations, but rather, a statutory prerequisite to challenging the action of the governing body of a locality in adopting or failing to adopt a zoning ordinance. *Id.* at 21. Because the Court explicitly ruled that the 30-day period contained in the statute was “not a statute of limitations,” it would appear that an action challenging a rezoning or a denial of a rezoning under Va. Code § 15.2-2285(F) cannot be revived under the six-month recommencement provision for a nonsuit contained in Va. Code § 8.01-229(E)(3).

Though not yet presented to the Virginia Supreme Court, that question was the dispositive issue before the Loudoun County Circuit Court in *Ticonderoga Farms, Inc. v. Loudoun County Board of Supervisors*, 72 Va. Cir. 365 (Loudoun Cnty. 2006). In *Ticonderoga Farms*, the plaintiff had filed a timely lawsuit challenging the rezoning of certain property by the county. That suit was terminated by entry of an order of nonsuit. When the plaintiff brought a second suit, the county asserted that it was time-barred, because it was filed more than 30 days after the local governing body’s action, and the tolling provision of Va. Code § 8.01-229(E)(3) did not apply to an action brought under Va. Code § 15.2-2285(F).

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<sup>4</sup> See also *ACA Fin. Guaranty Corp v. City of Buena Vista*, No. 18-1268 (4th Cir. Feb. 21, 2019) (affirming dismissal of bond insurer’s action to recover on bonds originally issued to finance a municipal golf course in Buena Vista after the City of Buena Vista refused to continue paying debt service).

The court dismissed the second suit, noting that (1) the statutory period in which a party must bring such an action is 30 days, and (2) the Supreme Court ruled in *Friends of Clark Mountain* that this 30-day period is neither a statute of limitations nor a statute of repose. The court therefore declined to apply the nonsuit statute's tolling provision.

Attorneys should be aware of the interplay between these two statutes, as a plaintiff who nonsuits an action brought to challenge the approval or failure to approve a zoning amendment may not be able to recommence the action after entry of a nonsuit order.

### **Deference to Legislative Acts:**

#### **Locality Wins if any Evidence Makes the Question "Fairly Debatable"**

Local governments also receive the benefit of the doubt when courts are interpreting laws for purposes of substantive due process, equal protection, and other facial attacks on the substance of a legislative enactment. *Fairfax Cnty. v. Southland Corp.*, 224 Va. 514 (1982) (legislative enactments are presumed valid, which includes a presumption that local zoning ordinances are not arbitrary or capricious, but reasonable); *Schefer v. City Council of Falls Church*, 279 Va. 588 (2010) (appellant failed to show zoning ordinance was unreasonable and thus failed to rebut presumption of validity).

In *City Council of Virginia Beach v. Harrell*, 236 Va. 99, 101-02 (1988), the Virginia Supreme Court held that "absent clear proof that [a decision on a conditional use permit] is unreasonable, arbitrary, and bears no reasonable relation to the public health, safety, morals, or general welfare," the conditional use permit will not be altered by a court. In most cases, if there is probative evidence on both sides of the reasonableness debate to make the matter "fairly debatable," the legislation must be upheld. *EMAC v. Cnty. of Hanover*, 291 Va. 13 (2016) (denial of extension of conditional use permit for a commercial sign upheld). The doctrine of separation of powers creates this result so that courts do not overstep their bounds and become de facto legislators. *Ames v. Town of Painter*, 239 Va. 343 (1990) (constitutional principle of separation of powers precludes judge from reviewing the legislative act absent showing of unreasonableness).

This presumption of reasonableness is a substantial deference to local government and can lead to unexpected results when there is little evidence to support the reasonableness of the legislation in question.

For example, in *Town of Leesburg v. Giordano*, the circuit court ruled that an ordinance enacting utility fees was unreasonable, finding the expert for the utility customers to be far more credible and attaching significant weight to that opinion. 280 Va. 597, 607-608 (2010). In response to the Town's appeal, the customers asserted that the Town's expert was not credible. He did not conduct an independent study to support his opinion or provide any nexus between the rates he deemed reasonable and the costs and risks borne by the Town as owner of the utility. In addition, the record reflected that the Town Council instructed the town expert double the rate for customers outside the town versus the rate for in-town customers. The customers asserted that there was no basis for the Town's expert to conclude that the fees were reasonable and uniform. Overruling the trial court, the Supreme Court concluded that despite these deficiencies, the Town's evidence was sufficient to make the issue of the rates' reasonableness fairly debatable.

The Court stated:

The question in this case is not who presented the greatest number of expert witnesses or even who won the battle of the experts. Rather, the question is whether there is any evidence in the record sufficiently probative to make a fairly debatable issue of the Board's decision to deny . . . a special use permit.

*Id.* at 11 (quoting *Bd. of Supv'rs v. Stickleby*, 263 Va. 1 (2002)). The sufficiency of evidence is not solely a matter of weight or credibility. If there is probative evidence sufficient to make the matter fairly debatable, the King wins, and legislative act will be upheld.

This presumption in favor of the locality leads to another oddity of local government law – these types of cases are far more susceptible to being dismissed by demurrer than others. When the allegations in the complaint and any documents attached thereto are taken as true and are sufficient to make the question of reasonableness fairly debatable, the trial court is correct to dismiss the case on demurrer. See *EMAC v. Cnty. of Hanover*, 291 Va. 13, 23 (2016) ("The circuit court properly relied upon this extensive record to conclude that the Board's decision was fairly debatable, and that EMAC had failed to allege facts upon which it could prevail in its challenge of the Board's zoning decision. It was, therefore, proper for the circuit court to sustain the defendants' demurrer and motion to dismiss."); *Eagle Harbor v. Isle of Wight Cnty.*, 271 Va. 603, 620 (2006) (complaint attached staff report that contained evidence of the reasonableness of the fees challenged).

### **Conclusion**

Given the unique nature of local governments and the historic development of the common law, local government law is replete with unexpected principles of law. A locality is a unique litigant. It literally retains rights that were once reserved to monarchs; it is frequently afforded deference no other party receives; and it is both governed and protected by the strictest interpretation of the laws. Understanding this unique character of local government law is critical to localities, to those who deal with localities, to litigants, and the courts.

