Local Government Attorneys of Virginia
35th Anniversary Conference, October 30, 2010
Case Law Update
by
Sam Darby, Glenn, Feldmann, Darby & Goodlatte
Warren Greth, McGuireWoods
Stephen Piepgrass, Troutman Sanders

1. *Ghameshlouy v. Commonwealth*, 279 Va. 379, 689 S.E.2d 698 (Va. 02/25/10) (Koontz, J.), *rev'g* 54 Va. App. 47, 675 S.E.2d 854 (Va. Ct. App. 05/05/09) McClanahan, J.)

The Court of Appeals erred in dismissing defendant's appeal of his conviction under the Virginia Beach City Code on the ground that it did not have jurisdiction over the case or the proper appellee. The defendant's notice of appeal was defective in not naming the proper appellee, the City. Dismissal of the appeal would have been justified on this ground, but the defect was subject to waiver by the City. The City waived the defect when it made no objection to the defect and the Commonwealth's Attorney for the City made an appearance, responded on the merits of the appeal, and joined the Commonwealth's brief in the Court of Appeals.

2. *Roberson v. Commonwealth*, 279 Va. 396, 689 S.E.2d 706 (Va. 02/25/10) (Koontz, J.), *aff'g* 53 Va. App. 666, 674 S.E.2d 569 (Va. Ct. App. 03/31/09) (Humphrey, J.).

Defendant's notice of appeal did not name the City of Virginia Beach as appellee, but this defect alone was not sufficient to deprive the Court of Appeals of jurisdiction. Given the absence of other information sufficient to identify the offense being appealed as the conviction for DUI under the City's ordinance, however, the notice of appeal failed to satisfy the minimum requirements to confer jurisdiction over the case to the Court of Appeals. Thus, dismissal of the defendant's appeal of his conviction for DUI under the City Code was affirmed.

3. *Ligon v. County of Goochland*, 279 Va. 312, 689 S.E.2d 666 (Va. 02/25/10) (Keenan, J.), *aff'g* Goochland County Cir. Ct. (Sanner, J.).

In this case, the Court held that the doctrine of sovereign immunity bars a claim of retaliatory discharge brought under the Virginia Fraud Against Taxpayers Act, Code §§ 8.01-216.1 through -216.19, against the Commonwealth or a political subdivision of the Commonwealth. A former Goochland County employee filed a complaint in the circuit court against the County, asserting that he was unlawfully terminated from his employment by the County and that he was entitled to relief under the "whistleblower protection" provision in Code § 8.01-216.8. The former employee alleged that he was terminated because he opposed certain fraudulent actions of his former supervisor, or because he initiated or participated in an investigation of those practices. As permitted by Code § 8.01-216.8, the former employee sought compensatory damages, reinstatement of

his employment, twice the amount of his "back pay," and attorney fees and costs. The Court concluded that the VFATA does not contain an explicit and express waiver of the Commonwealth's sovereign immunity regarding retaliatory discharge action. The Court stated that its conclusion was consistent with its prior holdings, because a waiver of sovereign immunity cannot be implied from general statutory language. Accordingly, the Court sustained the County's demurrer on the grounds of sovereign immunity.

4. *Marble Techs. v. City of Hampton*, 279 Va. 409, 690 S.E.2d 84 (Va. 02/25/10) (Kinser, J.), *rev'g* City of Hampton Cir. Ct. (Taylor, J.).

The Court reversed the circuit court and entered judgment in favor of the plaintiff landowners in a suit for declaratory and injunctive relief against enforcement of a city zoning ordinance. The court found that the City of Hampton was not expressly or impliedly authorized, either through the Chesapeake Bay Preservation Act or the regulations passed pursuant thereto, to utilize as a criterion for designating Chesapeake Bay Preservation Areas within its jurisdiction whether particular land was among the lands designated as part of the Coastal Barrier Resources System created by the Coastal Barrier Resources Act. The City of Hampton's ordinance, which made inclusion in the Coastal Barrier Resources System a criterion for designating lands part of an Resource Protection Area under the Chesapeake Bay Preservation Act, violated the General Assembly's express mandate that a locality use the criteria developed by the Chesapeake Bay Local Assistance Board to determine the extent of the Chesapeake Bay Preservation Area within its jurisdiction. Accordingly, the City's zoning amendments challenged in the appeal were void insofar as they included lands in its Resource Protection Areas on the basis of the Coastal Barrier Resources Act's applicability.

5. *Sch. Bd. of Newport News v. Commonwealth*, 279 Va. 460, 689 S.E.2d 731 (Va. 02/25/10) (Lemons, J.), *rev'g* City of Newport News Cir. Ct. (Conway, J.).

The issue before the Court was whether the trial court erred in holding that an insurance policy administered by the Commonwealth, the Virginia Local Government Risk Management Plan, did not cover a claim made by the School Board of the City of Newport News. Underlying the claim was a suit against the School Board brought under the Individuals with Disabilities Education Act, which sought to reinstate an administrative hearing officer's decision and award reimbursement in favor of the parents of a minor disabled child. However, the Plan excluded any obligations incurred in "administrative hearings or procedures," as well as claims for relief "in any form other than monetary damages." After finding that the suit under IDEA was not an administrative action and was a claim for compensatory damages, the Court held that: (1) the trial court erred when it held that the Plan did not cover the claim submitted by the School Board; and (2) the Commonwealth breached its contractual duty to defend under the Plan and was therefore liable for the litigation costs associated with the defense of the family's claim in federal court, as well as the costs of prosecuting the contract claim in the Circuit Court of the City of Newport News, the appeal to the Court, and on remand.

6. *W&W P'ship v. Prince William County Bd. of Zoning Appeals*, 279 Va. 483, 689 .E.2d 739 (Va. 02/25/10) (Goodwyn, J.), *aff'g* Prince William County Cir. Ct. (Whisenant, J.).

The Court held that the mere act of conveying property to the Commonwealth did not legally separate the noncontiguous portions of the remaining property, and that such legal separation of property must be shown by proof that the owner, at minimum, duly recorded a change in the legal description of the property either by metes and bounds or by plat. In so holding, the Court affirmed the Prince William County Zoning Administrator's ruling, which was affirmed by the board of zoning appeals and the circuit court.

The previous owners conveyed a portion of a tract of land to the Commonwealth to be used as a public road. The road bisected the rest of the tract of land leaving a larger and smaller parcel. After the owner acquired the property, it sought a separate address for the smaller parcel claiming that such portion was a separate, legally nonconforming lot created by the conveyance. The court found that the creation of a new lot was a legal separation of property because it resulted from action by an owner and involved, at a minimum, a change in the legal description of the property, either by metes and bounds or by plat, which was duly recorded in the appropriate land records. The act of conveying property to the Commonwealth did not legally separate the noncontiguous portions of the remaining property. Such legal separation of property had to be shown by proof that the owner, at minimum, duly recorded a change in the legal description of the property either by metes and bounds or by plat. Therefore the previous owners' conveyance to the Commonwealth did not legally separate the owner's remaining property, and the land at issue was not entitled to its own address.

7. *County of Chesterfield v. Tetra Assocs.*, 279 Va. 500, 689 S.E.2d 647 (Va. 02/25/10) (Millette, J.), *aff'g in part, rev'g in part* Chesterfield County Cir. Ct. (Allen, J.).

The County sought review of an order from the circuit court, which granted summary judgment in favor of appellee property owner's action for declaratory relief involving the disapproval of the owner's preliminary subdivision application, which determined that Chesterfield, Va., County Code §§ 17-2 and 17-36 were void, and which required the County to approve the application.

The County argued that the circuit court erred when it ruled that County Code §§ 17-2 and 17-36(a) were void. The Court found that the County Code § 19-128(f) allowed one acre lots in the agricultural district, and that by imposing a five acre minimum lot size in the agricultural district through applications of County Code § 17-36(a) and the definitions of lot subdivision and residential parcel subdivision contained in County Code § 17-2, the county infringed upon the right to subdivide to a minimum one acre parcel of

land in the agricultural district even though a residence on a one acre lot was a permitted use in owner's property's current agricultural zoning classification. County Code § 17-36(a), effectively rezoned the owner's property in a manner inconsistent with the uses permitted by the owner's agricultural zoning classification. The county was not permitted to use a subdivision ordinance to prohibit a use of the owner's property that was permitted by the property's zoning classification. Such error, however, did not void Chesterfield, Va., County Code §§ 17-2 and 17-36 in their entirety.

The court reversed the portion of the judgment finding County Code §§ 17-2 and 17-36 void in their entirety, affirmed the portion of the judgment that such sections were void as applied to the owner's preliminary subdivision application, and remanded the matter for further proceedings.

8. *Bailey v. Town of Saltville*, 279 Va. 627, 691 S.E.2d 491 (Va. 04/15/10) (Goodwyn, J.), *aff'g* Washington County Cir. Ct. (Lowe, J.).

The Town sought to quiet title and for ejectment against a landowner with respect to an abandoned railroad corridor. In 1909, the corridor was the subject of a deed stating that the grantor "will warrant the land hereby conveyed" to the Norfolk and Western Railway Company. However, a contemporaneous 1909 agreement between the grantor and Norfolk and Western described the conveyance as a mere "right-of-way" through a certain farm. In 1993, Norfolk and Western abandoned the corridor and, in 1994, donated said property to the Town by way of a quitclaim deed. Bailey is the present owner of the property which formerly comprised the named farm in the 1909 agreement, and she denied the Town the right to enter into the abandoned railroad corridor. The Town argued that Norfolk and Western had acquired a fee simple interest by way of the 1909 deed which it had subsequently conveyed to the Town, but Bailey contended that the 1909 deed conveyed only an easement which was extinguished when Norfolk and Western abandoned the railroad. On cross-motions for summary judgment, the circuit court granted the Town's motion for summary judgment, and Bailey appealed. The Court held that, construing the language of the 1909 deed together with the contemporaneous agreement that was convicted by the same parties and filed together with the deed on the same day, and applying the usual rules of deed construction, the natural and ordinary meaning of the deed's language evidenced an intention by the grantor to convey a fee simple interest to Norfolk and Western. The court emphasized the description of the conveyance as "all that certain strip or parcel of land" and the grantor's covenant that it would warrant generally "the land hereby conveyed." The court further noted that nowhere in the deed was the interest being granted described as anything other than a complete conveyance of land and contained no words of limitation or restriction indicating that the interest conveyed was a mere easement. The court discounted the language in the contemporaneous 1909 agreement which referred to a "right-of-way," concluding that the granting of such a right could be accomplished by the granting of a fee simple interest as well as by the granting of an easement. Consequently, the 1909 deed conveyed a fee simple interest to Norfolk and Western which was subsequently

quitclaimed to the Town. Therefore, the Court affirmed the circuit court's decision granting the Town summary judgment.

9. *Schefer v. City Council of Falls Church*, 279 Va. 588, 691 S.E.2d 778 (Va. 04/15/10) (Koontz, J.), *aff'g* Arlington County Cir. Ct. (Newman, J.).

In a declaratory judgment action by a landowner against the City challenging a zoning ordinance, the Court held that (1) the zoning ordinance which imposed different height regulations on single family homes on "substandard" lots and "standard" lots did not violate the uniformity requirement of Va. Code § 15.2-2282 and (2) the plaintiff failed to rebut the zoning ordinance's presumption of validity for purposes of his equal protection claim.

Plaintiff maintained that one-family dwellings are "buildings and uses" of the same "class or kind" and, therefore, the City must impose identical building height regulations on standard and substandard lots in the zoning district. The Court found, however, that there were two "kind[s]" of "uses" as contemplated by Code § 15.2-2282, that is residential use on standard lots and residential use on substandard lots. The Court further found that there was no dispute that the City uniformly applied its building height regulations for one-family dwellings on standard lots and uniformly applied its building height regulations for one-family dwellings on substandard lots in the zoning district. The building height regulations for one-family dwellings on all substandard lots were applied identically, and those regulations for one-family dwellings on standard lots were applied identically, and the Court held that the ordinance did not violate the uniformity requirement of Code § 15.2-2282.

On plaintiff's further contention that the ordinance violated equal protection principles, because the height regulation is not inherently suspect involving infringement upon fundamental rights, plaintiff was required to establish that the ordinance was unreasonable, and failed to do so. Therefore plaintiff failed to rebut the presumption of its validity.

10. *City of Alexandria v. J-W Enters.*, 279 Va. 711, 691 S.E.2d 769 (Va. 04/15/10) (Lacy, J.), *aff'g* City of Alexandria Cir. Ct. (Haddock, J.).

An appeal in a contribution action arose from an incident involving the pursuit of a group of restaurant patrons who left the restaurant without paying their check. The pursuit by an off-duty police officer who had been hired by the restaurant to provide a law enforcement presence resulted in the shooting death of one of the patrons. The issue before the Court was whether the trial court erred in holding that the off-duty police officer was performing a public function at the time of the shooting, thereby defeating the City's action for contribution against the restaurant.

The Court held that the trial court did not err in finding that the officer's actions had been performed pursuant to his duties as a police officer rather than as an employee of the restaurant. While "a person who is a police officer is not precluded from also acting in the capacity of an agent or employee of a private employer," "when considering tort liability, it is a factual question whether the officer was acting as an employee of the private employer or as a public officer enforcing a public duty when the wrongful conduct occurred." Here, although the officer testified that he had followed the decedent's group out of the restaurant in order to "stop them and to have them take care of the tab," he also testified that when the group refused to heed his calls, he believed a misdemeanor had been committed in his presence, that no one from the restaurant told him to follow the group, that he used his police training, and that he believed he was at the time acting as a police officer. Accordingly, the evidence provided the circuit court adequate grounds for finding that, at the time of the conduct in question, the off-duty officer's actions had been performed pursuant to his duties as a police officer, not as a restaurant employee. Therefore, the Court affirmed the judgment dismissing the City's claim for contribution against the restaurant owner.

11. *Shilling v. Baker*, 2010 WL 1491405 (Va. 04/15/10) (Lacy, J.), *aff'g* Rockingham County Cir. Ct. (Lane, J.).

The trial court did not err in concluding that a cemetery did not exist on a hilltop property where the cremated remains of plaintiff's grandfather and other relatives had been scattered, either prior to or at the time that an urn containing the cremated remains of plaintiff's mother was buried, or in finding that the interment of the urn at that location violated the county zoning code provision requiring a special use permit to use the land as a cemetery. Under applicable law, the scattering of cremains was insufficient to create a cemetery. The judgment is affirmed.

In 1984, Rockingham County enacted a zoning ordinance requiring a special-use permit for a family cemetery. The owner contracted to sell the land, against the wishes of his sister, including the "Baker Cemetery," conditioned upon his relocation of the cemetery, resulting in the litigation between the owner and his sister. While the action was pending, the Rockingham County Board of Zoning Appeals issued a decision stating that a cemetery had been created before the 1984 enactment of the ordinance requiring a special-use permit but that this cemetery was limited to the smaller area surrounded a chain-rope fence. The BZA also held that the sister's burial of her mother's urn beyond this area without a special-use permit violated the 1984 zoning ordinance. Both litigants appealed the BZA's decision, and their appeals were consolidated with the sister's action in the circuit court. The circuit court held that no legal cemetery had been established at the "Baker Cemetery" site, reasoning that the scattering of human ashes failed to create a cemetery under Va. Code § 54.1-2310, which required the land to be "used or intended to be used for the internment of human remains," meaning the burial of a dead body. Accordingly, even the smaller enclosure surrounded by the chain-rope fence did not qualify as a prior nonconforming use under the zoning ordinance, and the sister's suit was dismissed. The sister appealed.

The Supreme Court held that the family's actions failed to establish a legal cemetery on the property referred to as the "Baker Cemetery." Under Virginia law, the establishment of a valid cemetery required a final interment of human remains, and the mere scattering of ashes at the site did not suffice. Thus, a legal cemetery was not established in 1949 when ashes were first scattered at the "Baker Cemetery" site. As such, the circuit court did not err in holding that the cemetery did not exist on the property at issue prior to or at the time the urn containing the cremated remains of the parties' mother was buried in 1999. Consequently, the interment of the urn at that location violated the Rockingham County Code, which required a special-use permit to use the land as a cemetery. Therefore, the court affirmed the dismissal of the sister's lawsuit.

12. *Fairfax County Water Authority v. City of Falls Church*, Law No. 2008-16114, (Circuit Court of Fairfax County, Virginia), 2010 Va. Cir. LEXIS 10, Decided January 6, 2010 , *petition for appeal denied*, No. 100675 (Va. Sept. 1, 2010), *petition for rehearing pending.*

In this case the Circuit Court determined that it was unconstitutional for the City to set its water rates in order to generate profits to transfer to the general fund. Because 92% of the City's water customers lived in Fairfax County and had no representation on the City Council, this constituted "taxation without representation." The City of Falls Church was ordered to refund approximately $2.2 Million to the water fund and to stop building surpluses into its rate structure.

The City's Petition for Appeal was turned down September 1, 2010; and its Petition for Rehearing is pending at this time.

Assuming the 23 to 1 odds against the granting of a writ on petition for rehearing hold, you can expect to advise your clients that “profit” from an enterprise fund, when transferred to a general fund, must be scrutinized. (While the case involves extra-territorial sales, the logic of the decision applies to sales to the citizenry as well .)

13. *Steve Giordano, et al. v. Town of Leesburg,* Case No. (Civil) 42736, (Circuit Court of Loudoun County, Virginia, 2009 Va. Cir. LEXIS 110, Decided March 6, 2009 , *petition for appeal granted* (argued Sept. 13, 2010).

County residents charged water and sewer rates at twice the amount of Town residents were correct in challenging the rate structure, and the Town failed to offer a rational basis to explain why it doubled the out-of-town rates. Although there is no “per se” rule for setting rates , the court was convinced by the testimony of the County residents’ expert, who opined that the Town charged rates to out-of-town customers in excess of the maximum amount that could be considered "fairly debatable." The court permitted the Town to conduct a new rate study and to revise its rates.

In arriving at his conclusion , the expert considered "cost of capital, availability fee contributions, absence of quality issues, transfers from the utility fund to the general fund, system capacity, depreciation, owner's risk, operations and maintenance, fair return on investment, and a reasonable profit."

This case is still on appeal.

BOTTOM LINE: In both cases, the seminal legal concepts are (1) the utility rates a locality charges to its retail customers must be fair and reasonable; (2) the locality must be able to articulate a rational basis for the rate structure, including any rate differential charged to out-of-town customers; and (3) using utility rates to generate surpluses to transfer to the general fund exposes the locality to a significant risk of liability.

14. *County of Albemarle v. Keswick Club, L.P.* (*Keswick II*), 2010 Va. LEXIS 236 (Va. Sept. 16, 2010)

In an earlier case involving the same parties, *Keswick I*, the Supreme Court found a manifest error in the tax assessment in question because the assessor had failed to consider and properly reject all three methods of calculating the fair market value of the property. On remand, the circuit court took additional evidence from both sides, then determined the proper value was in between the values proposed by experts for the two parties, at a figure submitted in a pre-litigation letter to the Board of Equalization and testified to at trial by the Plaintiff's general manager. The Supreme Court found that the circuit court misunderstood the holding in *Keswick I*, which held that because the methodology was in manifest error, the presumption of correctness had been lost. Interpreting the Supreme Court's *Keswick I* opinion, the circuit court believed that because of this, the value itself was erroneous and the circuit court set the value on its own in accordance with the evidence. Although in *Keswick I*, the Supreme Court did not find that the assessment value was erroneous, the Supreme Court in *Keswick II* held that because the lower court held that the taxpayer's expert opinion supported the circuit court's finding that the County committed error in its assessment, this was a sufficient finding of erroneousness supported by evidence. Once the trial court made that finding of erroneousness, the Supreme Court held that it then had the power to set the value in accordance with the evidence, pursuant to Va. Code § 58.1-3987. *Keswick II* makes clear that after a finding of manifest error, the trial court must then determine that the taxpayer's evidence proves that the value is erroneous, before setting the value. *The burden is still on the landowner to prove erroneousness of the value, even if manifest error is found.*

Justice Kinser, dissenting, would have remanded the case because (1) the lower court misinterpreted the holding of the Virginia Supreme Court in *Keswick I* by assuming that manifest error in the manner of making the assessment and erroneousness of the assessment amount were the same, and (2) the lower court erred in finding that the taxpayer had showed the assessment amount to be erroneous after the court rejected the

expert evidence of the plaintiff and set the value in accordance with other evidence presented originally to the Board of Equalization.

15. *Arogas, Inc. v. Frederick County Bd. of Zoning Appeals*, 2010 Va. LEXIS 232, 698 S.E.2d 908 (Va. Sept. 16, 2010)

The petitioner argued that the proffer amendment was void because it was made after the date of the public hearing and without a new public hearing. The petitioner claimed that the county board of supervisors violated a provision of the Frederick County Code because the board amended a proffer after the initial public hearing and approved the amended proffer without holding a subsequent public hearing. The Supreme Court disagreed, holding that Virginia Code section 15.2-2285(C) and its local ordinance counterpart authorizes a governing body to make "appropriate changes or corrections in the [zoning] ordinance or proposed amendment" after the public hearing. Accordingly, the county board of supervisors was entitled to amend the original proffer. There also was no language in Va. Code Ann. § 15.2-2285 that prohibited the county from amending the proffer after the public hearing has occurred.

Other than a reference in a footnote, the Court did not address (because the public hearing in this case was held back in 2004), the 2006 amendment of Virginia Code section 15.2-2297, 15.2-2298 and 15.2-2303 to add the language, "The governing body may also accept amended proffers once the public hearing has begun if the amended proffers do not materially affect the overall proposal." See 2006 Va Acts of Assembly ch. 450.

16. *Covel v. Town of Vienna,* 280 Va. 151, 694 S.E.2d 609 (June 10, 2010).

This appeal involved three consolidated cases from the Circuit Court of Fairfax County, brought by owners of land located in a historic district in the Town of Vienna. In each case, the circuit court had affirmed a decision by the town council *denying a landowner's request to have his property withdrawn from the district*. On appeal, the landowners challenged the validity of the Historic Districts Ordinance and the Ordinance, which created the district. The supreme court held: (1) The decisions of the Town's governing body denying the landowners' requests were presumptively correct, and no landowner could point to any evidence in the record to rebut that presumption. Moreover, the court rejected the landowners' alternative argument that the Town Council's decisions were arbitrary and unreasonable because the underlying ordinances were invalid, holding that the court could not consider whether the underlying ordinances were invalid when considering an appeal from a decision of the Town's governing body and that the appropriate method for such a challenge was an action against that governing body. (2) The ordinance creating the district was not in excess of the authority delegated by the General Assembly, simply because the ordinance referred only to an "area" rather than to landmarks, buildings, or structures. The authorizing statutes in effect when the district was created clearly permitted the Town to create a historic district even if it contained no landmarks, buildings, or structures. Moreover, Va. Code § 15.2-1427(C) bars all

nonconstitutional challenges to a governing body's adoption of an ordinance which existed when that statute was enacted in 2000. (3) The Ordinance was not unconstitutionally vague.

17. *James v. City of Falls Church*, 280 Va. 31, 694 S.E.2d 568 (June 10, 2010)

Plaintiff, a church, sought to consolidate seven contiguous lots of real estate into one lot. The church sought a zoning interpretation from the City's zoning administrator, who responded *by letter* that the consolidation was permissible under the applicable ordinances. The planning commission later rejected the consolidation. The Court held that the zoning administrator's interpretation of the applicable zoning ordinances was not binding on the planning commission, pursuant to Va. Code Ann. § 15.2-2311(C), because the planning commission was not an administrative officer and because the zoning administrator did not issue a written order, requirement, decision, or determination. Accordingly, § 15.2-2311(C) was inapplicable. In the absence of evidence showing that the planning commission based its decision on incorrect factual assumptions, the trial court necessarily did not fail to accept as true the evidence favorable to the trustees as well as all reasonable inferences drawn from that evidence. Finally, the trustees failed to meet their burden of proof to demonstrate, pursuant to Va. Code Ann. §§ 15.2-2259(D), -2260(E), that the planning commission's decision was not properly based on the applicable ordinances, or was arbitrary or capricious.

18. *Advanced Towing Co. v. Fairfax County Bd. of Suprv'rs*, 280 Va. 187, 694 S.E.2d 621 (June 10, 2010).

Three towing companies from surrounding jurisdictions brought suit against the Fairfax County Board of Supervisors, seeking a declaratory judgment invalidating a Fairfax County towing ordinance. Pursuant to Va. Code § 46.2-1232(A), the Board had enacted an ordinance requiring that "trespassing vehicles" be towed to a storage site located within the County. The plaintiffs contended that the territorial restriction contained in the ordinance violated their equal protection rights and, in addition, was ultra vires under the Dillon Rule. The circuit court sustained the County's demurrer, and the towing companies appealed. The Supreme Court held: (1) The ordinance did not violate equal protection. Applying the rational basis test, the court concluded that there was a rational basis for the territorial limitation contained in the towing ordinance (the only way to ensure enforcement of its regulations for the safeguarding of stored vehicles was to confine the towing of vehicles to the area in which its own officers had enforcement authority.). (2) The territorial limitation did not contravene the Dillon Rule. The statutory basis for the Board's enacting the towing ordinance expressly granted localities the power to regulate towing, but the statute was silent with respect to the territory within which towed vehicles were to be stored. Pursuant to the "reasonable selection of method" rule, the Board was free to exercise its discretion in prescribing the jurisdiction within which towed vehicles can be stored.

19. *Mitchell v. Rappahannock Reg'l Jail Auth.*, 2010 WL 997384 (E.D. Va. March 16, 2010).

A female inmate brought a § 1983 claim, as well as a state law claim for gross negligence against the Rappahannock Regional Jail Authority and several individual correctional officers, alleging that the defendants had violated her Eighth Amendment rights. The inmate claimed she had been repeatedly assaulted and abused by a guard and that the higher-ranking correctional officers responded with deliberate indifference. The district court denied the defendants' FRCP 12(b)(6) motion to dismiss the plaintiff's claims of supervisory liability under § 1983 and her gross negligence claim. The court held: (1) The plaintiff sufficiently alleged supervisory liability claims against all of the defendants. The mere fact that the plaintiff made allegations against "all defendants" was not fatal, since the plaintiff adequately alleged facts showing that each of the defendant correctional officers had actual or constructive knowledge that one of their subordinates was abusing the plaintiff and the alleged response of each defendant was so inadequate as to show deliberate indifference or tacit authorization and there was a causal link between their inaction and the plaintiff's constitutional injury. (2) In view of the plaintiff's allegations setting forth violations of clearly established Eighth Amendment rights, the defendant officers were not entitled to qualified immunity. (3) A viable § 1983 claim for supervisory liability under the deliberate indifference standard also sufficiently states a plausible gross negligence claim under Virginia law.

20. *Fraternal Order of Police Lodge No. 89 v. Prince George's County*, 608 F.3d 183 (4th Cir. June 23, 2010).

Several labor unions and some of their members brought suit against Prince George's County, Maryland, alleging that the County's employee furlough plan violated the Contracts Clause. The severe downturn in the local housing market had caused a significant and adverse impact on the County's finances. In response to its anticipated revenue shortfall, the County adopted several measures to reduce its expenditures. As part of that effort, the County requested that its unionized employees forfeit their cost-of-living adjustments as provided in their collective bargaining agreements ("CBAs"). Although the Unions refused to forfeit their right, the County decided to implement the furlough plan. The County relied on § 16- 229 of the County Code, which allowed the County to furlough employees when necessary based on revenue shortfalls. The district court granted the Unions summary judgment on their Contracts Clause claim, and the County appealed. The Fourth Circuit held: (1) The County did not abandon its contention that the CBAs were not impaired for purposes of the Contracts Clause. Rather, the County's lawyer simply recognized the district court's differing viewpoint and its forceful suggestion that the County's argument focus on another issue. In that context, the County's lawyer's representations did not evidence "deliberate, clear and unambiguous abandonment of [its] contention." (2) The furlough plan did not unconstitutionally impair

the CBAs. All relevant laws are implicitly incorporated into a contract, and specific provisions of the County's personnel law authorized furloughs and, provided that each of the provisions therein applied to employees covered by the CBAs except as otherwise specifically provided. The CBAs did not preclude furloughs. (3) The County's reservation of rights to modify the CBAs by implementation of a furlough did not contravene the Contracts Clause. The Unions were free to negotiate a CBA that specifically prohibited furloughs, as they had done in the past, but the Unions could not later ask for such a benefit "that was left on the bargaining table" with regard to the current CBAs.

21. *News & Observer Publ'g v. Raleigh-Durham Airport Auth.*, 2010 WL 2745129 (4th Cir. July 13, 2010).

A newspaper publisher brought a § 1983 suit against the Raleigh-Durham Airport Authority, arising out of the Authority's restriction on newspaper vending racks inside its terminal building. In a previous panel decision, the Fourth Circuit had held that the Authority's total ban of all news racks inside the terminals violated the First Amendment. *See* 597 F.3d 570 (4th Cir. 2010). The Fourth Circuit denied the Authority's petition for a rehearing en banc. Concurring in this decision, Judge Wilkinson emphasized the First Amendment concerns implicated by the Airport Authority's news rack ban and concluded that resolution of the issue on summary judgment was appropriate where the record established: (1) that newspaper publishers were denied access to many potential readers, and (2) that the Airport Authority provided little more than speculation to justify the sweeping restriction on the First Amendment. The panel decision was limited only to considering whether banning all news racks inside the terminals violates the First Amendment; the panel did not dictate how many news racks must be allowed or how they must be accommodated.

22. *McBurney v. Cuccinelli*, 2010 WL 2902787 (4th Cir. July 27, 2010), *rev'g in part* 2009 WL 1209037 (E.D. Va. May 1, 2009) (unpublished).

A citizen of California brought a § 1983 suit against the Director of the Henrico County Real Estate Assessment Division, alleging that the Virginia Freedom of Information Act (FOIA) violated the *dormant Commerce Clause* and the *Privileges and Immunities Clause* of the U.S. Constitution. Because FOIA provides only "citizens of the Commonwealth of Virginia with a right of access to [the state's] public records," the County denied the plaintiff's request on the basis of his citizenship. The plaintiff, who was in the business of requesting real estate tax assessment records for clients from state agencies across the United States, alleged that the denial prevented him from pursuing his common calling on an equal basis with Virginia citizens in violation of the Privileges and Immunities Clause, and claimed that by giving Virginia citizens an exclusive right of access to Virginia's public records, the statute violated the dormant Commerce Clause. The district court dismissed the plaintiff's suit for lack of standing, and the plaintiff appealed. The Fourth Circuit held that the district court had improperly dismissed the plaintiff's claims on standing grounds. Specifically, the plaintiff had Article III standing to sue because he had shown (1) injury in fact, i.e., the lack of possession of requested

general policy information documents; (2) causation, i.e., continued denial of access to such records by the specific state official; and (3) redressability, i.e., that the release of the aforementioned information would remedy his injury. Moreover, the district court had erred in holding that the plaintiff did not have standing because he had failed to plead an ongoing injury as required for declaratory or injunctive relief. Rather, the plaintiff's amended complaint sufficiently pleaded an ongoing injury by alleging that he was prevented from pursuing his common calling by obtaining Virginia public records through the FOIA on an equal basis with Virginia citizens. Finally, the court declined to address the merits of the plaintiff's constitutional claims because they had yet to be ruled upon by the lower court in the first instance. Therefore, the court reversed the dismissal for lack of standing and remanded the case for further proceedings.

23. *Norfolk S. Ry. v. City of Alexandria*, 608 F.3d 150 (4th Cir. June 16, 2010), *aff'g in part, dismissing in part, and vacating in part* 2009 WL 1011653 (E.D. Va. April 15, 2010) (unpublished).

A railroad company brought a declaratory judgment action against the City of Alexandria, alleging that the City's haul ordinance, as applied through the Railroad's haul permit, was preempted by federal statutes. The Railroad operated an ethanol transloading facility in the City that was near two residential neighborhoods, an elementary school, and a metrorail station and associated commuter parking lot. Given the danger posed by having a flammable and volatile material in proximity to populated areas, the City enacted an ordinance prohibiting the hauling of certain bulk materials, including ethanol, on City streets and unilaterally issued a permit to the railroad imposing specific restrictions. The Railroad challenged the permitting requirement. The district court held that two federal statutes, the Interstate Commerce Commission Termination Act (ICCTA) and the Hazardous Materials Transportation Act (HMTA), but not the Federal Rail Safety Act (FRSA), preempted the City's ordinance and haul permits. The City appealed the preemptive effect of the ICCTA and HMTA, and the Railroad cross-appealed the holding that the FRSA did not also preempt the City's actions. The Fourth Circuit held: (1) The ordinance and haul permits were preempted by the ICCTA. The ICCTA expressly preempts state or local regulation of "transportation by a rail carrier," and the ordinance authorized the City to impose any "conditions and restrictions the director [of transportation] may deem appropriate to promote traffic safety." As this "open-ended provision grant[ed] the City unlimited control over the facility and its transloading," so the City was regulating "transportation by a rail carrier" within the meaning of the ICCTA. (2) The City could not avoid federal preemption by invoking the police powers exception. Although the ordinance and permit sought to enhance public safety, the ordinance unreasonably burdened rail transportation and thus could not escape ICCTA preemption. (2) The holding that the ICCTA preempted the City's ordinance and permit mooted the remaining questions as to whether the City was also preempted under the HMTA and the FRSA. The court affirmed the district court's judgment as it pertained to the preemptive effect of the ICCTA, but vacated the judgment as it pertained to the HMTA and the FRSA.

24. *Williams v. City of Richmond*, CL 10-74 (City of Richmond Cir. Ct. Aug. 13, 2010).

Plaintiff sued the City for personal injuries allegedly suffered when he fell while walking along the sidewalk. The City moved to dismiss the suit based on Va. Code § 15.2-209(A), which requires the plaintiff to provide written notice of the claim identifying the "place at which the injury is alleged to have occurred" within six months after the cause of action accrues. Although the plaintiff timely submitted a written statement asserting that he was injured while walking between 2nd and 3rd Streets when he fell into a "manhole," the plaintiff's amended complaint alleged that he was injured when he fell through a "metal grate" on the sidewalk between 2nd and 3rd Streets. Based on the fact that the plaintiff's counsel confirmed at the motion hearing that the plaintiff was relying on the metal grate as the place where the injury occurred, and noting that the statute expressly calls for a strict construction, Judge Hughes sustained the City's motion to dismiss. The court later denied the plaintiff's motion for reconsideration.

25. *Robinson v. Coles*, CL10-2252-00 (City of Richmond Cir. Ct. Sept. 3, 2010).

Plaintiff was injured by a truck driven by a supervisor with the City's leaf removal program during the course of a leaf removal project. The question presented by the City's plea of *governmental immunity* was whether the supervisor's acts were discretionary, as opposed to ministerial, so as to raise the degree of negligence the plaintiff had to establish to impose municipal liability from simple to gross negligence. Ultimately sustaining the City's motion, the court relied upon a four-part test and held that (1) the employee "was working in a governmental function in the leaf removal program;" (2) the City "has a strong interest in this
Program;" (3) "the City exhibited significant control regarding [the employee's] job function;" and (4) the employee "was acting with discretionary judgment . . . because he was operating a governmental vehicle, performing his designated job function as a supervisor, and making decisions about crew safety and job scope at the time of the accident."

26. *Session v. Anderson*, 2010 WL 2521075 (W.D. Va. June 21, 2010).

An African-American employee of the Montgomery County School Board sued the School Board, claiming that it had violated Title VII by retaliating against her because she had filed a grievance against a superintendent for allegedly having made racially derogatory comments. The plaintiff alleged that the Superintendent, who was a dark-skinned African-American, had made two racially derogatory comments concerning light-skinned African-Americans, such as the plaintiff. In the first instance, during a conversation about hair care, the Superintendent allegedly told the plaintiff that the

plaintiff had "good hair," which the plaintiff asserted has long been understood in the African-American community to be a racially charged insult that intimates that an individual has light-skinned features and, in this context, implied that the plaintiff was "not black enough." The second incident occurred a month later at a staff meeting, where the Superintendent allegedly made a comment about the need to use extra "plant" photos in a baby picture guessing game because some people had "more melanin in their skin than others." The School Board moved for summary judgment. The district court granted summary judgment, holding: (1) The Superintendent's comments, although perhaps inappropriate and subjectively offensive, did not violate Title VII, because, without more, they did not create a workplace permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the workplace and create an abusive working environment. (2) The plaintiff could not have reasonably believed that the Superintendent's isolated comments constituted a violation of Title VII, since it was not objectively reasonable to believe that those two comments, without more, created an objectively hostile or abusive work environment.

27. *Ocel v. Bd. of Zoning Appeals of Fredericksburg*, Case No. CL09-86 (City of Fredericksburg Cir. Ct. Aug. 13, 2009).

The circuit court reversed a Fredericksburg Board of Zoning Appeals decision which accepted an alleged oral conversation between a zoning officer and landowner as a "written order, requirement, decision or determination" for purposes of 15.2-2311(C) vesting. The landowner had argued that the word "written" modified only "order," and that a "requirement, decision or determination" could be verbal and still have the binding effect provided in 15.2-2311(C). The landowner claimed that the zoning officer had made a verbal determination that a parcel of land he owned *had been subdivided by the Commissioner of Revenue on a tax card in the 1940s*. The BZA accepted the landowner's argument but the Circuit Court, on appeal by the Zoning Administrator, rejected it. The court first denied the landowner's motion to dismiss for lack of standing, agreeing that the Zoning Administrator is not required to obtain specific approval for each petition for writ of certiorari from the governing body. Based on testimony from the zoning officer, the trial court also overturned the BZA's finding of fact that the office conversation had included a verbal determination. Finally, the court agreed with the Zoning Administrator that the landowner had no good faith basis to rely on the conversation with the zoning officer, in light of his own deed to the property which described it as a single lot or parcel of land. The Supreme Court denied a petition for appeal by the landowner.

28. *Turner v. City of Norfolk*, Civ. Dkt. No. CL09-7987 (City of Norfolk Cir. Ct. May 25, 2010).

The plaintiff alleged that, while she was in the process of collecting cans from the roadside of a narrow street, a municipal garbage collection truck pulled away from the curb and struck her as she was passing. In general district court, the City asserted a special plea of governmental immunity, citing *Stanfield v. Peregoy*, 245 Va. 339, 429

S.E.2d 11 (1993), which dealt with plowing and salting snow-covered roads. The GDC denied the special plea appearing to distinguish between infrequent governmental functions and regular government functions. The City appealed to the circuit court, which sustained the plea, relying on *Stanfield* and *Linhart v. Lawson*, 261 Va. 30, 540 S.E.2d 875 (2001). The court found "that the driver was cloaked with immunity while exercising judgment and discretion in completing his route" and rejected "a 'stop and start' immunity to the driver that would cover him only when in the actual act of dumping cans and not in maneuvering the truck between stops."

29. *Wells v. Shenandoah Valley Dep't of So .Servs.*, 56 Va. App. 208, 692 S.E.2d 286 (Va. Ct. App. May 4, 2010).

The operator of a group home for troubled youth sought judicial review of an administrative determination that she kept an inadequate food supply at the home. Based on resident complaints, the Shenandoah Valley Department of Social Services investigated the matter and ultimately determined that the complaints were founded – a finding upheld by the Virginia Department of Social Services (VDSS). Upon judicial review, after a hearing on the matter, the circuit court issued a letter opinion sustaining the VDSS determination. The plaintiff then filed a motion for reconsideration, and, on July 15, 2009, the circuit court denied the motion and entered an order incorporating its previous letter opinion. Thereafter, the plaintiff again asked for reconsideration, and, on September 23, 2009, the court entered an order stating that "the previous ruling . . . set out in its Order dated July 15, 2009, shall remain in full force and effect." On October 1, 2009, the plaintiff filed a notice of appeal. The court of appeals held that it lacked jurisdiction over the appeal. "Timely filing of the notice of appeal at the appellate level," within 30 days from the date of final judgment, "is mandatory and jurisdictional." Rule 1:1 applies notwithstanding the fact that the appeal implicated the Virginia Administrative Process Act (VAPA). Although VAPA cases are not always bound by the Rules of Civil Procedure in the circuit court, where, as here, the agency law does not prescribe a particular procedure, the action must be conducted "in the manner provided by the rules of the Supreme Court of Virginia" (quoting Va. Code § 2.2-4026). "Accordingly, appeals under the VAPA . . . are governed by the provisions of Rule 1:1." Therefore, the court dismissed the plaintiff's appeal for lack of jurisdiction.

30. *Doreen Johnson, Personal Representative of the Estate of Korey Johnson, v. Cordell Watson, et al.*, CL09-2051 (Richmond Cir. Ct. May 18, 2010).

The personal representative of an inmate sued four deputies who were working at the time that the decedent died while incarcerated as a pre-trial detainee. Upon intake, the decedent did not report any health problems other than asthma and was placed in a single holding cell. During the middle of the night, he was found unresponsive on the floor of his cell. The deputies tried unsuccessfully to revive him and then initiated CPR. The decedent died after the EMTs arrived. Although each deputy had slightly different roles, each was involved after the decedent was found unresponsive, although only two performed CPR. The plaintiff alleged that the deputies were grossly negligent for a

variety of reasons, including their alleged failure to administer appropriate treatment to the decedent, failing to transport him to the hospital, and improperly using ammonia inhalants. The Richmond Circuit Court sustained the deputies' plea in bar and dismissed the case against all four deputies based on the Good Samaritan statute, Va. Code § 8.01-225, finding that they were protected by law for the emergency care that they rendered. The trial court issued a brief order, although the rationale is contained in a ruling from the bench. The plaintiff filed a Notice of Appeal. The application of this statute to deputies provides an additional statutory protection for these public servants in the undertaking of their duties.

31. *Sowers v. Powhatan County,* Case No. 3:06cv754, 2008 U.S. Dist. LEXIS 19112 (E.D. Va. 03/12/08) (unpublished), *aff'd,* 347 F. App'x 898 (4th Cir. 10/15/09) (unpublished), *cert. denied,* 130 S. Ct. 3412 (June 14, 2010).

A subdivision developer lost his lawsuit against Powhatan County after challenging three County actions: (1) the County's decision not to remand his application for rezoning to the Planning Commission; (2) the County's denial of the developer's request to defer consideration of his application, and (3) the County's denial of the rezoning application. The developer argued that the County was motivated by ill will and personal animosity when it made these decisions and brought claims for denial of substantive due process and equal protection under 42 U.S.C. § 1983. The rezoning application was opposed by citizens at public hearings, and through petitions. The District Court dismissed one substantive due process claim because the developer did not have a cognizable property interest under Virginia law the “time value” of his application fee. The other substantive due process claim was based on the County's delay in issuing ministerial approvals preliminary to the rezoning process. The Court dismissed that claim because it was grounded in state, not federal, law; and the injury could have been cured by mandamus. The developer’s equal protection claim was based on the fact that no other applicant for rezoning had ever been denied remand to the Planning Commission when requested, no other applicant had ever been denied a deferral of a rezoning application when requested, and because the Chairman of the Board of Supervisors prefaced his call for a vote by noting that the developer had refused to work with the Planning Commission. The developer brought his equal protection claim as a "class of one.” Such a claim is subject to a rational basis test. The District Court granted the County's motion for summary judgment, holding that the developer was not similarly situated to other developers. The court found a rational basis for the County’s actions. On appeal, the Fourth Circuit affirmed, noting that it was up to the developer to negative every conceivable rational basis – including the rational basis that the County had responded to widespread public opposition to the rezoning. The U.S. Supreme Court denied the developers petition for a writ of certiori.

32. *ASWAN v. Virginia*, 699 F. Supp. 2d 787 (E.D. Va. March 15, 2010).

A homeless advocacy group brought suit against the City of Richmond, alleging that the decision to relocate a facility for providing services to the homeless was unlawful because it impermissibly segregated the homeless from Richmond's mainstream community. The complaint alleged that the City violated the Americans with Disabilities Act (ADA), the Fair Housing Act (FHA) (on both racial and handicapped grounds), and the Equal Protection Clause and conspired with the other defendants "to reduce the visibility of the homeless in Richmond's mainstream community" in violation of 42 U.S.C. § 1985(3). The district court granted the City's motion to dismiss, and the plaintiff appealed. The court held: (1) The conspiracy claim failed because it was not alleged with the requisite particularity. (2) Without deciding the merits of the plaintiff's equal protection, ADA, and FHA claims, those claims were time-barred. Although the ADA does not contain a statute of limitations, the one-year limitations period for the Virginia Rights of Persons with Disabilities Act provides the most analogous state statute of limitations. The FHA provides a two-year limitations period. *See* 42 U.S.C. § 3613(a)(1)(A). The equal protection and § 1983 claims are governed by Virginia's two-year statute of limitations for personal injury claims. All of the plaintiff's claims accrued no later than the date on which the relocated homeless center opened its doors to the public, yet the plaintiff the complaint until more than two years thereafter. The continuing violation doctrine also did not save the plaintiff's claims.