Bill of Particulars

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

National Legal Research Group, Inc. David Wagoner, J.D., Editor

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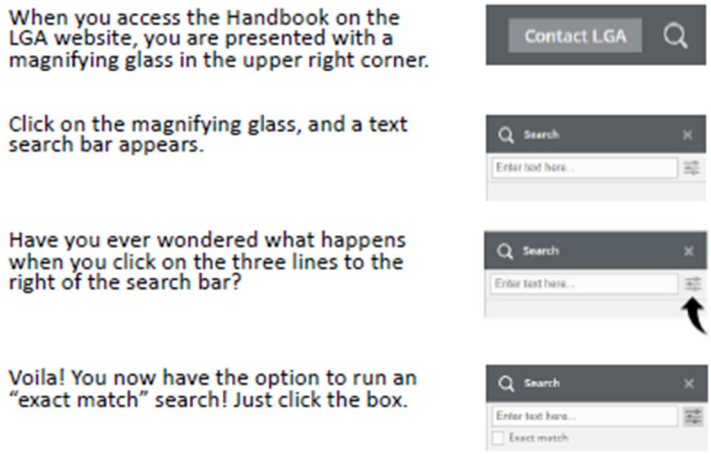
The 2024 Edition of the ***Handbook of Virginia Local Government Law*** is nearing completion. (Whew!) While many LGA members are "power users" of this terrific resource, there are some who are not as familiar with it as they might want to be. So, here is the first offering of what will be an occasional series of "how to" tips on how to get the most out of your ***Handbook*** research.

How to run an “exact match” search:



Happy researching!

David Wagoner, Editor, *Bill of Particulars* and *Handbook of Virginia Local Government Law*, dwagoner@nlrg.com

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IT’S ALMOST TIME! SPRING CONFERENCE REGISTRATION OPENS THIS MONTH

Christy Y. Jenkins, Associate Director

Registration opens March 21 for the 2024 LGA Spring Conference, which will take place at the Omni Richmond Hotel on April 25–27, 2024. Program topics include: Legislative Update, Legal Issues & Energy, Local Government Finance 101, FOIA, Zoning/Land Use, Appeals, Employment Law, Environment 101, and Localities on the Offensive. Keep your eye on the conference webpage for the full lineup of panelists, moderators, and descriptions, which will be published after a final review and approval by the Board.

Downtown Richmond is a fantastic backdrop for the much-anticipated “Friday Afternoon Activities.” We are working on some ideas, but we also welcome yours! Email Christy Jenkins at christy.jenkins@easterassociates.com with your thoughts and we will see what we can pull together!

Don't forget to tell us who is retiring, so we can recognize them; email the name and locality to christy.jenkins@easterassociates.com.

Conference Sponsorships are starting to sprout like the first crocuses of spring! The LGA is grateful for the generous support of the following sponsors:

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We also recognize our Annual Sponsors who support all LGA operations, including the conference:

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If you would like to join these sponsors in their support of exceptional education, networking, and fellowship as we foster excellence in local government, please see more information on our website or reach out to christy.jenkins@easterassociates.com.

LAW STUDENT/LAW FELLOW SCHOLARSHIP APPLICATIONS: AVAILABLE NOW

Law student and law fellow scholarship applications are now available for the LGA's 2024 Spring Conference. Please encourage your office's law student interns, externs, and post-graduate law fellows to apply. The application deadline is Wednesday, April 10. Click here for the application forms, which can also be found on the LGA website under the Conference menu tab at "Conference Scholarships." Please contact Brian Lubkeman, Chair of the Law School Liaison and Scholarships Committee, at blubkeman@brigliahundley.com or (703) 883-0206 with any questions.

NOTICE OF ANNUAL MEETING

The annual meeting of the Local Government Attorneys of Virginia, Inc., will take place on Thursday, April 20, at 2:45 p.m., following the first general session of the Spring Conference. The order of business is the election of officers and directors whose terms of office will begin September 1, 2023. Only active members (localities, independent school districts, Virginia Municipal League, and Virginia Association of Counties) are eligible to vote for board members.

On March 3, 2023, the LGA Nominating Committee met to consider the candidates for appointment or reappointment as officers and directors of the LGA Board. A synopsis of the report follows. The full report may be read here.

Nominating Committee Report

After thorough review and consideration, the Nominating Committee makes the following recommendations:

OFFICERS:

President - Andrew “Andy” H. Herrick, County of Albemarle (2024-2025)
Vice President - Kelly J. Lackey, County of King George (2024-2025)
Treasurer - Courtney R. Sydnor, County of Loudoun (2024-2025)
Secretary - Ryan C. Samuel, County of Arlington (2024-2025)

BOARD MEMBERS RETURNING FOR A SECOND TERM:

John C. Blair, City of Staunton (2024-2026)
Brandi A. Law, City of Hampton (2024-2026)

NEW BOARD MEMBERS:

Jeffrey “Jeff” S. Gore, County of Amelia and Hefty Wiley & Gore, P.C. (2024-2026)
Sarah E. Kegley, County of Scott (2024-2026)

THE FOLLOWING BOARD MEMBERS WILL CONTINUE IN OFFICE:

Martin R. Crim, Town of Culpeper (2023-2025)
Patrick C. Murphrey, City of Newport News (2023-2025)
Alan B. Spencer, City of Danville (2023-2025)
Tyler C. Southall, County of Dinwiddie (2023-2025)
Lesa J. Yeatts, Town of Herndon Immediate Past President 2024

NOMINATING COMMITTEE:

Adam R. Kinsman, Chair, County of James City
Bonnie M. Ashley, City of Richmond
Christine M. Newton, Town of Leesburg
Michael W.S. Lockaby, Spilman Thomas & Battle, PLLC
George Lyle, County of Henry
Lesa J. Yeatts, LGA President, ex officio Town of Herndon

LEADERSHIP TRAINING PROGRAM UPDATE

The inaugural Leadership Training Program was a hit! Registrants gathered in Fredericksburg to participate in this leadership development opportunity developed through a collaborative effort by the Virginia State Bar Local Government Law Section, Local Government Attorneys of Virginia (LGA), and the Virginia Institute of Government. Attendees dove into the management portion and intangible skills during this two-day seminar, and will complete the program through a combination of webinars and LGA conference programming

Interested in learning more about the program? Contact staff at info@lgava.org.

MEMBER NEWS

WELCOME to the following new members of the LGA!

Kenneth P. Abbarno (kabbarno@dicellolevitt.com), DiCello Levitt LLP

David D. Burnett (dburnett@dicellolevitt.com), DiCello Levitt LLP

Roxana Pierce (rpierce@dicellolevitt.com), DiCello Levitt LLP

Hon. Holly B. Smith (hbsmith@vacourts.gov), Williamsburg/James City County Circuit Court

Mark A. Trank (mtrank@norfolkairport.com), Norfolk Airport Authority

Diandra “Fu” Debrosse Zimmermann (fu@dicellolevitt.com), DiCello Levitt LLP

CONGRATULATIONS to the following LGA members who have a new position!

John D. Dryden (jdryden@rockbridgecountyva.gov) is the new Rockbridge County Attorney.

Stephanie J. Pough (spough@suffolkva.us) has been promoted to Deputy City Attorney with the City of Suffolk.

INTERVIEW WITH HUNTON ANDREWS KURTH LLP—A PROUD ANNUAL SPONSOR OF THE LGA

Please tell us about the history and structure of the firm.

Hunton Andrews Kurth LLP (our name resulting from the 2018 merger of Hunton & Williams LLP and Andrews Kurth Kenyon LLP) comprises over 800 lawyers serving clients across a broad range of complex transactional, litigation, and regulatory matters. We have domestic offices in Atlanta, Austin, Boston, Charlotte, Dallas, Houston, Los Angeles, Miami, New York, Richmond, San Francisco, Tysons, and Washington, D.C. Internationally, we serve clients from our offices in Bangkok, Beijing, Brussels, Dubai, London, and Tokyo.

What are the firm's areas of expertise when it comes to local government?

Public Finance. Hunton has represented and advised clients in public finance transactions for more than 65 years. For the entirety of the existence of our public finance practice, Hunton has been listed in The Bond Buyer's Municipal Marketplace, better known as "The Red Book," the directory of recognized municipal bond attorneys. We have played a role in transactions with over 900 different bond issuers and have served as bond counsel, disclosure counsel, or underwriter's counsel in 32 states, as well as the District of Columbia and the U.S. Virgin Islands.

While the geographical scope of our public finance practice is an important indicator of the firm's experience and wide acceptance in the marketplace, we have always valued the historic ties to our Virginia clients. To date, our Richmond-based Public Finance practice has served more than 500 Virginia issuers of municipal bonds, including the Commonwealth, state agencies, counties, cities, towns, water and sewer authorities, regional jail authorities, industrial/economic development authorities, and miscellaneous other authorities and districts. Financings for these clients have included virtually every purpose for which public bodies in Virginia are authorized to borrow money.

More recently, we have assisted localities in using innovative financing techniques, such as tax increment districts, service districts, and community development authorities, to leverage private investment in much-needed public infrastructure. The Hunton lawyers leading our Public Finance and P3 efforts are Chris Kulp, John O'Neill, Brendan Staley, and Martha Warthen.

Litigation Practice. Our Virginia litigation team has expertise across a wide range of matters and offers a broad set of capabilities to local government clients. Hunton's experience in representing public bodies in Virginia in litigation dates back decades, and it has continued to grow with the addition of both governmental clients and attorneys with relevant backgrounds working in Attorney General offices, overseeing matters for public bodies and officials, or both.

Hunton lawyers have substantive familiarity with the full panoply of litigation faced by Virginia public entities, including § 1983 claims and other constitutional challenges, employment disputes, intergovernmental disputes, FOIA challenges, construction litigation, and Dillon-rule challenges. Our experience has given us keen insight into the dynamics of representing public entities in litigation. We understand the distinctive pressures that underlie public decisions and that can influence the strategy of defending those decisions. We appreciate the institutional interests of public bodies, including the importance of establishing useful precedent and of taking litigation positions that are not in conflict with those taken by the client in other matters.

We are appropriately sensitive to the public scrutiny that often attends litigation against public entities. We are familiar with doctrines that are unique in the context of defending public-body clients—sovereign immunity, qualified immunity, etc.—as well as the potential impact of FOIA on litigation. Understanding the budget challenges facing public bodies, we have succeeded in attracting and retaining governmental clients because we pursue efficiency in staffing litigation matters. Our public-body clients do not necessarily hire Hunton for every case, but they regularly hire us for their most important cases. Hunton lawyers who frequently handle litigation for public entities include Trevor S. Cox, Maya Eckstein, Bob Tata, and Sona Rewari.

Governmental Relations. In addition to its diverse legal practice, Hunton Andrews Kurth operates a full-service public affairs consultancy known as the Global Economic Development, Commerce, and Government Relations Group. The consultancy includes government relations, economic development, and communications professionals who have worked at the highest levels of the public and private sectors including former elected officials, cabinet secretaries, agency and authority directors, senior staffers to statewide elected officials and members of congress, and economic development professionals with local, regional, state, and international experience.

Staffed by both attorneys and non-attorneys, the consultancy provides a range of services to local government clients and to private sector clients who interface with local, state, and regional entities. These services include lobbying and government relations, strategic communication and public relations, business and economic development, site selection, incentive negotiation, and much more. Todd Haymore leads this consultancy.

Is there any current or recent work of the firm that you would like to highlight?

- Served as bond counsel on several financings sold to the U.S. Environmental Protection Agency (EPA) under its Water Infrastructure Finance and Innovation Act (WIFIA) loan program, including the first "master" trust indenture structure used in that program.
- Currently advising or recently advised several localities on P3 projects involving public infrastructure to support sports facilities, retail malls, office parks, residential developments, and mixed-use projects. Such work has also involved advising on the deployment of economic development incentives, the relocation and retention of professional sports teams, and the development of tourism attractions.
- Served as bond and tax counsel in connection with private activity bonds issued as part of toll road transportation projects.
- Frequent representation of a county school board in various high-stakes litigation matters in state and federal courts, including the U.S. Supreme Court.
- Successfully defended a Virginia city in litigation matters concerning the disposition of public monuments.
- Persuaded the Virginia Supreme Court to dissolve an injunction preventing county police department from engaging in a common law-enforcement practice.
- Currently serving as registered lobbyists for several Virginia cities, counties, and authorities, as well as various private sector clients, trade associations, and non-profits. As such, we have secured millions in funding for local governments and agencies, and helped both public and private sector clients interact productively with one another.
- Provided full service public affairs services across a range of industries including the energy sector, finance, infrastructure development, government contracting and procurement, and healthcare. Notable recent work includes support for the development of a sports and entertainment district in Northern Virginia, support for creation of the East Coast's largest utility scale solar farm, and support for the creation of a robust pharmaceutical industry in and around the Richmond region.

Why does the firm support LGA?

Since the founding of LGA, Hunton lawyers have been enthusiastic supporters of LGA through our participation in conferences and our firm's role as an annual sponsor. We value the friendships and collaborative working relationships that we have been able to form and cultivate over the years with other LGA members. The collegiality found through LGA is unrivaled by other legal organizations. We continue to salute the professionalism and remarkable service to our shared goal of good government that we find among the LGA membership.

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MANY THANKS TO HUNTON ANDREWS KURTH FOR ITS ANNUAL SPONSORSHIP OF LGA!

VIRGINIA COURT OF APPEALS

REAL ESTATE TAXES • EXEMPTION FOR RELIGIOUS USE • VA. CODE § 58.1-3606(A)(2) • ATTORNEYS' FEES

Emmanuel Worship Ctr. v. City of Petersburg, No. 0409-23-2, 2024 Va. App. LEXIS 78 (Va. Ct. App. Feb. 13, 2024) (Raphael, J.).

HOLDINGS: (1) The church-owned property was subject to real estate taxation because it was not used exclusively for religious purposes. (2) The property was not exempt under the "adjacent land" provision. (3) The city was not entitled to attorneys' fees for the legal work performed after the church redeemed the property.

DISCUSSION: A church in Petersburg sought to recover back taxes that it had paid "under protest" on a property adjacent to the parcel on which it conducted its weekly worship services. The property at issue housed a shop (and several outbuildings) leased by a commercial tenant, as well as a brick building used by the church for activities that included Bible studies, Sunday school classes, and youth outreach. The trial court determined that the property was subject to real estate taxes because it was not used "exclusively" for religious purposes. The church appealed.

The court held first that the property was not exempt from taxation. Virginia's tax laws exempt from taxation "[r]eal property . . . owned by churches . . . and exclusively occupied or used for religious worship or for the residence of the minister." Va. Code § 58.1-3606(A)(2). Although caselaw from the 1960s liberally interpreted the term "exclusively" in similar contexts to mean something less than absolute, a 1971 amendment to the Virginia Constitution has since required that "[e]xemptions of property from taxation . . . shall be strictly construed." Va. Const. art. X, § 6(f). Here, it was uncontested that the property was not used as a ministerial residence, and the church failed to prove that it used the property "exclusively" for religious worship. Although various aspects of the church's activities on the property arguably fell under this umbrella, the presence of a window-tinting business that was unrelated to the church's religious mission rendered the property outside the scope of the exemption. The fact that the tenant's rent payments were deposited into the church's bank account did not alter the analysis, since "[i]t is the use to which property is put, not the use to which profits that are realized from such property are put, that determines whether the property shall be exempt." *Mariner's Museum v. City of Newport News*, 255 Va. 40, 47, 495 S.E.2d 251, 254 (1998).

The court held second that the property could not be deemed exempt from real estate taxes as "adjacent land" or "ancillary and accessory" property. The provision cited above also exempts from taxation church-owned property that qualifies as "adjacent land reasonably necessary for the convenient use of any such property," and "property used for ancillary and accessory purposes . . ., the dominant purpose of which is to support or augment the principal religious worship use." Va. Code § 58.1-3606(A)(2). For instance, this provision would apply to separate parcels used as parking lots for worship service attendees. Because the church never raised this argument, the court did not analyze its merit.

The court held third that the City of Petersburg was not entitled to attorneys' fees for its work performed after the church's redemption of the property. In earlier proceedings, the trial court entered a decree ordering the sale of the property to cover delinquent real estate taxes. The church subsequently rendered to the City the amount necessary to redeem the property by paying the accumulated taxes, penalties, interest, and attorneys' fees. The church then filed a bill of review, asking the trial court to reverse its findings, and the litigation proceeded. But nothing in the statutes addressing the sale of delinquent tax lands contemplated fees incurred after the property's sale or the taxpayer's redemption. *See* Va. Code §§ 58.1-3965–58.1-3975.

Therefore, the court affirmed the judgment rendered by the Circuit Court of the City of Petersburg.

TERMINATION OF PARENTAL RIGHTS • DEPARTMENT OF SOCIAL SERVICES • VA. CODE § 6.1-283(C)

Haynesworth v. Henrico Dep't of Soc. Servs., Nos. 1706-22-2 & 1720-22-2, 2024 Va. App. LEXIS 40 (Va. Ct. App. Jan. 30, 2024) (Raphael, J.).

HOLDING: The order terminating the parental rights of the mother was supported by clear and convincing evidence.

DISCUSSION: The mother of two young children, now six and nine years old, opposed the decision of the Henrico County Department of Social Services (DSS) to petition for the termination of her parental rights. Pursuant to this petition, the Henrico County Juvenile and Domestic Relations (JDR) District Court terminated the mother's parental rights pursuant to Va. Code § 16.1-283(C) on July 29, 2022, and approved the foster care goal of adoption. (The rights of each of the children's fathers were also terminated in 2022.) On October 25, 2022, the circuit court found by "clear and convincing evidence" that terminating the mother's parental rights was in the best interests of both children. This appeal followed.

The appeals court held that the circuit court did not err. In 2021, DSS received a report indicating that the mother had left her children unattended in a hotel room while she argued with hotel staff and was subsequently arrested. DSS notified the Henrico Police Crisis Intervention Team, which was already familiar with the mother because of "ongoing concerns regarding her mental health." Meanwhile, the children's maternal grandmother took the children into her home and expressed her concerns about their safety due to her daughter's "bizarre behavior." The grandmother also alerted DSS that the children were noticeably thinner since the last time she had seen them, and that one of the children had not been enrolled in school for several months. Based on this information, on February 21, 2022, the police obtained an emergency custody order and transported the mother to a psychiatric hospital, where she remained for two months. DSS assumed custody of the children, who were placed with the grandmother.

This all served as a backdrop for the court proceedings at hand. The statute upon which the JDR court based its ruling authorizes a court to terminate parental rights:

> if the court finds, based upon clear and convincing evidence, that it is in the best interests of the child and . . . [t]he parent or parents, without good cause, have been unwilling or unable . . . to remedy substantially the conditions which led to or required continuation of the child's foster care placement, notwithstanding the reasonable and appropriate efforts of social, medical, mental health or other rehabilitative agencies to such end.

Va. Code § 16.1-283(C). In other words, termination decisions based on this provision hinge on the demonstrated failure of the parent to make reasonable changes. Here, the mother's "unwillingness" began with her lack of cooperation with the Family Services Specialist (Caseworker) assigned to her case after she was hospitalized. At that time, the mother refused to comply with mental health treatment, take prescribed medications, or follow service recommendations; she refused to sign releases that were critical to DSS's ability to monitor her status; and she cut off or refused any communications with the Caseworker. After her release, the mother again refused to sign releases of information, denied all services offered by DSS, and declined mental health assessments and financial and housing assistance. Although she consented to a visitation plan, she breached that agreement just days later by attempting to visit her children without authorization. The court continued:

> Considering that the children's interests are paramount, we find it significant that the children were distressed by the idea of even *visiting* their mother. As the circuit court found, the children needed "a stable, permanent" home. But [the mother] could not provide one because her mental state changed "from day to day," she failed to receive mental health care, and she refused to provide the Department basic information or use their services. The children had been in foster care for over 20 months by the time of the circuit court hearing. They had benefitted from a stable family setting, and both were thriving in school, day care, family, and extra-curricular activities . . . .
>
> The record also supports the circuit court's finding that the Department made "reasonable and appropriate efforts" to remedy the conditions that led to the foster care placement. The Department's efforts began when it initiated a voluntary prevention case, which [the mother] essentially ignored. Before [the mother]'s hospitalization, when the Department tried to form a safety plan to address its concerns, [the mother] responded angrily. After the emergency order was issued and [the mother] was hospitalized, the Department's efforts ramped up. It assigned [the Caseworker] to assist the family. She testified at length about her efforts to meet and communicate with [the mother] and to support her with resources . . . .
>
> Even after [the mother]'s release from the hospital in May 2021, the Department continued to offer her services (including consultations and case management). [The Caseworker] met with [the mother] and attempted to form a visitation plan. [The Caseworker] referred [the mother] to the [Attachment & Trauma Institute], which, even after denying [the mother]'s application for therapeutic visitation after her chaotic behavior, offered her other services (including support classes). The Department arranged for [the mother] to see a therapist. It hoped to have her therapist and the children's therapist decide together when visitation could resume. And even after initiating termination proceedings in November 2021, the Department attempted to help [the mother] by guiding her through the available services.

In sum, all relevant authorities and judicial officials concluded that it was in the best interests of the children that they remain in the custody of their grandmother, who expressed interest in adoption.

Therefore, the circuit court's judgment was affirmed.

VIRGINIA-BASED U.S. DISTRICT COURTS

INMATE • *PRO SE* COMPLAINT • 42 U.S.C. § 1983 • SOCIAL MEDIA

Santiago v. Lynchburg Police Dep't, No. 7:23cv00281, 2024 U.S. Dist. LEXIS 24179 (W.D. Va. Feb. 12, 2024) (Cullen, J.).

HOLDING: The inmate did not state a cognizable § 1983 claim against the police department.

DISCUSSION: A Virginia inmate, proceeding *pro se*, filed a civil complaint against the Lynchburg Police Department (LPD), in which he alleged a violation of his First Amendment rights. According to the inmate, the LPD blocked him from posting comments on its Facebook and Instagram pages. This occurred after he posted Facebook comments for several weeks, expressing his indignation that the LPD had continued to employ a particular police officer. The complaint did not contain any other details regarding the online comments. The LPD moved to dismiss the complaint.

The court held that dismissal was warranted. The inmate named only the LPD as a defendant. The LPD is not an autonomous legal entity; it is an operating division of the City of Lynchburg. Thus, is not a "person" subject to suit under 42 U.S.C. § 1983 for alleged constitutional violations. Even if the court were to construe the claim as being asserted against the City, the inmate's "vague and conclusory allegations fail to establish a viable municipal-liability claim."

Therefore, the court granted the LPD's motion to dismiss and provided the inmate with the opportunity to file an amended complaint within 21 days.

POLICE • TRAFFIC STOP • INVALID LICENSE PLATE • PERSONAL JURISDICTION • QUALIFIED IMMUNITY • 18 U.S.C. §§ 241 AND 242 • 42 U.S.C. §§ 1985 AND 1986

Hodges v. Henrico Police Dep't, No. 3:23cv271, 2024 U.S. Dist. LEXIS 27779 (E.D. Va. Feb. 16, 2024) (Lauck, J.).

HOLDINGS: (1) The police department was not a proper party for a § 1983 suit. (2) The officers were entitled to qualified immunity. (3) The driver, as a citizen, had no authority to initiate a federal prosecution. (4) The complaint did not allege facts to support a federal conspiracy claim. (5) The court declined to exercise supplemental jurisdiction over the pendent state law claims.

DISCUSSION: A driver stopped by a Henrico County Police Department (HCPD) Officer for displaying invalid license plates brought a litany of claims against the HCPD and two Officers, proceeding *pro se*. The traffic stop occurred on the night of February 26, 2023. Upon the Officer's request that the driver furnish his Virginia driver's license, the driver produced an international, foreign license. The Officer then called his Sergeant, who instructed the Officer to confiscate the vehicle's license plates. The Officer did so and issued the driver three traffic tickets. During this interaction, the driver allegedly was rebuffed when he requested the Officer's "bonding information," although the complaint failed to clarify what this "bonding information" was or why the driver was entitled to it. The driver alleged that the Henrico General District Court Judge "dismissed the complaints," which presumably referred to the traffic tickets, but that the HCPD unlawfully retained possession of his license plates. According to the complaint, these were "private plates of the Trust MPH Foundation recorded in the Pima County Recorders office," or possibly "for Tribal purposes for means of travel registered with the [Federal Motor Carrier Safety Administration]," or perhaps both. (Note: the driver's initials are M.P.H., and Pima County is located along the Mexican border in southern Arizona.) The HCPD and the two Officers moved to dismiss the complaint.

The court held first that the driver failed to demonstrate that the court possessed personal jurisdiction over the HCPD, rendering all claims against it subject to dismissal pursuant to Rule 12(b)(2). In Virginia, an operating division of a governmental entity cannot be sued unless the legislature has vested it with the capacity to be sued. Here, the driver did not assert that the HCPD was statutorily vested with such capacity, and courts have previously dismissed the HCPD as an improper party that was incapable of being sued.

The court held second that the two HCPD Officers were qualifiedly immune from liability on the federal claims. The driver alleged that the Officer who executed the traffic stop violated his Fourth Amendment rights by detaining him, asking for his license, and confiscating his license plates, and that the Sergeant was likewise wrongful in authorizing the seizure of his plates. The driver also asserted constitutional claims under the Fifth Amendment based on the Officer's demand that he furnish a Virginia driver's license, and because the Officers confiscated his plates without just compensation and did not return

them. The court ruled that this conduct did not violate any clearly established rights. "[The driver]'s Amended Complaint describes a routine traffic stop in which a law enforcement officer stopped a vehicle after observing a traffic infraction, asked for the license and registration that vehicle operators are required by law to produce to law enforcement, and confiscated the invalid plates that initiated the traffic stop." Notably, the driver did not allege that the Officers refused to return the license plates to him upon request, or clarify the significance of how the Officer's refusal to supply "bonding information" constituted a violation of his rights. The driver's allegation that this traffic stop was pretextual, based on the fact that the Officer had previously stopped his vehicle, was not significant enough factor to alter the analysis, "particularly where [the driver] himself presents facts suggesting that he failed to properly display valid Virginia license plates on his vehicle."

The court held third that the driver could not pursue his purported civil claims asserting a violation of 18 U.S.C. §§ 241 and 242 since private citizens are not endowed with the authority to enforce the federal criminal code.

The court held fourth that the allegations contained in the complaint did not meet the "high threshold" needed to establish a prima facie case of conspiracy under 42 U.S.C. § 1985. The driver offered only broad allegations that failed to indicate any actual violation of his civil rights or the existence of a conspiracy. The related § 1986 claim asserting liability for party with knowledge of a conspiracy necessarily failed as well.

The court held fifth that it would exercise its discretion to decline to address the driver's remaining state law claims. The court interpreted the complaint to include the following claims under Virginia law: breach of trust, misuse of private property without consent, fraud, identity theft, theft of trust property, misuse of one's name, fraudulent contracting under duress, and deprivation of rights under Article I, § 16 of the Virginia Constitution.

Therefore, the court granted the motion to dismiss the complaint.

PRISONS • 42 U.S.C. § 1983 • *MONELL* LIABILITY • STATUTE OF LIMITATIONS • CONTINUING VIOLATION DOCTRINE

Cummings v. GEO Grp., Inc., No. 3:23CV327 (RCY), 2024 U.S. Dist. LEXIS 12670 (E.D. Va. Jan. 23, 2024) (Young, J.).

HOLDING: The continuing violation doctrine applied to preserve the inmate's claim that would otherwise have been barred by the statute of limitations.

DISCUSSION: An inmate incarcerated at the privately owned Lawrenceville Correctional Center in Brunswick County brought a claim under 42 U.S.C. § 1983 against its commercial owner and operator (prison), alleging that understaffing at the facility was a

proximate cause of the severe injuries that he suffered there. According to the complaint, the prison was deliberately indifferent to the fact that incarcerated gang members essentially ran the establishment, and that the prison's employees did nothing to rein in the rampant violence and drug trafficking. The inmate alleged that he witnessed an inmate's drug overdose, and after being questioned by prison officials about this matter, he was labeled a "snitch" and subjected to extortion and severe assaults by gang hitmen. These attacks were ongoing, almost ended his life on two occasions, and rendered him permanently disabled. He filed his complaint on May 15, 2023, asserting a single constitutional claim against the prison, sounding in *Monell* liability. The prison filed a partial motion to dismiss, arguing that Virginia's two-year statute of limitations for personal injury actions, which applies to § 1983 claims, barred the inmate's claims that were based on acts which had occurred prior to May 15, 2021.

The court held that the continuing violation doctrine preserved the entirety of the inmate's claim. In *DePaola v. Clarke*, 884 F.3d 481 (4th Cir. 2018), the Court of Appeals delineated a two-part test for determining when the continuing violation doctrine applies—the plaintiff must: (1) identify a series of acts or omissions that demonstrate deliberate indifference to serious, ongoing needs; and (2) place one or more of these acts or omissions within the applicable limitations period. Although *DePaola* concerned medical needs, courts in the Fourth Circuit have applied it in other § 1983 contexts.

Responding to the prison's arguments in favor of dismissal, the court found first that *DePaola* and its rationale applied to the type of understaffing-related deliberate indifference claim alleged here. It next determined that, contrary to the prison's contention that the inmate had identified "discrete and distinguishable causes of action" that should have been timely asserted as separate claims, the inmate "alleged an overarching policy or custom that facilitated the treatment he received at the hands of other inmates." Although the inmate could have sued the individual officers and other inmates for the beatings he endured, this did not prevent him from asserting the instant claim. Finally, despite the prison's attempt to sever the link between a stabbing that the inmate suffered on February 15, 2021, and the physical abuse occurring after May 15, 2021, the court construed the complaint as adequately alleging that intimidation and assaults were ongoing during this time.

Therefore, the court denied the partial motion to dismiss.

SCHOOLS • MAINTENANCE WORKER • 42 U.S.C. § 1983 • MALICIOUS PROSECUTION • STATUTE OF LIMITATIONS • TOLLING • COLOR OF LAW

Thompson v. Fairfax Cnty. Pub. Schs., No. 1:23-cv-1596 (MSN/IDD), 2024 U.S. Dist. LEXIS 20878 (E.D. Va. Feb. 5, 2024) (Nachmanoff, J.).

HOLDINGS: (1) Tolling of the limitations period rendered the suit timely. (2) The § 1983 claim failed because the complaint lacked any allegation that the defendants acted under color of law.

DISCUSSION: A former maintenance worker sued Fairfax County Public Schools and three school employees (collectively, Defendants) for malicious prosecution under 42 U.S.C. § 1983. On June 29, 2018, a custodial staff member reported to another school employee that the maintenance worker said that he was "going to shoot everyone in here" before he retires. Another employee asked him, "Are you going to shoot me too?" to which the maintenance worker responded, "Maybe. Maybe not." Fairfax County Police interviewed witnesses and arrested the maintenance worker the same day while he was working at an elementary school, charging him with making an oral threat to commit bodily harm under Va. Code § 18.2-60. This charge and others were subsequently disposed of *nolle prosequi* on September 18, 2018. In this civil suit, the maintenance worker alleged that three school employees, including his supervisor, fabricated his comments in order to provide an excuse to terminate his employment. Defendants moved for dismissal.

The court held first that the maintenance worker's claim was not barred by Virginia's two-year, personal-injury statute of limitations, which applies to claims brought under § 1983. The maintenance worker's malicious prosecution cause of action accrued on September 18, 2018, when the criminal charges against him were dismissed. The Supreme Court of Virginia tolled all limitations periods from March 16, 2020, through July 19, 2020, via emergency order due to the COVID-19 pandemic. On November 12, 2020, the maintenance worker filed a complaint in state court against Defendants, alleging common law tort claims, including malicious prosecution. That action was nonsuited on April 28, 2022. Virginia law provides that the statute of limitations with respect to a voluntarily nonsuited action "shall be tolled by the commencement of the nonsuited action . . . and the plaintiff may recommence his action within six months." Va. Code § 8.01-229(E)(3). The maintenance worker then filed this action on October 28, 2022, in state court, alleging only the § 1983 claim for malicious prosecution. Since the complaint filed on November 12, 2020, and the instant complaint concerned claims arising from the same transaction or occurrence, they constituted the same action.

The court held second that the operative complaint failed to state a cognizable claim under § 1983. Liability for such claims extends only to persons acting under color of law, and the maintenance worker did not allege, beyond mere conclusory statements, that the school employees acted under color of law. Their allegedly false reports to the police were not "clothed with state authority," as nothing about the purported "scheme" to effectuate his termination was made possible or easier based on their status as public employees. Nor did it help the maintenance worker's case that the school employees supposedly lied to law enforcement in a collaborative effort to have him fired. "If anything, this allegation establishes that personal motivations—not state motivations—underlie Defendants' alleged false reports."

Therefore, the court granted the motion to dismiss.

U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

PROPERTY DEVELOPMENT • REZONING APPLICATION • CITY COUNCIL • EQUAL PROTECTION • SIMILARLY SITUATED COMPARATORS • DISCRIMINATORY ANIMUS

SAS Assocs. 1, LLC v. City Council for the City of Chesapeake, 91 F.4th 715 (4th Cir. 2024) (Wilkinson, J.).

HOLDINGS: (1) There was no evidence that the city council members harbored discriminatory animus. (2) The developers failed to identify similar comparators to support their equal protection claim.

DISCUSSION: Two property development companies (developers) filed suit in federal district court after they were denied approval of a rezoning application filed with the City of Chesapeake. The developers wished to combine several adjoining parcels in order to create a 90-acre development that would include single and multifamily housing units, commercial space, and a conservation district. The area slated for development lay within several zones—agricultural (A-1), general business (B-4), and single-family residential (R-15S)—that each contained land use restrictions which did not allow for the types of uses that the developers envisioned. Their rezoning applications were twice denied by a vote of the City Council, most recently in 2020. The City Council cited community opposition to the proposed project. One Council member staunchly voiced her opposition to the project, sympathizing with residents' concerns about compounding the flood risk to the area, increasing traffic congestion, and contributing to overcrowding in local schools.

The developers asserted that the City Council's denial violated their right to equal protection under the Fourteenth Amendment, as well as their right against unconstitutional rezoning limitations under state law. In support of their equal protection claim, the developers alleged that the City Council had approved rezoning applications for ten similarly situated developments, and that the City Council had acted in an irrational and arbitrary manner when it denied their application. They contended that this could only be explained by discriminatory animus. The district court granted the City Council's Rule 12(b)(6) motion to dismiss the equal protection charge, and also dismissed the pendent state law claim based on lack of independent jurisdiction. The developers appealed.

The court held first that the developers supplied no facts from which it could infer discriminatory animus on the part of the City Council members. The developers focused their allegations on the one outspoken Council member, but the record was devoid of

anything that would support a conclusion that the concerns she expressed were pretext for any type of discriminatory animus. Her apprehensions echoed those voiced by the community, and the factors that she considered were "the very ones that ought to be taken into account when making zoning determinations."

The court held second that none of the properties that the developers identified was, in fact, sufficiently similar to theirs to support an inference of zoning malfeasance. The developers sought to establish a class-of-one equal protection claim, in which they must have shown an extremely high degree of similarity between their plans and those of their comparators in order for the court to infer that the City Council's differential treatment was intentional and arbitrary. They did not clear this hurdle, as nine of the properties to which they pointed were developed prior to 2010, and the City had seen drastic demographic changes in the intervening time, including an influx of more than 25,000 new residents. Additionally, none of the comparator developments was alleged to include a commercial component, and none of the other developers had requested the proposed combination of the same three zoning classifications. These dissimilarities proved fatal to the developer's claim.

Therefore, the court affirmed the judgment of the district court.

PROPERTY DEVELOPMENT • REZONING APPLICATION • DUE PROCESS • EQUAL PROTECTION • FIFTH AMENDMENT REGULATORY TAKING

Scratch Golf, LLC v. Beaufort County, No. 21-2284, 2024 U.S. App. LEXIS 3361 (4th Cir. Feb. 13, 2024) (Rushing, J.).

HOLDINGS: (1) The company's lack of a cognizable property interest in the approval of its rezoning application doomed its due process claims. (2) The equal protection claim could not proceed because the city council offered rational reasons for denying the application. (3) The denial did not amount to a regulatory taking.

DISCUSSION: A South Carolina golf course and property management company (company) sued Beaufort County and its Council following the denial of a rezoning application. The 300-acre property at issue, on which sits Hilton Head National Golf Club, was zoned for rural and mixed use. The company sought to rezone the property to accommodate a large development project that would include 500 homes, 700 hotel rooms, a theme park, and other commercial uses. Residents voiced their opposition to the project, and the County Council ultimately voted to deny the company's application. The company brought claims alleging violations of substantive and procedural due process, equal protection, and the Fifth Amendment's Takings Clause. The district court dismissed these claims, and the company appealed.

The court held first that the company's due process rights were not violated. In order to proceed with this claim, the company must have demonstrated a cognizable property interest in the approval of its rezoning application. This can only be shown if "the local agency lacks *all* discretion to deny issuance of the permit or to withhold its approval." *Gardner v. Balt. Mayor & City Council*, 969 F.2d 63, 68 (4th Cir. 1992). But, according to Beaufort County's Community Development Code, rezoning decisions are made at the discretion of the County Council.

The court held second that the company was not deprived of its equal protection rights because the Council provided rational reasons for denying the application. It cited, among other things, the unreasonable size and scope of the proposed project, its impact on nearby land, public health and safety concerns, and the absence of a demonstrated community need. "These reasons amply justify denying [the company]'s application even if the Council approved a different rezoning request from an allegedly similarly situated developer."

The court held third that the County Council did not execute a regulatory taking by denying the company's rezoning application. All three factors in the *Penn Central* balancing test weighed against the finding of a Fifth Amendment violation. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The company did not allege facts establishing that the zoning decision caused a "substantial diminution" in the value of its property. Its investment-backed expectations were not founded on a preexisting property right. And the development restrictions were "based on density and other traditional zoning concerns."

Therefore, the court affirmed the district court's ruling.

ATTORNEY GENERAL'S OPINIONS

As of the time of publication, there were no recent Attorney General's Opinions that may be of interest to local government attorneys.

POSITIONS AVAILABLE

(Positions posted in order received, sorted by most recent)

County of Augusta

Position: Assistant County Attorney

Deadline: Open until filled

Details: The County of Augusta is accepting applications for the position of Assistant County Attorney. The Assistant County Attorney assists the County Attorney in providing general legal services for the Board of Supervisors, County Administration, County departments, and various other boards, commissions, and agencies of the County. Duties at this level are varied, touch upon all phases of legal work, and may include trial practice, transactional work, opinion writing, and legal research on a wide range of local government topics, including but not limited to defending the County in state and federal courts; zoning code enforcement; drafting ordinances and resolutions; drafting and reviewing contracts; drafting deeds and leases and other documents related to real estate transactions; responding to requests under the Virginia Freedom of Information Act; and handling various administrative matters and proceedings. Areas of practice may include employment law, public procurement, real estate acquisition and disposition, local taxation, land use, zoning enforcement, building code enforcement, election law, access to and confidentiality as to records, economic development issues, etc.

Salary: $77,232–$120,040

Link/Contact: Augusta Assistant County Attorney

City of Manassas

Position: Deputy City Attorney

Deadline: Open until filled

Details: The Manassas City Attorney's Office is seeking experienced and qualified applicants to be considered for the position of Deputy City Attorney. The Deputy City Attorney will assist the City Attorney in providing a wide range of legal services to the City Council and to City departments, officials, and employees. A successful candidate will be well versed in Virginia general and local government law and their application to the functions of government.

The City Attorney's Office performs most of the City's legal work in-house, with the exception of representation of the City's Department of Social Services. The duties of the Deputy City Attorney will include drafting or reviewing legal documents such as ordinances, resolutions, deeds, leases, contracts, real estate closing documents, and other legal documents; preparing memoranda and rendering advice to City Council, City Manager, and City Departments; reviewing and preparing amendments to the City Code; reviewing Freedom of Information Act requests and responses; performing essential legal research; monitoring new federal and state legislation that could affect the City; representing the City in court on Zoning and Building Code enforcement matters; and assuming the duties of the City Attorney in his/her absence.

Salary: $103,916–$142,896

Link/Contact: Manassas Deputy City Attorney

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