Short-Term Residential Rentals: Legal Issues Confronting Local Governments

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Introduction
The recent phenomenon known as the “sharing economy,” in the majority of its many forms, is here to stay.\(^1\) Necessity being the mother of invention, the Great Recession provided a tremendous impetus for people to invent new ways of doing business, in large part to monetize their most important assets – their automobiles and their homes – by converting them from money pits into money trees. And thus were created once-unheard of, but now ubiquitous, companies like Airbnb. While many hopeful startups have vanished, Airbnb, the best known, but far from the only, peer-to-peer short-term residential lodging platform,\(^2\) has in the last several years grown exponentially, fulfilling needs almost no one, until a few years ago, realized was there. And thus Airbnb, and later, its progeny, were able to build successful businesses to make it easy – with just a few clicks of a computer mouse - for travelers to find an alterna-

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\(^1\) The sharing economy is far from restricted to short-term residential lodging. For a listing and brief description of a number of such businesses, see Currency Fair, The Peer-To-Peer Marketplace Revolution: 50+ Companies That Are Changing The World, March 26, 2014.

\(^2\) “Peer-to-peer” or “P2P” home lodging is the process by which the owner of a residential property makes the property, or a portion of it, available for transient (short-term) rental, generally through the use of a web site in which the prospective lodger is able to review candidate residential property and make the necessary reservations (“hosting platform”).
tive to traditional lodging uses, such as hotels and motels, and to enable ordinary homeowners to earn extra income by renting their house or apartment, or even just a part of it, to guests who have been screened ahead of time to minimize potential trouble. In retrospect, it is no wonder at all that Airbnb and many of its inevitable imitators have been so successful. It would be difficult indeed to deny that legions of people, both users and providers, are well-served by the ready availability of short-term residential lodging offered up through P2P hosting platforms; at the same time, however, it would be equally difficult to argue that the phenomenon has been an unqualified success, for experience has shown that there are potential pitfalls for host and guest alike. While most transactions are smooth, hosts have experienced, among other things, trashed apartments, unsavory guests and stolen valuables. Airbnb Hell, Uncensored Stories from Hosts and Guests, What has happened to Airbnb? Why are guests so bad?, December 29, 2016. Guests, for their part, have suffered from fraudulent listings, misleading descriptions of the premises, rude or uncooperative hosts, lack of assistance from the platforms on which they booked their stays, and other issues that have made a stay unpleasant, or even worse. See generally Airbnb Hell, Uncensored Stories from Hosts and Guests.

As fascinating and often humorous as the tales of residential rentals gone bad are, it is not the purpose of this article to regale the reader further with such accounts, nor is it to advocate for or against the use of private homes for short-term lodging purposes. It is only to identify and examine, in varying degrees of depth, the legal issues presented by such uses. The major issues derive from the near-certainty of conflict arising when business uses such as short-term home rentals begin to appear in neighborhoods that, until then, have been uniformly occupied by homeowners or long-term lessees. Modern-day Smart Codes and form-based zoning aside, one of the fundamental imperatives of zoning has been to keep incompatible uses separate from each other; more often than not, this has meant keeping commercial uses away from residential neighborhoods. See, e.g., Village of Euclid, Ohio Zoning Ordinance No. 2812 Section 3 (Classification of Uses) (1922). When a home in a residential area is used primarily for short-term lodging purposes, the nature of the use is no longer residential, but commercial. And even if the principal use of a home continues to

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3 Airbnb was the brainchild of two San Franciscans who, unable to pay their rent, decided to put three air beds on the floor for guests and serve them breakfast for $80 each and, critically, as it turned out, to advertise it on their own web site. A. Vital, How Airbnb Started – Infographic, Funders and Founders, April 10, 2014.

4 For another compilation of stories of rentals ranging from unfortunate to disastrous, see H. Bradford, Most Airbnb Rentals Go Perfectly. Then There Are These Horror Stories, The Huffington Post, July 29, 2014.

5 It should be noted that the cited web site neither claims to be, nor is in fact, a neutral observer of Airbnb-related activities, having announced on its home page that it is “dedicated to helping Hosts and Guests share their stories about the risks and dangers of using Airbnb” and on the same page running a banner, complete, stating “Join our Class Action Lawsuit Against Airbnb!” (exclamation point original).

6 The Euclid ordinance, of course, was the subject of the seminal case of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), in which the United State Supreme Court upheld a zoning ordinance that, among other things, separated prohibited all but a few innocuous commercial or institutional uses in residentially-zoned areas.

7 The incompatibility between the lodging use and quiet enjoyment of residential areas seems, at least anecdotally, to be the greatest where, as in Virginia Beach, so-called “event homes” or less euphemistically, “party houses,” are interspersed with bona fide dwellings in residential neighborhoods or near the beach. Typically, these homes, although permitted as single-family dwellings under applicable building codes and zoning ordinances, are advertised as being available for short-term rentals for weddings, family reunions, business retreats or other events during most of the year. See, e.g., the listing for twenty-one named “event homes,” the largest of which contains fourteen bedrooms and thirteen baths and sleeps fifty people, at https://www.siebert-realty.com/htmls/spevents.php.
Chairman’s Message

Spring has come to the mountains. The trees bud. The flowers bloom. And the Board of Supervisors and School Board prepare to argue over money. It is all part of the great circle of life I suppose.

I have decided not to do one thing this year, which I have done for many years running: attend the mandatory CLE’s to qualify as court appointed legal counsel in criminal cases. I had kept up the certification in the event I decided to return to that practice. After twelve years in local government, I have decided that is what I will be doing from here on out.

When I first opened my solo practice many years ago, court appointed criminal work was a staple. I liked criminal work. Where else do you get to actually practice what all of your friends and family see on TV. I was much more popular at cocktail parties in those days.

I was not happy to see the mandatory CLE’s for court appointed counsel at first. Some of the attorneys I practiced with in the local Criminal Bar and I were offended that anyone thought we did not know what we were doing. I felt, like every other rule or regulation we live with, the requirement was intended for the 5% who don't know what they are doing or don't care. However, I later realized that was not the point. What I saw as a hassle, to the public was reassurance. The requirement builds public confidence in the system. That is absolutely critical to our democracy.

I said that to say this: Why do we require attorneys who want to represent persons charged with crimes to take certain CLE courses but not require attorneys who want to represent local governments to take certain CLE courses?

There are many small towns across the state and some counties who are represented by attorneys engaged in private practice on a contractual basis--part time. Sometimes a town or political subdivision may hire an attorney to represent them on a single issue. In those contexts the attorneys may or may not know some of the finer points of local government law. Again 95% are responsible enough to educate themselves on the finer points. But there always are the 5% who don't. They may not be familiar with FOIA, COIA, procurement, etc. and unknowingly let their elected officials walk into big mistakes--the kind of mistakes that sell newspapers.

I am aware of the long running debate in our profession about these types of requirements. Every area of practice thinks deep down that only attorneys who regularly practice their type of law should be permitted to participate. By contrast, as a former general practitioner, I think I have a better perspective on the law as a whole because of my general practice experience and would have been insulted if anyone had told me I did not know enough to engage in a particular field. We could debate endlessly with valid concerns on all sides. But we are not the point.

In a broader sense, just as in the criminal context, I believe the public perception of the conduct of local governance is as critical to confidence in the system as their perception of criminal prosecution.

Would the public be reassured if the legal counsel to their elected officials was educated in FOIA? COIA? Public procurement? I think the answer is yes. At a time when politicians are screaming at each other for being corrupt, wouldn't the public like to know there is an Archibald Cox on the inside? Reassuring the public of good counsel for their government is as important as reassuring them of the competence of legal counsel for criminal defendants.

I humbly suggest that before representing a political subdivision as general counsel, attorneys should be required to attend CLEs regarding COIA, FOIA, Procurement, and a CLE comparing the responsibilities of representing a local government entity with those for representing individuals who occupy positions within the local entity.

Eric Young
Chairman
be residential, its occasional use as a short-term rental can cause disruption to the neighborhood, as experience in Virginia’s largest city has demonstrated.8

Zoning, and its related public health, safety and welfare issues,9 are not the only ones localities with short-term residential rentals must deal with. Transient occupancy taxes, which are a source of significant revenue in many localities, often remain uncollected and unpaid by short-term residential rental operators, and it is difficult for local governments to ferret out locations that are generating, but not paying, the tax. These issues, along with recent legislation intended to address those concerns, are the subject of this article.10

**Zoning and Zoning Enforcement**

It is axiomatic that localities in Virginia have the authority to control the use of property within their boundaries through the use of zoning. Virginia Code § 15.2-2280. In particular, they may “regulate, restrict, permit, prohibit, and determine . . . [t]he use of land, buildings, structures and other premises for . . . business, industrial, residential, flood plain and other specific uses . . . .” Id. The broad language of the statute allows local governments to place strict limitations on, or even to prohibit or require specific approval of, short-term (i.e., “transient”) rentals of homes in areas zoned for residential use. Typically, the term “transient” is defined in the zoning ordinance itself as a rental for a period of no more than thirty days. *E.g.*, Charlottesville City Code § 34-1200 (defining “occupancy, transient”). Transient occupancy is intended to denote a lodging use, such as a hotel, motel, or bed and breakfast, as opposed to a residential use.11

While not all Virginia localities have utilized this authority to specifically address the P2P-based lodging uses, either because the use has not become problematic or because their pre-existing ordinance already addressed transient rentals,12 zoning regulation may run the gamut from absolute prohibition of short-term residential rentals in residential districts to an absence of any regulation specific to the use. Regulation may, of course, take a middle ground, either by allowing the use by right with appropriate restrictions and requirements pertaining to the use, or by requiring specific approval by the governing body in the form of a special or conditional use permit, although in localities where there is a significant tourism population, and thus a high demand for short-term rental units, requiring case-by-case consideration would weigh heavily on the dockets of the local governing body, especially where proposed locations are in established residential neighborhoods.

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8 For a newspaper account of the continuing controversy in Virginia Beach, see A. Skelton, *People speak out about “party houses” at public hearings in Virginia Beach*, The Virginian Pilot, July 23, 2016.

9 These issues include things such as parking, noise, litter and similar things that may be addressed in either the zoning ordinance or elsewhere in a locality’s codes.

10 In localities where there exists a shortage of affordable housing, short-term rentals take those housing units off the market for full-time residents and thus drive housing costs higher. This rationale impelled New York City in 2010 to prohibit the rental of entire apartments for less than 30 days. When the City later enacted a law making it illegal to advertise such rentals on hosting platforms such as Airbnb, the company sued. The case was eventually settled, with the City agreeing to enforce the advertising prohibition against hosts only. Stipulation of Settlement and Dismissal, *Airbnb, Inc. v. Schneiderman*, Case No. 1:16-cv-08239 (S.D. N.Y. December 5, 2016). While it is an important consideration for localities in deciding a course of action, the effect of short-term rentals on the housing market is primarily a policy, rather than a legal, issue and so will not be examined here. For the same reason, the obvious issue of competition with established lodging uses will not be discussed.

11 This distinction itself raises the question of what is a legally permissible time for a real estate rental to be deemed transient in nature. While broad, it does not confer carte blanche authority upon localities. Thus, for example, an ordinance prohibiting all rentals of residential property, irrespective of the rental term, is more likely to be successfully challenged than one prohibiting rentals of less than 30 days.

12 Of the thirteen localities that responded to a recent request for information concerning their treatment of short-term residential rentals, six deemed their current ordinances to adequately control the use, two reported that they had not experienced any adverse impacts, two had recently adopted ordinances pertaining to short-term residential rentals, and three were considering doing so but had not yet acted.
Whether allowed as principal or special/conditional uses, appropriate conditions may include a requirement for a ministerial permit authorizing either a single short-term rental or one allowing a certain number of rentals on an annual or seasonal basis. The permit would, in turn, set forth the conditions applicable to the rental, which could include any or all of the following provisions, depending, in large part, on the exact nature and characteristics of the proposed rental use: (1) restrictions on the location where vehicular parking is allowed, so as to avoid interference with public thoroughfares and private driveways or, where a site does not have sufficient parking for the anticipated number of vehicles, requiring shuttle parking; (2) retractions of the maximum number of guests (both those who actually occupy the unit during the rental term and temporary guests at parties and similar gatherings); (3) noise limits, both those already set forth in a general noise ordinance and those applicable only to short-term rentals; (4) notice requirements to nearby properties, which may consist of notice of the submittal of an application (with or without language inviting comments on the application) or of the actual time and place of a rental, or both; (5) insurance requirements; (6) inspection requirements to ensure that applicable Building Code and related standards are met; (7) evidence of registration as a place offering lodging to transients, for purposes of transient occupancy tax collection; (8) on-site litter disposal locations and methods; and (9) compliance with other applicable ordinances not specific to short-term rentals, including prohibitions of bonfires, fireworks and similar activities.

The mere existence of an ordinance is not, of course, sufficient to ensure actual compliance. In any regulatory scheme, especially where the regulations are intended to limit or prohibit uses, such as short-terms residential rentals, that involve a high degree of non-compliance, the critical element of a successful ordinance is proper enforcement. Never easy in any context, especially where successful legal action, whether civil or criminal, to address violations depends upon the testimony of neighbors of an alleged violator, zoning enforcement differs from standard law enforcement by being subject to certain statutory constraints that prolong the enforcement process; some of these provisions enable violators to continue to conduct an illegal activity or to ignore the requirements of an allowed activity with impunity. In particular, these provisions: (1) afford a “person aggrieved” (in other words, an alleged violator) of a notice of violation or order of the zoning administrator or other officer involved in administering or enforcing the zoning ordinance” to cease and desist from violating the zoning ordinance (in this context, to maintain an unlawful short-term rental) the right to appeal the notice of violation or order to the locality’s Board of Zoning Appeals by filing a notice of appeal within thirty days; Virginia Code § 15.2-2311(A); (2) require the notice of violation or order to contain a statement informing the recipient that he may have a right to appeal within the prescribed time limit, and that the

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13 The listing of permit conditions is not intended to encompass all possible, or even all advisable, conditions, as localities may have different needs and different approaches to regulation of short-term rentals.

14 Shuttle parking is more likely to be required for short-term rentals akin to the “party houses” discussed earlier, where the property is rented for a special event such as a graduation party or wedding.

15 Again, this type of provision is more appropriate for permits allowing short-term rentals for special events involving large gatherings of people.

16 An illustrative anecdote comes from a member of a certain locality’s special committee formed to study short-term rentals, who reported that “flying lanterns” propelled by rising hot air generated by the lit candles within them landed on his roof after having been released during a gathering at a neighbor’s rented party house.

17 Such other officers would most often include zoning inspectors who have issued a notice of violation to an alleged zoning offender.

18 The statute does not specify whether the 30-day period commences as of the date the notice or order is issued or the date on which it is received by the alleged violator.
decision shall be final and unappealable if not appealed within that time,\textsuperscript{19} \textit{id.}; (3) automatically stay, upon the filing of a notice of such an appeal within the prescribed time period, not only the direct enforcement of the ordinance against the violator by court action, but “all proceedings in furtherance of the action appealed from” unless the zoning administrator certifies that such a stay would “cause imminent peril to life or property,” \textit{id.} subsection (B); (4) allow the aggrieved party to appeal the board’s decision to the circuit court by filing a petition for writ of certiorari within thirty days of the board’s final decision, Virginia Code § 15.2-2314; and (5) change the former traditional standard that requires the board’s decision to be affirmed by the trial court unless it determines that the BZA applied erroneous principles of law or was plainly wrong and in violation of the purposes and intent of the zoning ordinance, \textit{e.g.}, \textit{Masterson v. Board of Zoning Appeals}, 233 Va. 37, 44, 353 S.E.2d 727, 732-33 (1987), to a less stringent test in which the presumption that the Board’s decision was correct may be rebutted by a mere preponderance of the evidence and questions of law are decided \textit{de novo}. Virginia Code § 15.2-2314.

Traditional methods of zoning enforcement include actions deemed criminal in nature, Virginia Code § 15.2-2286(A)(5), or actions for injunction or abatement under either § 15.2-2286(A)(4) or § 15.2-2208. As an alternative to those methods, or in some cases in addition to them, the use of civil penalties is also available as an enforcement tool, except where a violation results in injury to any person. Virginia Code § 15.2-2209. While the existence of a civil penalty under the zoning ordinance does not preclude an action for injunction or abatement; criminal actions, however, are precluded except for any violation resulting in personal injury or in cases in which civil penalties total $5,000 or more. \textit{id.}

The statute contains several limitations on the use of civil penalties. The maximum civil penalty is $200 for the initial summons and $500 for each additional summons. \textit{id}. While each day during which the violation is found to have existed constitute a separate offense, specified violations arising from the same operative set of facts may not be charged more frequently than once in any 10-day period, and a series of specified violations arising from the same operative set of facts may not result in civil penalties which exceed a total of $5,000.\textsuperscript{20} \textit{id}. In addition, a civil penalty may not be assessed by the court during the pendency of the 30-day appeal period to the board of zoning appeals. Virginia Code § 15.2-2311(a).\textsuperscript{21} Once the total amount of civil penalties exceeds $5,000, however, further violations may be prosecuted as misdemeanors. \textit{id}. The latter provision, as well as the ability to enjoin violations, serves as a disincentive to hosts that consider civil penalties to be a cost of business and are able to factor the costs into their rates.

Civil penalty actions are instituted by the issuance of a civil summons to the alleged violator, who may choose to either contest the summons or appear in person or in writing to the treasurer or finance director of the locality prior to the trial date, admit the violation and pay the penalty. Virginia Code § 15.2-2209. If contested, the locality has the burden at trial, which is in the general district court, to show the liability of the violator by a preponderance

\textsuperscript{19} A different statute, Virginia Code § 15.2-2286(A)(4), allows localities to prescribe appeal periods of a little as 10 days in cases of alleged violations involving temporary or seasonal commercial uses, parking of commercial trucks in residential zoning districts, maximum occupancy limitations of a residential dwelling unit, or similar short-term, recurring violations. In some case, illegal short-term rental uses may fit one or more of these descriptions, such that the 30-day period in which the alleged violator has in which to file an appeal to the board of zoning appeals would be reduced to whatever shorter period the ordinance prescribes.

\textsuperscript{20} Whether the “same set of operative facts” encompasses, for example, two illegal rentals at different times and to different guests is not made clear by the statute or case law.

\textsuperscript{21} Presumably, where a civil penalty action was for a violation of the type for which the appeal period has been reduced, the imposition of penalties could resume after the expiration of the applicable time limit, rather than the 30 days stated in the statute.
of the evidence. Id. As the case is civil in nature, either party has the right of appeal to the circuit court. Id.

Critically to the ends of law enforcement, statute’s reach is not limited to the award of a judgment against the violator. If the violation remains uncorrected at the time of the admission of liability or finding of liability, the court may order the violator to abate or remedy the violation, in which event, unless the court provides otherwise for good cause shown, the violator must abate or remedy the violation within such period of time as the court may determine, but not later than six months of the date of admission of liability or finding of liability. Each day during which the violation continues after the court-ordered abatement period has ended (but, presumably, not during the abatement period) shall constitute a separate offense.

The doctrine of vested rights is of considerable relevance to the regulation of short-term residential rentals, especially in localities that adopt either a new set of regulations to permit short-term residential rentals or amend their regulations so as to impose new or stricter requirements pertaining to the use. There are a multitude of situations in which a claim of vested rights against a new ordinance may arise, and the law on the subject has not evolved sufficiently to address many of the situations that may arise out of the adoption of regulations affecting such uses; in light of those realities, a comprehensive discussion of vested rights is beyond the scope of this article. A few general principles, however, may be useful to localities that are contemplating the adoption of ordinances concerning short-term residential rentals.

First, an illegal short-term residential rental use cannot claim to be a protected nonconforming use, assuming that the locality where it is located has not been so unwise as to define nonconforming uses to include uses other than those that were lawfully established. Thus, unless the new ordinance permitting short-term residential rentals contains grandfathering provisions allowing pre-existing short-term residential rentals not legally permitted prior to the adoption of an ordinance, or the particular property falls within the protections of Virginia Code § 15.2-2311(C) or the related ones set forth in the latter portion of that subsection or in subsection (D), such uses cannot claim a vested right to continue the operation without complying with the new ordinance. As a result, those pre-existing uses would be subject to all of the requirements of the new ordinance. Conversely, an example of a situation in which the adoption of a new ordinance does not affect an existing use or

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22 The part of the statute that allows the court to order remediation even when the violator has entered an admission of liability appears to be inconsistent with the part that states, "If a person charged with a scheduled violation does not elect to enter a waiver of trial and admit liability, the violation shall be tried in the general district court," which implies that the trial court hears only cases in which there is no admission of liability.

23 For purposes of this discussion, the term "vested rights" applies both to proposed development and existing uses, the latter of which more specifically fall within the rubric of "nonconforming uses." Localities have substantially greater authority concerning their treatment of nonconforming uses and structures under § 15.2-2307(c) than they do with respect to uses that have met the vesting requirements set forth in subsections (a) and (b), as the protections afforded by subsection (c) are not mandatory upon localities, which may choose to adopt them or not.

24 In its most basic form, a "grandfather clause" is a provision in an ordinance that applies to existing uses so as to expressly exempt them from all, or a part of, the ordinance. A vested right, by contrast, arises by operation of law irrespective of the provisions of the ordinance, so as to protect existing uses.

25 Section 15.2-2311(C) provides that an erroneous decision by the zoning administrator or other administrative officer may not be reversed or modified after 60 days where a person has "materially changed his position in good faith reliance on the action of the zoning administrator or other officer unless it is proven that such written order, requirement, decision or determination was obtained through malfeasance of the zoning administrator or other administrative officer or through fraud." The provision thus constitutes a departure from the traditional rule that localities are not subject to estoppel as the result of its acts or those of its agents or employees. E.g., Segaloff v. City of Newport News, 209 Va. 259, 163 S.E.2d 135 (1968). The other provisions concern unusual situations in which a business license, building permit or certificate of occupancy has been issued and all taxes relating to the use have been paid.
structure is that of new building code requirements, which are generally not applicable to existing residential short-term rental units. Virginia Maintenance Code § 103.2, 13VAC5-63-470 (2014) (stating that “no provisions of [the Virginia Maintenance Code] shall require alterations to be made to an existing building or structure or to equipment unless conditions are present which meet the definition of an unsafe structure or a structure unfit for human occupancy”).\textsuperscript{26}

Less certain of resolution under current rules of vesting, however, are those situations in which an ordinance imposes new regulatory requirements on existing legally-established (i.e., conforming) establishments other, than those exempted by the Virginia Maintenance Code or the subject of a grandfathering provisions excusing compliance. Some such requirements, such as those imposing or increasing a transient occupancy tax, are clearly applicable to existing uses. Others, such as requirements that are physically impossible for the property owner to comply with, may not be. Here, in the absence of bright-line rules, the answers are highly fact-dependent.

Virginia Code § 15.2-2307 sets forth the circumstances under which a property owner who has received approval of a proposed short-term residential use on his property through a “significant affirmative governmental act”\textsuperscript{27} is essentially given immunity from subsequent amendments that would prohibit the proposed use. Those circumstances are: (1) the approval is for a specific project; (2) the act of approval remains in effect; (3) the property owner relies in good faith on the significant affirmative governmental act, and (4) the property owner incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act. Thus, a landowner who was the beneficiary of, for example, a rezoning specifically for the proposed development may continue to develop the property for that use even if subsequent action by the locality would otherwise prohibit the use.\textsuperscript{28}

The general vesting statute described in the preceding paragraph protects the use of property, but not necessarily every aspect of the use or structure. Approved site plans and subdivision plats may be deemed by the locality to be valid only for a certain time, such that ordinance amendments adopted after the period of validity has expired may affect certain features of the use, while not affecting the landowner’s ability to maintain the use itself. During the period in which the site plan or subdivision plat is valid, however, the property owner may proceed with the approved development as shown on the approved site plan or subdivision plat unless the amendment otherwise affecting the development was required “to comply with state law or there has been a mistake, fraud or a change in circumstances substantially affecting the public health, safety or welfare.” Va. Code § 15.2-2261.

\textsuperscript{26} Application of the Virginia Uniform Statewide Building Code (USBC), codified at 13 VAC 5-63-10 thr. -550 (2014), involves an entirely different set of issues, most of which concern how to classify a use under the Uniform Statewide Building Code so as to determine the construction standards, such as smoke alarms, sprinklers and other safety features, applicable to it. Determining the Use Group in which a particular building belongs, once a relatively straightforward determination, has been made much more difficult by the advent of short-term residential rentals, as uses that once clearly belonged in the less-restrictive Residential R-5 Use Group (single-family dwellings less than three stories in height) now may be more appropriately classified in a different Use Group. This is especially true with regard to “party houses” allowed to be constructed as single-family dwellings but thereafter used frequently for social activities and, as a result, may be considered an Assembly Use subject to more stringent requirements under the USBC.

\textsuperscript{27} The act of approval must be one (or more, presumably) of seven specific types enumerated in Virginia Code § 15.2-2307(B). The seven types of significant affirmative governmental act are not exclusive under the statute.
While in many cases, these provisions provide definitive guidance as to when a vested right accrues, in other circumstances they leave unanswered questions, such as whether once acquired, a vested right may be lost by reason of disuse or abandonment, what is the proper measure of “extensive obligations or substantial expenses,” and what constitutes “diligent pursuit” of the project. The Virginia Supreme Court did, however, address each of the last two standards in City of Suffolk v. Board of Zoning Appeals, 266 Va. 137, 580 S.E.2d 796 (2003), in which the court affirmed a trial court decision that had upheld a decision of the board of zoning appeals that the landowner had acquired a vested right to a certain development that had previously been approved by the city. The court reasoned that the first test had been met as a result of the fact that the landowner had incurred substantial expenses by spending $158,000 on certain services between 1993 and 1998 and had dedicated property to VDOT for road improvements, and that, by engaging in a “train of regular, although not constant, events occurring in the period of some [14] years between the purchase of the property and the adoption of the [ordinance],” the second test had been satisfied as well. Id. at __, 580 S.E.2d at 780, 781. The case was decided, however under the former standard by which a decision of the board of zoning appeals could only be disturbed if it was clearly erroneous or was plainly wrong and in violation of the purposes and intent of the zoning ordinance, Masterson v. Board of Zoning Appeals, 233 Va. 37, 44, 353 S.E.2d 727, 732-33 (1987), and it is not at all clear that the Court would have reached the same decision under the current standard, which requires decisions on questions of law to be decided de novo by the courts.

Tax Issues
An issue of great concern to local governments is the effect of unpermitted short-term residential rentals on revenues from the transient occupancy tax (commonly referred to as the “lodging tax”), which is defined as a tax on “hotels, motels, boarding houses, travel campgrounds, and other facilities offering guest rooms rented out for continuous occupancy for fewer than 30 consecutive days,” Virginia Code § 58.1-3819, and clearly includes short-term rentals of fewer than thirty consecutive days. Localities are authorized to impose the tax, in varying amounts, pursuant to one or more of the statutes comprising Chapter 38, Article 6 of Title 58.1, Virginia Code §§ 58.1-3819 thr. -3826, or by Virginia Code § 58.1-3840.29 The tax is a trustee tax, under which the lodging operator only collects the tax from its guests and holds the monies in trust for the locality and periodically remits the amounts it has collected, minus commission, to the locality. Virginia Code Section 58.1-3819 (D) and (E). The hosting platform through which the lodging was secured has no responsibility to do anything with respect to the tax.

While it is impossible to determine what percentage of short-term residential rentals actually collect and remit to the locality such taxes, it is certainly safe to conclude that many do not, such that many localities are receiving less revenue than they are legally entitled to. In addition to depriving localities of revenue to which they are legally entitled, operators that fail to collect and pay over the tax gain an unwarranted advantage over their competitors that do collect the tax, as by not including the lodging tax in their guests’ bills, they enable themselves to keep their rates lower than they would be able to if they complied with the lodging tax ordinances.

29 Section 58-1-3819(C) also preserves any authority previously granted to a county, city or town to levy a transient occupancy tax. As a result, localities that had prior authority to impose transient lodging taxes may use a longer period in defining what constitutes transient occupancy for purposes of the tax. See, e.g., Virginia Beach City Code §35-158 (defining “transient” as “any person who, for any period of not more than ninety (90) consecutive days, either at his own expense or at the expense of another, obtains lodging in any lodging place.”
The primary difficulty is enforcing compliance with lodging tax requirements is a simple one – it is a daunting task in many localities to find every short-term lodging operator in the locality that is required to collect and pay over the tax. While the fact that most such operators use internet hosting platforms or local real estate agencies for their advertising simplifies the task of locating them, doing so requires considerable time and effort on the part of the local commissioner of revenue or finance department.  

Once discovered, a lodging place subject to the tax may be required to register and post surety, in the form of a bond, irrevocable letter of credit, cash or other suitable form, to secure the payment of transient occupancy taxes to the locality; the difficulty is not with overly restrictive laws, but with the practicalities of enforcing it. While there is no easy solution, recent legislation enacted by the General Assembly may benefit local governments in solving the identification and collection problems they have been experiencing.

2017 Legislation

On February 22, the 2017 House of Delegates approved, by a vote of 86 to 14, Senate Bill No. 1578, which previously had been passed by a 36 to 4 margin in the Senate. Approved by the Governor, the bill will take effect on July 1 of this year. 2017 Va. Acts. ch. 741. The bill is a far cry from the 2016 General Assembly’s Senate Bill No. 416, which was actually approved by both houses of the General Assembly and, but for a last-minute amendment that required it to be reenacted by the 2017 Session of the General Assembly in order to become effective, would have gone to the Governor. While that bill would have divested localities of a great deal of their authority to address the public safety and tax issues presented by the proliferation of short-term residential rentals, the 2017 legislation allows local governments to use their existing zoning and land use authority to regulate such rental uses, requires short-term lodging operators to register with the locality, provides remedies for noncompliance with applicable laws and ordinance, and preserves the effectiveness of private instruments, such as restrictive covenants and condominium declarations, related to the use of real property.

The most significant provisions of the new legislation are contained in new Virginia Code § 15.2-983. There, the definitions of “operator” and “short-term rental” and the statutory provisions pertaining to short-term rentals are set forth. An “operator” is defined as the proprietor (defined broadly to include an owner, lessee, sublessee, mortgagee in possession, licensee or a person in any other possessory capacity) of any dwelling, lodging or sleeping accommodations offered as a short-term rental. Id. subsection (A). “Short-term rental,” in turn, means the provision of a room or space that is suitable or intended for occupancy for dwelling, sleeping, or lodging purposes, for a period of fewer than 30 consecutive days, in exchange for a charge for the occupancy. Id. The definition is obviously intended to be all-inclusive; it encompasses virtually all short-term rental uses, including apartments, condominium units, single-family and other dwellings or portions thereof, whether available for rental through P2P hosting platforms, real estate agencies, or by direct communication between host and guest, and whether or not the owner or proprietor occupies the use at the same time as his or her guests. It also includes hotels, boardinghouses, bed and breakfast establishments, although none are expressly mentioned in the definition itself.

A potentially troublesome effect of the statute’s definition of “short-term rental” as applying to stays of fewer than thirty days is that, in localities with an ordinance imposing the

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30 At least one locality, Virginia Beach, has reached out to a company that claims to have developed software able to identify all short-term lodging within a locality; to date, however, the solution has not been implemented.

31 Of lesser importance to local governments is the inclusion of language in Virginia Code § 4.1-200 to make it clear that an Alcoholic Beverage Control License is required for to serve or provide alcoholic beverages to guests of a short-term rental.
transient occupancy tax on lodging for periods of greater than thirty days\textsuperscript{32} and requiring registration, the legislation may operate to actually reduce the number of short-term rental establishments required to register with the locality. These localities are the ones that impose the tax under the grandfathering provision contained in Virginia Code § 58.1-3840 and hence are allowed to apply the tax to transient rentals of longer than 30 days. The statute is also silent as to the authority to require surety for collection and payment of the tax to localities. It remains to be seen how those localities address the new law.

Subsection (B) of the statute authorizes localities to establish, by ordinance, a registry of short-term rental properties in which operators must annually provide their name and the address of each property offered for short-term rental, thereby giving localities a mechanism by which they can ensure that transient occupancy taxes of registered short-term rental properties are collected. An exemption is provided for certain persons, including persons who are (1) licensed by the Virginia Real Estate Board or are a property owner represented by a real estate licensee; (2) registered pursuant to the Virginia Real Estate Time-Share Act, Virginia Code § 55-360 et seq.; (3) licensed or registered with the Department of Health, related to the provision of room or space for lodging; or (4) licensed or registered with the locality, related to the rental or management of real property, including licensed real estate professionals, hotels, motels, campgrounds, and bed and breakfast establishments. Virginia Code § 15.2-983(B).

While the statute cannot, of course, ensure that all short-term rental operators will register their properties, it does provide that localities may adopt ordinance provisions imposing a penalty in an amount not to exceed $500 per violation for an operator required to register who offers for short-term rental an unregistered property. An ordinance may also provide that unless and until an operator pays the penalty and registers such property with the locality, the operator may not continue to offer it for short-term rental. Upon repeated violations of a registry ordinance as it relates to a specific property, an operator may be prohibited from registering and offering that property for short-term rental. \textit{Id.} subsection (C) (1). The ordinance may further provide that an operator required to register may be prohibited from offering a specific property for short-term rental in the locality upon multiple violations on more than three occasions of applicable state and local laws, ordinances, and regulations, as they relate to the short-term rental.\textit{Id.} subsection (C)(2).

The final provision of the statute relating to local governments preserves intact their ability to regulate the short-term rental of property through their general land use and zoning authority. \textit{Id.} subsection (D). As it is settled to the point of certainty that local governments already have ample authority to regulate short-term residential lodging uses through their zoning and land use powers, the importance of the 2017 legislation is best seen in the light of the attempt to divest localities of much of their land use authority during the 2016 General Assembly Session. While not landmark legislation, the enactment of Senate Bill No. 1578 serves as a signal to the P2P lodging industry, and those who have been affected by it, that the General Assembly recognizes the need to weigh the interests of local governments, the traditional lodging industry and residents of neighborhoods where short-term residential uses have materialized (or may do so in the future) in determining the future course of the non-traditional lodging industry in Virginia.

\textsuperscript{32} Virginia Beach is one such locality, as the tax applies to rentals of no longer than 90 days.

\textsuperscript{33} The precise language of this latter provision is somewhat puzzling – read literally, it would seem to signify that there must be more than three occasions, \textit{each one} involving multiple violations of state or local laws or ordinances, in order for the prohibition to apply, although the more logical interpretation is that “multiple occasions” \textit{means} three or more violations.
How Can a City Be Resilient?

For over 400 years, resiliency has been part of the City of Norfolk’s DNA: The city has always been a model in resiliency—responding to major shocks (epidemics, war, fires, floods, and hurricanes) and the day-to-day stresses that challenge every city (economic downturns, unemployment, social ills, and crime). By effectively dealing with adverse events, Norfolk is better able to deliver basic functions in both good times and bad, to all populations. These experiences can provide useful guidance to other cities facing similar issues but which aspire to achieve a resiliency that can help to better protect and preserve its neighborhoods, institutions, businesses, culture, history and the livelihood and health of its citizens.

Resilience deals with both shocks and stresses and the ability to respond in ways which allow the community to grow and prosper. According to the Rockefeller Foundation, which is funding a 100 Resilient Cities program to help urban centers around the world, “Resilience is the capacity of individuals, communities and systems to survive, adapt and grow in the face of stress and shocks and even transform when conditions require it.” True resilience requires a whole of community, whole of government approach.

Characteristics of a Resilient Community (from the Rockefeller Foundation)

1. Meets basic needs
2. Supports livelihoods and employment
3. Ensures public health services

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4. Promotes cohesive and engaged communities
5. Ensures social stability, security and justice
6. Fosters economic prosperity
7. Enhances and provides protective natural & man-made assets
8. Ensures continuity of critical services
9. Provides reliable communication and mobility
10. Promotes leadership and effective management
11. Empowers a broad range of stakeholders
12. Fosters long-term and integrated planning

Some cities face more of these stresses than others, and all of them suffer their effects to differing magnitude during various points in their history. Norfolk is an older, coastal city born of colonial origins due to its strategic location alongside one of the East Coast’s best harbors, an extensive military presence that was at its apex during the Second World War, and the social struggles common to all larger cities in southern states that were compelled to find a way forward after the economic and social reformation resulting from the Civil War. Its particular resilience strategy is driven by three key goals, each of which includes accompanying strategies for how to realize them:

**Goal 1: Design the coastal community of the future**

If a coastal community is going to be able to survive, adapt and grow, it must plan for the future. To do that, it needs to establish a vision of what will happen over the coming decades. Where will the new growth corridors that accommodate a larger population be developed? What institutions are essential to the survival of the community and how will they be protected and enhanced? Are there industries and commercial enterprises that exist now that will be part of the envisioned future—or not? Are there new ones that must be incubated? What elements of the existing infrastructure must be maintained or replaced? What elements might be abandoned? Where would new infrastructure be needed and what will it consist of? What is the role of technology and innovation? Because the ability to survive, adapt, and grow are necessary hallmarks of a resilient city, thinking about and documenting a vision of what the future can be and how to achieve it is an essential first step.

**Strategies**

In Norfolk, the process for imagining culminated in a planning document reflecting what the city would look like in the year 2100. Aptly titled “Vision 2100,” the report incorporated the input of residents, organizations, governmental agencies, civic groups, military installations, and city planners. It incorporated other work that had already been done or was ongoing and which touched on the same issues that arose during the workshops.

In the end, the following efforts resulted in identifying the strategies the city could use to formulate a design for the resilient coastal community it would be by the end of this century.

- Collectively create a vision for the city’s future
  - *Vision 2100* is the main implementation tool for this part of the strategy. It provides a vision for adapting to and mitigating the impacts of relative sea level rise in the long-term future. It envisions re-orienting the city towards areas of higher ground in order to focus where growth and new development could flourish even as water levels rise and the land subsides. To appropriately recognize the significance of *Vision 2100*, the city council incorporated it in-
to the city’s comprehensive plan, where it serves as a lodestar that guides how long-range plans should align with its concepts of how to enhance resiliency. (More specific details about this planning document are discussed below.)

The U.S. Navy, U.S. Army Corps of Engineers, City of Virginia Beach, Commonwealth of Virginia, Virginia Institute of Marine Science, Old Dominion University, College of William & Mary, Hampton Roads Planning District Commission, and others all participated in the development of a Joint Land Use Study, a Comprehensive Flooding Strategy, and various other projects designed to identify a collaborative, cooperative approach to the issues that challenge the people and facilities that make Norfolk work by bringing the whole of government and community together.

- Identify and implement innovative infrastructure for water management
  - Calling on hundreds of years of experience overseas, the city invited a panel of experts from the Netherlands to help brainstorm the sorts of hardscape and soft infrastructure improvements that could be used to manage water. These “Dutch Dialogues” resulted in creative, multifaceted designs that sometimes would hold back the water, capture the water in other places, and sometimes even allow it to come and go with the tide but without damaging either the city’s built or natural environments.

Figure 2: Harbor Park and Downtown Norfolk in 2015
Implementing various tools to directly fund and to indirectly incentivize the private construction of green infrastructure is another way the city is working to manage water. These efforts include creating and protecting living shorelines, installing green roofs, promoting an initiative to “Retain Your Rain,” and looking for opportunities to improve storm water management in every new development.

Surrounded by water on three sides and graced with several rivers that course through its territory, Norfolk not only seeks to manage the challenge of storm water in a future of relative sea level rise, but also unpredictable coastal storm activity. All along its seven-mile coast on the Chesapeake Bay, the city has committed to an expansion of the sandy beaches by adding up to 60 feet of width, with the cooperation and funding assistance of the federal government under the management of the Army Corps of Engineers. Much more than a recreational enhancement, this bigger beach will work to mitigate the effects of coastal storms that annually strain the resilience of the primary sand dunes and the waterfront neighborhoods that define Norfolk’s Ocean View region.
• Redesign tools and regulations to achieve our vision for the future
  o While not completed yet, Norfolk is presently working on rewriting its zoning ordinance for the first time in 25 years. As the principal regulating instrument controlling how and where development occurs, incorporating strategies that promote resilience is essential to pushing toward the ultimate goal. (More specific details about what rules are contemplated to be implemented through the new version of the zoning ordinance are discussed below.)
  o Like other cities, much of the tapestry of Norfolk is composed of the fabric in each of the various neighborhoods and greater communities that span its boundaries. What is essential to one neighborhood may be less important in another. In order to explore what works now and what can work better in the future, the city has hosted placemaking exercises like the Better Block program and design charrettes to test how altering the built environment can promote the future that a particular neighborhood envisions.

Goal 2: Create economic opportunity by advancing efforts to grow existing and new industry sectors
All great cities that are still in existence today have changed with the times. Being resilient includes being responsive to and receptive of change. Innovations in industry, technology, social values, and the environment can have profound impacts on what a city looks like and how it grows. To the extent it can, Norfolk strives to identify new industry sectors and nurture a fertile environment for them to prosper.

Strategies
• Create a multi-pronged economic development strategy
  o There is perhaps no single undertaking that so symbiotically and effectively helps individuals and whole societies overcome poverty, raise standards of living, create wealth, enhance self-esteem, empower communities, create and foster personal and professional relationships, and realize prosperity than jobs, especially good jobs where workers feel a sense of contribution and take home a living wage. A city can promote resilience by working to increase wages and by ensuring the health and safety of working environments.
  o As a logical consequence of its founding alongside a fine, deep-water harbor, Norfolk’s heritage was heavily influenced by shipping commerce and today the Port of Virginia is the second largest port on the East Coast. Settled at a time in history when sea power was the dominant form of projecting military might, it eventually became home to the largest naval base in the world. The addition of a master jet base in the neighboring city of Virginia Beach during the later rise of air power further cemented the Hampton Roads area as a military stronghold, anchored at its core by Norfolk. Thus, the armed forces and the fortunes of the Department of Defense have had an outsized influence on the local economy. However, the city recognizes that moving forward it must diversify and broaden its economy so that the disproportionate sway that one or two sectors of the economy had in the past can be minimized. By adding jobs in growth sectors, such as health care, and creating new capacity, such as arts and higher education, the city will be better-positioned to weather economic shocks that might upset its larger, established industries.
• Nurture the city’s entrepreneurial ecosystem
  o Studies have shown that vibrancy and sense of place are important to the incubation of entrepreneurialism. Norfolk has realized a significant resurgence
in residents looking for an urban lifestyle. A newly-established arts district has attracted creative reinvestment in what had been a neglected stretch of downtown just a few years ago. The Chrysler Museum, located within the new arts district, has spurred a growing confluence of glass fine art creation, display, and innovation in the mid-Atlantic. This activity has made the downtown area a destination where young entrepreneurs are increasingly choosing to live, work, and play.

- Efforts are underway to encourage mixed uses and to ensure that opportunities to live in proximity to one’s workplace are plentiful. This can be done by adjusting zoning rules to allow multiple uses in zoning districts, mixing uses in buildings, and allowing commercial, industrial, and residential uses to live side-by-side in a more vernacular manner than what is typically realized under traditional Euclidean (a.k.a. “single-use”) zoning. Removing the prohibition against locating homes and workplaces in the same areas is another way to invigorate entrepreneurs to find new solutions to the age-old challenge of designing communities that residents and visitors alike will say—to turn Gertrude Stein’s famous aphorism on its ear—“there is definitely a there there!”

- Placemaking is more than just providing an opportunity for the right things to happen; it requires investments in infrastructure and developing a strong visual presence in both the public realm and those areas immediately adjacent to it. Thus, the city has invested in pedestrian and bicycling amenities, urban forestry, and exemplary public buildings and spaces to create a walkable, bikeable, activated place that appeals to millennials and boomers alike.

- Strengthen the workforce development pipeline

  - Investing in technical training programs and apprenticeship opportunities contributes to resiliency by opening avenues for students to find marketable skill sets and livelihoods that are oftentimes not available in traditional primary schools. This strategy targets the economic aspects of resilience.

- Reinvest in neighborhoods

  - Norfolk has been called a “City of Neighborhoods.” However, not all its neighborhoods have benefited equally under the City’s programs, regulations, and general success. As part of the development of the Vision2100 document, it became apparent that many of the less affluent neighborhoods are actually well-positioned to become resilient neighborhoods of the future. For example, a wealthy waterfront neighborhood today will face increasing stresses over time, mainly from the effects of increased flood events, costs to insure, and the commensurate downward pressure on property values that comes along with those risks. On the other hand, a neighborhood consisting of smaller, perhaps dated, homes in an area of higher elevation would seem ripe for reinvestment, as homes get expanded, upgraded or replaced as infill is encouraged.

Goal 3: Advance initiatives to connect communities, deconcentrate poverty, and strengthen neighborhoods

Strategies

- Improve citizen access to information and services

  - The city recently partnered with the Bloomberg Foundation in the “What Works Cities” initiative which focuses on the use of data to engage citizens, improve the efficacy and effectiveness of public services, and improve the
lives of Norfolk’s citizens. The key is to find ways to make the data and information stores of the city much more “consumable” as well as more readily available.

- Use technology to support and enhance community-building efforts
  - From free WiFi in downtown to community visualization tools allowing civic leagues to contemplate “what if” scenarios for future plans, the city is committed to finding new and better ways for citizens to engage in building their communities from the grassroots up. This is a huge paradigm shift in Norfolk, where a paternalistic, top-down approach that had arisen during the urban renewal era of the 1960’s has stubbornly persisted even into the 21st century.

- Connect people and facilitate dialogue that advances community-building efforts
  - Developing a housing strategy which meets the twin goals of strengthening neighborhoods citywide and deconcentrating clusters of poverty has been a high priority for the city and its partners. One of the primary tasks has been to give a myriad of existing housing programs a strong strategic focus. Potential changes in federal programs, such as the federal Department of Housing and Urban Development’s “Affirmatively Furthering Fair Housing rule, make this work even more imperative.

  - Addressing obsolete public housing requires the creation of new housing options for low-income residents in communities of opportunity. Not all of these can be provided by the private sector at market rate, but the city is encouraging of both not-for-profit and for-profit developers in presenting concepts and proposals.

Figure 4: Preliminary plans call for dismantling the existing Tidewater Gardens public housing and redeveloping with mixed-income, mixed-density while ensuring opportunities for existing public housing tenants to remain in the new development.
New housing programs have included a strong market-based focus and approach. For example, in the Olde Huntersville neighborhood, the city and the neighborhood have worked collaboratively to create an approach which combines unique zoning authority, free pre-approved home plans, infrastructure investment, and the availability of city-owned vacant lots to incentivize the private marketplace to build quality, affordable homes in a community where an overabundance of poorly managed and maintained rental housing presently exists.

Norfolk’s Planning Efforts to Attain the Resilience Vision
As we discussed earlier, planning is essential to the process of achieving a specific future, particularly one that seeks to strengthen existing resilience and build new protections against disruptive influences. In fact, one might even argue that planning to address such problems is legally required.

Under Virginia law, every locality is required to have a comprehensive plan in place that sets out “the physical development of the territory within its jurisdiction.” Va. Code § 15.2-2223. In every instance, the plan is formulated with the same purpose: “guiding and accomplishing a coordinated, adjusted and harmonious development of the territory which will, in accordance with present and probable future needs and resources, best promote the health, safety, morals, order, convenience, prosperity and general welfare of the inhabitants, including the elderly and persons with disabilities.” Id. (emphasis added). The comprehensive plan must consider or address future transportation needs (Va. Code § 15.2-2223(B)(2)), future affordable housing needs (§ 15.2-2223(D)), and future economic and population growth (§ 15.2-2224(A)). Anticipating what the future will demand is a clear statutory mandate.
And while many of the prescriptions set out in the comprehensive plan are often regarded as advisory and not legally binding, there is one aspect that does have a regulatory component. All roads and other transportation improvements must be included in the comprehensive plan. See Va. Code § 15.2-2223. If any new street or connection to an existing street is proposed, it cannot be approved for construction unless the planning commission has reviewed it and concluded that it is substantially in accord with the adopted comprehensive plan. Va. Code § 15.2-2232.

In Norfolk, Vision 2100 calls for investing in future transportation infrastructure that connects the most resilient parts of the city—those areas that have been fortified and protected as well as those areas that are least likely to be negatively affected by relative sea level rise—with the rest of the city. And those connections themselves should be sited and utilize both materials and design to enhance resilience. Finally, the future transportation network should be multimodal, incorporating routes for high-capacity transit, automobiles, bicycles, and pedestrians. This approach reduces the chance that one stress event will snarl all transportation conduits. For example, a hurricane evacuation is likely to strain roadways, but would not have the same impact on railways. And because Vision 2100 was made part of the comprehensive plan, its prescriptions will regulate how new streets and connections to streets are constructed.

The Code of Virginia’s directives to local governments to analyze and envision the future are not limited to just the comprehensive plan. Even in the zoning enabling statutes the obligation to think about what the future needs of the citizenry will be is expressed. The text of a municipality’s adopted zoning ordinance as well as its map of districts must consider not only what the comprehensive plan says, but also “the current and future requirements of the community as to land for various purposes.” Va. Code § 15.2-2284. Crafting a zoning ordinance that only addresses the needs of the present simply isn’t good enough.

In Norfolk, the City is presently working on rewriting its zoning ordinance. In a city its age, most of what is being redrafted are refinements or improvements of a well-established development pattern. But there is one decidedly new element: building a more resilient community. The efforts show up in multiple aspects of the draft rewrite and can be roughly classified into three areas.

**Increased environmental resilience:**

- Resilient construction and design (a.k.a. green building) standards will both incentivize and, in some areas, require the use of building techniques that will increase the durability, sustainability, and lifespan of new buildings.

- Form standards will establish a more universal freeboard requirement, requiring most new construction to be elevated at least 18 inches and perhaps as much as three feet above the current ground elevation, regardless of whether the building is being constructed in an area that is designated as a high-risk flood zone under the currently applicable Federal Emergency Management Administration (FEMA) Flood Insurance Rate Map.

- Landscaping, buffering, open space, and parking standards will be designed to work symbiotically to provide measures that always increase storm water infiltration quantity and quality with each new development or redevelopment.

**Economic resilience:**

- Revised rules regarding nonconforming structures will allow more opportunities to retrofit and adaptively reuse existing buildings when possible, rather than requiring that such buildings be torn down.
Expanding the range of uses in all multifamily and commercial districts provides more opportunities to build the neighborhoods and shopping districts of the future in areas of the city with greater natural and manmade resilience. Allowing more mixing of uses within buildings and planned developments further opens the city to making adaptable, innovative, interactive, sustainable districts that will define the urban landscape of the future.

Neighborhood/social resilience:

- Placing more focus on standards that regulate the form of development with the goal of recognizing and reinforcing neighborhood character and cohesion, which are crucial to creating a sense of place that neighborhood residents identify with and can be proud of. Another tool is the possible use of neighborhood compatibility overlays that could be used on a case-by-case basis to strengthen neighborhoods that are especially iconic, cohesive, or even distressed and in need of reinvestment.

- New rules to specifically address infill development to discourage or prohibit incompatible new construction that frays the fabric of the neighborhood. As noted above, the city has already started implementing these principals in one neighborhood—Olde Huntersville—as a sort of pilot project. The neighborhood is close to downtown but not likely to see much impact from relative sea level rise. So, to encourage reinvestment and development of vacant lots, the city has created a plan book, complete with full building plans available for use by builders looking to construct infill homes. Building permits are available the same day that the plans are requested and can be customized with over 140 different building elements, all of which comply with more rigorous form standards that demand all new infill to be constructed in a manner that fits alongside and respects the existing, turn of the century homes.

In addition to these sorts of rules, the new zoning ordinance can also begin to inform decision-making in a way that pushes it in the direction of the Vision 2100 future. Development in coastal areas might require enhanced, resilient construction in high-risk areas while easing requirements in lower-risk areas. To complement this concept, a regime of transferable developments rights could be used to allow property owners to relocate density from a more vulnerable sending area to a more resilient receiving area. This would allow participants in a private market to reorganize future development when and wherever the effects of individual stresses—such as sea level rise or a military base closure—start to have actual, negative impacts on property values.

The best example of work the City of Norfolk has already done to make its land use rules more resilient is found in its most recent update to its zoning regulations for floodplain management. In November of 2014, it completed a significant overhaul of its floodplain rules, including adopting what was, at the time, the most stringent freeboard requirement of any Virginia locality, requiring all new construction in a floodplain district to be elevated three feet above base flood elevation. This was done when the consensus suggested that the average predicted rise in sea levels by the year 2100 would be three feet in the area of the Chesapeake Bay basin where Norfolk is located. Not only will this effort lead to buildings that are less likely to sustain flood damage, but just having a heightened regulatory approach results in lower flood insurance premiums for all the city’s residents, a consequence of Norfolk’s many years of participating in FEMA’s Community Rating System.

To provide another, more recent example, Norfolk is facing a phenomenon that many other American cities are also now dealing with: the demise of an enclosed shopping mall. The Military Circle Mall first opened in the 1970’s but over the past decade has suffered declining customers and tenants as well as the loss of all of its anchor stores, sending it into foreclosure. In anticipation of the inevitable redevelopment of over 100 acres are land encompassed by the mall, outparcels, and associated parking, the city took on studying the
area. The resulting plan, "Military Circle / Military Highway Urban Development Area: A Vision for the Future," emphasizes and builds on the fact that the land is situated along a spine of high ground that runs through the eastern half of the city, at the intersection of two interstates, abutting major arterial roads, and within walking distance of an existing light-rail station. On these exceptional bones, the plan builds a vision of the future that accommodates a series of walkable, urban neighborhoods anchored by a new transit boulevard and station areas. And while the specific layout and details of the future of the Military Circle area will surely evolve in the years to come, the core vision that it must be resilient in all respects remains fixed.

**Envisioning the Future Requires Changing Today’s Point of View**

Realizing a future vision takes work. The first challenge to undertake in the present is changing points of view so that those who work to attain the future must be able to see it. Using Norfolk’s *Vision 2100* experience as an example, the planners and citizens who collaborated in its creation found that past, reactive measures taken to combat or remedy the effects of relative sea level rise were too often focused on the challenges. The new approach identified in *Vision 2100* looks at these impacts as opportunities to effectuate change. Rather than leaving to future generations all the work of solving the coming problems, today’s vision presents a blueprint to guide today’s decisions—from land use to transportation, to infrastructure, to construction and design, to economic development, to social progress, and to the very manner in which we live, work, and play together. And since the Code of Virginia requires every locality to reevaluate its comprehensive plan every five years, *Vision 2100* provides a compass needle for many decades to come, pointing every short-range, mid-range, and long-range decision in the direction of designing the coastal community of the future.
**EXECUTIVE SUMMARY**

The Virginia Freedom of Information Advisory Council (the Council) completed its third and final year of study of the Virginia Freedom of Information Act (FOIA) pursuant to House Joint Resolution No. 96 (HJR 96, 2014) on December 5, 2017. HJR 96 directed the Council to (i) study all exemptions contained in FOIA and determine the continued applicability or appropriateness of such exemptions, (ii) determine whether FOIA should be amended to eliminate any exemption from FOIA that the Council determines is no longer applicable or appropriate, (iii) examine the organizational structure of FOIA and make recommendations to improve the readability and clarity of FOIA, and (iv) report its findings and recommendations by December 1, 2016. The Council was required to consider comment from citizens of the Commonwealth; representatives of state and local governmental entities; broadcast, print, and electronic media sources; open government organizations; and other interested parties as part of its study.

At its first meeting on April 22, 2014, the Council approved a study plan, which (i) provided for the formation of two subcommittees, one to study records exemptions, and the other to study open meeting exemptions and other FOIA provisions related to meetings; (ii) set out a timetable for the exemption review by the each Subcommittee; and (iii) included in the study a review of any FOIA bills that may be referred by the General Assembly over the course of the study. In reviewing exemptions, the Subcommittees were directed to give consideration to the following factors to help determine the appropriateness of any exemption:

- The public policy advanced by the exemption—protection of the public good (protection of the public purse or of the public bargaining, negotiating, or litigating position) versus the protection of private interests (privacy or proprietary interests);

- The application of the attorney/client or other recognized privilege(s);

- Whether there was a clear understanding of the nature and scope of records or meetings subject to an exemption, especially in light of the narrow construction rule found in FOIA at § 2.2-3700;

- Whether there was a need/desire to (i) update or clarify terminology or (ii) remove obsolete or redundant exemptions;

- The impact of court decisions, and opinions of the Attorney General and the FOIA Council, on an exemption;

- Legislative history and intent, to the extent available, of an exemption and whether the exemption clearly reflects the intent of the General Assembly; and
Whether there exist comparable provisions in other states' FOIA laws that may offer a preferred way of addressing the underlying public policy for which the exemption was granted.

In addition to meeting notices posted on the Council's website and sent to the Council's mailing list, a process was devised to notify each affected state or local agency of the timetable of review as well as the standard for review of exemptions. The Council also decided that rather than introduce individual legislative recommendations as separate bills while the study was ongoing, it would recommend for the 2017 Session one or more omnibus bills at the conclusion of the study. Meetings of the two Subcommittees were generally informal and reflected the Subcommittees' preference for dialog among the study participants over a more formal process. At each meeting, public comment was solicited to ensure the free exchange of ideas between all interested parties and to find consensus where possible. Consensus led to legislative proposals, which were posted on the Council's website to give wider notice of the proposal and to allow time for reflection, before being acted upon formally by a Subcommittee. Frequently, such proposals were the subject of discussion at two or more meetings before action was taken by the Subcommittee. Ultimately, the Council recommended two omnibus bills--one bill incorporating the recommendations of the Records Subcommittee and the other incorporating the recommendations of the Meetings Subcommittee. At its meeting on December 5, 2016, the Council voted unanimously to recommend these two omnibus bills to the 2017 Session of the General Assembly.

The Records Subcommittee met 18 times during the course of the study. The Records Subcommittee systematically reviewed all of the records exemption sections of FOIA (§§ 2.2-3705.1 through 2.2-3706), as well as relevant FOIA definitions (§ 2.2-3701) and the procedures for making and responding to a public records request (§ 2.2-3704). A Proprietary Records Work Group, which met four times in 2015 and once in 2016 was created by the Records Subcommittee. That Work Group did not reach consensus to move forward, and due to time constraints, the Records Subcommittee recommended that the issue of proprietary records and trade secrets continue to be studied in 2017, which recommendation was adopted by the Council. The Records Subcommittee also formed a Personnel Records Work Group in 2016 which met three times to study the personnel records exemption (subdivision 1 of § 2.2-3705.1) and to attempt to define the term "personnel records." This Work Group also did not reach a consensus to move forward with a definition, and the Council decided to continue studying the issues related to personnel records in 2017. The Records Subcommittee formed a DHRM Records Work Group in 2015 which met once and recommended removing a DHRM-specific exemption which exempts records already exempt as personnel records. In three years of study, the Records Subcommittee considered 33 different legislative proposals addressing concerns raised about particular exemptions, of which it recommended 17 proposals to the Council. These 17 recommendations were approved by the Council and were ultimately incorporated into the Records Omnibus draft (HB 1539).

The Meetings Subcommittee met 17 times over the course of the study. The Meetings Subcommittee systematically reviewed all of the closed meeting exemptions in FOIA (approximately 48 exemptions in total) and also studied closed meetings procedures, electronic meetings and remote participation by members of a public body, and relevant definitions contained in FOIA. The Meetings Subcommittee considered 14 different legislative proposals, of which it recommended eight proposals to the Council. These eight recommendations were approved by the Council and were ultimately incorporated into the Meetings Omnibus draft.

Summaries of the Records Subcommittee’s and Meetings Subcommittee’s work, including agendas, recommendations, and other materials are available on the Council’s website and are incorporated in the Final FOIA Study Report of the Council.
Final Recommendations
Two omnibus bills, one bill incorporating the Council-approved recommendations of the Records Subcommittee, the other incorporating the Council-approved recommendations of the Meetings Subcommittee\(^1\) were recommended by the Council.

**Substantive Changes**
As a result of the study, the Council recommended several substantive changes to FOIA. These substantive changes were as follows:

**HB 1539, the Records Omnibus bill:**
- The elimination of the "correspondence" exemption for the Office of the Governor; the Lieutenant Governor; the Attorney General; the members of the General Assembly, the Division of Legislative Services, or the Clerks of the House of Delegates and the Senate of Virginia; the mayor or chief executive officer of any political subdivision of the Commonwealth; or the president or other chief executive officer of any public institution of higher education in Virginia\(^2\) (2.2-3705.7)
- The requirement that information publicly available or not otherwise subject to an exclusion under FOIA or other provision of law that has been aggregated, combined, or changed in format without substantive analysis or revision shall not be deemed "working papers" (2.2-3705.7)
- The inclusion of school boards in the requirement for posting a FOIA Rights and Responsibilities document on their websites to assist citizens in obtaining records (2.2-3704.1)
- The protection of personal information of citizens in the following instances:
  - Designated survivors and authorized individuals under the Virginia College Savings Plan (2.2-3705.4)
  - Post-employment benefits, other than pensions for local government employees (2.2-3705.7 and 2.2-3711)
- The elimination of the record exemption for certain operational and marketing strategies of the yet-to-be created Alcoholic Beverage Control Authority (2.2-3705.7 and 2.2-3711)

**HB 1540, the Meetings Omnibus bill:**
- A redefinition of "regional public body" (2.2-3701)
- The requirement that notices of meetings be posted on government websites (2.2-3707)
- The requirement that notices of continued meetings be given, regardless if the meeting is held by traditional or electronic communication means (2.2-3707 and 15.2-1416)
- The requirement that a proposed agenda must be included with agenda packets available to the public (2.2-3707)

\(^1\) House Bills 1539 (2017) and 1540 (2017), respectively.
\(^2\) NOTE: To the extent that any correspondence meets the definition of a "working paper" for the public officials identified above, it may be withheld from the mandatory disclosure provisions of FOIA.
• A limitation on discussion in closed meetings of certain museum boards to specific gifts, bequests, or grants from private sources (2.2-3711)

• The allowance of closed meetings for discussion by a local finance board or board of trustees of a trust established by one or more local public bodies to invest funds for postemployment benefits other than pensions (2.2-3711)

• A limitation on closed meeting discussion held by the board of visitors of Virginia Commonwealth University and the VCU Health System Authority (2.2-3711)

• A limitation on remote participation by a member of a public body due to a personal matter to two meetings per year (2.2-3708.1)

**Clarifying Amendments**
The Council also recommended several clarifying amendments to FOIA. These clarifying amendments included:

**HB 1539, the Records Omnibus bill:**

• Revision of the definition of public record (2.2-3701)

• Clarification of a citizen rights to inspect or receive copies of public records (2.2-3704)

• Creation of a uniform reference to government websites ("official public government website" (2.2-3704.1 et seq.))

• Merger of general provisions relating to personnel records into one section (2.2-3705.1)

• Clarification that the name of a public employee is subject to mandatory disclosure in the context of requests for position and salary information (2.2-3705.1)

• Creation of a definition of "personal contact information" (2.2-3705.1)

• Consolidation of public safety exemptions (#s 4, 6, and 14) relating to security of buildings, people in buildings, critical infrastructure, cybersecurity, and the Statewide Agencies Radio System (STARS) (2.2-3705.2)

• Update of terminology for "telecommunications provider" to "communications services provider" (2.2-3705.2)

• Consolidation of the exemptions for Department of Health Professions (#s 8, 11, and 15)

**HB 1540, the Meetings Omnibus bill:**

• Removal of references to the Commonwealth Calendar in favor of "a central electronic calendar" (2.2-3707 et seq.)

• Separation of the closed meeting exemption for legal matters and litigation into two distinct exemptions (2.2-3711)
• Clarification of the purposes for which closed meetings may be held in an effort to better distinguish the "subject" of a closed meeting from its "purpose" (2.2-3712)

• Provision of a better context for open meeting exemptions in an effort to better inform citizens of the topic of discussions allowed and by whom such discussions may be made (2.2-3711)

**Removal of Obsolete or Redundant Provisions**

Finally, the Council also recommended the removal of obsolete or redundant provisions contained in FOIA. These deletions are as follows:

**HB 1539, the Records Omnibus bill:**

• Deletion of subdivision 8 of 2.2-3705.3, relating to DHRM investigations, as redundant of the personnel record exemption

• Deletion of subdivision 7 in 2.2-3705.5, relating to data formerly held by the Commissioner of Health, as obsolete

• Deletion of subdivision 13 in 2.2-3705.7, relating to names and addresses of persons subscribing to Wildlife Magazine, as obsolete

• Deletion of subdivision 30 in 2.2-3705.7, as redundant of the definition of public record

**HB 1540, the Meetings Omnibus bill:**

• Deletion of the reference to informal gatherings of the General Assembly (2.2-3707) as obsolete

• Deletion of the reporting requirement to Joint Commission on Science and Technology (2.2-3708) as redundant (these reports go to the FOIA Council)

• Deletion of references to local crime commissions (2.2-3711) as obsolete

**Continuation of Study Issues to 2017:**

Despite a very active three years of study, the Council was unable to achieve the goals set out in its original study plan. This was due in part to the time constraints imposed by HJR 96 and in part by the lack of consensus among interested parties concerning larger issues related to personnel records and proprietary/trade secret records. The Council, however, is committed to a complete review of all of the provisions of FOIA and has declared that the following issues will be considered during the 2017 interim:

• The proprietary records and trade secrets draft proposed by the Virginia Press Association.  *Note: The Council recommended that study of § 2.2-3705.6 (proprietary record exclusions) be carried over to 2017 as efforts were unsuccessful in reaching consensus to create a general exemption for trade secrets and proprietary records*

• Review of FOIA provisions in light of the advancement in technology

• FOIA policy statement.  *At the beginning of the HJR 96 study, staff suggested that FOIA be amended to include a policy statement to the effect that: "Any public body procuring any computer system, equipment or software, shall ensure that the proposed system, equipment or software is capable of producing public records in ac-
cordance with this chapter." It is believed that inclusion of this statement in FOIA as part of its policy statement would enhance compliance with the redaction rule of FOIA.

- Definitions
- Vendor proprietary software” is exempt from release under § 2.2-3705.1(6), vis a vis the exemption for software “developed by or for a state agency.....” in 2.2-3705.1(7)
- Website posting of notice and minutes (§§ 2.2-3707 and 2.2-3707.1)
- Texting among members during public meetings and its impact on open meeting provisions
- Access to law-enforcement records (§ 2.2-3706)
- Personnel records (§ 2.2-3705.1)
- Enforcement of FOIA; penalties for violations
- Reorganization of FOIA-- Examine the organizational structure of FOIA and make recommendations to improve its readability and clarity

Result for HB 1539
HB 1539, the Records Omnibus bill, was passed by the House of Delegates and the Senate of Virginia as recommended by the FOIA Council, except for two proposals.

HB 1539 was amended in the House of Delegates to restore the correspondence exemption for the Office of the Governor; the Lieutenant Governor; the Attorney General; the members of the General Assembly, the Division of Legislative Services, or the Clerks of the House of Delegates and the Senate of Virginia; the mayor or chief executive officer of any political subdivision of the Commonwealth; or the president or other chief executive officer of any public institution of higher education in Virginia.

The Council’s proposed bill provided that that information publicly available or not otherwise subject to an exclusion under FOIA or other provision of law that has been aggregated, combined, or changed in format without substantive analysis or revision shall not be deemed "working papers" (2.2-3705.7). The Assembly amended the italicized language to but does not contain a material revision. HB 1539 was communicated to the Governor on March 13, 2017. The Governor recommended that the wording be changed back to that proposed by the Council, which recommendation was adopted by the Assembly. 2017 Va. Acts ch. 778.

Result for HB 1540
HB 1540, the Meetings Omnibus bill, was passed by the House of Delegates and the Senate of Virginia as recommended by the FOIA Council. HB 1540 was communicated to the Governor on February 21, 2017. The Governor approved the bill, 2017 Va. Acts ch. 616.
Proposed Bylaws: At its April 6, 2017 meeting, the Board of Governors of the Local Government Section voted to approve that proposed amendments to its bylaws be presented to the membership at the annual meeting of the Section, which will be held on Friday, June 16th, immediately following the VSB’s Annual Meeting Showcase CLE V on Proffers at the Sheraton Oceanfront Hotel. The seminar is scheduled to conclude at 11:40 am. The proposed changes are not substantive in nature. They remove outdated language regarding the initial formation of the Section and bring the bylaws in conformity with current practices such as electronic publications. A black-lined copy of the proposed changes may be viewed here.

Bibliography & Back Issues Notice: A bibliography of all articles published in the Journal of Local Government Law may be accessed at the Section’s website: http://www.vsb.org/site/sections/localgovernment/publications. Local Government Section members have website access to back issues at the same site. The username is lgmember and the password is Kdqp38fm (reset August 8, 2012).

Notice to Members: The Journal is distributed to its members via electronic distribution. If you become aware that as a member of the Local Government Section you are not receiving the Journal via email, please contact the Journal Editor, Susan W. Custer, at susan.custer5@gmail.com.
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