

LGA PARTICIPATION AS AN AMICUS CURIAE

(Last updated April 2009)

The following chronological list summarizes the court cases in which LGA has filed amicus briefs as *amicus curiae*. For those cases in late 2007 and thereafter, the amicus briefs themselves are available for viewing in pdf format by clicking on the appropriate link on the LGA Amicus Committee web page: www.lgava.org/committees/amicus.php.

Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 945 F.2d 760 (4th Cir. 1991).

Author(s): Harold Jonathan Krent, University of Virginia Law School, Charlottesville VA argued. On brief: Harold P. Juren; G. Timothy Oksman; Joseph P. Rapisarda, Jr.; Local Government Attorneys of Virginia, Inc., Charlottesville, VA; C. Flippo Hicks, Virginia Association of Counties, Richmond, VA

Issue: Landowners brought civil rights action against Virginia town that failed to extend sewer service to their parcels of land following annexation in accordance with Virginia Annexation Court orders.

Result: The Fourth Circuit Court of Appeals held that because the annexation court system is a matter of purely state and local law, and because there may be other state remedies available to plaintiffs in this case, the district court's orders granting summary judgment and damages in favor of plaintiffs was vacated. In *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943), the Supreme Court set out a form of abstention which is appropriate in order to prevent unnecessary interference by the federal courts in the interpretation of a complex state regulatory scheme. The purpose of *Burford* abstention is to prevent a federal court from interfering with a "complex state regulatory scheme concerning important matters of state policy for which impartial and fair administrative determinations subject to expeditious and adequate judicial review are afforded." *Aluminum Co. v. Utils. Comm'n of N.C.*, 713 F.2d 1024 (4th Cir. 1983).

People Helpers Found. v. City of Richmond, 12 F.3d 1321 (4th Cir. 1993).

Author(s): Harold Jonathan Krent, DePaul University College of Law, Chicago, IL

Issue: Nonprofit corporation promoting housing for the developmentally disabled brought action against city alleging violation of Fair Housing Act, claiming that the City had intimidated People Helpers and discriminated against its disabled clients in violation of 42 U.S.C. § 3617. The District Court determined that discriminatory practices had occurred and granted the plaintiff's motion for a permanent injunction. The court also found that People Helpers was a prevailing party, under 42 U.S.C. § 3613(c)(2), and was entitled to attorney's fees and costs; in so doing, the court concluded that because the City's Rule 68 offer of judgment was not more favorable than the final judgment, People Helpers was entitled to attorney's fees and costs, which it established in the amount of \$10,000. Three months after the injunction, People Helpers' requested tax exempt status. The Council Legislative Committee voted not to recommend People Helpers for tax exempt status because People Helpers had past due personal property taxes. People Helpers then filed a petition for a rule to show cause why the City should not be found in contempt for violating the court's order by interfering with People Helpers because it failed to recommend tax exempt status to the General Assembly. The Court found the City had violated the court's injunction and ordered the City to abate all personal property taxes assessed against People Helpers.

Result: The Court of Appeals held that: (1) district court exhibited no personal bias against city warranting recusal of district judge; (2) corporation was not entitled to either punitive or compensatory damages in the absence of showing of actual harm to nonprofit corporation; (3) corporation was not a prevailing party entitled to recover attorney fees; and (4) city did not violate injunctive order by recommending that nonprofit corporation be denied tax-exempt status. The court also vacated the punitive damages award, assessment of attorney fees and costs, and contempt order.

Richmond, Fredericksburg & Potomac R.R. v. Metro. Washington Airports Auth., 251 Va. 201, 468 S.E.2d 90 (1996).

Author(s): On brief, in support of appellee: Elizabeth D. Whiting

Issue: A landowner whose land fell within "clear zone" in which development was restricted by Federal Aviation Administration (FAA) seeks a determination in a declaratory judgment proceeding under Va. Code § 8.01-187 that its private property has been taken or damaged for public use without just compensation, within the meaning of Article I, § 11 of the Constitution of Virginia.

Result: Actions of airport authority in seeking to acquire or obtain land use and aviation easement over property adjoining airport did not constitute “taking” of property where authority constantly resisted FAA pressure to acquire property and finally accepted RF & P’s offer to sell for \$2,000 an easement over the clear zone. The conditional letter of intent, which would have allowed use of the clear zone to support RG & P’s non-clear zone land, was purely voluntary on RF & P’s part. The Authority’s acts taken subsequent to execution of the letter of intent did not constitute a commitment to acquire RF & P’s land. Additionally, flights over private land are not “taking” for which just compensation is required under State Constitution unless they are so low and so frequent as to be direct and immediate interference with enjoyment and use of land.

Prince William County v. Omni Homes, 253 Va. 59, 481 S.E.2d 460 (1997).

Author(s): On brief, in support of appellant: Roger C. Wiley, Hefty & Wiley

Issue: Developer claimed that county’s purchase of property adjoining its proposed subdivision constituted an uncompensated taking of property in violation of the 5th Amendment of the United States Constitution or Article I, § 11 of the Constitution of Virginia.

Result: The Supreme Court of Virginia held that: (1) County's purchase of property through which developer planned to gain road and sewer access to its proposed subdivision did not deprive developer of all economic or beneficial use of its property and was not categorical taking under Fifth Amendment. The subdivision could be developed at planned density if developer paid full cost of off-site roads and utility access, or at lesser density. Action which limits ability to develop or use land as originally intended or in manner producing largest return on investment does not qualify as categorical taking if another economic use for land is available; proper inquiry is whether action complained of stripped land of all economic uses. (2) County did not interfere with developer's reasonable investment-backed expectations for Fifth Amendment purposes when it purchased parcel through which developer had sought to obtain road and sewer access to proposed subdivision; developer's hope that it could secure required access could not transform risk of development into investment-backed expectation at time of purchase. In determining whether compensable taking has occurred, one who buys with knowledge of restraint must assume risk of economic loss. (3) County's purchase of property through which developer had planned road and sewer access to its proposed subdivision did not damage developer's property for purposes of takings provision of Virginia Constitution; developer did not lose right to develop its property, and had not acquired rights necessary to realize its preferred method of development either as matter of contract or easement.

Lawrence v. Jenkins, 258 Va. 598, 521 S.E.2d 523 (1999).

Author(s): On brief, in support of appellants: Wilburn C. Dibling, Jr. of Gentry, Locke, Rakes and Moore

Issue: Whether an individual requesting documents pursuant to the Virginia Freedom of Information Act (FOIA) is denied rights and privileges conferred by that Act when a responding public official chooses to exercise an exemption, redacts the exempt information from the documents, but fails to timely reference the applicable Code sections that makes portions of the requested documents exempt.

Result: Failure of zoning administrator to refer to specific provision of the Freedom of Information Act (FOIA) that protected redacted information from disclosure in his initial response to property owner's request for information under the FOIA did not entitle property owner to disclosure of redacted information, where redacted information fell within a FOIA exemption and zoning administrator stated in his initial response that redacted information was protected from disclosure under the FOIA; zoning administrator's failure to refer to specific provision of FOIA that protected redacted information from disclosure did not operate as a waiver of zoning administrator's otherwise valid exercise of applicable exemption.

360 Degrees Commc 'ns Co. of Charlottesville v. Bd. of Superv'rs of Albemarle County, 211 F.3d 79 (4th Cir. 2000).

Author(s): William Malone; John L. Knight, Henrico Deputy County Attorney; Sterling Rives, Hanover County Attorney; C. Flippo Hicks; Mark K. Flynn; Miller & Van Eaton, PLLC, Washington, DC

Issue: Provider of wireless telephone services alleged that denial of special-use permit for construction of wireless communications tower violated the Telecommunications Act.

Result: Fourth Court of Appeals held that: (1) denial of permit was supported by substantial evidence, and (2) denial did not have effect of prohibiting provision of personal wireless services in view of evidence of other potential alternatives for expanding provider's coverage and board's prior approval of 18 applications for wireless service facilities, including several from that provider and a few for towers in mountain regions.

Coca-Cola Bottling Co. of Roanoke v. County of Botetourt, 259 Va. 559, 526 S.E.2d 746 (2000).

Author(s): On brief, in support of appellee: John L. Knight; Michael H. Long; James V. McGettrick

Issue: Whether personal property was used (1) in a sales business and subject to local taxation, as the trial court held, or (2) in a manufacturing business and a part of the Commonwealth's tax base, as set forth in Va. Code 58.1-1100, as the taxpayer contends.

Result: Unlike computers or office equipment used in whole or in part, in planning, directing or administering the manufacturing function, the sales equipment in question in this case was not used in manufacturing but merely in selling the finished product. Thus, this equipment could be considered as sales equipment used in a separate sales business. The Supreme Court not decide whether the taxpayer was also engaged in a separate wholesale business because the taxpayer has not borne his burden under Virginia Code § 58.1-3984 of showing, which, if any, of the taxed property was used in sales at the wholesale level.

Blanton v. Amelia County, 261 Va. 55, 540 S.E.2d 869 (2001).

Author(s): Neil L. Walters, Scott & Kroner, Charlottesville, VA

Issue: Farmers who either possessed or had applied for permits from State Health Commissioner authorizing use of biosolids upon their respective farmland filed bill of complaint for declaratory judgment and injunctive relief against County, challenging county ordinances that banned use of biosolids.

Result: The Supreme Court of Virginia held that the County's ordinances were inconsistent with Virginia Code § 32.1-164.5 (state statute authorizing land application of biosolids upon issuance of permit) and with Biosolids Use Regulations promulgated by State Board of Health pursuant to that statute.

Connally v. City of Portsmouth, Case Nos. 01589, 01590 (Portsmouth Cir. Ct., order entered Sept. 27, 2001).

Author(s): Letter of support from LGA President David Bobzien on behalf of LGA

Issue: Grievability of pay decision of governing body when inconsistent with past practice. Appeals of two determinations of non-grievability by the Portsmouth Director of Human Resource Management, involving two police officers' complaints over differences in pay between police and fire personnel. The City Council had approved a higher pay scale for officers in the Fire Department than for officers in the Police Department. The Circuit Court orally held that the City had a uniform system for fire and police pay which is routinely followed, and called the disparity in pay "inconsistent and arbitrary" and therefore grievable. On reconsideration, the LGA submitted a letter in support of the City addressed to Tim Oksman, City Attorney, over the signature of David Bobzien, LGA President at the time, dated September 6, 2001. In it, Bobzien noted that establishment of revision of wages and salaries are solely within the prerogative of management under Virginia Code § 15.2-1507, and therefore, nongrievable. He also complained about the adverse effect the decision might have in other circuits if followed.

Result: The Circuit Court refused to reconsider its decision and entered an order dated September 27, 2001 consistent with his earlier verbal ruling.

Padgett v. Appomattox County Bd. of Superv'rs, Case No. CL02000028-00 (Appomattox County Cir. Ct. 2002).

Author: Andrew McRoberts

Issue: The County Administrator separately telephoned the members of the Board of Supervisors on two occasions to ask whether or not they supported an appeal of a decree entered against the County in a mandamus action brought by the Commonwealth to force the County to either renovate the current court facilities or construct new facilities. The County Administrator had the authority to note the appeal without an official vote by the Board but wanted to seek guidance from the members of the Board before making a decision. The Board members were never sitting together, either physically or through any other means, and there was no simultaneous electronic or telephone communications between the members. The General District Court held that the poll conducted by the County Manager constituted a meeting in violation of the FOIA. The County appealed the General District Court's decision to the Circuit Court.

Result: The Circuit Court gave the LGA leave to file an *amicus curiae* letter in the appeal. As the president of the LGA, Andrew McRoberts sent the *amicus curiae* letter to the Court in March 2003. After the LGA filed the *amicus curiae* letter, the Board of Supervisors announced that the LGA had validated its actions and it was withdrawing the appeal to avoid further costs to the County.

City of Bristol v. Earley, 145 F. Supp. 2d 741 (W.D. Va. 2001), *sub. nom. City of Bristol v. Beales*, Record # 01-1741 (L), 01-800, __F.2d __ (4th Cir. 2002) CA-00-173

Author(s): Howard P. Dobbins and Elizabeth Horsely of Williams, Mullen, Christian & Dobbins, Richmond, VA (on brief: Mark Flynn, VML; David Bobzien, Fairfax County Attorney; Andrew R. McRoberts, Goochland County Attorney, on brief)

Issue: Telecommunications Act of 1996; federal preemption of Virginia statute restricting local government authority to provide telecommunications services. Lawsuit brought by City of Bristol under 47 U.S.C. § 253 (a) to declare void Virginia Code §15.2-1500(b), which was intended to prevent local government entities from providing fiber-optic telecommunications services. District Court held that the state restriction was void under the supremacy clause, since Section 253 of the Telecommunications Act states that no state may prohibit “any entity” from providing telecommunications services. The LGA joined VACo and VML in filing an amicus brief on appeal to the Fourth Circuit Court of Appeals.

Result: The Fourth Circuit dismissed the appeal and vacated the order of Judge Jones of the District Court. The appeal was dismissed after being sought by the AG and agreed to by Bristol in light of the remedial amendments to Va. Code § 15.2-1500 earlier that year. The dismissal was granted over the objection of the Virginia Telecommunications Industry. The dismissal order was filed May 1, 2002.

County of Chesterfield v. Windy Hill, Ltd., 263 Va. 197, 559, S.E.2d 627 (2002).

Author(s): Gail Starling Marshall, Rapidan, VA (on brief: David P. Bobzien, Fairfax County)

Issue: County and planning director filed a bill of complaint to enjoin landowner and lessee from selling alcohol at a sports complex in violation of conditional use permit. Local land use authority; preemption by state ABC license. The county zoning ordinance places the land in an agricultural district in which certain uses, including “outdoor recreational establishment[s],” are permitted only upon the issuance of a conditional use permit. In June 1999, Windy Hill applied to the Virginia Alcoholic Beverage Control Board (the ABC Board) for a license to sell and serve beer at the sports complex. The County objected to the issuance of a license on the ground that the sale of alcohol at the complex would violate the applicable zoning conditions. On March 20, 2000, the ABC Board granted Windy Hill a beer on-premises license.

Result: Supreme Court of Virginia reversed judgment in favor of Windy Hill and issued a permanent injunction preventing Windy Hill from violating conditions of special use permit. The Supreme Court held: (1) the permit condition against alcoholic beverages did not conflict with the power of the Alcoholic Beverage Control Board to regulate the use of alcohol and, therefore, was valid, and (2) county was not entitled to injunction against owner.

Glazebrook v. Bd. of Superv'rs of Spotsylvania County, 266 Va. 550, 587 S.E.2d 589 (2003).

Issue: Virginia Supreme Court ruled that the county's advertisement of a zoning text amendment was invalid and in violation of Va. Code § 15.2-2204 as lacking a "descriptive summary" of the amendment. Supreme Court overturned a circuit court decision on demurrer in favor of the county.

Result: Court denied LGA's request to file a brief and refused to reconsider the decision.

Boyd v. County of Henrico, 42 Va. App. 495, 592 S.E.2d 768 (2004) (en banc).

Author(s): Andrew McRoberts, Goochland County Attorney; Walter C. Erwin, Lynchburg City Attorney, on brief

Issue: Defendant, a dancer at club featuring dancers wearing G-strings and "pasties," was convicted in the General District Court, Henrico County, of public nudity in violation of county ordinance, and two other defendants who managed the club were convicted of aiding and abetting public nudity. The attorney in the case for the local government side was the Henrico Assistant Commonwealth's Attorney. Three-judge panel (with vigorous dissent) dismissed criminal charges against exotic dancer. En Banc review approved.

Result: On rehearing en banc, the Court of Appeals held that: (1) County ordinance banning public nudity furthered the interest in preventing harmful secondary effects associated with erotic clubs in a manner unrelated to suppression of free expression, as element of First Amendment analysis of content-neutral restrictions on speech, though ordinance exempted theaters. Exemption did nothing more than ensure that the ordinance incidentally restricted the least amount of expressive conduct, thereby protecting the ordinance against an overbreadth challenge, and providing an exemption for theaters, but not for erotic

clubs, reflected legitimate recognition of unique secondary effects associated with erotic clubs. (2) County ordinance banning public nudity did not violate due process by allegedly being vague regarding prohibited conduct; ordinance used terms in common use and readily understood by the average person, such as “buttocks,” “female breast,” and “top of the nipple,” and the ordinance's scienter requirement mitigated any vagueness. (3) Prosecution of erotic dancers for violating county ordinance banning public nudity did not constitute selective prosecution in violation of equal protection, because the dancers had no First Amendment right to wear pasties and G-strings rather than the lingerie-like tops and bottoms required by the ordinance; the dancers were not prosecuted because of their expression of any constitutionally protected speech. (4) Erotic dancers at club did not qualify for theatrical exemption from county public nudity ordinance; dancers took their clothes off on a bar rather than a theatrical stage, they did not use scripts, read lines, or sing, no one passed out playbills or programs, no stage hands set up props or made scene changes, and no evidence suggested the audience came to see a play, ballet, drama, tableau, production, or motion picture or showed up at club thinking it was a theater or similar establishment.

County of Goochland v. W. Creek Assocs. II, Record No. 032316 (Va. Sup. Ct., Order entered July 9, 2004).

Author(s): Tracy L. Taliaferro, Esquire, Taliaferro Law Offices (now Taliaferro & Mallory) Sterling E. Rives, III, then president of the LGA, actually signed the brief on behalf of the LGA

Issue: This appeal pertained to a trial court decision to reduce the assessment of multiple parcels by a total of \$35 million. The County of Goochland challenged the ruling of the trial court on many grounds that many of the assessments were in error and should be corrected. The landowners appealed the denial of their nonsuit motion on the morning of trial. The LGA amicus brief pertained to whether the trial court afforded the real estate assessment the appropriate presumption of correctness.

Result: The Virginia Supreme Court did not rule on the County's appeal, but instead reversed the trial court on the nonsuit ruling, dismissing the cases. The decision was issued by order and no opinion was issued. The assessments returned to the pre-litigation amounts, but can still be challenged by property owner. The order was entered on July 9, 2004.

City of Chesapeake v. Cunningham, 268 Va. 624, 604 S.E.2d 420 (2004).

Authors: Howard W. Dobbins; Elizabeth Mason Horsely; Williams Mullen, on brief

Issue: Customer brought action against city, alleging that her miscarriage was caused by toxic water supplied by city. Case involving sovereign immunity of cities and towns (and arguably authorities established by counties or combination of counties, cities, and towns). Circuit Court denied demurrer of City of Chesapeake. Many plaintiffs filed suit against Chesapeake, alleging harm to plaintiffs from chemicals in drinking water.

Result: The Supreme Court upheld the application of sovereign immunity by decision issued in November, 2004.

Alliance to Save Mattaponi v. Commonwealth, Dep't of Env't'l Quality, 270 Va. 423, 621 S.E.2d 78 (2005).

Author(s): LGA and VML jointly filed an *amicus* brief in support of the petition for appeal and, after the appeal was granted, an *amicus* brief in the case.

Issue: These cases involve appeals from the Court of Appeals decision to uphold the State Water Control Board's ("SWCB") issuance of a Virginia Water Protection Permit to the City of Newport News for the proposed reservoir in King William County. The issue of concern to VML and LGA pertains to a sovereign immunity claim raised by the Attorney General that the appeal of the SWCB permit is barred.

Result: On consolidated appeals, the Supreme Court held that: (1) State Water Control Board (SWCB) acted within its discretion in determining that conditions of water protection permit for city's reservoir project would provide adequate protection for affected wetlands; permit conditions required city to create or restore vegetated wetlands at a minimum of a 2:1 level of compensation and to submit a detailed wetland mitigation plan to Department of Environmental Quality (DEQ) for prior review and approval, the wetlands mitigation plan was required to include specific success criteria and a monitoring program, and permit conditions required city to subject mitigation plan to public notice, public meeting, and comment period before final DEQ approval. (2) SWCB acted within its discretion in relying on a one-dimensional scientific model addressing potential salinity changes in river, in connection with Board's issuance of water protection permit to city for reservoir project; a report prepared by Army Corps of Engineers' Waterways Experiment Station analyzed model and found that its approach was

technically sound for assessing environmental impact of freshwater withdrawal from river, Corps' report also approved assumptions made in model and concluded that model's conclusions were adequate to address impact of freshwater withdrawals, and Corps' report disagreed that a three-dimensional model was needed. (3) SWCB satisfied its statutory obligation to prevent waste or unreasonable use of state waters, in connection with Board's issuance of water protection permit to city for reservoir project, even if certain studies concluded that city inflated its future water needs by as much as 50%; several studies conducted by a regional study group, the Corps, DEQ, and Board all supported the need for project, the future water deficits estimated in Corps' final environmental impact statement (EIS) compared favorably with Board's own studies, and DEQ independently determined that city's demand projections were not unreasonable and that objectors' projections were low. (4) SWCB did not have authority to consider Indian tribe's rights under a 1677 treaty that tribe's ancestors made with the British Crown, before Board issued city a water protection permit for reservoir project; Board derived its authority solely from Water Control Law, which set forth Board's duties including issuance or denial of water protection permits, and Water Control Law did not authorize Board to adjudicate any private rights. (5) Archaeological sites that allegedly would be flooded by city's reservoir project for which city obtained disputed water protection permit from SWCB were not beneficial uses of water under statute specifying cultural and aesthetic values as component considerations in the preservation of instream flows as beneficial uses of state's waters; although sites had cultural value, statute did not refer to sites among the various factors to be considered but focused instead on present-day uses related to the waters, including fish and wildlife resources. (6) A 1677 treaty between the British Crown and ancestors of Indian tribe that opposed reservoir project for which city obtained water protection permit from SWCB was not federal law; treaty could not have been made under authority of United States, as the United States did not exist in 1677, Supremacy Clause's reference to "treaties made" signified an adoption of only those treaties made during the eight years when Articles of Confederation were in effect for federal government, tribe's chancery suit did not raise a claim involving title or possession of any Indian lands, and tribe had not been granted federal recognition and had not obtained protective federal legislation based on an acknowledged guardian-ward relationship. (7) Commonwealth had sovereign immunity from Indian tribe's claims, under 1677 treaty between tribe's ancestors and the British Crown, challenging SWCB's issuance of water protection permit to city for reservoir project; General Assembly had not waived the Commonwealth's immunity from suits of that nature and, in the absence of such an express waiver, Commonwealth could not be held liable on those claims. (8) Executive Secretary of SWCB had immunity from suit in his official capacity with respect to Indian tribe's claims, under 1677 treaty between tribe's ancestors and the British Crown, challenging Board's issuance of water protection permit to city for reservoir project, even

though tribe sought injunctive relief against Secretary, where treaty was not federal law and there was an absence of any alleged violation of federal constitutional rights. (9) Circuit court had jurisdiction to consider Indian tribe's claims against city, under 1677 treaty between tribe's ancestors and the British Crown, concerning SWCB's issuance of water protection permit to city for reservoir project; plain terms of article of treaty addressing breaches and violations of treaty by "the English" against the Indians did not restrict tribe's recourse under the law but guaranteed such legal recourse "as if such hurt or injury had been done to any Englishman."

Eagle Harbor LLC v. Isle of Wight County, 271 Va. 603, 628 S.E.2d 298 (2006).

Author(s): Sands Anderson did the brief on behalf of VACO and LGA, as well as the Fairfax County Water Authority and the Virginia Water and Waste Authorities Association. The Supreme Court rejected the *amicus* brief based on opposition from the appellant.

Issue: Developers filed bill of complaint against county, seeking declaratory and injunctive relief concerning county's ordinances that increased water and sewer connection fees. Eagle Harbor contended that the connection fees were not "fair and reasonable" as required by statute because there was "no reasonable correlation" between the benefits derived from the water and sewer improvement projects funded by the bond proceeds and the fees charged. Developers made a demand pursuant to Virginia Code § 15.2-1248, that the County pay damage representing the sum by which land sales had been impacted by the challenged fees and for the imposition of improper and excessive water and sewer connection fees.

Result: The Supreme Court of Virginia held that: (1) Reasonable-correlation test, which examined whether there was reasonable correlation between benefit conferred and cost exacted, had no application to county ordinances that increased water and sewer connection fees; developers challenging fees neither pled nor argued that ordinances enacted fees that constituted impermissible tax as special assessment or impact fee, and developers did not contest county's authority to enact and levy connection fees as valid exercise of county's police powers. (2) Reasonableness of county ordinances that increased water and sewer connection fees was fairly debatable, and thus presumption of reasonableness would attach to ordinances, and ordinances would be sustained; fees were uniform charge to all new customers countywide, were less than actual system costs, and were solely dedicated to retiring utility bond issue. (3) Evidentiary hearing on issue of reasonableness was not required.

Bd. of Superv'rs of Culpeper County v. Greengael, LLC, 271 Va. 266, 626 S.E.2d 357 (2006).

Authors: LGA, VML and VACO jointly filed an *amicus* brief in the Supreme Court of Virginia, prepared by Howard Dobbins with Williams Mullen.

Issue: The case involves an appeal of a trial court decision to approve a subdivision plat in Culpeper County which did not meet all of the County's requirements for subdivision approval. In particular, the subdivision did not have the necessary water and sewer service which needed to be provided by the Town of Culpeper.

Result: The trial court attributed motives to Town council's denial of utility extensions. Lastly, the trial court improperly applied the vested rights laws by holding the actions taken in pursuit of, rather than reliance on, a significant affirmative government act were sufficient. The Supreme Court reversed the trial court's decision.

Bacon v. City of Richmond, 475 F.3d 633 (4th Cir. 2007).

Author(s): Sands Anderson did the brief in this case in the Fourth Circuit Court of Appeals on behalf of LGA and VML.

Issue: Disabled school children and their families brought action against the City and school board under Americans with Disabilities Act (ADA), the Rehabilitation Act, and state disability act, alleging inadequate handicap accessibility for school facilities. After defendants' motion to dismiss the ADA and Rehabilitation Act claims was denied, school board entered into settlement agreement under which it agreed to execute five-year ADA remediation plan. Judgment was entered against the City, even though it had not agreed to the settlement.

Result: The Court of Appeals held that: (1) The City could not be ordered to provide funding for system-wide retrofitting of City schools without a finding of fault on the part of the City; injunctive relief could not issue against the city when the city played no part in depriving any plaintiff of the rights guaranteed by the ADA. (2) Fact that City provided capital funding to City's public schools did not, in the absence of a finding of fault, justify an injunction imposing obligation on city to fund system-wide retrofitting of City schools pursuant to five-year ADA remediation plan agreed to by school board, in the board's settlement agreement with disabled children and their families in ADA lawsuit; City exercised no operational control over City school buildings or school services, and school board

received funding from other sources. (3) Fact that City owned public school buildings and used those buildings for certain recreational programs and civic events did not, in the absence of a finding of fault, justify an injunction imposing obligation on City to fund system-wide retrofitting of City schools pursuant to five-year ADA remediation plan agreed to by school board, in the board's settlement agreement with disabled children and their families in ADA lawsuit; City did not exercise any control over challenged services and activities, City was vested with bare legal title, school board was vested with exclusive control of all school property, and City's limited functions at school buildings were not at issue.

Logan v. City Council of City of Roanoke, 275 Va. 483, 659 S.E.2d 296 (Apr. 18, 2008).

Authors: Phyllis C. Katz and M. Ann Neil Cosby of Sands Anderson did the brief in this case in the Supreme Court of Virginia on behalf of LGA, VML, and VACo.

Issue: In 2004, a developer began the administrative process for the approval of a subdivision of a 50 acre parcel. The developer requested and the City of Roanoke Subdivision Agent granted two exceptions, one modification and one approval under the City's subdivision ordinance. Complainants dispute the granting of the two exceptions, one modification, and one approval. The brief argues that local governments must be able to delegate under Va. Code § 15.2-2255, the administration and enforcement of their subdivision regulations that pertain to "public improvements," including exceptions thereto to their planning commissions or other agent.

Result: The Supreme Court of Virginia held that § 15.2-2255 authorizes a local governing body to delegate to an agent the responsibility to administer and enforce subdivision regulations pertaining to public improvements within the locality.

City of Newport News, Va. v. Sciolino, No. 07-159 (U.S., filed Nov. 9, 2007).

Authors: Andrew J. Morris, Charles A. Rothfeld, and Evan P. Schultz of Mayer Brown LLP on behalf of LGA, VACo, IMLA, IPMA-HR, NLC, and NPELRA.

Issue: The Fourth Circuit held that placing an allegedly false accusation of wrongdoing in the personnel record of a terminated probationary employee, allegedly without due process, could give rise to a claim against the employer under the Due Process Clause of the Fourteenth Amendment, even though there has never been any "actual" dissemination of the record, if it is "likely" that such a disclosure might occur. This ruling lays an unreasonable choice before public

employers who wish to terminate a probationary employee. The employer may either (1) terminate the employee without any explanation or supporting documentation or, alternatively, (2) preserve the explanation and supporting documentation and suffer the burdens of discovery and a hearing to substantiate its reason(s) for terminating the employee.

Result: Petition for certiorari denied. *See* 480 F.3d 642 (4th Cir. Mar. 12, 2007), *cert. denied*, 128 S. Ct. 805, 169 L. Ed. 2d 606, 2007 WL 2292746 (U.S. 12/10/07).

W. Creek Assocs. v. County of Goochland, 276 Va. 393, 665 S.E.2d 834 (Sept. 12, 2008).

Author: James V. McGettrick, Assistant Fairfax County Attorney, on behalf of LGA, VACo, and VML.

Issues: (1) What is the significance of the price paid for a large tract of land in the subsequent assessments of much smaller individual parcels created from it, and (2) if and when the presumption that an assessment is correct can be overcome by a contrary opinion of value. In this case, the taxpayers argued that the total of the individual assessments of 144 separately recorded parcels of property, each owned by a different legal entity, had to equal the price paid in the previous year in a sale of the entire large tract of land from which the parcels were created. Also, in the appeal the taxpayers effectively sought to modify various well-established procedural rules relating to local tax assessment proceedings and judicial review thereof.

Result: In order to show manifest error, a taxpayer need not prove what information the taxing authority considered and how it arrived at the assessment in question (i.e., its methodology) but, rather, can simply show a significant disparity between fair market value and assessed value. In this case, however, the trial court's finding "that [the taxpayer] did not carry its burden of showing that the parcels are assessed at more than fair market value" was not plainly wrong or otherwise unsupported by the evidence.

Lynchburg Div. of Soc. Servs. v. Cook, 276 Va. 465, 666 S.E.2d 361 (Sept., 12, 2008).

Authors: Michael S.J. Chernau, Mark K. Flynn, and Phyllis A. Errico, on behalf of LGA, VML, and VACo, respectively.

Issue: Division of Social Services (DSS) removed minor child from her parents' custody, based on allegations against father, and placed her in foster care. Parents and grandparents filed petitions for custody. The Court of Appeals held that: (1) grandparents were entitled to bring a direct, independent action seeking a change in child's custody from DSS, separate and apart from any foster care plan; (2) "best interest of the child" standard, rather than the standard for approving foster care parents, applied in adjudicating grandparents' custody petition; and (3) DSS's position was not unreasonable, and, thus, there would be no award of attorney fees associated with appeal.

Result: Reversed and remanded. "Once a child has become subject to proceedings under the foster care statutes, a court may not transfer custody without the specific, written factual findings required by the foster care statutes. This statutory mandate holds true whether the custody order is entered upon a petition for custody, a petition for a foster care review hearing, or a petition for a permanency planning hearing. An award of custody without such findings, as in the case at bar, is error as a matter of law." 276 Va. at 483, 666 S.E.2d at 370.

Va. Baptist Homes v. Botetourt County, 276 Va. 656, 668 S.E.2d 119 (Oct. 31, 2008).

Author(s): LGA and VACo jointly filed an *amicus* brief in the Supreme Court of Virginia, prepared by Edwin N. Wilmot, City Attorney for Hopewell.

Issue: Virginia Baptist Homes is a nonprofit organization that owns and operates a retirement community, the Glebe, in Botetourt County. The County argues that the property does not qualify for exemption by designation from local real estate taxation because the tax-exempt designee does not hold the necessary ownership in the property, the tax-exempt designee is not using the property, the property is not used exclusively for religious or benevolent purposes, and because the property is not used in accordance with the purpose for which the designee was designated exempt.

Result: The trial court erred in holding that a not-for-profit corporation organized by a church-based organization and intended to provide a home for the elderly was not exempt from local property taxation. Final judgment entered in favor of Virginia Baptist Homes, holding that it and The Glebe were exempt from taxation under the provisions of Va. Code § 58.1-3650.33.

Hale v. Bd. of Zoning Appeals of Blacksburg, 277 Va. 250, 673 S.E.2d 170 (February 27, 2009).

Authors: LGA, VML, and VaCO filed an *amicus* brief in the Supreme Court of Virginia, prepared by Andrew R. McRoberts, Goochland County Attorney.

Issue: Whether a developer has a vested right, under Va. Code § 15.2-2307, to build a “big box” store without obtaining a special use permit. The special use requirement for “big box” stores was enacted one year after the builder’s property had been rezoned. The developer had proffered no specific use or enforceable plan of development when it requested a commercial rezoning stating it needed “flexibility” to adjust to the market conditions. The developer sought a determination that the rezoning had resulted in vested rights under § 15.2-2307. The Circuit Court found that the rezoning was directed to a specific project within the meaning of § 15.2-2307 and, thus, ruled for the developer. The Town of Blacksburg appealed, arguing that the Circuit Court erred in determining that the adoption of the ordinance constituted a significant affirmative governmental act allowing development of a specific project within the meaning of § 15.2-2307.

Result: The circuit court erred in ruling that the BZA correctly determined that the developers had a vested right to develop on the property structures for retail sales in excess of 80,000 square feet of gross floor space without the necessity of first obtaining a special use permit. The Supreme Court reversed the judgment of the circuit court affirming the decision of the BZA, reinstated the determination of the Zoning Administrator that a special use permit will be required for a Retail Sales, Large Format use of the property, and entered final judgment for the Town.

Comcast of Chesterfield County v. Bd. of Superv’rs of Chesterfield County, 277 Va. 293, 672 S.E.2d 870 (February 27, 2009).

Authors: The LGA, City of Hampton, Commissioners of the Revenue Association of Virginia filed a joint *amicus* brief in the Supreme Court of Virginia, prepared by Daniel F. Basnigh of Kaufman & Canoles, PC.

Issues: Assignments of error:

1. The circuit court erred in failing to strictly construe the County’s authority to tax the contested property under Va. Code § 58.1-1101, as required by American Woodmark Corp.
2. The circuit court erred in applying the presumption of correctness afforded local tax assessments to questions of law regarding statutory construction and the County’s authority to tax the contested property.

3. The circuit court erred in adopting a broad construction of the term “machines and tools” that is inconsistent with the plain meaning, and frustrates the purpose, of § 58.1-1101(A)(2a).
4. The circuit court erred in holding that converters are subject to local taxation under § 58.1-1101(A)(2a), when the General Assembly expressly removed them from the statutory list of property that could be taxed locally.
5. The circuit court erred in dismissing the long-standing interpretation of § 58.1-1101(A)(2a) in ACP I & II, which adopted an appropriately narrow construction of the term machines and tools to hold that converters, amplifiers, power supplies and radios were intangible personal property.
6. The circuit court erred in ruling that the contested property was tangible personal property under Va. Code. § 58.1-1101(A)(2a), subject to business tangible personal property taxation by Chesterfield County.

Result: The order of the circuit court classifying the contested property as “machines” was not a final order and was not otherwise appealable as an interlocutory order. Thus, the Supreme Court was without jurisdiction of the appeal and the appeal was dismissed without prejudice as improvidently granted.

City of Lynchburg v. English Constr., __ Va. __, __ S.E.2d __, 2009 WL 1026836 (April 17, 2009).

Authors: LGA, VML, and Treasurers’ Association of Virginia filed an *amicus* brief in the Supreme Court of Virginia, prepared by Debra L. Mallory.

Issue: The Lynchburg Circuit Court held that the City of Lynchburg cannot levy a business license tax against gross receipts of a contractor attributable to definite places of business outside of Lynchburg, even if the other jurisdiction in which the definite place of business is located does not assess a business license tax. Currently, local tax officials assess the business license tax against all of the gross receipts of a contractor based in their jurisdiction, unless the contractor can show that the gross receipts were actually taxed in another jurisdiction.

Result: Affirmed. Applying the “last antecedent” rule of statutory construction, Va Code § 58.1-3703.1(A)(3)(a)(1) merely authorizes the locality in which the contractor has an office to tax those extraterritorial gross receipts derived from business done in other localities, which localities do not themselves tax such receipts, if the contractor does not have a “definite place of business” in such other localities.

Tanner v. City of Virginia Beach, __ Va. __, __ S.E.2d __, 2009 WL 1026491 (April 17, 009).

Authors: LGA and VML filed a joint *amicus* brief in the Supreme Court of Virginia, prepared by Andrew R. McRoberts, Goochland County Attorney.

Issue: The owners of a club brought suit against the City of Virginia Beach seeking a declaratory judgment that the City’s noise ordinance was unconstitutionally vague in violation of the Due Process Clause, both on its face and as applied to the club. The circuit court granted the City’s demurrer as to the facial challenge and the case proceeded on the as-applied claim. The circuit court ultimately held that although the City’s enforcement of the ordinance was “selective and uneven,” the plaintiffs failed to prove that it was discriminatorily applied against the club. The plaintiffs appealed.

Result: Reversed and final judgment for the plaintiffs. The City’s noise ordinance, prohibiting “unreasonably loud [and] disturbing noise” of “such character, intensity and duration as to” “disturb or annoy” “persons of reasonable sensitivity,” was struck down in its entirety as being unconstitutionally vague.

Bd. of Superv’rs of Stafford County v. Crucible, Inc., Record No. 081743 (Va., filed Feb. 23, 2009).

Authors: LGA filed an *amicus* brief in the Supreme Court of Virginia, prepared by Phyllis C. Katz, L. Lee Byrd, Annemarie DiNardo Cleary, and Ann Neil Cosby of Sands, Anderson, Marks & Miller PC.

Issue: Assignments of error:

1. The trial court erred in holding that § 15.2-2286(A)(4) VA Code Ann. allows the Crucible to obtain a vested rights determination from the Circuit Court without having to first obtain a vested rights determination from the zoning administrator.
2. The trial court erred in holding that the Crucible had a vested right, under § 15.2-2307 VA Code Ann., to develop its new training facility based on a zoning verification issued by the zoning administrator.
 - a. The trial court erred in holding that the Crucible was the beneficiary of an un-enumerated, significant affirmative governmental act ("SAGA") based on a zoning verification.

b. The trial court erred in holding that the Crucible relied in good faith on a SAGA.

c. The trial court erred in holding that the Crucible incurred extensive obligations or substantial expenses in diligent pursuit of a specific project in reliance on a SAGA.

Result: Appeal not yet decided.