The Religious Land Use and Institutionalized Persons Act in the Fourth Circuit

Why do we still care about the Religious Land Use and Institutionalized Persons Act? Literally thousands of RLUIPA cases have been decided since the Act was passed in 2000, and it would take more than one article, or this writer, to do them justice. The answer may well be that in almost every jurisdiction where a reader may sit, there is likely to be found an evangelical church bursting at its seams in a neighborhood already resistant to its growth, a new synagogue that cannot find land on which to build, and, yes, a mosque that is opposed because it will “generate too much traffic.”

Religious land use issues are alive and well, but I have chosen to focus this article on the statute as has been applied in the 4th Circuit, and thus to those of us practicing in Virginia. There is sufficient grist for the mill.

First, for those few troglodytes who do not know, the Religious Land Use and Institutionalized Persons Act of 2000 (Ruh-LOOP-Ah), codified at 42 U.S.C. § 2000cc, et seq., was indisputably enacted to impose impediments on the regulation of religious uses by local governments.1 RLUIPA targeted land use as it affects religious uses in part because “zoning conflicts between churches and cities have become a leading church-state issue” and, in particular, because expansion of existing churches and attempts “to locate a new

1 The marriage of land use with prisoner rights is not as odd as it might seem, since the primary sources of religious claims in recent years have been land use and jails, so Congress created a catchment basin for such claims.
Message from the Chair

In my last message, I reflected at the end of January on the past decade about how much technology had changed the practice of local government law in ten years. As I listed all the ways in which media habits had changed, it seemed like an overwhelmingly quick shift in public engagement, privacy, records retention, FOIA production, social media formats, and telecommunications facilities. All these shifts caused a dizzying array of new legal landscapes to watch over, as the world went rushing through the streets, phones in hand, using larger and larger amounts of data.

My, how fast the world can come to a screeching halt and make all that recent tech connection feel downright vital. The COVID-19 pandemic has changed everything in a matter of weeks, and the quarantining, isolating and social distancing has tested all of us, the world over.

Localities, like other sectors and industries, are suffering enormous hits to their resources, staffing, funding and health. But no matter how bad it gets, a city, county or town cannot hang a “closed” sign and wait it out or just give up. With or without its expected resources, a locality must carry on. Luckily, most local government attorneys I know are a hearty and resourceful bunch, and we are finding creative ways to support our clients and each other, interpreting new orders from the Governor and the Virginia Supreme Court on the fly, so localities can keep the street lights on, the trash picked up, and meetings running, all while social distancing.

In this issue, we offer two new articles, written before the virus took hold of Virginia, but which nevertheless you may find helpful. The first is a comprehensive look at the Religious Land Use and Institutionalized Persons Act (RLUIPA), which likewise may see a resurgence as we emerge post-pandemic to a new normal of restricted gatherings. Religious institutions by their nature hold regular gatherings, many of them large, and the places people gather for religious services may change as a result of the need to stay distanced. Already there are legal conflicts arising from drive-in churches, and localities may see smaller services moving into new spaces. Keep this issue handy for guidance in the months ahead.

The second is a look at special purpose public authorities, which may take on new importance in the financial aftermath of COVID-19, as independent authorities are called upon to manage federal stimulus grants or to address financing for public projects for which planned local funding is no longer available.

I want to express our gratitude to David A. Lord, Deputy Commonwealth’s Attorney from the City of Alexandria, who presented an informative ethics CLE webinar on ethical responsibilities while prosecuting code enforcement cases. The Board of Governors will continue to bring you free CLE webinars, a help for strapped training budgets, and we hope this issue finds you safe and feeling connected.

Becky Kubin,
Chair

As a Maryland District Court said in a detailed review of the history of RLUIPA,

[i]n considering RLUIPA and its predecessor, the Religious Liberty Protection Act of 1998, Congress created a substantial record “replete with zoning actions, in the form of individualized decisions, which adversely affect religious institutions.” For example, at one hearing before the House Subcommittee on the Constitution, the Subcommittee heard testimony concerning “a pattern of abuse that exists among land use authorities who deny many religious groups their right to free exercise, often using mere pretexts (such as traffic, safety, or behavioral concerns) to mask the actual goal of prohibiting constitutionally protected religious activity.” Based on the testimony, the Subcommittee concluded: “Many cities overtly exclude churches, others do so subtly. The motive is not always easily discernible, but the result is a consistent, widespread pattern of political and governmental resistance to a core feature of religious exercise: the ability to assemble for worship.”


RLUIPA does not repeal local land use regulation. Rather, the legislative history of the statute merely confirms that congressional intent is to require “regulators to more fully justify substantial burdens on religious exercise.” 146 Cong. Rec. S 7775. Therefore, RLUIPA does not exempt religious users from seeking local permits, but it does require localities to justify a denial of such permits on the federal grounds established by Congress. Moreover, even if a regulation meets the compelling state interest test, which no locality has so far done, a locality must show that the impact, or burden, that is imposed from its action, has been done in the least restrictive manner possible.

If, however, seventeen years after its passage courts are still finding reason to quote the legislative history that underpinned the statute, in cases that present live controversies, then it is apparent that the purpose behind the legislation remains unfulfilled, and its need continues.

**What does the statute say?**

It is never too late to return to the fundamentals, so bear with me.
The Act creates a “general rule” with respect to land use regulation of religious uses and establishes limitations on local regulation of such uses and as noted further below, actually creates two separate grounds for relief.

(a) Substantial burdens –

(1) General Rule – No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application. This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion –

(1) Equal Terms – No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution, on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination – No government shall impose or implement a land use regulation that discriminates against any assembly or institution, on the basis of religion or religious denomination.

(3) Exclusions and limits – No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.


Congress has provided that the Act “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.” 42 U.S.C. § 2000cc-3(g). The burden of persuasion is shifted so that if a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of the statute, the government bears the burden of persuasion on any element of the claim. This is true except that the plaintiff bears the burden of persuasion of whether the challenged law or regulation or government practice substantially burdens the plaintiff’s exercise of religion. 42 U.S.C. § 2000cc-2.
In order to avoid violation of the Act localities are always permitted to take steps to alleviate the application of any rule that would burden religious exercise. Thus

[a] government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.


Following the two RLUIPA trails
As noted, RLUIPA has created two separate bodies of law that heighten the standards by which local land use regulation must be evaluated when it seeks to affect religious land uses. In the first, the law shifts to the locality a substantial burden to demonstrate a “compelling state interest” for the regulation of religious uses, and requires that even when regulation is permissible, it must be accomplished by the least restrictive alternative.

The statute also mandates that religious uses be subject to equal terms as compared to secular uses, although, as Judge Urbanski has trenchantly observed below, the Fourth Circuit has not decided how that second test is best to be measured.

Substantial Burden
It is a pretty straightforward proposition. Governments may not place substantial burdens on the use, and zoning, of religious institutions, absent compelling governmental interest.\(^4\)

Even when such interests exist, those governments must achieve legitimate ends by the least restrictive means possible. But, of course, where the fact patterns can vary so greatly, how this “straightforward” test is to be applied is precisely where courts and lawyers get involved.

In the land use context, a plaintiff can succeed on a substantial burden claim by establishing that a government regulation puts substantial pressure on it to modify its behavior. Two cases set the parameters of the substantial burden test in the Fourth Circuit, and it is therefore important to deal with them at some length.

In *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548 (4th Cir. 2013), the Church owned a place of worship in Silver Spring and rented a satellite facility in Gaithersburg. These became overcrowded and so the Church bought 119 acres in Montgomery County located in a 93,000 acre “agricultural reserve” designated largely as a “rural density transfer zone” under a transferable development rights system. Before 2007 a church was permitted on the property, but the County did not generally provide water and sewer to the area, though it did consider case-by-case exceptions. In 2001, the church’s predecessor had sought such an exception that would have permitted it to build four 1,000 seat churches. In part because of this request, the County began to reconsider its utility policies, yet made no changes to them. Then, in 2004, after the church bought the land, it asked for its own exception for a 3,000-seat sanctuary, a daycare building, a social hall, and offices. In November 2005, the County Council denied the request, and at the same time

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\(^4\) As we all know, the “compelling governmental interest” test is the most stringent standard known to federal law, and derives from a long line of Equal Protection cases involving the regulation of what are known as “suspect classifications.” That said, the courts have not applied the “compelling governmental interest” test with the same rigidity in the RLUIPA context as in the Equal Protection arena, and most have not applied a strict scrutiny analysis to the Equal Terms claims at all. Still, nationwide localities have not fared altogether well in RLUIPA under either of the two branches of the statute.
approved an amendment to the water and sewer plan that prohibited public water and sewer service to private institutional facilities in the rural density transfer zone.

The Church filed administrative proceedings in state court and included a RLUIPA challenge. While its state court action was pending, the County Council considered the separate application of Derwood Bible Church for approval of private well and septic systems necessary to build a 1500-seat church in the rural density transfer zone. In February 2006, the County Council approved an amendment to the County’s water and sewer plan that restricted the size of new private well and septic systems in such rural density transfer zones and a month later, denied Derwood’s request because its proposed private well and septic system exceeded the maximum capacity permitted by this amendment, delightfully known as the Knapp Cap.

Because in November 2005 the County had amended its water and sewer plan to prevent private institutional facilities from obtaining access to the public water and sewer system, the Knapp Cap’s restriction on private systems effectively imposed a size limitation on any new private institutional facilities in the rural density transfer zone. In response, the Bethel Church modified its plan in order to comply with the Knapp Cap, and in January 2007 applied for a private well and septic system to support the construction of a smaller, 800-seat church.

Then, in October 2007 while that application was pending and the County Council as yet undeterred, it adopted an amendment to its zoning ordinance that prohibited a landowner from building a private institutional facility on any property subject to a transferable development rights easement. Because the Church’s property was subject to such an easement, the amendment barred it building even the smaller 800-seat church. In April 2008, the County “deferred” Bethel’s well and septic application pending submission of a proposed use consistent with the previous ordinance amendment (to wit, a change to agriculture or single-family homes). The court observed that the Church’s application appeared to have been the only pending application effectively denied based on the amended ordinance.

A month later, in May 2008, Bethel, its Christian patience finally worn to a raw nub, filed suit alleging that the ordinance amendment and the “deferral” of its application for a well and septic system violated its rights under RLUIPA, among other things.

The Fourth Circuit, having recounted this rather dismal history, was not sympathetic to the County.

Even government action preventing a religious organization from building a church will rarely, if ever, force the organization to violate its religious beliefs, because the organization can usually locate its church elsewhere. See Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 348-49 (2d Cir. 2007) (“[I]n the context of land use, a religious institution is not ordinarily faced with the ... dilemma of choosing between religious precepts and government benefits.”). Thus, requiring a religious organization to prove that a land use regulation pressured it to violate its beliefs would be tantamount to eliminating RLUIPA’s substantial burden protection in the land use context. It seems very unlikely that Congress intended this.

Rather, every one of our sister circuits to have considered the question has held that, in the land use context, a plaintiff can succeed on a substantial burden claim by establishing that a government regulation puts substantial pressure on it to modify its behavior. "[I)n the land use context[,] courts appropriately speak of government action that directly coerces the religious institution to change its behavior . . . ." (emphasis in original)); "[A] substantial burden on religious exercise must impose a significantly great restriction or onus upon such exercise." (internal quotation marks omitted)); ("[A] substantial burden is akin to significant pressure
which directly coerces the religious adherent to conform his or her behavior accordingly." (internal quotation marks omitted)); ("[A] land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable."). We believe that this standard best accords with RLUIPA.

706 F.3d at 555-56 (internal citations omitted).

The Court noted that when a religious organization buys property reasonably expecting to build a church, as Bethel did in this case, governmental action impeding the building of that church may impose a substantial burden even if other suitable properties are available. It found that the County’s water and sewer restrictions and zoning restrictions, imposed after the church bought the property, prohibited the building of a church and that the County failed to show that these measures were the least restrictive means of meeting the assumed compelling governmental interest of preserving agricultural land, water quality, and open space and managing traffic and noise in the rural density transfer zone. It reversed summary judgment that had been granted for the County and remanded the case to the trial court.

The Court also held that the substantial burden provision protects against non-discriminatory, as well as discriminatory, conduct that imposes a substantial burden on religion. Accordingly, a religious organization asserting that a land use regulation has imposed a substantial burden on its religious exercise, need not show that the land use regulation targeted it. This is a useful observation in a case where it may well have been that the County Council contended that it was acting to protect its rural areas from development of any kind, and not churches in general, or Bethel in particular.

The Fourth Circuit distinguished Bethel in Andon LLC v. City of Newport News, 813 F.3d 510 (4th Cir. 2016). In 2012, Walter T. Terry, Jr. formed a congregation known as Reconciling People Together in Faith Ministries, LLC, in Newport News, and served as its pastor. Although the members of the congregation initially worshiped in Terry’s local business, they later looked for a larger location. Terry found a suitable property, which included an office building and a small parking lot, offered for “lease or sale” by Andon, LLC, in Newport News. Andon had purchased the 0.32-acre parcel of land, in 2011. For the previous 14 years it had been zoned for commercial use. The City’s ordinance provided that properties zoned for commercial use could be used for a “community facility,” including a “place of worship” or church, only when four conditions were satisfied: (a) access was provided from a public street directly to the property; (b) no use was operated for commercial gain; (c) no building or structure, nor accessory building or structure was located within 100 feet of any side or rear property line which is zoned single-family residential; and, (d) any parking lot or street serving such use was located 25 feet or more from a side or rear property line zoned single family residential.

Although the property complied with three of these conditions, it did not satisfy the “setback” requirement since the building was located close than 100 feet to the rear and side property lines adjacent to properties zoned for “single-family residential” use. Although the church knew of this problem, it entered into a written lease with Andon contingent on Andon obtaining “City approval” for a church. Andon filed an application with the BZA for a variance from the setback requirement.

The City Codes and Compliance Department filed a report with the BZA that before it could issue a variance, it must first find the usual things then required: (1) "strict application of the ordinance would produce an undue hardship" relating to the property "not shared generally by other properties"; (2) such a variance "will not be of substantial detriment to adja-
cent property”; and (3) “the character of the district will not be changed” by granting the variance. The Department recommended that the BZA deny the variance, because the property could be used for other purposes without a variance, and because denial of a variance would not cause Andon to suffer a hardship unique among other commercial property owners in the vicinity.

The BZA adopted the Department’s recommendation and denied the variance. Andon appealed from the BZA decision to circuit court, which upheld the BZA.

The plaintiffs then filed in federal court alleging that the BZA's denial of their variance imposed a substantial burden on the plaintiffs' religious exercise in violation of 42 U.S.C. § 2000cc(a)(1) (the substantial burden element). They plaintiffs that the BZA's action caused “delay in obtaining a viable worship location” and “uncertainty as to whether . . . the [c]ongregation will be able to go forward with the lease of the [p]roperty.” They attached to their complaint an affidavit from Terry, who said that he “could not find a[n alternate property] that was the appropriate size, location, and price” to serve as a place of worship for the congregation. He also wrote that “[m]any of the [alternative] buildings were too large and too expensive for [the] young congregation.”

The district court granted a motion to dismiss with prejudice, and Andon and the church appealed.

The Fourth Circuit said that:

To state a substantial burden claim under RLUIPA, a plaintiff . . . must show that a government’s imposition of a regulation regarding land use, or application of such a regulation, caused a hardship that substantially affected the plaintiff’s right of religious exercise.

The plaintiff in Bethel asserted a substantial burden claim against a county that had adopted two land use regulations after the plaintiff had purchased property for the then-permitted purpose of constructing a large church. 706 F.3d at 553-55. The first regulation at issue in Bethel banned extension of public water and sewer services to certain classifications of property, including the plaintiff's property. Id. at 553. In response to the county’s implementation of this regulation, the plaintiff modified its construction plans and proposed to build a smaller church that operated on a private septic system. Id. at 554. Before those plans were approved, however, the county adopted a second regulation applicable to the plaintiff's property, which prohibited the construction of private institutional facilities including churches. Id.

Although the county regulations we considered in Bethel did not target religious exercise and applied generally to both secular and religious uses, we concluded that the plaintiff nevertheless presented a triable RLUIPA claim, because the regulations substantially pressured the plaintiff to modify and ultimately to abandon its pre-existing plan to construct a church. Id. at 556-59. And, we explained, although other real property may have been available for the plaintiff to purchase, the "delay, uncertainty, and expense" of selling the plaintiff's property and finding an alternate location increased the burden imposed on the plaintiff's religious exercise. Id. at 557-58. In reaching this conclusion, we emphasized that a critical function of RLUIPA's substantial burden restriction is to protect a plaintiff's reasonable expectation to use real property for religious purposes. Id. at 556-57; see Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007) (explaining that when an organization buys property "reasonably expecting to obtain a permit, the denial of the permit may inflict hardship" on the organization).
The circumstances of the present case are materially different from those presented in Bethel. The plaintiffs here never had a reasonable expectation that the property could be used as a church. When the plaintiffs entered into the prospective lease agreement, the property was not a permitted site for a community facility such as a church, and had not met applicable setback requirements for that type of use for at least 14 years. Before Andon filed the application seeking a variance, the Zoning Administrator had informed Andon that the application would not be approved for failure to meet the setback requirement. Thus, the plaintiffs assumed the risk of an unfavorable decision, and chose to mitigate the impact of such a result by including the contingency provision in the lease. Accordingly, unlike the governmental action at issue in Bethel, the BZA's denial of the variance in the present case did not alter any pre-existing expectation that the plaintiffs would be able to use the property for a church facility, or cause them to suffer delay and uncertainty in locating a place of worship.

Because the plaintiffs knowingly entered into a contingent lease agreement for a non-conforming property, the alleged burdens they sustained were not imposed by the BZA's action denying the variance, but were self-imposed hardships. See Petra Presbyterian Church, 489 F.3d at 851 (because the plaintiff purchased property with knowledge that the permit to use the property for a church would be denied, the plaintiff "assumed the risk of having to sell the property and find an alternative site for its church"). A self-imposed hardship generally will not support a substantial burden claim under RLUIPA, because the hardship was not imposed by governmental action altering a legitimate, pre-existing expectation that a property could be obtained for a particular land use. Therefore, we hold that under these circumstances, the plaintiffs have not satisfied the "substantial burden" requirement of governmental action under RLUIPA.

Our conclusion is not altered by the plaintiffs' further contention that they have been unable to find another property that meets the congregation's desired location, size, and budgetary limitations. The absence of affordable and available properties within a geographic area will not by itself support a substantial burden claim under RLUIPA. See Civil Liberties for Urban Believers, 342 F.3d at 762 (concluding that the "scarcity of affordable land available" and costs "incidental to any high-density urban land use" represent "ordinary difficulties associated with location" and do not support a substantial burden claim under RLUIPA).

We further observe that if we agreed with the plaintiffs that the BZA's denial of a variance imposed a substantial burden on their religious exercise, we effectively would be granting an automatic exemption to religious organizations from generally applicable land use regulations. Such a holding would usurp the role of local governments in zoning matters when a religious group is seeking a variance, and impermissibly would favor religious uses over secular uses. See Petra Presbyterian Church, 489 F.3d at 851 (reasoning that the substantial burden requirement must be taken seriously, or religious organizations would be free "from zoning restrictions of any kind"); Civil Liberties for Urban Believers, 342 F.3d at 762 (explaining that no "free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise").

The plain language of RLUIPA, however, prevents such a result. By requiring that any substantial burden be imposed by governmental action and by carefully balancing individual rights and compelling governmental interests, the language of RLUIPA demonstrates that Congress did not intend for RLUIPA to undermine the legitimate role of local governments in enacting and implementing land use regula-
tions. See Petra Presbyterian Church, 489 F.3d at 851; Civil Liberties for Urban Believers, 342 F.3d at 762.

Andon, 813 F.3d at 515-16 (some internal citations omitted, all emphasis supplied).

The Court elaborated on what the burden on each of the parties is in a substantial burden case in Jesus Christ is the Answer Ministries, Inc. v. Balt. Cnty., 915 F.3d 256 (4th Cir. 2019). The Ministries is a nondenominational Christian church founded in 1997 by Reverend Lucy Ware. It has associated churches in Kenya and the Seychelles, and many of the Church's congregants were born in Africa. Reverend Ware was herself born in Kenya. The Church has struggled to secure an adequate house of worship, and this has impeded its religious mission. Ware's efforts to obtain County approval to operate a church on property that she purchased in 2012 led to this case.

The property consisted of 1.2 acres of land with a building previously used as a dwelling, zoned "Density Residential 3.5." Churches are permitted by right subject to certain conditions, including that parking lots and structures are (1) set back 75 feet from tract boundaries, and (2) separated from adjacent lots by a 50-foot landscaped buffer. These conditions, however, don't apply to new churches whose site plans have been approved after a public hearing finding that compliance with the conditions will be maintained "to the extent possible," and that the plan "can otherwise be expected to be compatible with the character and general welfare of the surrounding residential premises." Before Ware purchased the site, her realtor advised her that a church was a permitted use.

Ware made improvements to the building and parking lot and held a church service and cookout. But – are we surprised – neighbors complained to the County, and a County inspector notified Ware that she couldn't use the site as a church unless she complied with zoning requirements.

She filed a petition with the County to approve use of the land as a church. The petition proposed a buffer and setback of zero feet, seeking complete relief from the zoning requirements. It also sought variances from parking requirements. The County Director of Planning did not oppose the petition, "provided a landscape and signage plan is submitted to the department for review and approval."

A hearing was held before an Administrative Law Judge and neighbors who opposed the petition attended and participated. Several neighbors made comments displaying open hostility to Ware and the Church. These comments included: (1) "dancing and hollering like they back at their home back in Africa somewhere"; (2) "[s]he can come over here from Africa . . . branch out from another church and put all of this in our neighborhood"; and (3) "[t]hey were out here dancing like from Africa. We don't have that in our block." After the hearing, neighbors subjected the Church and its members to a sustained barrage of harassment, including racial slurs. The site was subject to vandalism and theft.

The ALJ recommended denying Ware's petition. Ware appealed this recommendation to the Board of Appeals, which denied the petition, finding that "the proposed Church does not even minimally comply" with the applicable zoning requirements and that the plan would not be compatible with "the character or general welfare of the surrounding homes which homes are occupied by the [neighbors] who testified." The Board's decision was affirmed by the Circuit Court for Baltimore County and the Court of Special Appeals of Maryland.

While the first petition was pending appeal, Ware filed a second petition that included a modified site plan that (1) moved the parking lot to increase the setback and the buffer, and (2) did not seek any parking variances. The new petition also sought approval not only under the zoning provision governing new churches, but also under a separate provision governing existing churches.
The People's Counsel (a county official) initially sought dismissal of the new petition, on the ground that it sought essentially the same relief as its predecessor. The neighbors who opposed the first petition adopted the People's Counsel's motion to dismiss. But the People's Counsel subsequently withdrew his motion based on the differences between the two petitions. Nevertheless, the neighbors continued to pursue dismissal. The Board granted the motion to dismiss, holding that the new petition was barred by res judicata and collateral estoppel.

The district court dismissed Ware’s case, but the Fourth Circuit reversed in short order. It said that there are two questions that must be asked in a substantial burden case.

First, is the impediment to the organization's religious practice substantial? The answer will usually be “yes” where use of the property would serve an unmet religious need, the restriction on religious use is absolute rather than conditional, and the organization must acquire a different property as a result. [Citing Bethel].

Second, who is responsible for the impediment—the government, or the religious organization? In answering this question, we have considered whether the organization had a “reasonable expectation” of religious land use, and whether the burden faced by the organization is “self-imposed.” [Citing Andon].

915 F.3d at 261.

Although the Court treated this as a substantial burden case, it then trod onto equal terms ground. Because RLUIPA prohibits land use regulations that discriminate on the basis of religion or religious denomination, in applying RLUIPA's nondiscrimination provision courts have looked to equal protection precedent. Chabad Lubavitch of Litchfield Cnty., Inc. v. Litchfield Historic Dist. Comm'n, 768 F.3d 183, 198 (2d Cir. 2014) (citing Bethel, 706 F.3d at 559). Under that precedent, a plaintiff must demonstrate that the government decision was motivated at least in part by discriminatory intent. One factor which this inquiry recognizes as potentially probative of the decisionmaker's intent is the “specific sequence of events leading up to the challenged decision.” Departures from normal procedures can suggest that the decision was based on unlawful motives, as can “[s]ubstantive departures . . . particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.” See Dailey v. City of Lawton, 425 F.2d 1037, 1040 (10th Cir. 1970) (finding racial motivation where a city refused to rezone a plot despite present and former city planning directors’ testimony that there was no reason not to rezone).

Particularly relevant to, and compelling in, Jesus Christ is the Answer, is the Court’s observation that a government decision influenced by community members’ religious bias is unlawful, even if the government decisionmakers display no bias themselves. Such impermissible influence may be inferred where expressions of community bias are followed by irregularities in government decision-making, 915 F.3d at 263. Moreover, with respect to burden sharing, under RLUIPA a plaintiff need only establish a prima facie claim of religious discrimination, after which the defendant bears the burden of persuasion on all elements of the claim. 915 F.3d at 263.

So long as a plaintiff alleges a plausible prima facie claim of discrimination, a court may not dismiss that claim—even if the defendant advances a nondiscriminatory alternative explanation for its decision, and even if that alternative appears more probable. See Woods v. City of Greensboro, 855 F.3d 639, 649 (4th Cir. 2017) (“The question is not whether there are more likely explanations for the City's action . . . but whether the City's impliedly proffered reason . . . is so obviously an irrefutably sound and unambiguously nondiscriminatory and non-pretextual explanation that it renders [the plaintiff's] claim of pretext implausible.”). 915 F.3d at 263.
It is also essential that when regulation is permissible, it must meet the least restrictive means test. *Couch v. Jabe*, 679 F.3d 197 (4th Cir. 2012) (prison context; government must consider and reject other means before it can conclude that the policy chosen is the least restrictive means); *Chase v. City of Portsmouth*, Civil Action No. 2:05cv446, 2005 U.S. Dist. LEXIS 29551 (E.D. Va. Nov. 16, 2005) (allowing RLUIPA claim to go forward). That court has also held it is proper to name individual members of the governing body in their official capacities, even though this cannot affect the damages that would be paid by the city. There are substantive reasons for the retention of members of the governing body in the case, because it may provide plaintiffs with the public accountability if they succeed on the merits. Second, it gives the members of the governing body the ability to participate fully in defense of their actions as parties to the litigation. 428 F. Supp. 2d 487 (E.D. Va. 2006).\(^5\)

**Equal Terms**

RLUIPA also prohibits governments from imposing or implementing a land use regulation in a manner that treats a religious assembly or institution on “less than equal terms” with a nonreligious assembly or institution. It turns on whether similar uses are being treated similarly. It is important to note that the Equal Terms provisions do not incorporate a substantial burden requirement, and are therefore analyzed differently from cases under the substantial burden elements of the statute. *Lighthouse Institute for Evangelism v. City of Long Branch*, 510 F.3d 253 (3rd Cir. 2007); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F. 3d 752 (7th Cir. 2003) (upholding a requirement for a special use permit for churches in the city’s commercial zones and rezonings in all industrial zones).

As addressed further below, there is no judicial consensus as to what a plaintiff must show to prevail on an Equal Terms claim and how such evidence is to be analyzed, and most importantly no guidance from the Fourth Circuit, so, alas, we must turn to others.

In *Lighthouse*, cited above, the Third Circuit held that a religious plaintiff need not identify a “secular comparator”\(^6\) that proposes precisely the same mix of uses as the religious plaintiff for purposes of determining whether the religious plaintiff and the secular use are in fact similarly situated. Thus, a church does not have to show that there are other users that wish to perform the same functions within a given zone. It must show, however, that there is a secular comparator\(^7\) that is “similarly situated as to the regulatory purpose of the regulation in question” without regard to the particular uses that may be at issue. A regulation does not automatically cease being neutral and generally applicable simply because it allows certain secular behaviors, but not certain religious ones. The impact of the allowed and forbidden behaviors must be examined in light of the purpose of the regulation. In addition, when a government permits secular exemptions to an otherwise generally applicable government regulation, then the government must accord treatment to religion-based claims for exemptions on an equal basis, when they would have a similar impact on protected interests. Perhaps this kind of dancing on the head of conceptual pins is what has kept otherwise sophisticated judges from coming to a consensus.

According to the Third Circuit the relevant comparison is between a regulation’s treatment of religious conduct, compared to analogous secular conduct with a similar impact on the regulation’s aims. A regulation will violate the Equal Terms provision only if it treats reli-

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\(^5\) Perhaps the most recent substantial burden case in Virginia has been *United States v. Cnty. of Culpeper*, 245 F. Supp. 3d 758 (W.D. Va. 2017), in which Judge Moon found that denial of a pump and haul permit to a small group of Muslims seeking to build a mosque where no public sewer was available had imposed a substantial burden on their religious exercise, given that such permits had been regularly issued as a matter of course and this permit had been denied after community objections based on the applicants’ religion.

\(^6\) Am I the only person who thinks “comparator” is just an awful word? I suppose the appraisers have used up comparable. I don’t think “equator” is a word and it would be worse than comparator. Is “equivalent to” too long?

\(^7\) Have I already complained about this word?
gious assemblies or institutions less well than secular assemblies or institutions that are similarly situated as to the regulatory purpose involved, and not viewed more abstractly. (Can you imagine how long it took a law clerk to write that?) That Circuit also holds that RLUIPA’s Equal Terms provisions operate on a strict liability standard but that strict scrutiny is not applicable. 510 F.3d at 269.

In Third Church of Christ, Scientist v. City of New York, 626 F.3d 667 (2d Cir. 2010), the Second Circuit affirmed a lower court decision that the city’s prohibition on church use of property for private, catered, events was a violation of the Equal Terms provision. It found that the city permitted secular institutions in the church’s neighborhood to conduct the same type of events. The church had commenced such catered dinners in order to raise money to keep its 80-year-old building useable and contracted with a catering company to use the building, to restore it, and provide operating money for the church. In exchange, the caterer had the right to hold private functions in the building. Neighbors complained, and the city issued a notice of revocation of a previously issued permit. The church sued, claiming a violation of the Equal Terms provision. It produced evidence of two key comparators, a cooperative apartment building, and a hotel, both located in the same R-10 zone applicable to the church. The city issued notices of violation to those two comparators, asserting that they were acting outside their permitted zoning. The court found that the other uses were indeed appropriate comparators. Interestingly the two were considered similarly situated because the city argued that each was equally illegal! The court said that technical differences between the uses were not critical to RLUIPA because the question was whether, in practical terms, secular and religious institutions were treated equally, not whether the secular comparator’s use was identical to the religious entity’s.

In Elijah Group, Inc. v. City of Leon Valley, 643 F.3d 419 (5th Cir. 2011), the Fifth Circuit read all of this and gave up. It found all of the existing tests for an Equal Terms wanting. In holding that the City had violated RLUIPA when it eliminated the possibility of a special use permit for churches in the city’s B-2 commercial zone, and placed them exclusively in its B-3 zone in order to preserve a “commercial corridor” along its principal street, the ordinance violated RLUIPA because it treated the church on terms that were less than equal to the terms on which it treated similarly situated nonreligious institutions.

The Seventh Circuit weighed in in River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367 (7th Cir. 2010). It added to the confusion by holding that a plaintiff must plausibly assert that religious and secular land uses were treated the same from the standpoint of an accepted zoning criterion. Thus, if a church and community center, though different in many respects, do not differ with respect to an accepted zoning criterion (such as traffic and parking), then an ordinance that allows one and forbids the other denies equality and violates the Equal Terms provision.

The Ninth Circuit, warming to the task and observing that six other circuits had already lobbed decisions into the hopper, noted that the cases divide into roughly two camps. In Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163 (9th Cir. 2011) it observed that Midrash Sephardi, cited above, focuses on the facial differentiation between religious and nonreligious assemblies or institutions, and finds that such differentiation alone may readily violate the Act. The 3d Circuit in Lighthouse had focused on the treatment of uses with respect to the goal of the regulation. The Seventh Circuit in River of Life had adopted a variation on the 3d Circuit approach and held that there must be a similarly situated comparator with respect to an accepted “regulatory criteria” such as “commercial district,” or “residential district,” or “industrial district,” not the Third Circuit’s “regulatory purpose.” The Fifth Circuit’s Elijah Group did not explicitly adopt any of the foregoing tests but rather stated that a church must show “more than simply that its religious use is forbidden and some other nonreligious uses permitted,” because the Equal Terms provision “must be measured by the ordinance itself and the criteria by which it treats petitions differently.”
In *Centro Familiar* the Ninth Circuit held that with respect to “membership organizations” such as a church, “[i]t is hard to see how an express exclusion of ‘religious organizations’ from uses permitted as of right by other ‘membership organizations’ could be other than ‘less than equal terms’ for religious organizations.” Because the statute shifts the usual burden of persuasion to the government, and not the religious institution, if a plaintiff produces a prima facie case of a violation of the Equal Terms provision, then the government must produce evidence by which to overcome that case. *The burden is not on the religious institution to show a similarly situated secular assembly, but rather on the government to show that the treatment received by the religious institution should not be deemed unequal, where it appears to be so on the face of the ordinance in question. The 9th Circuit also rejected a strict scrutiny standard for analysis.*

The Eleventh Circuit came along to provide even a more expansive reading of the statute. According to it, all assemblies and institutions “travel” together under RLUIPA: if a zoning regulation allows a secular assembly, all religious assemblies must be permitted. *Midrash Sephardi*, 366 F.3d at 1230-31; see also *Vision Church, United Methodist v. Vill. of Long Grove*, 468 F.3d 975 (7th Cir. 2006). The Eleventh Circuit further holds that while a violation of the Equal Terms provision is not necessarily fatal to a land use regulation, it must undergo a strict scrutiny analysis. *Primera Iglesia Bautista Hispana de Boca Raton v. Broward Cnty.*, 450 F.3d 1295 (11th Cir. 2006). It appears that this is the only circuit that has so held as to either point.

And, of course, the Fourth Circuit has, as yet, decided no case involving the Equal Terms requirements of the Act. Perhaps it has read the other Circuits and decided that it can do no better, and might just do worse.

The excellent Judge Michael Urbanski of the Western District of Virginia has had recent occasion to note this in *Afresh Church v. City of Winchester*, No. 5:18-CV-144, 2019 U.S. Dist. LEXIS 109975 (W.D. Va. July 1, 2019).

There are four elements to an equal terms violation: (1) the plaintiff must be a religious assembly or institution, (2) subject to a land use regulation, and (3) the regulation must treat the religious assembly on less than equal terms than (4) a non-religious assembly or institution.

The plaintiff bears the burden of establishing a prima facie claim. If it meets the burden, the government bears the burden of persuasion as to the elements of each claim.

Circuits are split over whether a plaintiff can state an equal terms claim under RLUIPA by alleging that a zoning law is not facially neutral, or whether a plaintiff must show that a similarly situated non-religious comparator would be treated differently than the religious entity. In *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 292-93 (5th Cir. 2012), the Fifth Circuit held that because the zoning ordinance in question expressly distinguished between religious and non-religious land uses, the church plaintiff established a prima facie case under the equal terms clause. See also *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1171 (9th Cir. 2011) (finding city violates the equal terms provision only when a church is treated on a less than equal basis with a secular comparator, similarly situated with respect to accepted zoning criteria, but city bears burden where treatment appears unfair on face of ordinance).

Conversely, the Seventh Circuit in *River of Life Kingdom Ministries v. Vill. of Hazel Crest III.*, 611 F.3d 367, 373 (7th Cir. 2010), found that it is enough to rebut an equal terms claim if religious and secular land uses are treated the same from the standpoint of an accepted zoning criterion. Similarly, in *Lighthouse Institute for
Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 269 (3rd Cir. 2007), the Third Circuit upheld the district court's conclusion that the relevant analysis under the equal terms provision must take into account the challenged regulations' objectives and that a regulation will violate the provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated as to regulatory purpose.

It does not appear that the Fourth Circuit has decided which standard to apply. See Hunt Valley Baptist Church, 1:17-cv-00804 (D. MD. Feb. 10, 2020) (discussing split and finding that Fourth Circuit has not decided, but finding that the plaintiff had met its burden under all extant standards). In A Hand of Hope Pregnancy Resource Center v. City of Raleigh, 332 F.Supp.3d 983 (E.D.N.C. 2018), the district court applied the "accepted zoning criteria" test, i.e., that "a religious institution cannot be treated less favorably than a secular institution if the two institutions cannot be distinguished on the basis of the accepted zoning criteria that define the zone." Id. at 995 (internal quotations and citations omitted). See also Summit Church v. Randolph Cnty. Dev. Auth., 2016 U.S. Dist. LEXIS 25665, 2016 WL 865302 (N.D. W.Va. 2016) (adopting the Lighthouse "regulatory purpose" test and finding that defendants had not explained how secular assemblies furthered the objectives of having a commercial mixed-use district that reflected the history and culture of the site but religious assemblies did not).

Here, Afresh [Church in Winchester] acknowledges that the City may have an interest in controlling the size of a particular gathering for purposes of noise and traffic. However, it points out that the zoning ordinance provides for conditional use permits for entities expected to draw a large crowd, such as gymnastic studios, youth activity centers, and bus terminals, as well as arenas, amphitheaters, and stadiums with some space requirements, but does not allow churches. Afresh also asserts that the City has allowed very large groups to assemble in the zone for one-time events such as festivals and fundraisers, but has fined the Owner for allowing Afresh to use the Building for religious purposes. Thus, it has alleged a cause of action under both tests—that the zoning ordinance is not facially neutral and also that it discriminates as applied to religious organizations.

Afresh Church v. City of Winchester, No. 5:18-CV-144, 2019 U.S. Dist. LEXIS 109975, at *12-19 (W.D. Va. July 1, 2019). So Judge Urbanski was spared the task of deciding what standard to employ, having facts enough to employ a couple.

Where are we now?

We are, it would seem, deep in analytical mire. For those who have made it this far, I am grateful for your patience. I have wanted to try a RLUIPA case since the statute was passed. Well, I have wanted to try one of these cases ever since the Religious Freedom Restoration Act that preceded it was passed. But it has not been so. I will bide my time and continue to find these matters of surpassing interest, as only a legal dweeb can.
Did You Know . . .

Cities and counties beware. In 2012, the General Assembly amended Virginia Code Section 15.2-1802 to add new requirements for cities and counties when acquiring land for development of business or industry, but the section’s caption still refers only to “towns.” (§ 15.2-1802. Authority of towns to acquire, lease or sell land for development of business and industry).

Because the statute’s caption stayed the same, many attorneys representing cities and counties may not be aware that this section applies to their localities. If a city or county is acquiring land by voluntary sale for the purpose of developing business or industry, localities may only acquire such land after holding a public hearing concerning the proposed acquisition. The statute was amended as follows:

§ 15.2-1802. Authority of towns to acquire, lease or sell land for development of business and industry.

A town city or county may acquire pursuant to §15.2-1800 by contract, with such consideration as is agreed to by the parties, but not by condemnation, land within its boundaries or within three miles outside its boundaries, for the development thereon of business and industry. A town may acquire pursuant to § 15.2-1800, but not by condemnation, land within its boundaries or within three miles outside its boundaries, for the development thereon of business and industry. No such land shall be acquired until the governing body has held a public hearing concerning such proposed acquisition. Any land so acquired may be leased or sold at public or private sale to any person, firm or corporation who will locate thereon any business or manufacturing establishment. This section shall constitute the authority for any town to exercise the powers herein conferred notwithstanding any charter provision to the contrary.

If any land so acquired, or any part thereof, is not sold to a person, firm or corporation who will locate thereon any business or manufacturing establishment, and such land is, in the discretion of the governing body, not required for the development thereon of business and industry, the governing body, if deemed proper by it, may dispose of the land so acquired, in whole or in part, making such limitations as to the uses thereof as it may see fit. No such land shall be disposed of until the governing body has held a public hearing concerning such proposed disposal.

As with all public hearings required in Chapter 18 of Title 15.2, the hearing must be advertised “once in a newspaper having general circulation in the locality at least seven days prior to the date set for the hearing.” Va. Code § 15.2-1813,

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Special Purpose Public Authorities: Esoteric, Yet Essential, Arms of Government

“Before the $21 million allegedly went missing, before the sheriff put the gun in his mouth and fired, before the entire top tier of the Warren County government had been indicted, there was the dream.” That report, in a recent edition of The Washington Post, recounted an alleged fraud arising out of a data center facility promised to an economic development authority (“EDA”) in Virginia. In addition to highlighting the inexcusable actions of certain rogue employees, the reporter pointed out “the perils of weak oversight” in EDAs—described as “quasi-public entities” with boards that critics believe “often lack the financial savvy and investor scrutiny that protect their corporate counterparts.”

The colloquial saying “you can’t fight city hall” certainly rolls off the tongue easier than “you can’t fight the Board of Directors of The Front Royal-Warren County, Virginia Economic Development Authority.” However, while perhaps not often discussed in a high school civics textbook or easily described by turn-of-phrase, the prevalence of independent or special purpose public authorities has increased, as has their importance in day-to-day life. As that is the case, increasing scrutiny should be given to how such entities are formed, what their powers are, how accountable they are to the public, and what impacts they have on local communities.

We’re here to help. Public authorities like EDAs are public bodies that we, as public finance lawyers, frequently work with to improve the communities in which they are situated. As discussed in this article, we believe our understanding of these “quasi-public entities” may help shed some light on their legal foundations and utility.

History and Purpose
Public authorities have a long history and can trace their origins to England during the reign of Queen Elizabeth. Early public authorities were corporations granted certain limited governmental powers to construct public improvements with the proceeds of private investment, and to pay the investors by charging the public for use of such im-

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1 Antonio Olivo, “Millions of dollars are missing. The sheriff is dead. A small Virginia town wants answers,” THE WASHINGTON POST (September 24, 2019).
2 See generally UNITED STATES CENSUS BUREAU: 2017 UNITED STATES CENSUS OF GOVERNMENTS, available at: https://www.census.gov/programs-surveys/cog.html (hereinafter referred to as the “2017 Census of Governments”). The 2017 Census of Governments is a census undertaken every five years by the United States Census Bureau to take inventory of the types of local governments in the United States. For example, the 2017 Census of Governments reports that there are 38,542 special purpose governments (or special districts) in the United States, representing an increase from 38,266 reported in the 2012 Census of Governments. Special Districts form the largest category of government entities reported in the 2017 Census of Governments. By comparison, the 2017 Census of Governments reported that there are 3,031 county governments and 19,495 municipal governments in the United States.
3 For a humorous discussion of these questions, see LAST WEEK TONIGHT WITH JOHN OLIVER, Special Districts (HBO Broadcast, March 6, 2016), available at: https://www.youtube.com/watch?v=3saU5racsGE.
provements. This heritage influenced governance in America’s early days and, prior to the nineteenth century, little distinction was drawn between public and private corporations.

The Port of London Authority (named “Authority” because each of the clauses in its enabling act began with the words “Authority is hereby given”) became a model for the Port of New York Authority, but public authorities were relatively uncommon in the United States until the New Deal, when Reconstruction Finance Corporation (RFC) and Public Works Administration (PWA) grants were made widely available for “self-liquidating projects.”

Likewise, in Virginia, the great majority of “authorities” were created to issue revenue bonds for particular purposes, and to do so without impacting the borrowing capacity of state or local government. The Virginia Supreme Court, in a 1952 decision relating to the powers of the Hampton Roads Sanitation District Commission (“HRSD”), described bodies like HRSD as not being municipalities in a strict sense, but as being “quasi-municipal corporations” created to perform particular public services. These public authorities are not the alter ego of local governments created under Article VII of the Virginia Constitution; instead, they are independent in their operations, their incurrence of debt, and their ownership of property. Based on this, we will refer to Virginia “quasi-municipal” authorities throughout this article as “independent” or “special purpose” public authorities.

**Designation**

Virtually every independent public authority in the Commonwealth has been designated by statute as a “public body politic and corporate.” Although these terms are used without much definition, it seems to us that the term “body politic” refers to a locus of delegated political or policy-making authority, whereas the term “body corporate” refers to a person

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5 Id.
7 CARO, supra note 4, at 615–16.
8 See Dykes v. No. Va. Transp. Dist. Comm’n, 411 S.E.2d 1, 9 (Va. 1991) ("The [Northern Virginia Transportation District Commission] is an independent political subdivision as are housing authorities, water and sewer authorities, and industrial development authorities. The enabling legislation, like that of these other authorities vested with the power to incur bonded indebtedness, affirms that the debt so incurred is that of the entity, not of the Commonwealth or any other political subdivision.").
10 See id. at 499–500.
12 See Short Pump Town Center Community Dev. Auth. v. Hahn, 554 S.E.2d 441, 445–46 and n.10 (Va. 2001) (stating that all of the following types of authorities or types of authorities, among others, are described as bodies corporate and politic: water and waste authorities (VA. CODE § 15.2-5102); Metropolitan Washington Airports Authority (VA. CODE § 5.1-153); electric authority (VA. CODE § 15.2-5403); park authority (VA. CODE § 15.2-5702); Virginia Baseball Stadium Authority (VA. CODE § 15.2-5801); Hampton Roads Sports Facilities Authority (VA. CODE § 15.2-5901); Alleghany-Highlands Economic Development Authority (VA. CODE § 15.2-6200); Tourist Train Development Authority (VA. CODE § 15.2-6500); Virginia Public School Authority (VA. CODE § 22.1-163); Virginia College Building Authority (VA. CODE § 23-30.25); Educational Facilities Authority (VA. CODE § 23-30.41(a)); Virginia Commonwealth University Health System Authority (VA. CODE § 23-50.16:3); Virginia Resources Authority (VA. CODE § 62.1-200); Virginia Commercial Space Flight Authority (See VA. CODE § 2.2-2202(B)); and Virginia Small Business Financing Authority (VA. CODE § 2.2-2280(B) (Virginia Small Business Financing Authority)).
13 The breadth of a "body politic" seems to encompass only the particular powers that have been delegated to the body by the legislature, rather than any broad list of powers that are used in determining whether a true municipality exists (e.g., taxing power, police power, or eminent domain). See id. at 447 ("First, in determining whether that Commission was a political subdivision, the Court looked solely at the statutory language used in the Commission’s enabling legislation, not at the Commission’s attributes . . . . Second, the essential attributes, one of which was the fact that the Commission was created as a political subdivision, were relevant only [as one part of] the inquiry whether the Commission was also a municipal corporation.").
or legal entity\textsuperscript{14} with constitutional rights such as the rights to hold property and enter into contracts.

**Delegated Powers**

As a “Dillon’s Rule” state, Virginia does not provide substantial legislative power to local governments, apart from those which may be granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable.\textsuperscript{15} Unlike the state, a local government is not a sovereign at common law or under the state constitution; the state may delegate certain of its powers to a local government or it may, in fact, abolish any local government.\textsuperscript{16} Similarly, the General Assembly can freely create independent political subdivisions and delegate certain powers to those entities.\textsuperscript{17} Over one hundred years ago, the Virginia Supreme Court found “no doubt whatever” that the General Assembly had the power to “provide for the drainage and reclamation of swamp lands” by creating local drainage districts and delegating part of the General Assembly's police power to such districts to build infrastructure and “assess the cost thereof against the property thereby benefited.”\textsuperscript{18}

The powers delegated to independent authorities may be similar to the powers of local governments, such as the ability to sue and be sued, the power to hold and expend revenues, the power of eminent domain, the power to issue tax-exempt bonds, and governance by a board or commission.\textsuperscript{19} Additionally, such powers may overlap areas of public policy in which local governments might otherwise be the logical administrator. For example, the General Assembly has created industrial and economic development authorities, in such case granting local governments the power to establish such authorities, but otherwise limiting the power of the local government to control their authorities’ affairs.\textsuperscript{20} However, as noted above, these broad powers are invariably granted in furtherance of relatively narrow purposes. Further, the Virginia Supreme Court has made clear that the General Assembly may not delegate any taxing power to an independent or special purpose public authority that is not a local government.\textsuperscript{21}

Although the General Assembly cannot delegate its taxing power, it can certainly delegate the power to impose user fees, service charges, tolls, and other fees which derive revenues

\textsuperscript{14} See, e.g., City of Virginia Beach v. Flippen, 467 S.E.2d 471, 473–74 (Va. 1996).


\textsuperscript{17} See Mumpower v. Housing Auth. of the City of Bristol, 11 S.E.2d 732, 735 (Va. 1940) (holding that a housing authority may be created under the police power of the state).

\textsuperscript{18} See Strawberry Hill Land Corp. v. Starbuck, 97 S.E. 362, 364 (Va. 1918).


\textsuperscript{20} See Va. Code Ann. § 15.2-4900 et seq.

\textsuperscript{21} The power to tax is a legislative power that the Virginia Constitution vests in the General Assembly and which it cannot delegate except to the limited extent authorized in the Constitution for local government taxation. See Marshall, 657 S.E.2d at 79-80 (“Upon review of the constitutional provisions set forth above, we conclude that the Constitution, in keeping with rights enumerated in Article 1, Section 6 of the Constitution’s Bill of Rights, clearly contemplates that taxes must be imposed only by a majority of the elected representatives of a legislative body, with the votes cast by the elected representatives being duly recorded.”); Wright, 286 S.E.2d at 228-29; Town of Danville v. Shelton, 76 Va. (1 Hans.) 325, 327-28 (1882).
to support the bonds issued by independent or special purpose political subdivisions.22 These powers are essential for a public authority to pay the debt service on their bonds. Likewise, as both public bodies and “corporate bodies,” independent public authorities have the power to enter into contracts and to acquire, own, lease, and dispose of properties, and to take other actions necessary to accomplish their statutory purposes.23

A Note on Sovereign Immunity
For purposes of sovereign immunity, an authority exercising its “proprietary” powers or functions (as opposed to governmental powers or functions) will not be held to be immune from liability.24 The powers considered “proprietary” for purposes of sovereign immunity analysis may or may not neatly align with the powers otherwise regarded in as “corporate” powers of otherwise public authorities.25 Sovereign immunity is a concept of tort law, rather than of public or contract law. Where a governmental entity's governmental and proprietary functions overlap, courts are most likely to view an action as “governmental,” especially to the extent it most naturally relates to activities advancing public health or safety.26 That said, sovereign immunity does not shield a governmental entity from contractual liability, regardless of whether its action or inaction under a contract pertains to a political question.27 This means all obligations under contracts with bondholders should be valid (at least as against claims of sovereign immunity) regardless of the nature of their security.28

Power and Criticism
At the beginning of this article, we quoted a recent article in The Washington Post which noted the “weak oversight” of quasi-public entities and their directors' lack of financial savvy.29 Indeed, independent public authorities are often criticized for controlling and leveraging large amounts of public revenues with little public accountability. One commentator

23 See Warren County Residents v. Industrial Dev. Auth., 2000 WL 33943517, at *3-4 (Va. Cir. 2000). In that case, a Virginia circuit court determined that an industrial development authority could act as a general contractor for the construction of a commercial facility and thereby purchase all construction materials for the facility on a sale and use tax exempt basis. See id. at *1.
25 For example, collecting tolls for a public highway has been found not to be a proprietary function. See Hobbs v. Richmond Metropolitan Auth., 1995 WL 1055951, at *1 (“At this point, it may seem logical to say that because a tollgate is used in the collection of money, it is part of a proprietary function; that is, toll equals profit—ergo, proprietary. The fact is, however, that whenever public roads are built, they have to be paid for. Some are paid for with taxes. Some are paid for with bonds. Some are paid for with tolls. The court is unwilling to fashion a rule which makes recovery for personal injury dependent upon the method chosen by a municipality to pay for the street on which the injury occurs. Some other test must be used.”)
27 See Wiecking v. Allied Medical Supply Corp., 391 S.E.2d 258, 260 (Va. 1990) (noting judicial decisions that reasoned as follows: (i) when the state receives the benefit of a contract, and then refuses to honor its obligations, the contractor’s property is subjected to an unconstitutional taking without just compensation; (ii) denial of liability under such circumstances also violates state and federal due process guarantees; and (iii) the courts will not attribute to the legislature any intention to permit the government to exercise bad faith and unfair dealing).
28 See id. at 261 (“It is true that the legislature has the power to withhold appropriations to cover the states obligations … [t]hose safeguards, however, affect only the remedy not the validity of the obligation on which the claim is based.”). But see Dykes, 411 S.E.2d at 9 (holding that a contract which provides the issuer is not obligated to appropriate funds for the payment of bonds does not constitute "debt"); ACA Fin. Guar. Corp. v. City of Buena Vista, Virginia, 917 F.3d 206, 214-15 (4th Cir. 2019) (“By the express terms of the Trust Agreement, the Authority’s obligation to make bond payments is limited to the rent paid by the City. It makes clear that the City’s obligation to make rent payments is subject to the City’s decision to appropriate rent money. In the face of those clear contractual terms, the counts alleging violations of the Deeds of Trust fail to state a claim for which relief can be granted.”).
29 See Olivo, supra note 1 and accompanying text.
argued that the creation of independent authorities to provide public works “places the financial burden of the new service upon the users and allows the [local government] to avoid an obvious political problem.” 30 However, this tenet of independent public authorities is also one of the key benefits of utilizing independent public authorities: the ability to delegate limited power to a group more able to provide sustained focus and expertise to a problem. 31 A lack of expertise on such a board (as alleged by The Washington Post) would be contrary to the concept behind utilizing independent public authorities as boards of specialized “experts.”

An even more pragmatic reason behind the proliferation of independent public authorities since the mid-twentieth century is that they have provided a useful means of receiving federal grants and carrying out federal program requirements through specialized staffing immune from local politics. 32 The federal government has expanded its area of influence, at the expense of state and local power, over the same period of time that independent public authorities have proliferated. In fact, historian and noted biographer Robert Caro observed that certain independent public authorities established in the State of New York during the mid-twentieth century amounted to “a new layer of urban government,” unaccountable to the others. 33

Of course, not all independent public authorities receive dedicated revenues or grants from higher levels of government. As noted elsewhere in this article, the vast majority of “authorities” are created to issue revenue bonds for special purposes. As such, they are designed to construct and manage “self-liquidating projects” by using financial leverage without burdening current taxpayers—though in such purposes their existence has often been criticized as a means to disguise debt and remove accountability. 34 They have also sometimes been criticized for the “regressive” effect of placing the incidence of financial burden on user fees rather than on income taxation. 35

By having the power to enter into contracts with bondholders involving many millions of dollars, independent public authorities may indirectly impact the credit quality and the policy flexibility of the states or localities with which they are associated. However, any attempts by higher levels of government to alter or interfere with these contracts, including bond covenants, may well violate state and federal constitutional restrictions against “im-

31 See, e.g., Gerald E. Frug, Beyond Regional Government, 115 HARV. L. REV. 1763, 1781–82 (2002) (describing key features of public authorities as efficiency, experience, independence, and expertise of the public authority and its agents who are insulated from the political influence of city governments). The rationale for such delegation may, of course, be influenced by a public administration bias in favor of efficiency rather than values, or means rather than ends. See generally Robert B. Denhardt, Theories of Public Organization (3d ed. 2000).
32 See Makielski, supra note 30, at 1186–87. Immunity from local politics has been deemed to be beneficial to citizens in certain areas; for example, in the 1960s the federal government sought to achieve anti-poverty measures through community action programs which established independent organizations outside the influence of state and local governments, but which encouraged “maximum feasible participation” at the neighborhood level. See Frances Fox Piven & Richard A. Cloward, Regulating the Poor: The Functions of Public Welfare, 256–82 (2d ed. 1993).
33 See Caro, supra note 6, at 624 (independent public authorities were able to obtain funding, and thus power, from the federal government, without the necessity of getting approval from the state legislature, the governor, or the mayor).
34 See, e.g., Earl Swift, The Big Roads, 177–89 (2011) (describing, in the context of creating a federal Interstate Highways statute, the proposals to establish a “Federal Highway Corporation” to use bond financing, and the successful opposition of such plan by Senator Harry F. Byrd (of Virginia), who called it “legerdemain” that would “wreck our fiscal budget system”).
pairing the obligation of contracts.” As a result, an independent authority could incur financial obligations outside the control of related governments, and then in instances of financial difficulties spawn a practical need for higher levels of government to intervene in the settlement or resolution of bondholder lawsuits. This risk may be part of the trade-off for the benefits of having special purpose authorities solve funding problems in an “off-balance-sheet” manner.

**Public Authorities as Essential to the Public Good**

Although subject to criticism indeed, special purpose public authorities have been responsible for billions in infrastructure investment, benefiting the health, welfare, safety and prosperity of millions of Virginians and Americans. Public authorities have filled gaps in governmental services and become essential components of modern life. The independent public authority structure allows for configurations and organizations of governmental entities that may not otherwise be feasible, such as the series of interstate agreements that allowed for development of the Washington, D.C. area metro system via the Washington Metropolitan Transit Authority. Additionally, authority financings may be made and programs administered in a way that allows allocation of risk to investors willing to assume such risk. Put another way, public authorities may provide a vehicle for financing infrastructure while limiting or eliminating exposure to a conventional municipal government.

All ideas with merit can be misused, and public authorities are no different. In Warren County, such misuse allegedly manifested through non-critical oversight of the EDA’s finances. If, as one Front Royal council member stated, “[i]t only took me about 15 minutes of research to see that there was something fishy going on,” then, at least in this instance, the problems of oversight were not necessarily structural but were instead related to the diligence of research by the bodies charged with oversight of the EDA.

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36 See CARO, supra note 4, at 1120.

37 See, e.g., In re: Financial Oversight and Management Board for Puerto Rico, 919 F.3d 121 (1st Cir. 2019) (pertaining to certain issues arising in debt adjustment proceedings related to Puerto Rico Highway and Transportation Authority revenue bonds).

38 See Rosenbloom, supra note 6, at 853 (“Today, thousands of public authorities perform individual public functions formerly performed by state and local governments. Their operation translates into billions of tax dollars each year, as the majority of principal and interest on public authority debt is paid from the state general funds through complex leases and contracts.”). However, Rosenbloom also notes that “public authorities remain a fairly unstudied matter” and argues for applying typical corporate oversight structures to public authorities. Id. at 871.


40 The Washington Area Metropolitan Transit Authority is a body corporate and politic that was created effective February 20, 1967, pursuant to the Compact and to the National Capital Transportation Act of 1960 (P.L. 86-669, now repealed) (collectively referred to with the National Capital Transportation Acts of 1965 (P.L. 89-173), 1967 (P.L. 90-220), 1969 (P.L. 91-143), 1972 (P.L. 92-349), and the National Capital Transportation Amendments Acts of 1979 (P.L. 96-184) and 1990 (P.L. 101-551), all as amended, as the “Capital Transportation Act”). The Authority is an instrumentality and agency of Maryland, Virginia, and the District of Columbia, the signatory parties to the Compact.


42 See Olivo, supra note 1 (“Skeptics asked increasingly pointed questions at public meetings, sparking warnings from Town Council members that the naysayers would blow Front Royal’s big chance.”).

43 Id.
Local Government Fellowship Recipient

First awarded in 2013, the Local Government Fellowship annually recognizes outstanding Virginia law students who will work full-time during the summer at a local government attorney’s office within the Commonwealth. The Board of Governors is delighted to announce that Haley Maddrey has been selected as this year’s Local Government Fellow. Haley is a rising 2L at Regent University Law School. She will intern with the Office of the City of Suffolk City Attorney. Haley lives in Suffolk and in her personal statement noted she has observed that the “local government in Suffolk has done an excellent job of uniting the community through cultural integration, economic growth, and providing citizens with opportunities to speak about their concerns.” She is excited to have an opportunity to provide public service to the people in her local community.

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.

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.custer@lgava.org.
Virginia State Bar Local Government Law Section  
2020 Report of Nominating Committee  
Submitted May 20, 2020

Pursuant to Article III, Section 3 of the Bylaws of the Local Government Law Section of the Virginia State Bar (VSB), Chair Rebecca Kubin appointed a Nominating Committee for the 2020 election of members and officers of the Board of Governors. The Nominating Committee consists of Jan L. Proctor, Chair, Vandeventer Black; Kathleen Dooley, Fredericksburg City Attorney; Eric Gregory, Hefty, Wiley & Gore, PC; Wahaj Memon, Senior Assistant County Attorney for Loudoun County; and Larry Spencer, Blacksburg Town Attorney.

Members of the Board of Governors:

All members of the Nominating Committee conferred by conference call on May 14, 2020, assisted by Mallory Ralston, VSB Liaison. There are four positions open on the Board of Governors. Members Paul Mahoney and Andrew Painter were not able to serve a second term. Two members, MinChau Corr and Brian Lubkeman, were originally elected in September 2018 by the Board to fill vacancies created by the resignations of Dawn Figueiras and Ken Golski until the next election, and in June of 2019, they were elected by the membership to complete these terms. Ms. Corr and Mr. Lubkeman are eligible to be elected for a first full term.

Thus, the Committee considered four candidates for three-year terms on the Board of Governors and unanimously agreed to the following recommendations:

Recommended for First Full Terms:
MinChau Corr, Deputy County Attorney for Arlington County
Brian Lubkeman, BrigliaHundley, PC

Recommended for First Terms:
Mike Lockaby, Guynn, Waddell, Carroll & Lockaby, PC
Wade Anderson, Sands Anderson, PC

Each of these candidates expressed interest in serving or continuing to serve on the Board of Governors. Ms. Corr and Mr. Lubkeman have already demonstrated a strong commitment to the goals and objectives of the Local Government Law Section through their service on the Board of Governors since 2018. Mr. Lockaby and Mr. Anderson have extensive experience in local government law and are highly respected by their communities and colleagues.

Officers:

The Nominating Committee is also tasked with recommending candidates for the offices of Chair, Vice Chair, and Secretary. Currently, Rebecca Kubin serves as Chair, Bernadette Peele serves as Vice Chair, and Cynthia Bailey serves as Secretary. Upon consideration of their experience and contributions, the Committee makes the following recommendations:

Chair – Bernadette Peele, Deputy County Attorney for Prince William County
Vice Chair – Cynthia Bailey, Deputy County Attorney for Fairfax County
Secretary – J. Vaden Hunt, Pittsylvania County Attorney

Ms. Kubin will serve as Immediate Past Chair, and Ms. Proctor will complete her service on the Board.
Elections:
Due to the cancellation of the Virginia State Bar Annual Meeting, the Local Government Law Section will be electing their 2020-2021 officers and board members by electronic vote as opposed to in-person at the Annual Meeting. An electronic poll will be sent to all members on June 1 and will be held open until June 5. As the Bylaws provide that nominations of officers and Board members may be made from the floor at the Annual Meeting, the poll will provide an opportunity for nominations to be made. If any nominations different from that proposed by the nominations committee are received, a new poll will be submitted with the additional name(s).

Respectfully Submitted,
Jan L. Proctor
Kathleen Dooley
Eric Gregory
Wahaj Memon
Larry Spencer
STATEMENTS OR EXPRESSIONS OR OPINIONS APPEARING
HEREIN ARE THOSE OF THE AUTHORS AND NOT
NECESSARILY THOSE OF THE STATE BAR OR SECTION