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## Recent Developments in Virginia Election Law of Interest to Local Government Practitioners

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Over the past four years, Virginia residents have seen many changes affecting how they vote, including (i) the creation and implementation of a mandatory photo identification requirement, (ii) a shift away from direct recording electronic machines to printed ballots in Virginia's most populous areas, and (iii) increased scrutiny by federal officials of local polling stations. This article details these changes and their ramifications, particularly for election law practitioners and local government attorneys.

### Changes to Virginia's Voter Identification Laws and Pending Litigation

Changes to voter identification requirements represent one area of Virginia election law experiencing modifications in recent years. Beginning in 2012 and continuing this past session, the General Assembly has created and implemented a mandatory photo identification requirement for voting and has eliminated previously acceptable forms of identification to comply with this requirement. These changes are part of a broader national trend in laws requiring

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### TABLE OF CONTENTS

Recent Developments in Virginia Election Law of Interest to Local Government Practitioners .....	1
Chairman's Message.....	2
Accusations of Unauthorized Practice of Law Against Social Workers for Departments of Social Services .....	10
The Limited Public Forum through the Lens of <i>Reed v. Town of Gilbert</i> : Drafting Policies for the Use of Government Facilities.....	17
2016 Local Government Fellowship Recipients .....	26
Membership Notices .....	26
Board of Governors .....	27

### Chairman's Message

This is the last issue of the *Journal* for this fiscal year. Thanks to all of the members of the Board of Governors, the staff of the Virginia State Bar and the many authors of the articles that helped us with complex questions associated with local government law. A special thank you also goes to Susan Warriner Custer for her patience and dedication in her service as editor.

In this issue we have an article on election law by Stephen C. Piepgrass and L.A. Kuykendall of Troutman Sanders. There is also a review of the UPL opinion regarding social workers by Robert F. Beard and Martin R. Crim of Vanderpool, Frostick & Nishanian, and Shelia Weimer, Tazewell Assistant County Attorney. Finally, there is a review of the use of government facilities in light of *Reed v. Town of Gilbert* written by Sara Silverman of Fairfax County.

I hope you will join us at the [Virginia State Bar's Annual Meeting](#) in Virginia Beach on June 16-19, 2016. As mentioned in a previous message, our section is jointly sponsoring on Friday at 9:00 am, with the Construction Law and Litigation Sections, the Showcase CLE II, "[Official Acts and Honest Services in the Wake of U.S. v. McDonnell](#)." This is a two-hour ethics CLE. There will also be a brief business meeting immediately following the session to elect next year's officers.

Larry Spencer  
Chairman

voter identification. Virginia is one of thirty-three (33) states with a voter identification law currently in effect,<sup>1</sup> and is one of nine (9) states with what has been called a "strict photo ID" law.<sup>2</sup>

While most public discussion focuses on the pros and cons of and justifications for voter ID laws, local election officials, registrars, and local government attorneys are typically more concerned about the practical realities of applying and implementing these laws. With that focus in mind, this section first provides a brief overview of recent changes to Virginia's voter identification statutory scheme and, second, highlights recent activity in the courts regarding these laws.

Virginia's election procedures and voting requirements are codified in Title 24.2 of the Virginia Code. Prior to 2012, a Virginia voter who was unable to present one of the enumerated forms of identification required by statute to vote nonetheless could cast a ballot after he or she signed an affidavit attesting to his or her identity and registration status.<sup>3</sup> In 2012, the General Assembly eliminated the affidavit provision and amended the statute to offer a "provisional ballot" to a voter who did not show one of the enumerated forms of

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<sup>1</sup> Wendy Underhill, National Conference of State Legislatures, "Voter Identification Requirements / Voter ID Laws," April 4, 2016, available at <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

<sup>2</sup> Georgia, Indiana, Kansas, Mississippi, North Dakota, Tennessee, Texas, and Wisconsin, also have so-called strict photo voter ID laws. *Id.*

<sup>3</sup> Va. Code § 24.2-643(B) (2011).

identification, pursuant to Va. Code § 24.2-653.<sup>4</sup> The “provisional ballot” section of Virginia Code § 24.2-653 obligates the voter to provide an acceptable form of identification within a short time after the election in order for his or her vote to count.<sup>5</sup>

One year later, the General Assembly again amended § 24.2-643.<sup>6</sup> The 2013 amendment required would-be voters to present a “valid Virginia driver’s license, valid United States passport, or *any other photo identification . . .*”<sup>7</sup> The amendment struck from the Code forms of identification that did not contain a photo, such as a Virginia voter registration card.<sup>8</sup> The 2013 amendments became effective July 1, 2014.<sup>9</sup>

Following the implementation of the strict photo voter ID requirement, voters who lacked an acceptable photo ID could apply for a free photo ID from their local election registrar.<sup>10</sup> As of July 23, 2015, Virginia has issued over 4,300 free photo voter IDs statewide.<sup>11</sup> In the November 2014 general election, the first election in which the new photo voter ID law operated, almost 800 Virginia voters cast provisional ballots.<sup>12</sup>

The latest round of changes to Virginia’s voter ID laws came in 2015, when the General Assembly again amended § 24.2-643, authorizing the use of “any valid student identification card containing a photograph of the voter and issued by any . . . any private school located in the Commonwealth” as an acceptable form of photo ID.<sup>13</sup> This change took effect January 2, 2016.<sup>14</sup>

Within a year of the 2013 amendment (which took effect in July of 2014), challenges to Virginia’s photo voter identification scheme made their way into Virginia courts. In June 2015, the Democratic Party of Virginia and two party supporters filed suit in the U.S. District Court for the Eastern District of Virginia against the Virginia State Board of Elections, members of the Board, the Virginia Department of Elections, and the Commissioner of the Department of Elections.<sup>15</sup> The lawsuit alleged the 2013 photo voter ID law violated the United States Constitution and Section 2 of the Voting Rights Act.<sup>16</sup> The plaintiffs were represented by Marc Elias, who had also been involved with legal challenges to voting laws in other states, including Ohio and Wisconsin, and who represented then-candidate Mark Herring in

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<sup>4</sup> 2012 Va. Acts 839 (codified at § 24.2-643(B)).

<sup>5</sup> Va. Code § 24.2-653(A).

<sup>6</sup> 2013 Va. Acts 725 (codified at § 24.2-643(B)).

<sup>7</sup> *Id.* (emphasis added).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See <http://elections.virginia.gov/registration/photo-ids-required-to-vote/index.html>.

<sup>11</sup> See <http://elections.virginia.gov/registration/voter-id-statistics/index.html>.

<sup>12</sup> Markus Schmidt, *Democrats Challenge Va. Photo ID Law in Court* (hereinafter, “*Democrats Challenge Photo ID Law*”), RICHMOND TIMES DISPATCH, June 11, 2015, available at [http://www.richmond.com/news/virginia/government-politics/article\\_945d86c9-37a2-5dfd-a950-03eb535a525a.html](http://www.richmond.com/news/virginia/government-politics/article_945d86c9-37a2-5dfd-a950-03eb535a525a.html).

<sup>13</sup> 2015 Va. Acts 571 (codified at § 24.2-643).

<sup>14</sup> 2015 Va. Acts 571 (codified at § 24.2-643).

<sup>15</sup> *Democrats Challenge Va. Photo ID Law*; Complaint, *Lee v. Va. State Bd. of Elections*, No. 3:15cv357-HEH (E.D. Va. filed June 11, 2015) (ECF No. 1).

<sup>16</sup> See Complaint, *Lee v. Va. State Bd. of Elections*, No. 3:15cv357-HEH (E.D. Va. filed June 11, 2015) (ECF No. 1); Amended Complaint, *Lee v. Va. State Bd. of Elections*, No. 3:15cv357-HEH (E.D. Va. filed Aug. 14, 2015) (ECF No. 36).

his recount for the office of Attorney General.<sup>17</sup> Attorney General Herring appointed Mark F. “Thor” Hearne, II as independent counsel for the Virginia election defendants.<sup>18</sup>

The bench trial before the Honorable Henry E. Hudson, presiding in Richmond, Virginia, began on February 22, 2016 and concluded on March 2, 2016.<sup>19</sup> The district court summarized the main issue at trial as the “constitutionality of Virginia’s law requiring voters to present photographic identification before casting ballots.”<sup>20</sup> The seven day bench trial featured testimony from over thirty witnesses and experts, including Virginia Senator Scott A. Surovell, Delegate Jennifer L. McClellan, and former Delegate Algie T. Howell, Jr.<sup>21</sup> At the conclusion of the bench trial, Judge Hudson ordered the parties to submit post-trial briefing.<sup>22</sup> As of the time of publication, the parties have submitted post-trial briefing, which the court will consider before issuing its opinion.<sup>23</sup>

At trial and in post-trial briefing, the plaintiffs argued that the 2013 photo voter ID law violated the First and Fourteenth Amendments because it imposed burdens on Virginia voters that the Commonwealth cannot justify based on any legitimate interest.<sup>24</sup> The defendants urged the district court to conclude that the Democratic Party of Virginia lacked standing to bring claims on behalf of voters and to find that the plaintiffs failed to prove their claims.<sup>25</sup> Further, the defendants contend that Virginia’s photo voter ID law resembles laws previously found to survive constitutional scrutiny.<sup>26</sup> The plaintiffs attempted to distinguish those laws in rebuttal briefing.<sup>27</sup> Local government attorneys and election personnel will certainly follow the case closely as it develops.

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<sup>17</sup> Markus Schmidt, *Democrats Challenge Va. Photo ID Law in Court*, RICHMOND TIMES DISPATCH, June 11, 2015, available at [http://www.richmond.com/news/virginia/government-politics/article\\_945d86c9-37a2-5dfd-a950-03eb535a525a.html](http://www.richmond.com/news/virginia/government-politics/article_945d86c9-37a2-5dfd-a950-03eb535a525a.html).

<sup>18</sup> Jenna Portnoy, *Virginia Voter ID Lawsuit Is Part of National Push by Democrats*, THE WASHINGTON POST, January 1, 2016, available at [https://www.washingtonpost.com/local/virginia-politics/virginia-voter-id-lawsuit-is-part-of-national-push-by-democrats/2016/01/01/d08f08fe-af3e-11e5-b820-eea4d64be2a1\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginia-voter-id-lawsuit-is-part-of-national-push-by-democrats/2016/01/01/d08f08fe-af3e-11e5-b820-eea4d64be2a1_story.html).

<sup>19</sup> Gary Robertson, *Virginia’s Voter ID Law Challenged in Federal Trial*, REUTERS, February 22, 2016, available at <http://www.reuters.com/article/us-virginia-votingrights-idUSKCN0VV169>.

<sup>20</sup> *Lee v. Va. State Bd. of Elections*, No. 3:15cv357-HEH, 2016 U.S. Dist. LEXIS 16697, at \*2 (E.D. Va. Feb. 10, 2016). The Amended Complaint also challenged the long wait times to vote, but the district court dismissed these claims. *Lee v. Va. State Bd. of Elections*, No. 3:15cv357-HEH, 2015 U.S. Dist. LEXIS 169701, at \*27 (E.D. Va. Dec. 18, 2015).

<sup>21</sup> Minute Entries for proceedings held, *Lee v. Va. State Bd. of Elections*, No. 3:15cv357-HEH (E.D. Va.) (ECF Nos. 190, 192–95, 197, 199).

<sup>22</sup> Order for Post-trial Briefing, *Lee v. Va. State Bd. of Elections*, No. 3:15cv357-HEH (E.D. Va. March 3, 2016) (ECF No. 180).

<sup>23</sup> See *Lee v. Va. State Bd. of Elections*, No. 3:15cv357-HEH (E.D. Va.) (ECF Nos. 211–13, 216).

<sup>24</sup> Plaintiffs’ Post-Trial Brief, *Lee v. Va. State Bd. of Elections*, No. 3:15cv357-HEH (E.D. Va. filed Mar. 25, 2016) (ECF No. 211).

<sup>25</sup> Defendants’ Post-Trial Brief, *Lee v. Va. State Bd. of Elections*, No. 3:15cv357-HEH (E.D. Va. filed Mar. 25, 2016) (ECF No. 212).

<sup>26</sup> *Id.* at 32 n.33.

<sup>27</sup> Plaintiffs’ Post-Trial Rebuttal Brief, at 11-12, *Lee v. Va. State Bd. of Elections*, No. 3:15cv357-HEH (E.D. Va. filed Mar. 25, 2016) (ECF No. 213).

## Changes in Voting Technology

### *The Shift from DRE Machines to Scannable Ballots*

Another change in Virginia election procedures that could have significant ramifications for upcoming elections is the replacement of direct recording electronic (DRE) voting machines in many localities with printed ballots and scanners.

Under Virginia law, localities may choose the types of machines that voters will use to cast their ballots.<sup>28</sup> However, the State Board of Elections must approve the use of these machines in Virginia.<sup>29</sup>

In 2007, the passage of an amendment to Virginia Code § 24.2-626,<sup>30</sup> marked the beginning of the phase-out of DRE machines in localities across the Commonwealth. The statutory amendment provided that, “[o]n and after July 1, 2007, no county or city shall acquire any direct recording electronic machine (DRE) for use in elections in the county or city except, . . . DREs acquired prior to July 1, 2007, may be used in elections in the county or city for the remainder of their useful life.”<sup>31</sup> In addition, localities with grandfathered DREs could acquire them on a temporary basis and to meet accessibility needs.<sup>32</sup>

Two concerns prompted the phase-out, at least in part: (1) the lack of a “paper trail” for votes that had been cast; and, (2) concerns about the “security of wireless communications features” that might make DREs “vulnerable to hacking.”<sup>33</sup>

Despite the change in the law, many localities across the Commonwealth continued to rely primarily on DRE machines for voting, with approximately 112 localities still using DREs in non-absentee precincts in 2014.<sup>34</sup>

In 2013 and 2014 the Virginia General Assembly overhauled election procedures in the Commonwealth.<sup>35</sup> The change that garnered the most attention was the modification of the structure of governance for election issues at the state-level. The State Board of Elections no longer solely ran Virginia’s election procedures; instead, responsibilities would be divided among the SBE, a Department of Elections, and a Commissioner of Elections.<sup>36</sup>

Around the same time of the enactment of this change to election governance, technical changes also were made that would affect the manner in which future elections would be conducted in Virginia. On April 3, 2014, Governor Terry McAuliffe signed into law Chapter 540 of the 2014 Acts of Assembly, a bill sponsored by Senator Mark Obenshain. As the Republican candidate for Virginia Attorney General who had lost a close statewide recount in late 2013 to current Attorney General Mark Herring, Senator Obenshain possessed a par-

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<sup>28</sup> Va. Code § 24.2-626.

<sup>29</sup> *Id.*

<sup>30</sup> 2007 Va. Acts 939.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See Final Report of the Joint Subcommittee to Study the Certification Performance, and Deployment of Voting Equipment, House Doc. No. 34 (2006), available at <http://leg2.state.va.us/DLS/h&sdocs.nsf/5c7ff392dd0ce64d85256ec400674ecb/053df67e3bdd88ba85256f89006e3f95?OpenDocument>.

<sup>34</sup> Interim Report on Voting Equipment Performance, Usage & Certification, Virginia Dept. of Elections (April 2015), available at <http://elections.virginia.gov/webdocs/VotingEquipReport/2.pdf>.

<sup>35</sup> See 2013 Va. Acts 542; 2014 Va. Acts 540 & 576.

<sup>36</sup> *Id.*

ticular interest in ensuring that a paper trail existed for votes cast in the Commonwealth.<sup>37</sup> The statute made the technical changes necessary for the use of printed paper ballots and ballot scanners throughout Virginia.<sup>38</sup>

The changeover to printed ballots accelerated following the November 2014 elections. After personally having trouble with a malfunctioning voting machine in the City of Richmond, Governor McAuliffe called for a review of voting machines in the Commonwealth.<sup>39</sup> That review, conducted by the Department of Elections and the State Board of Elections, in conjunction with the Virginia Information Technology Agency (VITA),<sup>40</sup> concluded that WINVote DRE machines used in 29 localities, including some of Virginia's most populous localities (e.g., the City of Fairfax and County of Arlington), suffered from security vulnerabilities that "create[] an unacceptable risk to the integrity of the election process in the Commonwealth."<sup>41</sup> Reasons cited for recommending decertification included that the machines ran on outdated versions of Windows that had not been updated in years, lacked adequate password protection, and depended on obsolete, easily-hacked wireless security.<sup>42</sup>

Based on the report, and following a public hearing, the State Board of Elections voted to decertify the WINVote machines, forcing the nearly 30 localities that planned to operate them in the next election to scramble to replace them with new ballot scanning equipment compliant with Virginia law.<sup>43</sup>

### ***Ramifications for Elections and Recounts***

These changes in Virginia voting technology have a number of practical ramifications for local governments and election law practitioners.

First, while few reports of difficulties voting in the 2016 primaries in Virginia exist, the paper ballot casting and counting process has not been tested in a general election. In the event of a close contest, reports of long lines and malfunctions could lead to requests for emergency injunctions by candidates and political parties in the next general election.

Second, in the event of close elections, the switch to paper balloting will almost certainly lead to more election recounts. When candidates consider whether to file for a recount under Code § 24.2-800, et seq., they must first determine whether sufficient ballots are "in play," such that a recount could change the outcome of the election. In the case of localities where votes are cast on DREs, a recount involves only a re-adding of the "tapes" produced by the DRE machines.<sup>44</sup> Thus, little opportunity for a dramatic change in vote count in locali-

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<sup>37</sup> 2014 Va. S.B. 456.

<sup>38</sup> See Va. Code § 24.2-627.

<sup>39</sup> Jenna Portnoy, "Report Questions Security, Accuracy of Some Voting Machines," *Washington Post*, April 6, 2015, available at [https://www.washingtonpost.com/local/virginia-politics/report-questions-security-accuracy-of-some-va-voting-machines/2015/04/06/82a99452-dc61-11e4-be40-566e2653afe5\\_story.html](https://www.washingtonpost.com/local/virginia-politics/report-questions-security-accuracy-of-some-va-voting-machines/2015/04/06/82a99452-dc61-11e4-be40-566e2653afe5_story.html).

<sup>40</sup> VITA, Commonwealth Security and Risk Management, Security Assessment of WINVote Voting Equipment for Dept. of Elections (April 14, 2015) (hereinafter, "VITA WINVote Report"), available at <http://elections.virginia.gov/WebDocs/VotingEquipReport/WINVVote-final.pdf>.

<sup>41</sup> Jenna Portnoy, "Va. Board of Elections votes to decertify some voting machines," *Washington Post*, April 14, 2015, available at [https://www.washingtonpost.com/local/virginia-politics/va-board-of-elections-votes-to-decertify-some-voting-machines/2015/04/14/46bce444-e2a6-11e4-81ea-0649268f729e\\_story.html](https://www.washingtonpost.com/local/virginia-politics/va-board-of-elections-votes-to-decertify-some-voting-machines/2015/04/14/46bce444-e2a6-11e4-81ea-0649268f729e_story.html).

<sup>42</sup> See VITA WINVote Report.

<sup>43</sup> Portnoy, "Va. Board of Elections votes to decertify some voting machines," *Washington Post*.

<sup>44</sup> Va. Code § 24.2-802(D)(2) ("For direct recording electronic machines (DREs), the recount officials shall open the envelopes with the printouts and read the results from the printouts. If the printout is not clear, or on the request of the court, the recount officials shall rerun the printout from the machine or examine the counters as appropriate.").

ties where DREs dominate exists. On the other hand, where votes are cast on paper, the recount involves re-scanning all of the cast ballots. Election personnel must count by hand ballots that contain undervotes (i.e., where no vote for a candidate for a particular office is read by the scanner), or overvotes (i.e., where the scanner reads votes for two or more candidates for a single seat), or which otherwise cannot be scanned.<sup>45</sup> With the addition of multiple paper ballot jurisdictions to the electoral map, the potential for outcome-determinative recounts soars. Thus, a highly likelihood exists that Virginia will see an increase in recounts in future close elections.

Third, with the increased likelihood of recounts involving scanned paper ballots, practitioners should familiarize themselves with the Department of Elections' regulations governing recounts and the counting of paper ballots. The Department's regulations, found at 1 Va. Admin. Code § 20-80, include a guide for use "[f]or any paper ballot that is to be counted manually and can be counted manually . . . in determining the voter's intent."<sup>46</sup> This guide provides the precedent for arguing how questionable votes should be counted.

### **Federal Scrutiny of Accessibility of Virginia's Polling Places**

State and federal laws require that Virginia "[p]olling places . . . be accessible to qualified voters."<sup>47</sup> By statute, the State Board of Elections must provide instructions to local electoral boards and general registrars to assist localities with complying with federal and state laws regarding the accessibility of polling places.<sup>48</sup>

The Virginia Department of Elections electronically publishes the *General Registrar and Electoral Boards Handbook* (the "*GR/EB Handbook*") as a resource guide for understanding state and federal laws, administrative regulations, and procedural requirements regarding elections.<sup>49</sup> In addition to providing information regarding (among other things) the Department, registrar office operations, absentee voting, and voter registration, the *GR/EB Handbook* includes guidance regarding accessibility.<sup>50</sup>

According to the *GR/EB Handbook* the Department of Elections' "policy [is] to assure programmatic access<sup>[51]</sup> at every polling place or registration facility and to provide physical accessibility in those locations where this can be achieved without creating an undue burden

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<sup>45</sup> Va. Code § 24.2-802(D)(3) ("For ballot scanner machines, the recount officials shall rerun all the machine-readable ballots through a scanner programmed to count only the votes for the office or issue in question in the recount and to set aside all ballots containing write-in votes, overvotes, and undervotes. The ballots that are set aside, any ballots not accepted by the scanner, and any ballots for which a scanner could not be programmed to meet the programming requirements of this subdivision, shall be hand counted using the standards promulgated by the State Board [of Elections]. . . .").

<sup>46</sup> The Department of Elections' "Ballot Examples: Hand Counting Printed Ballots for Virginia Elections or Recounts," are available at <http://elections.virginia.gov/Files/ElectionAdministration/ElectionLaw/ExamplesforHandcounting.pdf>. The recount regulation is being updated to reflect the change in the governance structure for elections in Virginia. See Proposed Regulation 1 VAC 20-80, Virginia Register, vol. 32, issue 16 (April 4, 2016), available at <http://register.dls.virginia.gov/details.aspx?id=5616>.

<sup>47</sup> Va. Code § 24.2-310(C) (citing Virginians with Disabilities Act, Va. Code § 51.5-1 et seq., the Voting Accessibility for the Elderly and Handicapped Act, 52 U.S.C. § 20101 et seq., and the Americans with Disabilities Act relating to public services, 42 U.S.C. § 12131 et seq.).

<sup>48</sup> *Id.*

<sup>49</sup> *GR/EB Handbook*, Introduction, available at <https://voterinfo.sbe.virginia.gov/GREBHandbook/Default/Index/9e4424e8-d94e-9fb8-4b40-55ce240222d1>.

<sup>50</sup> *Id.*

<sup>51</sup> "Programmatic access" means "all individuals with visible and invisible disabilities can benefit from the voter registration and election services, programs and benefits offered to the public." *Id.* § 8.2.3.3.

on the locality.”<sup>52</sup> The *GR/EB Handbook* also includes information to address polling place accessibility issues, best practices, and recommendations to ensure easy registration and voting for persons with disabilities.<sup>53</sup> The Department of Elections’ “best practices” include: contacting voters who have self-identified as persons with disabilities on their voter registration applications to explain available accommodations; communicating to the public the availability of assistive technologies; and, offering information regarding operating accessibility features of voting machines in training sessions for election officers and poll workers.<sup>54</sup>

In addition to state resources, local government and election personnel should consult the Department of Justice’s *ADA Checklist for Polling Places* when addressing polling place accessibility concerns.<sup>55</sup> The comprehensive manual provides guidance regarding the evaluation of the physical accessibility of polling places and specific evaluation checklists regarding parking, sidewalks and walking, building entrances, halls and corridors, the voting area, etc.<sup>56</sup>

The willingness of the U.S. Department of Justice (DOJ) to enforce accessibility requirements was evidenced most recently by a lawsuit and settlement between the United States and Augusta County. An examination of the DOJ’s investigation and the resolution agreed to by the parties may be helpful to election personnel and local government attorneys who are called upon to provide advice regarding the accessibility of polling places.

On January 20, 2016, the Honorable Elizabeth K. Dillon of the U.S. District Court for the Western District of Virginia approved a Consent Decree between the United States and Augusta County to resolve allegations that Augusta County discriminated against individuals with mobility and vision disabilities by failing to provide physically accessible polling places, in violation of Title II of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §§ 12131–12134, and its implementing regulations.<sup>57</sup> According to the Consent Decree, the United States found that at least twenty-one (21) of Augusta County’s twenty-five (25) polling places “contained architectural barriers . . . that rendered the facilities inaccessible to voters with disabilities.”<sup>58</sup> The “architectural barriers” included “excessively sloped parking areas, narrow doorways, steep ramps, protruding objects, and inaccessible door knobs.”<sup>59</sup>

The Consent Decree was the result of a process that began in February 2013, when DOJ first contacted Augusta County regarding complaints about the accessibility of polling places to persons with disabilities.<sup>60</sup> Over two days in July 2013, DOJ representatives and members of the Augusta County Electoral Board inspected each voting precinct.<sup>61</sup> About two years later, in May 2015, DOJ provided the results of the two-day inspection, including identifying deficiencies in twenty-one (21) of Augusta County’s twenty-five (25) voting precincts.<sup>62</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* §§ 8.3 to 8.6.

<sup>54</sup> *Id.* § 8.4.

<sup>55</sup> Department of Justice, *ADA Checklist for Polling Places*, available at <http://www.ada.gov/votingck.htm>.

<sup>56</sup> *Id.* §§ A through E.

<sup>57</sup> Consent Decree, *United States v. Augusta Cnty.*, No. 5:15cv77 (W.D. Va. Jan. 20, 2016) (ECF No. 7).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

Following the notification regarding the deficiencies, DOJ and county officials worked together to develop temporary and permanent solutions, which the Department then approved.<sup>63</sup>

On January 13, 2016, the Augusta County Board of Supervisors unanimously voted to approve the settlement and Consent Decree,<sup>64</sup> which will remain in effect for five years from January 20, 2016 (subject to extension by mutual agreement).<sup>65</sup> Under the Consent Decree, the County must, among other things:

- Make certain polling places temporarily accessible or relocate them to an alternative, accessible location by the March 2016 election;
- Provide a remediation plan within ninety (90) days of entry of the Consent Decree, with the plan to be approved by DOJ and implemented in time for the November 2016 presidential election;
- Ensure that any new polling locations are accessible or could be made temporarily accessible to persons with disabilities, with new polling places to be approved by DOJ; and
- Provide training for election officials and poll workers on how to comply with these requirements.

During the March 2016 mid-term elections, the disAbility Law Center of Virginia (dLCV), the federally-designated protection and advocacy organization for Virginians with disabilities, surveyed 202 randomly selected polling sites across Virginia.<sup>66</sup> The dLCV determined that twenty (20) percent of the surveyed sites had potential ADA compliance violations.<sup>67</sup> Issues identified included inadequate voting, lack of proper signage, improper ramps and inaccessible doorways.<sup>68</sup>

In light of the DOJ's well-publicized actions in Augusta County and the dLCV's findings of potential non-compliance, if a locality suspects its polling places may not be ADA compliant, it may be wise to undertake a compliance survey, using the DOJ's *ADA Checklist for Polling Places*,<sup>69</sup> so that any accessibility issues may be corrected before they come to the attention of the Department of Justice.

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<sup>63</sup> *Id.* The Consent Decree specifically notes that Augusta County cooperated with the United States during the course of the investigation. *Id.*

<sup>64</sup> Traci Moyer, *County Passes Resolution to Settle ADA Lawsuit*, NEWSLEADER, January 13, 2016, available at <http://www.newsleader.com/story/news/local/2016/01/13/augusta-ada-resolution/78768832/>.

<sup>65</sup> Consent Decree, *United States v. Augusta Cnty.*, No. 5:15cv77 (W.D. Va. Jan. 20, 2016) (ECF No. 7).

<sup>66</sup> See <http://dLCV.org> ("The dLCV surveyed hundreds of polling places earlier this month, and found that 20% of them posed barriers to access."); see also e-mail from Clyde Mathews, Deputy Director for Legal Services, dLCV (March 24, 2016) (on file with author).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See n.56, *supra*.