

# 28

## BLIGHT AND NUISANCE

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### 28-1 INTRODUCTION

At the crux of every instance of blight or nuisance is an unreasonable use or condition occurring on property. Deteriorating tracts of real property and improvements, whether constituting nuisances as defined by common law, or blight as defined by statute, pose significant challenges to communities and local governments. Most localities, urban and rural, struggle to balance the need for government intervention for protection of public health and safety with significant budgetary and operational limitations. The purpose of this chapter is to provide local government attorneys with an overview of the tools available to assist with abatement of blight and nuisance conditions.

### 28-2 NUISANCES

#### 28-2.01 Generally

Land use regulations reflect the maxim that each individual may use his property only in a manner that will not injure or interfere with others—*sic utere tuo ut alienum non laedas*. The question of whether a particular situation constitutes a nuisance almost always depends on its particular facts and circumstances and its impact upon persons and property. “The [court] decisions establish that the term nuisance, in legal parlance, extends to everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property.” *Turner v. Caplan*, 268 Va. 122, 596 S.E.2d 525 (2004) (quoting *Bragg v. Ives*, 149 Va. 482, 140 S.E. 656 (1927)); *see also Ritholz v. Commonwealth*, 184 Va. 339, 35 S.E.2d 210 (1945) (a nuisance is an act, omission, or use of property that is hurtful to health, tranquility, or morals, or outrages the decency of the community).

Nuisances may be either private or public. Private nuisances are anything done to the hurt of the lands, tenements, or hereditaments of another. *City of Va. Beach v. Murphy*, 239 Va. 353, 389 S.E.2d 462 (1990). Public nuisances affect people, and a community, more generally. Localities may, through the exercise of their police powers, regulate and prohibit conduct and activities that generate nuisance impacts. If a local ordinance makes criminal any conduct that is a public nuisance, that ordinance is a presumptively valid exercise of the locality’s police power. *Id.* On the other hand, if the conduct prohibited by a local ordinance is merely a private nuisance, then it cannot be made criminal. A municipality has no authority under its police power to punish conduct which is a private nuisance. *Id.*

#### 28-2.01(a) Private Nuisances

A private nuisance is an activity that unreasonably interferes with the use and enjoyment of another’s property. *City of Newport News v. Hertzler*, 216 Va. 587, 221 S.E.2d 146

(1976). In other words, a private nuisance is one that implicates or interferes with a right or interest that is unique to an individual, such as an interest in land. *City of Va. Beach v. Murphy*, 239 Va. 353, 389 S.E.2d 462 (1990). In *Patterson v. Gardner*, No. CL22010435-00 (Norfolk Cir. Ct. Nov. 21, 2023), the Norfolk Circuit Court held that a landowner's erection of a fence that blocks a neighbor's view of a body of water did not constitute a private nuisance.

Local government attorneys are often confronted with circumstances in which their governing bodies are pressed to take action in relation to businesses or other activities that are lawful, in accordance with zoning or other regulations, but that are operated in a manner that becomes offensive to adjacent property owners. Such conduct may not amount to a public nuisance actionable by the locality, but adjacent property owners may have grounds to maintain a private nuisance action against the person responsible for the offense. So, for example, it has been held that a business, although lawfully situated within an appropriate zoning district classification or industrial area within a locality, will not be shielded from a private nuisance action if it causes annoyance to nearby property owners. *Bowers v. Westvaco Corp.*, 244 Va. 139, 419 S.E.2d 661 (1992); *Nat'l Energy Corp. v. O'Quinn*, 223 Va. 83, 286 S.E.2d 181 (1982); see also *Bragg v. Ives*, 149 Va. 482, 140 S.E. 656 (1927) (the establishment of an undertaking business within a residential neighborhood was a nuisance to those immediately affected by it). Similarly, although state law allows a landowner to conduct prescribed burning activities, and protects that landowner from nuisance suits arising from such activity, if the landowner then negligently or improperly conducts the prescribed burn, he may be liable to adjacent property owners for creating a nuisance. See Va. Code § 10.1-1150.5.

### 28-2.01(b) Public Nuisances

Whether the annoyance or offensive conduct generates impacts that can be abated by the local government as a public nuisance will depend on whether the injurious behavior affects a right or property interest in which the community at large shares a common interest, or whether the adverse impact of the activity is so great and extensive as to constitute a public annoyance or inconvenience.

A public nuisance may arise when an offensive or unreasonable use of land is committed in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community, which may be properly the subject of a public prosecution. *City of Va. Beach v. Murphy*, 239 Va. 353, 389 S.E.2d 462 (1990).

In addition to the foregoing, a public nuisance may arise as a result of an activity that hinders or obstructs the ability of members of a community to enjoy common rights and privileges. In English law, a public nuisance was any act or omission that obstructs, inconveniences, or diminishes the public's ability to exercise rights common to "all Her Majesty's subjects." *Tull v. United States*, 481 U.S. 412, 107 S. Ct. 1831 (1987). Virginia law reflects this same notion that there exists a governmental interest in the protection of rights "common to every person in the community." *City of Va. Beach v. Murphy*, 239 Va. 353, 389 S.E.2d 462 (1990).

In 2022, a federal district court in West Virginia entered judgment against several West Virginia localities in their action against several of the nation's largest prescription opioid distributors, in which the localities had argued that the distributors' actions in shipping suspiciously large quantities of opioids to individual pharmacies within their communities constituted a public nuisance. *City of Huntington v. Amerisourcebergen Drug Corp.*, Nos. 3:17-cv-01362 and 3:17-cv-01665 (S.D. W.Va. July 4, 2022). The localities appealed the decision to the Fourth Circuit, arguing that courts in twenty-four states have held that public nuisance law reaches the distribution and sale of opioids, grounding their holdings in the traditional scope and definition of "public nuisance." The Fourth Circuit

certified the questions to the West Virginia Supreme Court of Appeals. *City of Huntington v. AmerisourceBergen Drug Corporation*, Nos. 22-1819 and 22-1822 (4th Cir. Mar. 18, 2024) (certification contains a discussion of the issues). Additionally, the localities' briefs, and the cases cited therein, offer insight as to how the law of public nuisance may be applied by a local government to address problems for which its community may have no other means of legal redress.

### 28-2.02 Legislatively-Recognized Public Nuisances

Within the Code of Virginia, a local government attorney can find numerous statutory provisions identifying, defining, or otherwise referring to categories of “nuisance” or “public nuisance,” that localities are specifically authorized to regulate, prohibit, or abate through various means. Following below is a list of nuisances, or nuisance conditions, referenced within specific statutory provisions, organized into various categories.

Local government attorneys should note, when reviewing the Virginia Code provisions referenced within this section, and within other sections of this chapter, that:

1. some statutory authority is “self-executing,” meaning that the referenced abatement procedures may be utilized without the necessity of adopting a local ordinance; if a particular Code provision authorizes a locality to act “by ordinance,” then the provision is not self-executing, and a local ordinance will be required before action may be taken;
2. in some Code sections, powers are conferred on any “locality,”<sup>1</sup> which means that any county, city, or town may act; in other sections, a “municipality” is the entity authorized to take action.<sup>2</sup> Where only a municipality is referenced, a city or town may exercise the powers referenced in that Code section, but not a county. Occasionally, a statute will simply refer to a county, or to a city; in those instances, towns cannot utilize the referenced authority; and
3. unless otherwise expressly stated, remedies authorized by these Code sections are not exclusive—they are to be regarded as being available in addition to any other legal remedies that may apply.

#### 28-2.02(a) Dangerous, Unhealthy, and Unsafe Substances and Structures

##### 28-2.02(a)(1) Dangerous, Offensive, or Unhealthy Substances

Va. Code § 15.2-900—any locality may maintain a legal action to compel a responsible party to abate or remove dangerous or unhealthy substances that have escaped, spilled, been released, or been allowed to accumulate in or on any place. Examples of substances that might create this type of condition include accumulations of raw sewage, hazardous waste and chemicals spills, contamination of public water sources, etc.

Va. Code § 15.2-901(A)(1)—any locality may, by ordinance, require property owners to remove trash, garbage, refuse, litter, clutter (e.g., mechanical equipment, household furniture, containers, and similar items), except on land zoned or used for active farming operation, and other substances that might endanger the health or safety of residents of the locality.

<sup>1</sup> “Locality” is defined as “a county, city, or town, as the context may require.” Va. Code § 1-221.

<sup>2</sup> The terms “municipality,” “incorporated communities,” “municipal corporation,” and similar terms “mean cities and towns.” Va. Code § 1-224.

Va. Code § 15.2-1115—a municipal corporation may administratively compel the covering or removal of offensive, unwholesome, unsanitary, or unhealthy substances that have been allowed to accumulate in or on any place or premises.

### **28-2.02(a)(2) Unsafe Buildings and Structures**

Va. Code § 15.2-900—any locality may maintain a legal action to compel a responsible party to abate, raze, or remove any unsafe, dangerous, or unsanitary public or private building, wall, or structure that constitutes a menace to the health and safety of the occupants thereof or the public.

Va. Code § 15.2-906—any locality may, by ordinance, require property owners to remove, repair, or secure any building, wall, or other structure that might endanger the public health or safety of other residents of the locality. See *also* sections [28-4.01\(a\)](#) and [28-4.01\(b\)](#) (abatement by officials enforcing the Building Code).

Va. Code § 15.2-907.1—any locality that has a real estate tax abatement program may, by ordinance, require property owners to submit a plan for the demolition or renovation of a building that has been declared a derelict building. For the purposes of this statute, the term “derelict building” is defined to mean:

A residential or nonresidential building or structure, whether or not construction has been completed, that might endanger the public’s health, safety or welfare and for a continuous period in excess of six months, it has been (i) vacant; (ii) boarded up in accordance with the building code; and (iii) not lawfully connected to electric service from a utility service provider or not lawfully connected to any required water or sewer service from a utility service provider.<sup>3</sup>

After notice, the owner has ninety days to submit the demolition or renovation plan; thereafter, the locality may exercise such remedies as provided by law, including, for residential property, assessment of a civil penalty of up to \$500 per month (not to exceed the cost to demolish the derelict building) until the owner submits the plan. Va. Code § 15.2-907.1(3).

Va. Code § 15.2-1115—a municipal corporation may administratively compel the razing or repair of all unsafe, dangerous, or unsanitary public or private buildings, walls, or structures that constitute a menace to the health and safety of the occupants thereof, or the public. See *also* sections [28-4.01\(a\)](#); [28-4.01\(b\)](#) (abatement by officials enforcing the Building Code).

Va. USBC<sup>4</sup> Part I, § 118, and Part III, §§ 104.5.4, 105.4, 105.9—a local building official, or local maintenance/code official, is authorized to take action to abate certain building conditions presented by unsafe buildings or structures that present an imminent and immediate threat to the public, or to the occupants of a particular building. After making emergency repairs, or undertaking an emergency demolition, the building official may request the local government attorney to initiate legal action to recover the costs of the emergency abatement, pursuant to Va. Code §§ 15.2-906 and 15.2-1115. It should be noted that a locality may employ the provisions of Va. Code §§ 15.2-906 and 15.2-1115

<sup>3</sup> Note: the Virginia Removal or Rehabilitation of Derelict Structures Fund provides matching grants of up to \$1 million to local governments for acquisition, demolition, removal, rehabilitation, or repair of specific derelict structures. Va. Code § 36-152 et seq. One-half of all funds received must be used within a housing revitalization zone designated by the Governor (limit two zones per locality). See Va. Code § 36-157 et seq. and section [28-5.02](#).

<sup>4</sup> “USBC” refers to the Uniform Statewide Building Code (13 VAC 5-63-10 et seq.); see section [28-4](#). See *also* [Chapter 22, Administrative Inspections & The Virginia Maintenance Code](#).

regardless of whether it has elected to enforce the USBC’s property maintenance provisions; however, in those localities that have elected such enforcement, the above-referenced USBC provisions authorize local maintenance officials to initiate action under Va. Code §§ 15.2-906 and 15.2-1115, without prior approval of other local officials.<sup>5</sup>

Va. Code § 36-49.1:1—any locality may acquire or repair any “blighted property,”<sup>6</sup> and may recover the costs of repair or disposition of the property, in accordance with the spot blight abatement procedures. Within this statute, the state offers each locality an alternative procedure, i.e., adoption of an ordinance declaring a property to be a public nuisance, and abatement pursuant to Va. Code §§ 15.2-900 or 15.2-1115.

**28-2.02(b) Property Maintenance; Nuisance Conditions affecting Public Rights of Way**  
**28-2.02(b)(1) Grass, Weeds, and Other “Foreign Growth”**

Va. Code § 15.2-901(A)(3)—any locality<sup>7</sup> may, by ordinance, require owners of property, whether occupied or vacant, and whether developed or undeveloped, to cut the grass, weeds, running bamboo, and other foreign growth on such property. For rural communities having a population density of less than 500 people per square mile, this authority can only be applied within the boundaries of platted subdivisions or other areas zoned for residential, business, commercial, or industrial use. Notably, this authority is not applicable to land zoned for agricultural use, or to land in active farming operation.<sup>8</sup>

Va. Code § 15.2-901.1—any locality may by ordinance provide for the control of running bamboo.

Va. Code § 15.2-902—any locality may, by ordinance, declare musk thistle or curled thistle to be a public nuisance, and may enact measures to control its growth and require its destruction. Localities may also, by adoption of an ordinance, prevent, control, and abate the growth, importation, spread, and contamination of lands by Johnson grass or multiflora rose.

Va. Code § 15.2-1115—a municipal corporation may administratively compel the removal of weeds from any public or private property.

Va. Code § 15.2-1215—any county may, by ordinance, require that the owner of occupied residential property must cut the grass or lawn area (of less than one-half acre) whenever such grass or lawn exceeds twelve inches in height. Consistent with the provisions of Va. Code § 15.2-901, this authority does not apply to land zoned for or in active farming operation.

**28-2.02(b)(2) Inoperable Motor Vehicles**

Va. Code § 15.2-904(B) (applicable to any locality) or § 15.2-905(B) (applicable only to certain specified localities)—a locality may, by ordinance, require certain property owners to remove inoperable motor vehicles, trailers, or semitrailers that are not kept within a

<sup>5</sup> For a more detailed discussion of a locality’s option to elect enforcement of the Property Maintenance provisions of the USBC, see Chapter 22, section 22-3.05(b), and sections 28-4.01(a) and 28-4.01(b).

<sup>6</sup> Pursuant to Va. Code § 36-3, “blighted property” means any individual commercial, industrial, or residential structure or improvement that endangers the public’s health, safety, or welfare because the structure or improvement upon the property is dilapidated, deteriorated, or violates minimum health and safety standards.

<sup>7</sup> Prior to July 1, 2014, the authority conferred within this Code section applied only to certain named counties.

<sup>8</sup> For a discussion of other laws protecting farming operations against public and private nuisance actions, see section 28-3.07.

fully enclosed building or structure. For further discussion of these Code provisions, see section [28-3.04\(b\)\(3\)](#).

**28-2.02(b)(3) Junkyards**

Va. Code § 33.2-804(F)—any junkyard that came into existence after April 4, 1968, and that cannot be made to conform to the current provisions of Va. Code § 33.2-804, has been declared a public and private nuisance that may be removed, obliterated, or abated by the State Highway Commissioner or his representatives. The Commissioner may collect the cost of “removal, obliteration or abatement” from the person owning or operating the junkyard.

**28-2.02(b)(4) Graffiti**

Va. Code § 15.2-908—any locality may, by ordinance, require property owners to remove or repair the defacement of any private building, wall, fence, or other structure where such defacement is visible from any public right-of-way. For the purposes of this statute, the term “defacement” means the unauthorized application by any means of any writing, painting, drawing, etching, scratching, or marking of an inscription, word, mark, figure, or design of any type.

**28-2.02(b)(5) Snow Accumulation on Sidewalks**

Va. Code § 15.2-1115—a municipal corporation may administratively compel the removal of snow from sidewalks.

**28-2.02(b)(6) Unsafe Street Shoulders**

Va. Code § 15.2-1115—a municipal corporation may administratively compel the filling in, to the street level, and may compel the fencing or protection by other means, of the portion of any lot adjacent to a street on which there exists a difference in level between the lot and the street that constitutes a danger to life and limb. For a discussion of circumstances under which a municipality may be held responsible for public nuisances located on property adjacent to a public right-of-way, see *Taylor v. City of Charlottesville*, 240 Va. 367, 397 S.E.2d 832 (1990), discussed in section [28-3.08](#).

**28-2.02(b)(7) Grounds Holding Stagnant Water**

Va. Code § 15.2-1115—a municipal corporation may administratively compel the raising or draining of grounds subject to being covered by stagnant water.

**28-2.02(b)(8) Use of Public Property without Consent**

Va. Code §§ 15.2-2018 and 15.2-2107—use or occupancy of public property by any person or corporation (except a public service corporation), without the consent of the public body that owns it, is deemed a nuisance, and is subject to a criminal penalty. Any court conducting the trial of a criminal prosecution under this section may cause the nuisance to be abated, and may incarcerate the offenders and their employees and agents until the court’s order is obeyed.

**28-2.02(b)(9) Obstruction of Watercourses**

Va. Code § 29.1-532—any dam or other object in a watercourse, which obstructs navigation or the passage of fish, is a nuisance, unless it is used to work a mill, factory, or other machine or engine useful to the public, and is allowed by law or order of court.

**28-2.02(b)(10) Marine Vessels and Wharfs**

Va. Code § 15.2-909—any locality may, by ordinance, require a property owner to remove, repair, or secure (i) any vessel that has been abandoned, or (ii) any wharf, pier, piling, bulkhead, or other structure or vessel that might endanger the public health or safety or other persons, or that might constitute an obstruction or hazard to the lawful use of waters within or adjacent to that locality.

**28-2.02(b)(11) Right-of-way and Highway Signs**

Va. Code §§ 33.2-1224 and 33.2-1227—the legislature has declared that signs or advertisements placed within the limits of the state’s public right-of-way constitute a public nuisance that may be removed, obliterated, or abated by the Commissioner of Highways, without notice. The Commissioner may enter into agreements with a locality, authorizing the locality to act as its agent. See Va. Code § 33.2-1224. If the Commissioner collects civil penalties, they must be placed into the Highway Maintenance and Operating Fund; however, any agreement between the Commissioner and a locality may specify how the various penalties and costs collected pursuant to the agreement will be paid.

Va. Code § 33.2-1227—it has also been declared by state statute that any sign, advertisement, or advertising structure that is erected, used, or maintained without a required state permit constitutes a public and private nuisance that may be removed by the Commissioner of Highways.

**28-2.02(b)(12) Commercial Advertisements**

Va. Code § 57-2.1—any commercial advertisement that discourages any person(s) from utilizing lodgings (inns, hotels, etc.) on the basis of a person’s religion has been declared by the legislature to be a public nuisance subject to abatement by injunctive relief.

**28-2.02(c) Outdoor Advertising (Billboards)**

Va. Code § 33.2-1200 et seq.—The Outdoor Advertising in Sight of Public Highways Act governs the regulation of outdoor advertising along public highways in Virginia. See 1983-1984 Op. Va. Att’y Gen. 190. Any sign, advertisement, or advertising structure that violates the Act constitutes a public and private nuisance and may be abated by the Commissioner of Highways or his representatives.<sup>9</sup> The Commissioner may collect the cost of such abatement from the person erecting, using, maintaining, operating, posting, or displaying such sign, advertisement, or advertising structure. Va. Code § 33.2-1227.

Whenever any local ordinance that is more restrictive than state law requires the removal of nonconforming signs, advertisements, or advertising structures, the local governing body is required to initiate such removal with the Commissioner, who has complete authority to administer the removal. Upon proof of payment presented by the Commissioner, the local governing body must reimburse the Commissioner for state funds expended for removal, less any federal funds received for such purposes. If a locality does not want to utilize this process, it may itself take action to remove any structures that are nonconforming solely as a result of local ordinances, but the locality will then be responsible for all costs of removal, and for payment of just compensation to the owner. Va. Code § 33.2-1217(F).

Signs containing advertisements or notices that have been authorized by a county and that are located on public park property or school property that is owned by that

<sup>9</sup> The Act prohibits local officers, boards, commissions, and agencies from permitting any sign, advertisement, or advertising structure prohibited by the Act, and specifies that the Commissioner of Highways will not permit any sign, advertisement, or advertising structure that is prohibited by another public officer, board, or agency in the lawful exercise of its powers. Va. Code § 33.2-1226. Also note: Outdoor advertising of alcoholic beverages is separately governed by Va. Code § 4.1-112.2, which restricts such advertising within 500 feet of (i) a place of worship; (ii) a school; (iii) a playground or similar recreational facility; or (iv) a residential dwelling. See Va. Code § 4.1-320(D) regarding violations of this section. Similarly, outdoor advertising of marijuana and marijuana products is separately governed by Va. Code § 4.1-1402, which restricts such advertising within 500 feet of (i) a place of worship; (ii) a school; (iii) a playground or similar recreational facility; (iv) a substance use disorder treatment center; or (v) a residential dwelling. See Va. Code § 4.1-1116(C) regarding violations of this section.



county are exempt from the Act provided that the signs are not visible from National Highway System roads. Va. Code § 33.2-1204(20).

### **28-2.02(d) Illegal, Indecent, or Immoral Activities**

#### **28-2.02(d)(1) Buildings Harboring Illegal Activities (“Criminal Blight”)**

Va. Code § 15.2-907—any locality may, by ordinance, require a property owner to undertake corrective action to abate any drug or other criminal blight. For purposes of this statute, the term “criminal blight” is defined to mean:

a condition existing on real property that endangers the public health or safety of residents of a locality and is caused by (i) the regular presence on the property of persons in possession or under the influence of controlled substances; (ii) the regular use of the property for the purpose of illegally possessing, manufacturing, or distributing controlled substances; (iii) the regular use of the property for the purpose of engaging in commercial sex acts; or (iv) the discharge of a firearm that would constitute a criminal act under Article 4 (§ 18.2-279 et seq.) of Chapter 7 of Title 18.2 or a substantially similar local ordinance if a criminal charge were to be filed against the individual perpetrator of such criminal activity.

#### **28-2.02(d)(2) Buildings Harboring a Bawdy Place**

Va. Code § 15.2-908.1—any locality may, by ordinance, require a property owner to undertake corrective action to abate a “bawdy place.” For the purpose of this statute, the term “bawdy place” has the same meaning as set forth within Va. Code § 18.2-347, i.e., any place, within or outside a building or structure, used for “lewdness, assignation or prostitution.”

#### **28-2.02(d)(3) Use of Property for Lewdness, Assignation, Prostitution, or Activities of a Criminal Street Gang**

Va. Code § 48-7—any person who uses any building, “erection,” place or area for the purpose of lewdness, assignation, prostitution, or activities of a criminal street gang, is guilty of a nuisance. Additionally, any such place or area that is being used for those activities, together with all contents thereof (furniture, fixtures, musical instruments, etc.), are declared to be a nuisance.

### **28-2.02(e) Premises Where Alcohol Is Illegally Made, Used, or Sold**

Va. Code § 4.1-317—all houses, boathouses, buildings, club or fraternity or lodge rooms, boats, cars, and places of every description where alcoholic beverages are manufactured, stored, sold, dispensed, given away, or used contrary to law, by any scheme or device whatever, are common nuisances.<sup>10</sup>

### **28-2.02(f) Dangerous Uses and Activities**

#### **28-2.02(f)(1) —Regulation by Municipal Corporations of Certain Activities**

Certain activities create a higher risk of harm or danger within densely populated communities than they do in other areas. Municipal corporations are given broad authority not only to abate or regulate, but to prohibit in the first instance, certain activities that endanger the life or health of individuals residing within the municipality. Pursuant to Va. Code § 15.2-1113, a municipal corporation, if it so chooses, may entirely prohibit any of the following:

<sup>10</sup> It should be also noted that the Alcoholic Beverage Control Authority’s exclusive authority to regulate the sale of alcoholic beverages does not preclude a locality from using its zoning ordinance to regulate the location of an establishment selling alcoholic beverages. *Cnty. of Chesterfield v. Windy Hill Ltd.*, 263 Va. 197, 559 S.E.2d 627 (2002) (citing *City of Norfolk v. Tiny House, Inc.*, 222 Va. 414, 281 S.E.2d 836 (1981)).



- dangerous, offensive, or unhealthful business, trade, or employment;
- transportation of any offensive substance;
- manufacture, storage, transportation, possession, and use of any explosive or inflammable substance; or
- use or exhibition of fireworks.

A municipal corporation may also, by ordinance, prohibit hunting with firearms or other weapons in or within one-half mile of any subdivision, or any other area of the municipality that is so heavily populated as to make hunting dangerous to the inhabitants. Va. Code § 15.2-1113.1.

### **28-2.02(f)(2) Use or Transportation of Firearms**

In Virginia, local authority to regulate the use and possession of firearms is limited. Pursuant to Va. Code § 15.2-915, no locality may adopt or enforce any local ordinance, resolution, or motion, or take any administrative action that governs the purchase, possession, transfer, ownership, carrying, storage, or transporting of firearms, except with express statutory authorization. In addition, no school board may authorize or designate any person to possess a firearm on school property other than those persons expressly authorized by statute. Va. Code § 22.1-280.2:4. However, in 2020, localities were granted authority to prohibit, by ordinance, the possession or carrying of firearms or ammunition in any building owned or used by the locality for government purposes, any public park owned by the locality, any recreation or community center, and any public street, sidewalk, right-of-way, or “any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit.” Va. Code § 15.2-915(E).

In addition, certain localities have been granted express statutory authority to regulate or prohibit related activities that they may deem unacceptably hazardous within their own communities:

Va. Code § 15.2-915.2—Transportation of loaded guns. Any county or city may, by ordinance, prohibit the transportation, possession, or carrying of a loaded shotgun or loaded rifle in any vehicle on any public street, road, or highway within such locality. No such ordinance becomes enforceable unless the locality notifies the Director of the Department of Wildlife Resources by registered mail prior to May 1 of the year in which the ordinance is to take effect.

Va. Code § 15.2-915.4—Use of pneumatic guns. Any locality may, by ordinance, prohibit the shooting of pneumatic guns in any areas that are, in the opinion of the governing body, so heavily populated as to make such conduct dangerous to its inhabitants; however, the ordinance may not prohibit the use of pneumatic guns at facilities approved for shooting ranges, other property on which firearms may lawfully be discharged, or on private property, if used with reasonable care to prevent a projectile from crossing the bounds of the property.

Va. Code § 15.2-1113.1—Discharge of firearms within municipality’s limits. A municipality may prohibit the discharge of firearms. However, this authority is subject to a mandatory exemption applicable to land of at least five acres, which is zoned for agricultural use, to allow for the killing of deer pursuant to Va. Code § 29.1-529.

### **28-2.02(f)(3) Dump Creating Fire Hazard**

Va. Code § 33.2-803—It is unlawful for any person to establish or maintain a public or private dump containing flammable articles, within 500 feet of a public bridge constructed of wood, so as to create a fire hazard. In addition to a criminal penalty, a locality may

initiate action to enjoin this dangerous condition, in the same manner as provided for the abatement of public nuisances. See, e.g., Va. Code § 15.2-900.

#### **28-2.02(f)(4) Animals**

Va. Code §§ 3.2-6540, 3.2-6540.01-6540.04, 3.2-6541.1, 3.2-6542, 3.2-6542.1, 3.2-6542.2, 3.2-6543.1, 3.2-6562.2, and 18.2-52.2—*Dangerous dogs*. The statute regarding dangerous dogs was significantly amended in 2021. The amended provisions provide a process for determining whether a dog is dangerous, the establishment of a dangerous dog registry, new requirements regarding the housing and care of dangerous dogs, and more.

Any law-enforcement or animal control officer<sup>11</sup> may apply for the issuance of a summons regarding a suspected dangerous dog, with written notice to the owner that the summons has been requested, and that the owner may not dispose of the dog for thirty days other than by surrender to the animal control officer or by euthanasia by a licensed veterinarian. Va. Code § 3.2-6540(D). A hearing must be held within thirty days unless good cause is shown. The officer may confine the dog pending the hearing, unless he determines that the owner can do so in a manner that protects the public safety. Va. Code § 3.2-6540(F). If the summons is issued, the owner may not dispose of the animal, other than by euthanasia, before the hearing. *Id.* The court may order the implanting of electronic identification. *Id.* The procedures provided for misdemeanors apply to the trial and appeal, and the Commonwealth must prove its case beyond a reasonable doubt. Va. Code § 3.2-6540(H).

The court shall find that the animal is a dangerous dog if the evidence shows that it:

- (i) killed a companion animal that is a dog or cat or inflicted serious injury on a companion animal that is a dog or cat, including a serious impairment of health or bodily function that requires significant medical attention, a serious disfigurement, any injury that has a reasonable potential to cause death, or any injury other than a sprain or strain or (ii) directly caused serious injury to a person, including laceration, broken bone, or substantial puncture of skin by teeth.

Va. Code § 3.2-6540(H). The court may order the owner to pay restitution for damages to any person injured by the dog or whose companion animal was injured or killed, as well as reasonable expenses incurred in caring and providing for the dangerous dog if taken into custody. Va. Code § 3.2-6540(I). The injured person may also pursue additional civil remedies. *Id.*

If the dog is deemed dangerous, it will be registered as such and the owner will be provided with a “dangerous dog” tag that must be added to the dog’s collar and worn at all times. Va. Code § 3.2-6540.01(A). Within thirty days, the owner must post “clearly visible signs” where the animal is housed at all points of entry to the home and yard warning of the presence of a dangerous dog, have the animal neutered or spayed and implanted with electronic identification, provide evidence of liability insurance coverage (or an equivalent bond in surety) of at least \$100,000, pay a \$150 fee to the local governing body, and complete a dangerous dog registration certificate. Va. Code § 3.2-6540.01(B). The dog must be kept inside the owner’s residence, confined inside a locked enclosure with sufficient height and design to prevent escape, or, if outdoors and not confined in such a locked enclosure, controlled by a leash and muzzle. Va. Code § 3.2-6540.01(C), (D). The owner must notify the animal control officer of any change of contact

<sup>11</sup> The officer must be located in the jurisdiction where the dog resides or in the jurisdiction where the dog committed the prohibited act. Va. Code § 3.2-6540.1(B).

information of the owner or location of the dog, transfer of ownership of the dog, any complaint of an attack upon a person, cat, or dog, and the escape or death of the dog. Va. Code § 3.2-6540.01(E).

Note, however, that no dog may be deemed dangerous solely because of its breed, Va. Code § 3.2-6540(K), and a locality may not prohibit ownership of a particular breed of dog, Va. Code § 3.2-6541.1. A police dog engaged in the performance of its duties at the time of the alleged injury cannot be deemed a dangerous dog. Va. Code § 3.2-6540(K).

If a dog previously deemed dangerous is accused of a subsequent injury or an owner of a dog deemed dangerous is charged with a violation of its obligations arising out of such determination, animal control shall confine the dog until after a hearing and verdict is rendered pursuant to § 3.2-6540. Va. Code § 3.2-6540.03(A). If convicted, the court may order the disposal of the dog, or grant the owner up to thirty days to comply with various requirements, during which time the dog shall remain in the custody of animal control. Va. Code § 3.2-6540.03(B). If the owner fails to comply with those requirements within the time specified by the court, the court shall order the dog to be disposed. *Id.* The court may prohibit the owner from owning or residing on the property with a dog in the future. Va. Code § 3.2-6540.03(C).

Any locality may enact a dangerous dog ordinance parallel to the state law. Va. Code § 3.2-6543.1. *See also* Va. Code §§ 3.2-6542 (establishment of the Virginia Dangerous Dog Registry); 3.2-6542.2 (use of funds collected through registry); 3.2-6562.2 (rabies exposure reporting); and 18.2-52.2 (enhanced criminal penalties for owner's disregard for human life).

Va. Code § 3.2-6522—Rabid animals. When a locality believes that the risk of exposure to rabies is elevated, it may enact an emergency ordinance requiring owners of all dogs and cats to keep their animals confined on their premises, or on a leash. The ordinance may be operative for at least thirty days, but may be renewed by the locality in consultation with the local health director. This Code section also sets forth the manner in which individual actual or suspected cases of rabies should be handled by local officials.

Va. Code §§ 3.2-6538 and 15.2-1218—Animals running at large. Any locality may prohibit the running at large of dogs, except hunting dogs, and may provide for a civil penalty of up to \$100 per dog for dogs running at large in a pack. Any county may prevent animals from running at large upon the public highways, whether or not the highways are enclosed by a fence. Va. Code § 15.2-1218.

### **28-2.02(f)(5) Drones**

Va. Code § 15.2-926.3—Certain aircraft. Political subdivisions may not regulate the use of privately owned drones except that they may regulate, by ordinance or regulation, the take-off and landing of drones on property owned by the political subdivision.<sup>12</sup> The ordinance or regulation must be consistent with Department of Aviation regulations, and must be reported to the Department. Note that Title 18.2 classifies some drone-related activities as a Class 1 misdemeanor. Va. Code § 18.2-121.3 (Trespass with an unmanned aircraft system); § 18.2-130.1 (Peeping or spying into dwelling or occupied building by electronic device or unmanned aircraft system).

<sup>12</sup> The Attorney General has opined that a locality may not adopt zoning regulations that prohibit the takeoff and landing of privately-owned drones on private property, nor subject the activity to conditional or special use permit requirements. 2023 Op. Va. Att'y Gen. S-5.

**28-2.02(g) Noise****28-2.02(g)(1) Air Cannons**

Va. Code § 15.2-918—Any locality may, by ordinance, prohibit (or regulate) the use within its jurisdiction of certain devices, including air cannons, carbide cannons, or other loud explosive devices that are designed to produce high intensity sound percussions for the purpose of repelling birds.

**28-2.02(g)(2) Noise from a Sport Shooting Range**

Va. Code § 15.2-917—Localities are expressly authorized to enact a local noise ordinance regulating the noise generated by a sport shooting range,<sup>13</sup> but may not impose standards on a shooting range that are more stringent than those in effect as of the time that the construction or operation of the sport shooting range initially was approved, or at the time of submission of any application for authorization of the construction or operation of the sport shooting range, whichever is earliest.

**28-2.02(g)(3) Noise from Motorized Vehicles**

Va. Code § 46.2-1051—Any locality may, by ordinance, regulate noise from a vehicle operated on a highway that is not equipped with a muffler and exhaust system conforming to state requirements.

**28-2.03 Noise, Generally**

The Virginia Supreme Court has stated that “the right not to be subjected to unreasonably loud, disturbing and unnecessary noise,” is “common to all members of the general public,” and not particular to individuals in the enjoyment of their property. *City of Va. Beach v. Murphy*, 239 Va. 353, 389 S.E.2d 462 (1990). Therefore, unreasonable levels of noise may be regulated by a locality within the scope of its police power authority to control public nuisances. Typically, however, a locality’s noise ordinance prescribes criminal penalties for violations. When a locality enacts a penal ordinance, Due Process considerations require that the ordinance must describe with sufficient specificity the specific conduct that is subject to the penalty. Noise ordinances present particular challenges to drafters and law enforcement officers—as courts may disagree about the level of specificity required.

Until recently, many localities’ anti-noise ordinances prohibited unreasonably loud, disturbing, and unnecessary noise, consistent with the case of *City of Virginia Beach v. Murphy*, *supra*. In the wake of the *Murphy* decision, one Virginia circuit court judge observed that he did “not believe that anti-noise statutes or ordinances must provide for scientific precision to pass constitutional muster.” *Commonwealth v. Dixon*, 50 Va. Cir. 295 (City of Bristol 1999). This observation was consistent with the U.S. Supreme Court decision in *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294 (1972), in which an ordinance prohibiting a person, while on property adjacent to a school that is in session, from making any noise that tends to disturb the peace or good order of such school session. The Supreme Court pronounced the language of the Rockford ordinance to be marked by “flexibility and reasonable breadth, rather than meticulous specificity,” and stated that “condemned to the use of words, we can never expect mathematical certainty from our language.”

Ten years after the *Murphy* decision, however, the Virginia Supreme Court, in *Tanner v. City of Virginia Beach*, 277 Va. 432, 674 S.E.2d 848 (2009), held that the language of an anti-noise ordinance, which prohibited any “unreasonably loud, disturbing and unnecessary noise,” or “any noise of such character, intensity and duration as to be detrimental to the life or health of persons of reasonable sensitivity or to disturb or annoy

<sup>13</sup> The term “sport shooting range” means an area or structure designed for the use of rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, or any other similar sport shooting. Va. Code § 15.2-917(C); see *also* section 28-2.02(f)(2) (referencing the limited extent of localities’ authority to regulate firearms).

the quiet, comfort or repose of reasonable persons,” was impermissibly vague. The Court concluded that the provisions failed to give “fair notice” to citizens as required by the Due Process Clause, because the provisions do not contain ascertainable standards.

The *Tanner* decision did not go so far as to require “scientific precision” in anti-noise statutes and ordinances, but the court made clear that some “ascertainable standards” are necessary. Reference to specific decibel levels of offending noise, and/or reference to specific decibel levels measured at a given distance, as some ordinances provide, would certainly appear to constitute “ascertainable standards.” Even this approach, however, may have some limitations, since noise determination remains an inexact science. Noise meters may have varying degrees of sensitivity across the spectrum of sound frequencies. Post-*Tanner*, Virginia localities generally appear to be taking one of two approaches in drafting or revising anti-noise ordinances: (i) use of decibel meters<sup>14</sup> and enumerated standards, such as the standards adopted by Virginia Beach shortly after *Tanner*, see [Virginia Beach City Code Ch. 23, Art. II \(§ 23-63 et seq.\)](#), and (ii) enumeration of standards prohibiting noise in specified circumstances, see, e.g., [Blacksburg Town Code Ch. 13 \(§ 13-100 et seq.\)](#).<sup>15</sup>

### 28-2.03(a) Animal Noise

The Virginia Court of Appeals has held that a locality may properly enact an ordinance declaring that any “dog or cat that . . . barks, whines, howls, or makes other annoying noises in an excessive, continuous, or untimely fashion” constitutes a public nuisance, and not just a private one. *Patterson v. City of Richmond*, 39 Va. App. 706, 576 S.E.2d 759 (2003). In *Patterson*, the appellate court upheld the conviction of a sixty-year-old legally blind woman who, at a given time, would keep five to eight dogs at her single-family residence, two of which she used as service animals (she testified that she was also a member of a Doberman rescue league, and occasionally provided safe housing for the rescue dogs). Neighbors complained of continuous barking, sometimes for hours at a time. A city animal control officer issued a summons for violation of a city ordinance that required property owners to exercise proper care and control of dogs, to prevent them from becoming a public nuisance. The city’s definition of “public nuisance” included any dog that barks in an excessive, continuous, or untimely fashion. Quoting the prior *Murphy* decision, the *Patterson* court confirmed that there exists a right, common to the public generally, not to be subjected to excessive and continuous barking, and that the evidence was sufficient to establish that Patterson was responsible for having created a public nuisance.

Potentially, localities may apply the holdings in *Murphy* and *Patterson*, recognizing a common right to be free from excessive animal noise, to noises coming from other animals, e.g., domestic or feral cats, donkeys or mules, or birds (guineas and roosters can be particularly noisy!). But the local government attorney should proceed cautiously if requested to draft an ordinance regulating noise from animals comprising part of an agricultural operation. See section [28-3.07](#).

See also 2011 Op. Va. Att’y Gen. 39 (county’s animal noise ordinance prohibiting certain continuous or repeated animal noises that are “plainly audible across a property boundary” for a certain period of time is constitutional). *But cf. Souter v. Cnty. of Warren*, No. 0120-10-4 (Va. Ct. App. Feb. 1, 2011) (unpubl.) (holding that an ordinance prohibiting certain enumerated acts, including frequent or habitual animal noises that are “plainly audible across property boundaries,” must be read together with the ordinance’s general

<sup>14</sup> See Va. Code § 19.2-270.7 (requiring law enforcement officers to use proper equipment to determine the decibel level of sound, and allowing a certificate of calibration to be admitted in court proceedings as evidence of the facts therein stated).

<sup>15</sup> For legislation authorizing the imposition of civil penalties for violations of noise ordinances, see Va. Code § 15.2-980. See also section [28-3.04](#).

prohibition against any “unreasonably loud or disturbing sound”) (citing *Tanner v. City of Va. Beach*, 277 Va. 432, 674 S.E.2d 848 (2009)).

### 28-2.04 Vagrancy and Panhandling

Many local government attorneys receive inquiries about the extent to which a locality may regulate or prohibit the manner and locations at which individuals may engage in panhandling or at which vagrants may remain for extended periods of time. Penal ordinances attempting to prohibit panhandling and vagrancy entirely within a locality are difficult to draft, and regardless of the care taken in drafting, vulnerable to legal challenges.

#### 28-2.04(a) Vagrancy

Since the U.S. Supreme Court’s decision in *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839 (1972), local ordinances criminalizing the acts of “loitering” and “vagrancy” have been regarded as legally suspect. The Court in *Papachristou* declared the provisions of a city vagrancy ordinance to be constitutionally flawed, and impermissibly vague. The local ordinance at issue in *Papachristou* declared that “Rogues and vagabonds, or dissolute persons who go about begging . . . common drunkards . . . lewd, wanton and lascivious persons . . . persons wandering or strolling around from place to place without any lawful purpose . . . shall be deemed vagrants,” and upon conviction, such persons would be subject to imprisonment, a fine, or both. It is nigh impossible to craft definitions of “vagrancy” or “loitering” that are capable of precisely defining the conduct that is offensive, or a nuisance, without also encompassing a large amount of normal activities of daily life. See also *Coleman v. City of Richmond*, 5 Va. App. 459, 364 S.E.2d 239 (1988) (declaring unconstitutional a Richmond ordinance that prohibited loitering with the intent to engage in prostitution or other lewd, lascivious, or indecent behavior).

Due to their constitutional infirmity, the anti-loitering and anti-vagrancy ordinances that remain in effect in many localities are rarely utilized. What remains to be seen in Virginia is whether a locality might, in a given set of circumstances, use its nuisance abatement authority to address concentrations of behaviors or conditions that rise to the level of nuisance. For an interesting case in which this was attempted, but was ultimately unsuccessful, see *Niazi v. Commonwealth*, No. 2283-02-2 (Va. Ct. App. Mar. 9, 2004) (unpubl.) (overturning criminal conviction of the operator of an adult assisted living facility for creating or maintaining a public nuisance, because the operator was not legally responsible for the off-premises conduct of the facility’s residents). See also section [28-3.01](#).

But see also *Manning v. Caldwell*, 930 F.3d 264 (4th Cir. 2019) (en banc), where the Fourth Circuit found unconstitutional the state’s interdiction statute that criminalizes the possession of alcohol by a person who has been judicially declared an “habitual drunkard.”

#### 28-2.04(b) Panhandling

Ordinances prohibiting charitable solicitations and/or begging in public places are also vulnerable to legal challenges on constitutional grounds. Penal ordinances prohibiting or restricting these activities are most often found in cities; however, in recent years such ordinances are being implemented more frequently in suburban areas—particularly in response to charitable solicitations and begging directed at motorists stopped at traffic intersections.

The Fourth Circuit confirmed that begging constitutes protected expression under the First Amendment. *Clatterbuck v. City of Charlottesville*, 708 F.3d 549 (4th Cir. 2013). In many localities, elected officials are frequently requested to enact legislation prohibiting begging; inevitably, however, an ordinance that might pass constitutional muster will also preclude charitable solicitations, activities that are often favored by the community (for example: a “boot drive” conducted by members of a local fire department, within the



right-of-way at a street intersection, involves conduct that is difficult to distinguish in a meaningful way from begging conducted by an individual at the same location).

In *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. 2218 (2015), the Court held a regulation is content-based if “on its face” it makes distinctions based on the message the speaker conveys. If the regulation is content-based on its face, the government’s purpose or motive for the regulation is irrelevant. The Court found that a sign ordinance treating ideological messages more favorably than political messages, which were treated more favorably than temporary event signs, was “a paradigmatic example of content based discrimination,” even though the town’s restrictions were viewpoint neutral within each of those categories.

Attempts to draw distinctions between charitable solicitations and begging, based on assumptions and impressions, will create the impression that a locality’s ordinance is not content neutral, but rather favors the message conveyed by the charitable solicitors over that of the individual beggar. Likewise, attempts to treat commercial and noncommercial speech exactly the same may create problems, if the activities aggregated into a single permit process or procedure would be scrutinized by a court under different standards.

In a pre-*Reed* decision, an ordinance that prohibited panhandling in a highway median but permitted campaign workers with signs urging drivers to vote for their candidates was reviewed under intermediate scrutiny by the Fourth Circuit and found unconstitutional. *Reynolds v. Middleton*, 779 F.3d 222 (4th Cir. 2015). Under *Reed*, however, the ordinance should have been reviewed under strict scrutiny as content-based. If an ordinance includes any content-based distinction, it must be drawn to survive strict scrutiny: it must be narrowly tailored to further a compelling governmental interest. *Cent. Radio Co. Inc. v. City of Norfolk*, 811 F.3d 625 (4th Cir. 2016). The court in *Central Radio* noted that neither it nor the Supreme Court had ever held that “aesthetics and traffic safety” are compelling governmental interests. Even if they were, a locality would have to show, quantifiably, that its exemptions from restrictions were not underinclusive or overinclusive and thus were narrowly tailored.

See fuller discussion in Chapter 19, 42 U.S.C. § 1983, section [19-6.05](#).

As mentioned in the preceding section, it is conceivable that there may exist some circumstances or conditions that rise to the level of a public nuisance, to which a locality’s nuisance abatement powers could be applied (as opposed to prosecution under a penal ordinance). On the other hand, so much of the solicitation activity objected to by residents and businesses within a community is individual in nature, and unless that activity can be associated with a specific property, it is difficult to imagine that a locality could effectively apply nuisance abatement procedures to remedy objectionable behavior of individuals (not acting as a group, in concert) in public spaces.

## 28-3 REMEDIES FOR PUBLIC NUISANCES

### 28-3.01 Criminal Proceedings—Special Grand Jury Presentment

The act of creating and maintaining a public nuisance is a common law offense of ancient origin and still constitutes an indictable [criminal] offense. *Jordan v. Commonwealth*, 36 Va. App. 270, 549 S.E.2d 621 (2001) (citing *Taylor v. Commonwealth*, 70 Va. (29 Gratt.) 780 (1878)). At common law, public nuisance “was dealt with by the machinery established for the prosecution of crime, since no other was readily available.” *Id.*

Today, however, a statutory procedure offers the mechanism by which the Commonwealth may proceed by criminal presentment against persons who create or cause a public nuisance, and against property owners who permit the continuation of a

public nuisance. Va. Code §§ 48-1 through 48-6.<sup>16</sup> Any five citizens of a county, city, or town may present a written complaint to their local circuit court, alleging the existence of a public or common nuisance. When the circuit court receives the complaint, a special grand jury must be summoned to conduct an investigation. If the special grand jury is satisfied that the condition or activity complained of is of a public nature, then it may make presentment against any person(s) it finds to have created or caused the nuisance, and/or to any property owner who has permitted the nuisance to continue on his property. A presentment may also be returned against a property, for proceedings in rem, when the property owner is not a resident or citizen of the Commonwealth, or is someone whose whereabouts are unknown.

There is no particular format required by the enabling statute, either for the original citizen complaint or for any resulting presentment; however, facts sufficient to establish a public injury must be alleged and proved. *Jeremy Improvement Co. v. Commonwealth*, 106 Va. 482, 56 S.E. 224 (1907). Also, the presentment should establish that the nuisance occurred within one year prior to the presentment. See Va. Code § 19.2-8, discussed in *Jordan v. Commonwealth*, *supra*.

Under Va. Code § 48-5, a person who is found guilty of having created, caused, or permitted the continuation of a nuisance:

- *shall* be ordered to either abate the nuisance, or to reimburse the locality for all costs of removal and abatement of the nuisance (if the locality has abated the nuisance pursuant to Va. Code 15.2-900<sup>17</sup>); and
- *may* also be fined not more than \$25,000, in addition to other remedies available under the law.

A judgment in rem can be enforced in the same manner as an attachment levied on real estate. Va. Code § 48-6.

Two decisions of the Virginia Court of Appeals illustrate the practical difficulties that may be encountered when the procedure authorized by Va. Code § 48-1 et seq. is used to impose criminal responsibility upon a person.

In *Jordan v. Commonwealth*, 36 Va. App. 270, 549 S.E.2d 621 (2001), the court reviewed the conviction of two individuals (the Jordans) who were the sole owners of an LLC that held legal title to a banquet hall. The citizen complaint alleged that events held at the hall created a public nuisance by causing noise (traffic, car stereos, pedestrians yelling in the street), illegally parked cars, and garbage and litter in the adjacent streets following events. The presentment did not allege that the Jordans themselves had created or caused the nuisance (they rented the banquet hall to individuals and organizations for events), but rather the presentment alleged that as the sole owners of the LLC, the Jordans should be held responsible for permitting the nuisance to continue. Finding that the LLC, rather than the Jordans, held actual legal title to the property, the appellate court overturned their convictions, stating that “[t]he sovereign’s effort to stop conduct that creates a public nuisance can only be effective if directed at the person with ultimate authority over the premises where the nuisance exists.”

<sup>16</sup> Virginia Code §§ 48-1 through 48-6 are discussed at length in *Jordan v. Commonwealth*, *supra*. See also *Lee v. City of Norfolk*, 281 Va. 423, 706 S.E.2d 330 (2011) (abatement of a nuisance by a public body is not a compensable taking).

<sup>17</sup> A locality may proceed under Va. Code § 15.2-900 and then obtain reimbursement from the guilty party pursuant to Va. Code § 48-5.

In *Niazi v. Commonwealth*, No. 2283-02-2 (Va. Ct. App. Mar. 9, 2004) (unpubl.), the court of appeals considered the culpability of the owner/CEO of an LLC for a public nuisance. The LLC operated an assisted living facility. Residents of the facility frequently left the facility and, in the adjacent neighborhood, engaged in conduct such as sleeping on public streets, passing out in doorways of businesses, panhandling, and throwing up on public sidewalks. The criminal indictment procedure was initiated by a group of business owners alleging that the manner in which the facility was being operated (i.e., a lack of supervision of residents) was creating a public nuisance. A special grand jury returned a presentment against the owner of the LLC, and he was subsequently found guilty of causing, creating, and permitting the continuation of a public nuisance. The owner's conviction was overturned on appeal, with the court of appeals indicating that state regulations precluded the operator from restricting residents to the premises of the facility, and the operator did not have any authority to control their actions off-premises. At trial, the LLC owner failed to properly raise or preserve an objection based on the LLC's ownership of the premises; nonetheless, the court of appeals overturned his conviction on the grounds that he had no legal or practical ability to restrict residents of the facility from leaving the premises, or to control their off-premises behavior.

See also *Packett v. Herbert*, 237 Va. 422, 377 S.E.2d 438 (1989) (citing *City of Newport News v. Hertzler*, 216 Va. 587, 221 S.E.2d 146 (1976)); *City of Lynchburg v. Peters*, 145 Va. 1, 133 S.E. 674 (1926) (property owners can be held responsible for a nuisance upon or near their property, even if the activities complained of are their customers' and not their own); *Gelletly v. Commonwealth*, 16 Va. App. 457, 430 S.E.2d 722 (1993) (affirming conviction of person who operated a dance club, typically open between 10:30 p.m. and the following 4:30 a.m., where evidence established that patrons' behavior on and adjacent to the premises generated noisy, offensive, potentially dangerous behavior within the neighborhood).

### 28-3.02 Criminal Proceedings—Misdemeanor Prosecutions

In some instances, a locality is authorized either by statute or by a local charter to adopt ordinances prohibiting certain activities, and then to impose criminal penalties upon persons who violate those ordinances. For example, pursuant to Va. Code § 15.2-1812.2, any locality may, by ordinance, make unlawful the willful and malicious damage to or defacement of any public buildings, facilities, and personal property, or of any private buildings, facilities, and personal property. In addition to finding a person guilty of a criminal offense, a court may order community service, and/or may order payment of restitution. *Id.* When penal ordinances have been enacted, the existence of a criminal remedy at law may render it more difficult for a locality to obtain injunctive relief, see section [28-3.03\(c\)](#).

When a local charter confers upon a city broad powers (for example: the power to prevent vice and immorality, to preserve public peace and good order, and to prevent lewd and disorderly conduct, see, e.g., [Charlottesville City Charter § 14](#), 1946 Va. Acts ch. 384), then a municipality can demonstrate a broad and express grant of police power authority to identify, regulate, and prohibit conduct that falls within the definition of a public nuisance (see section [28-2.01\(b\)](#)) and to prescribe criminal penalties for violations.

Note, too, that a locality's police power authority to prohibit an activity includes the power to regulate. "[W]here the power exists to prohibit the doing of an act altogether, there necessarily follows the power to permit the doing of the act upon any condition, or subject to any regulation, . . . as the greater power includes the less." *Taylor v. Smith*, 140 Va. 217, 124 S.E. 259 (1924). Conditions imposed upon the exercise of an act that a governmental body has the power to prohibit may not, of course, be arbitrary or capricious, or impair constitutional rights. *Thompson v. Smith*, 155 Va. 367, 154 S.E. 579 (1930).

**28-3.03 Injunctive Relief****28-3.03(a) Courts—Mandatory Injunctions in Certain Proceedings**

A court is required to issue a temporary injunction after receiving a bill, sworn to by two reputable citizens, alleging that a nuisance exists, see Va. Code § 48-8, when the nuisance involves the use of any place for criminal street gang activities, or for acts of prostitution, lewdness, or assignation. Once initiated by a citizen, the bill will be tried as a civil action; see following section.

Likewise, a court is required to issue an order requiring the abatement of a public nuisance, after finding a person guilty of creating, causing, or permitting the continuance of a nuisance within a criminal proceeding brought pursuant to Va. Code § 48-1 et seq.

**28-3.03(b) Private Citizens' Rights of Action**

As offenses against the common interests of a community, public nuisances are generally remedied either by criminal proceedings, or by civil proceedings initiated by a public body. However, in certain limited circumstances, private individuals may have a right of action for abatement of a public nuisance.

A private right of action may accrue to an individual, in circumstances where (i) the individual has been specially damaged, in a manner different from the general public, and (ii) the injury to the individual is serious, affecting the substance and value of his property. *Meredith v. Triple Island Gunning Club*, 113 Va. 80, 73 S.E. 721 (1912).

Any responsible citizen of the Commonwealth, the Attorney General, or the Commonwealth's Attorney for a locality may maintain a suit in equity to seek a permanent injunction prohibiting the use of any place for activities of a criminal street gang, or for prostitution, lewdness, or assignations. Va. Code § 48-8. If two reputable citizens have sworn to the bill, a court, if requested, must grant a temporary injunction in the proceedings. Once a suit is initiated in this manner, the citizen(s) who initiated the bill may not dismiss the case prior to a final hearing, except upon a sworn statement setting forth justification, with the concurrence of the Commonwealth's Attorney. In any case, the court may refuse to dismiss, and may order the Commonwealth's Attorney to prosecute the case to judgment.

Pursuant to Va. Code § 4.1-317, the use of any place or any vehicle (boats, cars, etc.) for the unlawful manufacture, sale, or use of alcohol is a common nuisance. Pursuant to Va. Code § 4.1-335, any citizen may maintain a suit in equity to enjoin such common nuisance. If the bill is sworn to by two reputable citizens, the court may grant an injunction as soon as the bill is presented to the court. Thereafter, if the court is satisfied that the allegations in the bill are true, it may continue the injunction for a period of time as it deems proper. Va. Code § 4.1-335(B).

As mentioned in section [28-3.01](#), any five citizens may present a complaint to their local circuit court, alleging the existence of a nuisance, and that complaint will trigger the requirement for a special grand jury investigation. Although this citizen-initiated process is criminal in nature, the law specifies that, in the event that a person is convicted of creating, causing, or continuing the public nuisance, the court must also issue an order requiring the guilty party to abate the nuisance (or to pay the costs of abatement). Va. Code § 48-5.

**28-3.03(c) Localities' Rights of Action**

The availability of injunctive relief in an action commenced by a locality will always depend on the answers to two inquiries: (1) is the condition complained of a public nuisance, and (2) is an injunction (i.e., a court order of abatement) the appropriate relief? For information as to what conditions have been recognized as constituting a public nuisance, or which may be regulated as activities falling within the general definition of a public nuisance, see section

**28-2.** Several factors will influence the determination of whether an injunction is the appropriate relief in a given case.

### **28-3.03(c)(1) Express Statutory Right of Action**

In addition to any other remedy provided by law, Va. Code § 15.2-900 expressly authorizes any locality to maintain an action to compel a responsible party to abate, raze, or remove a public nuisance. Proof of irreparable harm and proof of the lack of an adequate remedy at law are not required. The Virginia Supreme Court has held that neither showing is required when a statute or ordinance expressly empowers a court to grant injunctive relief against a violation. *Ticonderoga Farms, Inc. v. Cnty. of Loudoun*, 242 Va. 170, 409 S.E.2d 446 (1991) (considering a local ordinance that contained a provision authorizing a local government official to seek injunctive relief to prevent or abate violations of the ordinance). In such a case, “all that is required is proof that the statute or regulation has been violated.” *Id.* (citing *Va. Beach S.P.C.A., Inc. v. S. Hampton Rds. Veterinary Assoc.*, 229 Va. 349, 329 S.E.2d 10 (1985)).

In circumstances where a public nuisance presents an imminent and immediate threat to life or property, the locality may choose to proceed immediately with abatement, and then it may subsequently bring an action against the responsible party to recover the necessary costs incurred by the locality for any public emergency services that were reasonably required for the abatement. Va. Code § 15.2-900. This statutory provision is cross-referenced within Va. Code § 48-5 (authorizing a court to order the locality’s costs of abatement to be paid by a person who has been found guilty of causing, creating, or permitting the continuance of a public nuisance).

### **28-3.03(c)(2) Injunctive Relief**<sup>18</sup>

Occasionally a court may determine that an adequate remedy at law exists, and then decline to grant injunctive relief requested by a locality. For instance, Virginia courts have previously declined to grant injunctive relief to restrain activities that are already prohibited by a local penal ordinance.<sup>19</sup> The Virginia Supreme Court held that equity does not restrain an act merely because it is in violation of an ordinance or a criminal statute. *Mears v. Town of Colonial Beach*, 166 Va. 278, 184 S.E. 175 (1936) (remedy available at law for violation of a local penal ordinance is a criminal prosecution).

Inevitably, circumstances will arise in which a remedy available at law (e.g., by criminal prosecution of the responsible person) will be inadequate, or for which an injunction would offer more effective and complete relief. In such cases, localities may invoke the equity jurisdiction of a court to seek injunctive relief. In *Ritholz v. Commonwealth*, 184 Va. 339, 35 S.E.2d 210 (1945), the Virginia Supreme Court permitted a locality to proceed in equity against non-resident operators of a nuisance, since they would not be extraditable to Virginia for prosecution of the misdemeanor criminal offense of maintaining a nuisance. In *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989), *rev’d on other grounds sub nom Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 113 S. Ct. 753 (1993), a federal court applying Virginia law observed that it could enjoin activity constituting a public nuisance, in order to “restrain irreparable mischief, suppress oppressive litigation, or prevent a multiplicity of suits.” *Id.* (citing *Switzer v. McCulloch*, 76 Va. 777 (1882)).

### **28-3.03(c)(3) Temporary and Preliminary Injunctive Relief**

If a locality may properly bring an equitable claim to enjoin a public nuisance in a given case, counsel may wish to seek a temporary (state court) or preliminary (federal court)

<sup>18</sup> The general procedures for obtaining injunctive relief in state court are set forth within Va. Code Title 8.01, Chapter 24 (Injunctions), § 8.01-620 et seq.

<sup>19</sup> For examples of activities that the General Assembly has expressly authorized municipal corporations to prohibit, see section [28-2.02\(f\)\(1\)](#).



injunction to preserve the status quo ante, pending final adjudication of the nuisance. In *Capital Tool & Manufacturing Co. v. Maschinenfabrik Herkules*, 837 F.2d 171 (4th Cir. 1988), the Fourth Circuit observed that there exists no great difference between federal and Virginia standards for temporary/preliminary injunctions. Under each standard, a court must examine the plaintiff's right and the existence of irreparable injury. While the Virginia Supreme Court has not yet decided a case that delineates standards to be applied in granting or denying a temporary injunction, Virginia circuit courts have recognized that, consistent with federal case law, the two most important factors are the potential irreparable harm to the plaintiff and harm to the defendant. *Seniors Coal., Inc. v. Seniors Found., Inc.*, 39 Va. Cir. 344 (Fairfax Cnty. 1996) (citing *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353 (4th Cir. 1991) (referencing a four-part test applied by the Fourth Circuit)). To the Fourth Circuit's list of factors must be added the plaintiff's lack of an adequate remedy at law, which is closely associated with irreparable harm. *Wright v. Castles*, 232 Va. 218, 349 S.E.2d 125 (1986).

#### **28-3.03(c)(3)(i) Exemption from Bond Requirements**

Private litigants seeking temporary injunctions in state court are required to post a bond; however, certain public officials and agencies may be exempt from the bond requirement. The General Assembly has exempted municipal corporations and counties from the bond requirement, see Va. Code §§ 15.2-1126 and 15.2-1232, respectively (the exemption applies broadly, in any circumstances where a bond would otherwise be required as a prerequisite to exercising *any* right). Likewise, the Commonwealth, its officers, and agencies are exempt from the requirement of a bond for or in connection with any temporary or permanent injunction. Va. Code § 8.01-631(E).

#### **28-3.03(c)(3)(ii) Damages upon Dissolution of Injunction**

For the circumstances in which damages may be awarded upon dissolution of an injunction, see Va. Code § 8.01-633.

### **28-3.04 Administrative Abatement Proceedings**

The General Assembly has also authorized localities to abate public nuisances through the use of certain procedures that, although they incorporate requirements serving Due Process, do not require litigation or any court proceedings. In this section, when reference is made to administrative abatement, the reference is to such non-judicial proceedings. It should be noted, however, that within some statutes, localities are granted authority to utilize administrative abatement (including assessment of charges to property owners of the cost of abatement), as well as authority to impose civil penalties. When civil penalties are authorized, court proceedings will be necessary for the imposition of such penalties.

A number of statutes authorize localities to abate or remove a public nuisance, and to charge and collect the cost of such abatement to the owner(s) or occupant(s) of a property, following notice to a property owner and his subsequent failure to abate the nuisance and/or to reimburse the locality for its costs. Unpaid abatement costs then become a lien against the real property from which the nuisance was removed, and are afforded priority status in the same manner as a lien for local taxes. In order to ensure the "super-priority" of any abatement cost lien, the locality's ordinance must contain the procedural requirements referenced in enabling legislation (see sections [28-3.04\(a\)](#) and [28-3.04\(b\)](#)), and the locality must strictly adhere to those requirements. See, e.g., *Kepley v. City of Richmond*, 40 Va. Cir. 520 (City of Richmond 1996). There is a helpful reported case from the City of Winchester addressing the notice required to be given to remaindermen. *Combs v. City of Winchester*, 25 Va. Cir. 207 (City of Winchester 1991).

Although individual statutes may differ slightly in wording, each statute that enables local administrative abatement involves some variation of the following format:



1. Identification of the nuisance condition(s) for which administrative abatement is authorized.
2. A requirement of notice by publication, or written notice to specified person(s), prior to initiating abatement action.
3. Authorization for the locality to charge the cost of abatement to specified person(s), usually a property owner.
4. Identification of the manner in which unpaid charges may be collected. Typically, administrative abatement statutes allow a locality to collect its costs in the same manner provided by law for the collection of local taxes.

#### 28-3.04(a) Broad Authority Granted to Municipalities

Virginia Code § 15.2-1115 authorizes a municipal corporation to compel the abatement or removal of all nuisances using administrative abatement procedures. The statute lists specific conditions that are recognized as nuisances,<sup>20</sup> but municipalities' authority to use the abatement procedure is not limited to the listed conditions. Notably, the authority conferred by this statute is "self-executing," i.e., a locality is not required to adopt a local ordinance as a condition precedent to exercising the authority. Characteristics of the abatement procedure authorized by Va. Code § 15.2-1115 include:

1. *Required Notice*—must be given to the owner(s) or occupant(s) of the property.
2. *Amount of Notice*—such "reasonable notice as the municipality may prescribe."<sup>21</sup>
3. *Collection*—any manner provided by law for collection of taxes.
4. *Property lien*—only for abatement costs in excess of \$200.<sup>22</sup>
5. *Nature of lien*—personal obligation of the owner at the time the lien is imposed, on parity with unpaid local real estate taxes. A municipality may waive the lien to facilitate a sale of the property, but only for purchasers unrelated by blood or marriage to the owner, and who have no business association with the owner.
6. *Civil penalty*—none authorized.

#### 28-3.04(b) Nuisance-Specific Abatement, by Local Option

Various statutes authorize localities to compel the abatement of specific nuisance conditions using administrative abatement procedures, combined, in some circumstances, with authority to pursue an action to impose a civil penalty. Among the nuisance conditions for which administrative abatement procedures are authorized, in one form or another, are those listed below. Readers should note the slight differences among the procedures set forth within the various statutes, relative to the manner in which notice must be given, the person(s) to whom notice must be given, the availability (or not) of additional civil penalties,

<sup>20</sup> Weeds on private and public property; snow accumulated on sidewalks; offensive substances accumulated in any place; unsafe or dangerous buildings, walls, or structures, etc.

<sup>21</sup> Notice provisions should always be crafted toward the end of satisfying constitutional Due Process requirements.

<sup>22</sup> Va. Code § 15.2-901; compare to Va. Code § 15.2-906 (providing that all unpaid charges constitute a lien against the property).

and the effect of property liens for unpaid charges. Examples of administrative abatement are as follows:

**28-3.04(b)(1) Unsafe Buildings, Walls, or Structures: Va. Code § 15.2-906**

Pursuant to the authority conferred by this statute, a locality may, by local ordinance, specify that upon receipt of written notice from the locality, a property owner must remove, repair, or secure a dangerous building, wall, or structure. If a property owner fails to act as directed by the notice, then (i) the property owner is in violation of the ordinance, and subject to a civil penalty,<sup>23</sup> and (ii) the locality may itself proceed to abate the dangerous conditions and charge the costs of abatement to the property owner. Characteristics of the administrative abatement procedure authorized by this section include the following:

1. *Required Notice*—must be given to the property owner(s) and lienholder(s) unless emergency action is allowed under the USBC.
2. *Amount of Notice*—reasonable notice is required prior to commencement of abatement, and the property owner must be afforded a reasonable amount of time to abate the conditions himself.
3. *Reasonable notice*—includes (i) a written notice given by certified or registered mail to the last known address of the property owner, and (ii) notice published in a newspaper within the locality, published once a week for two successive weeks. Abatement cannot commence until thirty days after the later of the returned mail receipt or the newspaper publication. (However, the locality may take action to secure the building to prevent unauthorized access, upon seven days' notice).
4. *Collection*—any manner provided by law for collection of taxes.
5. *Property lien*—for all costs of abatement (no minimum lien amount is prescribed).
6. *Nature of lien*—personal obligation of the owner at the time the lien is imposed, on parity with unpaid real estate taxes. Locality may grant a waiver in order to facilitate the sale of the property, but only for purchasers unrelated by blood or marriage, and who have no business association with the owner.
7. *Civil penalty authorized*—up to \$1,000 for violation of the local ordinance.

**28-3.04(b)(2) Trash, Weeds, and Foreign Growth: Va. Code § 15.2-901**

This statute allows any locality, by ordinance, to compel a property owner to take certain actions following receipt of a written notice from the locality, including: removal of trash, garbage, litter, etc., from property; cutting grass, weeds, bamboo, and other foreign growth<sup>24</sup> on occupied or vacant developed or undeveloped property; etc.<sup>25</sup> If a property owner fails to act as directed by the notice, then (i) the property owner is in violation of the ordinance, and subject to a civil penalty, and (ii) the locality may proceed to abate the

<sup>23</sup> Typically, local government attorneys utilize a warrant in debt, referencing the local ordinance provision and its specified civil penalty, as the mechanism for imposition of the civil penalty.

<sup>24</sup> A county with a population density of less than 500 per square mile may only utilize this abatement procedure for removal of grass/weeds, only within the boundaries of platted subdivisions, and in non-agricultural zoning districts. Va. Code § 15.2-901(A)(3).

<sup>25</sup> See Va. Code § 15.2-901, referenced in section [28-2.02](#).

dangerous condition(s) and charge the costs of abatement to the property owner. Characteristics of this administrative abatement procedure include:

1. *Required Notice*—must be given to the owner(s) of the property.
2. *Amount of Notice*—reasonable notice (trash removal); and reasonable notice “as determined by the public body” (cutting of grass/weeds).
3. *Collection*—any manner provided by law for collection of taxes.
4. *Property lien*—for all costs of abatement (no minimum lien amount is prescribed).
5. *Nature of lien*—personal obligation of the owner at the time the lien is imposed, on parity with unpaid local real estate taxes. A locality may grant a waiver in order to facilitate the sale of the property, but only for purchasers unrelated by blood or marriage, and who have no business association with the owner.
6. *Civil penalty authorized*—up to \$50 for the first violation; \$200 for subsequent violations; maximum: \$3,000 in a twelve-month period for violations arising from the same set of operative facts. The civil penalty is in lieu of criminal penalties. However, a locality may, by ordinance, provide that, after three civil penalties have been imposed on the same person within a twenty-four month period, a violation will constitute a Class 3 misdemeanor. Classifying any subsequent violations as misdemeanors will preclude the imposition of civil penalties for the same violations.

**28-3.04(b)(3) Inoperable Motor Vehicles: Va. Code § 15.2-904(B)<sup>26</sup>**

A locality may, by ordinance, require property owners to remove inoperable motor vehicles from property zoned for residential, commercial, or agricultural purposes, at times prescribed by the locality, when the vehicles are not kept within a fully enclosed building or structure.<sup>27</sup> Failure to comply with the ordinance will subject the owner to a civil penalty, and a locality may remove the vehicles itself. Characteristics of the authorized abatement procedure include:

1. *Required Notice*—must be given to the owner of the premises prior to removal, and to the owner of each vehicle, prior to disposal.
2. *Amount of Notice*—reasonable notice of removal, to the property owner; reasonable notice of disposal, to the owner of each vehicle removed.
3. *Collection*—costs of removal and disposal of vehicles are chargeable to the vehicle owner(s) or to the owner of the premises from which they were removed, and may be collected “as taxes are collected.”

<sup>26</sup> See also Va. Code § 15.2-905 (authority for removal of inoperable motor vehicles, for specific listed jurisdictions); section 28-2.02(b). Separate statutory authority, and slightly different definitions, exist to allow a locality to require the removal of abandoned motor vehicles from private property. See Va. Code § 46.2-1200 et seq., referenced in section 28-3.04(b)(4).

<sup>27</sup> Notably (and to make matters more complicated!), Va. Code § 15.2-904(B) provides that, upon receipt of a notice requiring him to remove a vehicle from his property, if a property owner can demonstrate that he is actively restoring or repairing a vehicle, and such vehicle is shielded or screened from view, then that vehicle and one additional vehicle (which must also be shielded or screened) must be allowed to remain on the property.

4. *Property lien*—for all unpaid costs of abatement (no minimum lien amount is prescribed).
5. *Nature of lien*—the lien for unpaid costs continues against the property until actual payment has been made to the locality.
6. *Civil penalty authorized*—civil penalty may be imposed in accordance with the provisions of Va. Code § 15.2-2209 (specifying a process for collection of civil penalties for violation of zoning ordinances; includes a maximum limit on penalties arising from the same set of facts). The civil penalty is in lieu of criminal penalties. However, a locality may by ordinance provide that, after three civil penalties have been imposed on the same person within a twenty-four-month period, a violation will constitute a Class 3 misdemeanor. Classifying any subsequent violations as misdemeanors will preclude the imposition of civil penalties for the same violations.

*Note:* The definition of “inoperable motor vehicle” contained in Va. Code § 15.2-904 differs from that set forth within Va. Code § 15.2-905. Virginia Code § 15.2-904 appears to be drafted in the conjunctive, while Va. Code § 15.2-905 appears to be drafted in the disjunctive. In other words, the plain language of Va. Code § 15.2-904 appears to require the absence of both a valid inspection decal and valid license plates, while under Va. Code § 15.2-905, the absence of either a valid inspection decal *or* valid license plates would suffice. Also, the exclusion for automobile dealers, salvage dealers, and scrap processors contains no effective date in Va. Code § 15.2-905, but an effective date is specified within § 15.2-904.

#### **28-3.04(b)(4) Other, Similar Statutory Abatement Procedures**

Also see the following statutes, containing legislative authorization for administrative abatement proceedings relative to other nuisance conditions:

- Abatement of “criminal blight”—Va. Code § 15.2-907.<sup>28</sup>

*Note:* An additional statute, Va. Code § 15.2-1716.2, allows any locality to provide, by ordinance, that any person who is convicted of an offense for manufacture of methamphetamine is liable at the time of sentencing, or in a separate civil action, to the locality or to any other law-enforcement entity for its actual expense in cleaning up a methamphetamine lab related to the conviction.<sup>29</sup>

- Abatement of “bawdy places”—Va. Code § 15.2-908.1.
- Abatement of “derelict buildings”—Va. Code § 15.2-907.1.
- Abatement of graffiti—Va. Code § 15.2-908.

*Note:* This authority extends to removal of defacement of any public building, wall, fence, or structure, and also to any defacement of a private building, wall, fence, or structure that is visible from a public right-of-way. Property liens for abatement charges do not attach unless the locality has given fifteen days’ advance notice to a property owner prior to commencing the abatement. No civil penalties are authorized (defacement of

<sup>28</sup> Two separate notices are required to be given before abatement may be initiated. The second notice must describe the specific corrective action that the locality plans to initiate, and following receipt of the second notice, the owner may seek equitable relief from a court.

<sup>29</sup> The dismantling of a drug laboratory in connection with drug blight abatement could involve exposure to, or threaten the release of, hazardous waste for the purposes of state and federal environmental laws. Special expertise and precautions may be necessary. See Chapter 5, Environmental Law, section 5-3, Solid and Hazardous Waste Regulation.

property is a criminal offense, see Va. Code §§ 18.2-137 and 18.2-138). However, any person who is criminally convicted of defacing property may be ordered to pay the locality full or partial restitution of amounts the locality expended to abate the defacement. An order of restitution is enforceable as a judgment in a civil action.

- Abatement of abandoned vessels, and wharfs, piers, pilings, bulkheads, etc., that are dangerous, or that may constitute an obstruction to use of adjacent waterways—Va. Code § 15.2-909.

*Note:* If the identity or whereabouts of an owner is unknown, notice by newspaper publication is required, once per week for two weeks, prior to abatement action taken by the locality. Liens for unpaid charges will be recorded in the circuit court's judgment lien book, and may also be reduced to a personal judgment against the owner.

- Abatement/removal of abandoned motor vehicles—Va. Code §§ 46.2-1200 through 46.2-1207.

*Note:* Any locality may enact an ordinance authorizing abandoned motor vehicles to be taken into custody, and allowing disposal of the abandoned vehicles pursuant to special notice and disposition procedures set forth within Va. Code §§ 46.2-1202 through 46.2-1205. The removal and disposition of an abandoned vehicle can be undertaken by the locality with its own personnel, or it may enter into agreements with independent contractors.

Separately, Va. Code § 46.2-1213 authorizes the governing body of a locality to enact an ordinance authorizing the removal for safekeeping of motor vehicles, trailers, semitrailers, or parts thereof, to a storage area, under circumstances that differ slightly from those listed in the definition of "abandoned motor vehicle." Removal of a vehicle pursuant to an ordinance enacted under Va. Code § 46.2-1213 must be carried out by or under the direction of a law enforcement officer or the locality's civil code enforcement division. Before a vehicle can be removed from any private property, the written request of the owner, lessee, or occupant of the private property is required, and a local ordinance may require the person making the request to provide indemnification to the locality. The local ordinance may include a provision stating that a vehicle removed under the ordinance will be presumed abandoned, if: (i) it lacks either a current DMV license plate, a current local license plate or decal, or a valid state inspection sticker; and (ii) it has been in a specific location for at least four days without being moved.

A local ordinance enacted pursuant to Va. Code § 46.2-1213 must designate a specific local government office as being responsible for managing the disposition of a vehicle after its removal, and for locating and notifying the vehicle's owner. After following the notification procedure specified in Va. Code § 46.2-1213(B), if the owner fails to pay the costs of removal, or cannot be identified, the locality may treat the vehicle as abandoned under state law, and dispose of the vehicle in accordance with the provisions of Va. Code §§ 46.2-1202 through 46.2-1205.

- Screening of vacant or abandoned commercial property—Va. Code § 15.2-903(C).

*Note:* Within this statute that is, in all other aspects, dedicated to authorizing local ordinances regulating automobile graveyards and junkyards, one locality—the City of Newport News—has been granted authority to require the screening of vacant or abandoned business properties. The authority granted Newport News applies to retail or commercial properties that have been vacant or abandoned for more than three years within designated areas consistent with the city's comprehensive plan.

### 28-3.05 Civil Penalties Authorized

In addition to any of the civil penalties referenced within state statutes authorizing nuisance-specific abatement action, see section 28-3.04(b), other state legislation may authorize the imposition of civil penalties. For example: pursuant to Va. Code § 15.2-980, any locality may, by ordinance, adopt a uniform schedule of civil penalties for violations of that locality's noise ordinance, enforceable by the chief law enforcement officer. Local government attorneys should also review the provisions of city and town charters, as such charters may contain municipality-specific authorization to impose civil penalties for violations of local ordinances.

### 28-3.06 Tax Code Remedies

Virginia's tax laws allow for the sale of certain tax delinquent properties for the purpose of collecting delinquent taxes on such properties.<sup>30</sup> See *generally* Chapter 10, Collection of Delinquent Taxes, section 10-5.03. Whenever a statute authorizes a locality to collect a particular fee or charge in the manner in which taxes are collected, see the administrative abatement procedures referenced within sections 28-3.04(a) and 28-3.04(b), the collection process referenced within this section is available.

Pursuant to Va. Code § 58.1-3965(A), in any locality, upon a finding by a court, relative to real estate having an assessed value of \$100,000 or less, that:

1. any taxes on such real estate are delinquent on December 31 following the first anniversary of the date on which such taxes have become due, or
2. there is a lien on such real estate pursuant to Va. Code §§ 15.2-900, 15.2-906, 15.2-907, 15.2-907.1, 15.2-908.1 or 36-49.1:1, which lien remains unpaid on December 31 following the first anniversary of the date on which such lien was recorded,

the property is deemed abandoned and is subject to sale by public auction pursuant to proper notice under Va. Code § 58.1-3965.

In the case of real property containing (i) any structure that has been "condemned" by the local building official;<sup>31</sup> (ii) any nuisance, as defined in Va. Code § 15.2-900; (iii) any derelict building, as defined in Va. Code § 15.2-907.1; or (iv) any declared blighted property, as defined in Va. Code § 36-49.1:1, the property may be sold after the first anniversary of the date on which such taxes have become due. See Va. Code § 58.1-3965(A). For other properties, regardless of value, sale may be had when taxes remain delinquent on December 31 following the *second* anniversary of the date on which such taxes have become due. *Id.*

Certain localities (having a score of 100 or higher on the fiscal stress index) may sell property after taxes are six months delinquent and when the locality has incurred abatement costs associated with any of the four types of buildings or properties described above (i.e., condemned, nuisance, derelict, or blighted) and for which repayment of the abatement costs are also delinquent for six months or more. Va. Code §§ 58.1-3221.6, 58.1-3695.

Separately, Va. Code § 58.1-3970.1 allows localities to gain title to real property having an assessed value of \$75,000 or less and where (a) delinquent taxes and liens, including penalty and interest, exceed 50 percent of the assessed value, or (b) the

<sup>30</sup> Certain localities are permitted to tax blighted and derelict properties at a rate that exceeds the general real property tax by up to 5 and 10 percent, respectively. Va. Code § 58.1-3221.6.

<sup>31</sup> See section 28-3.04(b)(1).



delinquent taxes alone exceed 25 percent of the assessed value, or (c) for parcels containing a structure that is a derelict building, such taxes and liens, together, including penalty and interest, exceed 25 percent of the assessed value.<sup>32</sup> Transfer of title may be accomplished by appointment of a special commissioner, without a public auction. This can be a great benefit to a locality battling to revitalize a blighted area, because the procedure prevents the property from being acquired through the auction process by individuals who might use it for purposes that would negatively affect an already struggling neighborhood. The special commissioner may convey the real estate to a locality's land bank entity or nonprofit entity designated to carry out the functions of a land bank entity, rather than to the locality itself. Va. Code § 58.1-3970.1(A). The land bank entity or nonprofit organization must sell the property to a third party or pay any surplusage that would result from such a sale beyond the amount of unpaid taxes and liens, to the beneficiaries of any liens against the property and the former owner or his heirs or assigns. *Id.*

Virginia Code § 58.1-3970.2 authorizes any locality to waive delinquent taxes on real property in exchange for the owner's donation of the property to a land bank entity created pursuant to the Land Bank Entities Act, Va. Code § 15.2-7500 et seq., or a nonprofit organization that builds, renovates, or revitalizes affordable housing for low-income families. See section 28-5.06.

### **28-3.07 Remedies for Nuisances Related to Agricultural Operations**

#### **28-3.07(a) Restricted Local Actions—Nuisances Arising from Agricultural Operations**

Inevitably, a locality's broad police power authority to regulate and abate "public nuisances" will intersect with a slightly less broad authority to enact zoning regulations prohibiting or restricting certain uses or development of land. Agricultural operations present special challenges for both the state legislature and for local governments.

##### **28-3.07(a)(1) The Virginia Right to Farm Act**

Many states adopted versions of the Right to Farm Act, beginning in the 1970s as urban and suburban sprawl commenced an unprecedented period of loss of agricultural land. Initially, right-to-farm laws intended to provide farmers with a defense to lawsuits grounded in nuisance, whether brought by their neighbors or by local governments.<sup>33</sup>

The Virginia Right to Farm Act, Va. Code §§ 3.2-300 to 3.2-302, was originally enacted in 1981. Currently, the Act limits the circumstances under which agricultural operations, as defined in Va. Code § 3.2-300, may be deemed a nuisance, and under which such operations may be regulated or abated as such. As a general rule, neither an "agricultural operation," as defined in Va. Code § 3.2-300, nor any of its appurtenances,<sup>34</sup> can be deemed by a court or local government to be a public or private nuisance, if:

<sup>32</sup> In localities with a score of 100 or higher on the fiscal stress index, the value of delinquent taxes and liens, including penalty and interest, and delinquent taxes alone need only exceed 35 percent and 15 percent of the assessed value, respectively.

<sup>33</sup> For an interesting case discussing the constitutionality of certain provisions within Iowa's Right to Farm Act (1998), see *Bormann v. Board of Supervisors for Kossuth County*, 584 N.W.2d 309 (Iowa 1998). A local governing body designated an area as an "agricultural area" at the request of certain landowners, resulting in those landowners obtaining immunity from liability for creating nuisances under the state's right to farm law. Neighbors, relying on the state's definition of "public nuisance" as a use that unreasonably interferes with the comfortable enjoyment of life or property of another, obtained a favorable ruling from the Iowa Supreme Court, stating that the effect of the designation was to impose an "easement" on the neighboring lands, in favor of the agricultural users, without just compensation.

<sup>34</sup> Which activities are among those that might legitimately be regarded as "appurtenant" to an agricultural operation? In 2012, the operator of a farm in Fauquier County created a statewide stir when she fought county zoning officials for the right to engage in the following activities on her

1. such operations substantially comply with applicable best management practices in use at the time of the alleged nuisance, and
2. the operations comply with existing laws and regulations of the Commonwealth relevant to the alleged nuisance, see Va. Code § 3.2-302(A).<sup>35</sup>

Furthermore, only persons with ownership interests in property alleged to be affected by a nuisance may bring an action for private nuisance, and compensatory damages for any such nuisance action not otherwise prohibited by this statute shall be limited to the diminution in value of the person's property. Va. Code § 3.2-302(C).

Any local ordinance, whether adopted pursuant to a locality's zoning authority, or otherwise, that would make any such agricultural operation a nuisance, or that would allow abatement of the operation as a nuisance, is null and void. Va. Code § 3.2-302(E). However, the protections of the Right to Farm Act do not apply to any action for negligence or tort other than a nuisance, when an agricultural operation causes damage to any person on account of any pollution or change in condition of the waters of any stream, on account of any "overflow of lands" of any such person, or to a common law action for physical or mental injuries arising from a nuisance claim not otherwise prohibited by the statute when shown to have endangered life or health. See Va. Code § 3.2-302(A), (B), (D). No known Virginia cases discuss what evidence might suffice to prove "best management practices," and substantial compliance is presumed. Thus, absent proof that an operation is being conducted in violation of state law or regulations relevant to the nuisance, as a practical matter, the Right to Farm Act creates a very difficult and expensive burden of proof; however, in the rare case when such evidence is available, a locality will retain broad authority under Va. Code §§ 15.2-900, 15.2-1115, and other provisions of law, to abate an agricultural nuisance.

Under local zoning authority, special exceptions (also commonly referred to as special use permits and conditional use permits) provide a mechanism by which a local government can "tailor" a specific use to fit in a particular location, by adopting conditions designed to mitigate the impact of the proposed use on neighboring properties. This makes sense when a new land use is proposed to be established in a location where surrounding land uses are less intense, or dissimilar. However, under the Right to Farm Act, every locality is prohibited from adopting an ordinance that would require a special exception to be obtained for any production agriculture or silviculture activity proposed to be located in an area zoned as an agricultural district or classification. See Va. Code §§ 3.2-301 and 15.2-2288.<sup>36</sup> (It might seem logical for localities to utilize special exceptions to tailor residential development proposing to locate adjacent to an already-established agricultural operation; however, state law also prohibits, per Va. Code § 15.2-2288.1, any local requirement that a special exception be obtained for the development and

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farm: retail sale of food grown onsite; sales of other, incidental items in a "retail farm shop"; sale of craft items; special events, such as pumpkin-carving contests and birthday parties; farm-stay accommodations; etc. The zoning dispute led to the initiation of HB 1430 (2013), which sought to significantly expand the current definition of "agricultural operations" as set forth within Va. Code § 3.2-300. HB 1430 was ultimately unsuccessful; however, public debate over the legitimate extent of local regulation of agricultural operations continues.

<sup>35</sup> Concentrated animal feeding operations (CAFOs) are subject to state environmental and stormwater management laws and regulations. See, e.g., 9 VAC 25-31-130 (noting requirement for a state VPDES permit for stormwater discharges, and specifying when nutrient management plans may be required). Likewise, agricultural operators are subject to state and federal regulations relative to the land application of sewage sludge. See Va. Code § 62.1-44.19:3.

<sup>36</sup> Virginia Code § 15.2-2288 defines "agricultural products" as the harvesting or production of livestock, aquaculture, poultry, horticultural, floricultural, viticulture, silvicultural, or other farm crops.

construction of residential dwellings at the use, height, and density permitted by right under a local zoning ordinance).

All of the foregoing begs a question: taking into account the objectives and requirements of the Right to Farm Act, and related state laws, what local regulation of agricultural operations may be implemented by localities?

#### **28-3.07(a)(1)(i) Setbacks and Sizes of Operations**

Localities may adopt setback requirements, minimum area requirements, and other requirements that apply to land on which agriculture and silviculture activity is occurring within an agricultural zoning district or classification, pursuant to Va. Code §§ 3.2-301 and 15.2-2288. See *also* Va. Code § 15.2-2280(3). Localities also have express authority to establish zoning districts and, in each district, to regulate and determine the appropriate uses of land. Va. Code § 15.2-2280(1). Since the 1920s, it has been established as a matter of law that localities may, through the exercise of police power zoning authority, create zoning districts for the purpose of segregating land uses that may be incompatible with residential uses. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114 (1926).

#### **28-3.07(a)(1)(ii) Detrimental Farm Structures or Practices**

Localities may not enact zoning ordinances that would unreasonably restrict or regulate farm structures, or farming and forestry practices, within an agricultural zoning district or classification, unless such restrictions “bear a relationship to the health, safety, and general welfare of its citizens.” Va. Code § 3.2-301; compare the general zoning enabling language of Va. Code § 15.2-2286(A)(7) (authorizing a locality to adopt zoning regulations “whenever the public necessity, convenience, general welfare or good zoning practice requires”).

#### **28-3.07(a)(1)(iii) Land Application of Sewage Sludge**

Any locality may adopt an ordinance that provides for testing and monitoring of the land application of sewage sludge within its boundaries, to ensure compliance with applicable laws and regulations. Va. Code § 62.1-44.19:3(I). Local governments are entitled to 100 days’ advance notice, prior to the commencement of any land application of sewage sludge at a permitted site. Va. Code § 62.1-44.19:3(K). Furthermore, within local zoning ordinances, localities may designate or reasonably restrict the storage of sewage sludge, based on criteria directly related to public health, safety, and welfare of citizens and the environment, and localities may require special exceptions for storage of sewage sludge on any property, including within an agriculturally zoning district or classification. (However, a local zoning ordinance may not restrict the storage of sewage sludge on a farm, as long as the sludge is being stored solely for land application on that farm, and for a period of forty-five or fewer days). Va. Code § 62.1-44.19:3(R). Land application and storage of sewage sludge is not included within the scope of the state’s definition of “production agriculture.” Va. Code § 15.2-2288.

#### **28-3.07(a)(2) Farm Wineries, Breweries, and Distilleries**

The General Assembly has specially protected licensed farm wineries (as defined in Va. Code § 4.1-100), small licensed breweries, and small licensed distilleries. According to Va. Code §§ 15.2-2288.3, 15.2-2288.3:1, and 15.2-2288.3:2, local restrictions upon the activities and events of such farm wineries, breweries, and distilleries must be reasonable, and must take into account:

1. the economic impact of the regulation on such facilities,
2. the agricultural nature of the activity or event, and
3. whether or not such activities and events are usual and customary for such facilities. If an event is “usual and customary,” then it must be permitted without local regulation, unless the locality can demonstrate a “substantial impact” on the health, safety, or welfare of the public. No

local ordinance regulating noise (other than outdoor amplified music) arising from activities and events at farm wineries or breweries (but not distilleries) may be more restrictive than the locality's general noise ordinance.

Certain activities of such facilities are entirely exempt from local regulation, see Va. Code §§ 15.2-2288.3(E), 15.2-2288.3:1(B), and 15.2-2288.3:2(B), specifically:

- production and harvesting of the wine or beer ingredients and other agricultural products, and the manufacturing of the wine, beer, or alcoholic beverages,
- on-premises sale, tasting, or consumption of wine, beer, or alcoholic beverages during regular business hours, within the normal course of business,
- direct sale and shipment of wine or beer by common carrier to consumers (but not by distillers),
- sale and shipment of wine, beer, or alcoholic beverages to the Alcoholic Beverage Control Authority, licensed wholesalers, and out-of-state purchasers,
- storage, warehousing, and wholesaling of wine, beer, or alcoholic beverages, and
- sale of wine-related, beer-related, or alcoholic beverage-related items that are incidental to the sale of the beverages.

Note that there are additional ABC requirements attendant to the sale of alcoholic beverages that do not apply to the sale of wine and beer.

Presumably, the operations of these facilities, at least so far as the production of ingredients and related activities would fit within the definition of “agricultural operation” set forth within, would be subject to the Right to Farm Act’s proscription of local ordinances declaring such operations to be a nuisance, or abating them as such, see section [28-3.07\(a\)\(1\)](#). However, the statutes go further than the Right to Farm Act, by defining, at least for purposes of local zoning regulations, what activities the General Assembly considers to be “appurtenant” to these specific types of agricultural operation.

### 28-3.08 Localities’ Liability for Creating or Maintaining Public Nuisances

A municipal corporation may have no immunity from liability for creating or maintaining a nuisance on its property, if the act complained of is not authorized by law. *Chalkley v. City of Richmond*, 88 Va. 402, 14 S.E. 339 (1891). The *Chalkley* court reasoned that, at common law, the “King cannot license the erection or commission of a nuisance, nor can a municipal corporation do so.” See also *Taylor v. City of Charlottesville*, 240 Va. 367, 397 S.E.2d 832 (1990). When a municipal corporation has ample power to remove a nuisance that is injurious to the health, endangers the safety, or impairs the convenience of its citizens, it may be held liable for injuries that result from its failure to properly exercise such power. *Chalkley, supra*.

It is possible that a locality, while immune from tort liability for alleged negligent acts, can be held responsible for those same acts in connection with an alleged public nuisance. In *City of Virginia Beach v. Virginia Beach Steel Fishing Pier, Inc.*, 212 Va. 425, 184 S.E.2d 749 (1971), the Virginia Supreme Court held that, if a municipal corporation creates or maintains a nuisance, it is not protected by the immunity doctrine unless (1) the condition claimed to be a nuisance is authorized by law, *and* (2) the act creating or

maintaining the nuisance is performed without negligence. The *Steel Fishing Pier* ruling is referenced in *Taylor v. City of Charlottesville*, 240 Va. 367, 397 S.E.2d 832 (1990), a case involving a city’s failure to implement measures to protect the users of the public street from hazardous conditions that existed adjacent to the street.

The essential characteristic of a public nuisance, as it relates to streets and highways, is that the condition imperils the safety of the street or highway and is dangerous in and of itself. *Taylor v. City of Charlottesville*, 240 Va. 367, 397 S.E.2d 832 (1990) (quoting *Price v. Travis*, 149 Va. 536, 140 S.E. 644 (1927)). For a municipality to be held responsible, it is not necessary that the dangerous condition be located within a public street, because “[i]t is as much the duty of a city to take steps to ward off and to prevent the known probability of injury to users of its streets as it is its duty to remove dangerous defects and obstructions within the streets themselves.” *Id.* (citing *Burson v. City of Bristol*, 176 Va. 53, 10 S.E.2d 541 (1940)). In *Taylor*, the Virginia Supreme Court ruled that a nuisance claim is not barred by governmental immunity when a plaintiff’s motion for judgment has sufficiently alleged a public nuisance. The facts presented to the Court, upon an appeal from the trial court’s order sustaining a demurrer, established that the city had failed to implement any measures to delineate the end of a public street, or to place users of the street on notice of hazardous conditions that existed just beyond the dead-end of a street (i.e., a steep precipice descending into a flood-prone creek).<sup>37</sup> The Court found these facts sufficient to plead an alleged condition which was dangerous and hazardous, that imperiled the safety of the city’s street, and that was located adjacent to the street, i.e., a public nuisance.

School boards, and apparently counties, are not subject to liability for nuisance claims. *Kellam v. Sch. Bd. of Norfolk*, 202 Va. 252, 117 S.E.2d 96 (1960). *But see Waltman v. King William Cnty. Sch. Bd.*, 81 Va. Cir. 381 (City of Norfolk 2010) (continuing nuisance constituted a taking and, therefore, school board was held not to be immune from inverse condemnation suit for damages, which sounds in contract).

There is a special rule for county sanitary districts. Attorneys for a county in which a sanitary district has been created must be aware that, pursuant to Va. Code § 21-118(9), the governing body for such county has the same power and authority as cities and towns for abatement of nuisances within the sanitary district, and Va. Code § 21-118(9) expressly provides that “it shall be the duty of the governing body to exercise such power when any such nuisance shall be shown to exist.” This suggests that, at least in relation to certain dangerous or unhealthy conditions that may relate to the purpose of the sanitary district, the county may be liable for failure to remove the nuisance—in the same manner as discussed in *Chalkley*, *supra*, relative to municipal corporations.

## 28-4 UNSAFE BUILDINGS & STRUCTURES

In addition to provisions set forth within Title 15.2 of the Code of Virginia, Title 36 (Housing) also provides substantial remedies for nuisance properties. The abatement mechanisms made available in Title 36 include enforcement of state building code violations that create unsafe or unsanitary conditions and administrative procedures for identification and removal of blighted properties. For a more thorough and substantive discussion of the Virginia Uniform Statewide Building Code (USBC), and the enforcement of its provisions within a locality, see [Chapter 22, Administrative Inspections and The Virginia Maintenance Code](#). For purposes of this chapter, we limit our discussion to the building official’s authority

<sup>37</sup> It is important to note that a municipality will generally have immunity from tort liability, in relation to the performance of discretionary governmental functions, including matters relating to traffic regulation—such as lights, barricades, and other safety devices. See *Freeman v. City of Norfolk*, 221 Va. 57, 266 S.E.2d 885 (1980).

relative to abatement of unsafe buildings and structures. The information provided in this section is intended to be read in coordination with Chapter 22, section [22-3.11](#).

#### **28-4.01 Building Code Enforcement—Unsafe Buildings and Structures**

Often, an unsafe building or structure, or a blighted property, will come to the attention of local officials through the work of a local official charged with enforcement of the USBC. Building officials (and, in localities that elect to enforce the Maintenance Code, the separate code/maintenance officials) have authority to issue notices of violation and also to initiate and take certain abatement action of their own initiative. In circumstances where the building or code official needs or desires the endorsement of the local government, the local government attorney and governing body may assist, by initiating one or more of the procedures referenced in sections [28-3.04\(a\)](#) and [28-3.04\(b\)](#). Especially when a possible razing or demolition of buildings and structures is under consideration, building officials, and code/maintenance officials, are well-advised to involve the local government attorney, to ensure that advance notice, and an opportunity to correct violations, has been afforded a property owner in accordance with applicable laws and procedures.

##### **28-4.01(a) New Construction—Correction of Unsafe Buildings and Structures**

Once a building permit has been issued for construction of a new building or structure, if the building is not completed, occupied, or both, and subsequently becomes unsafe, the USBC provides a mechanism for remedying the unsafe conditions. If an uncompleted and/or unoccupied building is deteriorated, improperly maintained, of faulty construction, deficient in adequate exit facilities, a fire hazard, or otherwise dangerous to life or the public welfare, it constitutes an unsafe building or structure. The building official may compel the owner to make the building or structure safe, through compliance with the USBC, or may seek the assistance of local government counsel to initiate proceedings to compel the building to be made safe through compliance with the USBC, or taken down and removed, if determined necessary. 13 VAC 5-63-180(B); USBC, Part I, § 118.2.

Initially, the building official will inspect a building or structure and prepare an inspection report. If the building official determines the building or structure to be unsafe, he must issue a separate written notice of unsafe structure to the owner or person in control of such building or structure (and, if possible, the occupants), specifying the required corrections to be made to render the structure safe, or requiring the unsafe structure or portion thereof to be taken down and removed. The notice must stipulate a specific time for performance, and must also contain a statement requiring the person notified to declare to the building official his or her acceptance or rejection of the terms of the notice. 13 VAC 5-63-180(C), (D); USBC, Part I, §§ 118.3, 118.4.

A building official also has certain emergency authority that may be exercised when there is an immediate danger of any portion of the unsafe building or structure collapsing or falling and when life is endangered. Pursuant to USBC, Part I, § 118.3.1, the building official may order occupants to vacate an unsafe building or structure, when the danger is both actual and immediate. Upon issuance of a vacation order, the building official must post a sign at each entrance, prohibiting use and occupancy of the building.

Further, pursuant to USBC, Part I, § 118.6, the building official may authorize emergency repairs (i) when there is an immediate danger of any portion of the building or structure collapsing or falling, and life is endangered, or (ii) when there is a code violation resulting in the immediate, serious, and imminent threat to the life and safety of the occupants or public. The building official has authority to authorize work necessary to make the building or structure temporarily safe, whether or not legal action to compel compliance has been instituted. In addition, whenever an owner of an unsafe building or structure fails to comply with a notice to demolish issued under USBC, Part I, § 118.2 in the time period stipulated, the building official may take action to cause the unsafe building or structure to be demolished. USBC, Part I, § 118.6.



The building official may ask the local government attorney to institute appropriate action against the property owner to recover the costs associated with any such emergency repairs or demolition, consistent with Va. Code §§ 15.2-906 and 15.2-1115, as may be applicable. USBC, Part I, § 118.6. The USBC confers this authority to take action on the building official, and he is not required to obtain the permission of any other local official prior to acting in accordance with the USBC provisions. See 13 VAC 5-63-180(H); USBC, Part I, § 118.7. Working together with its building official, any locality is authorized to maintain an action in court to compel a responsible party to abate an unsafe, dangerous, or unsanitary public or private building, wall, or structure. See Va. Code § 15.2-900; see also sections [28-3.04\(a\)](#) and [28-3.04\(b\)](#).

#### **28-4.01(b) Existing Structures—Procedures for Correction of Unsafe Buildings and Structures**

The provisions of USBC, Part III, 13 VAC 5-63-450 et seq. (the “Maintenance Code”) prescribe regulations to be complied with in the maintenance and repair of existing buildings and structures and equipment. The Maintenance Code can be enforced by localities with respect to existing properties, but only after official action by the locality electing to do so. See Va. Code § 36-105(C); 13 VAC 5-63-480(A); USBC, Part III, § 104.1. The local official designated by a locality’s governing body to be responsible for administration and enforcement of the Virginia Maintenance Code is referred to in USBC Part III as the “code official” (in common parlance, often referred to as the “maintenance official”). (Note: localities that choose not to enforce the Maintenance Code may still take such action as may be authorized to them under Va. Code §§ 15.2-906 and 15.2-1115, through other authorized local officials, see sections [28-3.04\(a\)](#) and [28-3.04\(b\)](#)).

The Maintenance Code establishes its own, separate procedures for remedying unsafe buildings and structures, see 13 VAC 5-63-490; USBC, Part III, § 105; however, these procedures are very similar to those described in section [28-4.01\(a\)](#). The code official inspects a building or structure alleged to be unsafe, or unfit for human habitation, and prepares an inspection report detailing his findings. If the code official finds a serious and dangerous hazard to life or health in a structure constructed prior to the initial edition of the USBC, and the condition is caused by something other than improper maintenance or failure to comply with building codes in effect at the time of original construction, the code official may order the minimum changes necessary to remedy the condition. On the other hand, if the structure is found to be unsafe or unfit for human occupancy, the code official must issue a notice of unsafe structure to the owner, the owner’s agent, or person in control of the structure. 13 VAC 5-63-485; USBC, Part III, § 105.4. The notice must identify the corrections necessary to comply with the Code, and if demolition is required, the notice must specify the time frame in which the demolition must occur. *Id.*

Under the Maintenance Code, the code official has several other procedures available as a means of remedying unsafe structures, and structures unfit for human occupancy. These procedures are described in detail in 13 VAC 5-63-490(A) through (J), USBC, Part III, § 105, and include:

- an order requiring immediate vacation of an unsafe structure, if there is actual and immediate danger to occupants or the general public, or life is endangered by continued occupancy, accompanied by notices posted at each entrance prohibiting use and occupancy of the structure;
- posting of a placard prohibiting use or occupancy of a structure, concurrent with the code official’s notice of unsafe structure, and (if the structure is open to the public) the code official may authorize work necessary to secure the structure against public entry;

- if a notice of unsafe structure is not timely complied with, the code official may request the building official to revoke the certificate of occupancy for the structure;
- the code official may authorize emergency repairs, upon a determination that there is an immediate danger of any portion of the structure collapsing or falling and when life is endangered, and also when there is a code violation resulting in the immediate serious and imminent threat to the life and safety of occupants of the structure; and
- whenever an owner of an unsafe structure or structure unfit for human habitation fails to timely comply with a notice to demolish issued under USBC § 105.4, the code official is authorized to cause the structure to be demolished.
- The code official may request legal counsel of the locality to institute appropriate action against a property owner, consistent with Va. Code §§ 15.2-906 and 15.2-1115, as may be applicable, to recover the costs associated with any emergency repairs or demolition, and every such charge that remains unpaid constitutes a lien against the property enforceable in the same manner as provided for local taxes. 13 VAC 5-63-490(G); USBC, Part III, § 105.6; see *also* sections [28-3.04\(a\)](#), [28-3.04\(b\)](#). The USBC does not require the code official to seek permission from any other local government official; however, particularly in cases where a demolition may be involved, it is advisable for the code official to keep other local officials informed.

#### 28-4.01(c) Local Rental Inspection Programs

It should be noted that the terms “blight,” “derelict building,” and “slum” all encompass conditions arising out of residential dwellings that have deteriorated to a point where they may not only be unsafe or unfit for occupancy, but they may also be adversely affecting the general public welfare in other ways, such as having an adverse impact on adjacent property values. Rental inspection programs offer one means of monitoring the condition of residential rental properties.

The General Assembly has authorized any locality to adopt an ordinance establishing a rental inspection program, following notice and a public hearing. Va. Code § 36-105.1:1. Following adoption of the ordinance, additional notice is required to owners of the units subject to the inspection program, or their designated managing agents. The inspections are conducted to determine compliance with the USBC and to otherwise promote safe, decent, and sanitary housing for its citizens. Inspections may be conducted by the locality, of (i) all “residential rental dwelling units” within a “rental inspection district” established by the governing body of the locality (a district may not encompass the entire locality);<sup>38</sup> and (ii) any individual residential rental dwelling unit outside an established district, upon a finding that such individual dwelling unit is unsafe; is blighted, or in the process of deteriorating; or contains building code violations that affect safe, decent, and sanitary living conditions for tenants. See Va. Code § 36-105.1:1(B).

The governing body may designate a local government agency *other than* the building department to assist the local building department with its duties of enforcement relating to the rental inspection program. If so stated in the locality’s ordinance, the locality may require owners of rental properties within a rental inspection district to notify

<sup>38</sup> But see *MacDonald v. City of Fairfax*, 80 Va. Cir. 567 (Fairfax Cnty. 2010) (city did not exceed the authority granted by statute, by creating two separate inspection districts that, together, included the entire area of the city; limiting amendments not retroactive).

the locality if their property is used for residential rental purposes, but no registration fee may be imposed in connection with this notification.

Upon establishment of a rental inspection district, a locality must proceed to conduct an initial inspection of each known residential rental dwelling unit within the district (“initial inspection”). The locality may provide for periodic inspections thereafter. For both the initial and periodic inspections, a locality may inspect a sampling of the units included within larger rental properties (properties containing more than ten units). If the sampling reveals building code violations that affect safe, decent, and sanitary living conditions, the building department may inspect as many additional dwelling units within that property as necessary to enforce the building code. Follow up inspections may be required. Va. Code § 36-105.1:1(D)–(F). Once a specific property has been inspected, with no violations being found, and for a period of four years following issuance of a certificate of occupancy, the building department must provide an exemption from further inspection under the ordinance for a minimum of four years, except that if the property is sold during that time, a periodic inspection may be conducted subsequent to the sale. However, if building code violations are otherwise discovered during an exemption period (for example, upon investigation of a complaint) the exemption may be revoked. Va. Code § 36-105.1:1(G).

Localities may exempt rental units in a rental inspection district if they are managed by a professional property manager, brokerage or real estate firm, or owner of a publicly traded entity that manages its own rental units. *Id.*

The enabling legislation for the rental inspection program does not in any way alter the provisions of Virginia’s landlord tenant law, nor does it alter the duties or responsibilities of the local building department. Va. Code § 36-105.1:1(I)–(J).

Penalties for violations of a local rental inspection program ordinance are the same as the penalties provided in the USBC. *See, e.g.,* Va. Code § 36-106.

#### **28-4.01(d) Vacant Building Registration**

Under Va. Code § 15.2-1127, any city (and the Towns of Clifton Forge, Timberville, and, if within a conservation or rehabilitation district, Pulaski<sup>39</sup>) may require the owner(s) of certain vacant buildings to register those buildings with the city/town on an annual basis. An annual registration fee may be imposed, not to exceed \$100, to defray the cost of processing such registration. *Id.*

When a vacant building registration program is authorized, only the following buildings are subject to the registration requirement:

1. every building that has been vacant for a continuous period of twelve months, or more, and
2. other vacant buildings that meet the definition of a “derelict building” set forth within Va. Code § 15.2-907.1.<sup>40</sup>

<sup>39</sup> See section 28-5.04. Designated conservation and rehabilitation areas, as established pursuant to Va. Code §§ 36-48.1 and 36-52.3, respectively, may be referred to in other sections of the Code as “conservation districts” and “rehabilitation districts.” *See, e.g.,* Va. Code § 15.2-2306(A).

<sup>40</sup> Per Va. Code § 15.2-907.1, a “derelict building” means a residential or nonresidential building or structure, whether or not construction has been completed, that might endanger the public’s health, safety, or welfare and for a continuous period in excess of six months, it has been (i) vacant, (ii) boarded up in accordance with the building code, and (iii) not lawfully connected to electric

Va. Code § 15.2-1127. Failure to register a vacant building, when required by the local ordinance, is punishable by a mandatory \$200 civil penalty; however, if the vacant building is in a conservation or rehabilitation district, or is a property designated as blighted pursuant to Va. Code § 36-49.1:1 (“spot blight”), then the ordinance may prescribe a specific civil penalty, in an amount not to exceed \$400. *Id.* Prior to seeking imposition of the civil penalty, the city/town must give thirty days’ advance written notice to the owner(s). *Id.*

## 28-5 BLIGHTED PROPERTY

### 28-5.01 Background

Within Title 36 of the Va. Code (Housing Law) there exist additional mechanisms by which blighted areas and blighted properties within a locality may be abated, revitalized, or rehabilitated. The terms “blighted area” and “blighted property” are broadly defined within Va. Code § 36-3 as follows:

*“Blighted area”* means any area that endangers the public health, safety or welfare; or any area that is detrimental to the public health, safety, or welfare because commercial, industrial, or residential structures or improvements are dilapidated, or deteriorated or because such structures or improvements violate minimum health and safety standards.

*“Blighted property”* means any individual commercial, industrial, or residential structure or improvement that endangers the public’s health, safety, or welfare because the structure or improvement upon the property is dilapidated, deteriorated, or violates minimum health and safety standards, or any structure or improvement designated as blighted pursuant to § 36-49.1:1, under the process for determination of “spot blight.”<sup>41</sup>

Depending on the nature and extent of blight within a community, and in addition to any powers a locality may exercise for abatement of public nuisances, localities and local housing and redevelopment authorities are granted additional remedies within the Housing Law for the abatement of blighting conditions. The powers conferred within the Housing Law are in addition to, and are supplemental to, the powers conferred by any other law (except as may otherwise be provided within a city or town’s charter). Va. Code § 36-8. Where such authorities exist, and where efficient political and operational working relationships can be established between the local government and the governing board of the authority, a jurisdiction will possess the maximum range of measures available under Virginia law for the abatement of nuisance conditions, including blight remediation.

*Note:* Relatively few communities have opted to utilize a housing and redevelopment authority; however, where such authorities are active, the tools available to them can be very powerful. It is interesting to note that there technically exists within each locality a political subdivision of the Commonwealth, which may be known as that locality’s “redevelopment and housing authority.” However, no such authority can act, or become activated, unless and until the voters within a locality confirm, within a referendum, that there exists a need for the authority to function within the locality. Any governing body may, by resolution, call for this referendum, but a town council must first obtain the concurrence of the governing body of its surrounding county prior to scheduling a referendum. See Va. Code § 36-4. For a more detailed and specific discussion of issues

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service from a utility service provider or not lawfully connected to any required water or sewer service from a utility service provider.

<sup>41</sup> Compare definitions of “nuisance” in Va. Code § 15.2-900 (unsafe, dangerous, or unsanitary public or private buildings, walls, or structures that constitute a menace to the health and safety of the occupants or the public), with references to “unsafe buildings and structures” in Va. Code § 15.2-906, USBC, Parts I and III, and “derelict building” in Va. Code § 15.2-907.1.

related to the creation and exercise of powers by an authority, see [Chapter 3, Redevelopment and Housing Authorities](#).

*Additional note: applicability of blight remedies to farm structures and properties.* Local government attorneys in agricultural communities should be aware that the Housing Law’s remedies and procedures for blighted properties do not apply to farm structures. The creation of redevelopment or conservation areas, or designation of “spot blight” relative to an individual property, cannot abrogate the right to farm, as protected in the Right to Farm Act, Va. Code § 3.2-300 et seq. In the event of a conflict between the Housing Law and the Right to Farm Act, the Right to Farm Act will control. See Va. Code § 36-9.1. The two laws are not entirely unrelated, however; for example: the owner of any farm that is operated, or worked upon, by low-income farmers who are in need of safe and sanitary housing, may file an application with a county housing authority requesting that it consider providing such housing. See Va. Code § 36-38.

### **28-5.02 Housing Rehabilitation Zones**

Pursuant to Va. Code § 36-55.64, any locality may establish, by ordinance, one or more housing rehabilitation zones, for the purpose of providing incentives and regulatory flexibility to encourage rehabilitation of properties within the zone.

#### **28-5.02(a) Incentives**

Incentives provided within a housing rehabilitation zone may include, but are not limited to, reduction of permit fees; reduction of user fees; and waiver of tax liens<sup>42</sup> to facilitate the sale of property that will be renovated, rehabilitated, or replaced. Any incentives established by a locality may extend for a period of up to ten years from the date of the initial establishment of the housing rehabilitation zone; however, provisions of federal and state law may further limit the extent or duration of a particular incentive. See Va. Code § 36-55.64(C). Any developer considering a project within one of these zones should be made aware that a locally-designated housing rehabilitation zone is deemed to meet the requirements for designation of housing revitalization—eligible for financing through the Virginia Housing Development Authority (VHDA) as an economically mixed project, pursuant to Va. Code § 36-55.30:2.

Note: For the sole purpose of empowering the VHDA to provide financing, the governing body of any city or county may, by resolution, designate an area within its jurisdiction as a “revitalization area,” see section [28-5.03](#).

#### **28-5.02(b) Regulatory Flexibility**

The regulatory flexibility that may be extended by a locality to property owners within a housing rehabilitation zone includes, but is not limited to, special zoning for the district; use of a special permit process; and exemption from certain specified ordinances (but not from Erosion & Sediment (E&S), Stormwater, or Chesapeake Bay Preservation requirements). Any incentives specified within a locality’s ordinance must be binding upon the locality for a period of up to ten years. See Va. Code § 36-55.64(D).

#### **28-5.02(c) Authorization for Special Service Districts within a Rehabilitation Zone**

Pursuant to Va. Code § 36-55.64(E), any locality may establish a service district, pursuant to Va. Code § 15.2-2400 et seq., in order to provide for any additional public services that the locality deems necessary within a housing rehabilitation zone. See Chapter 11, Economic Development, section [11-5.05](#) (special service districts).

<sup>42</sup> See sections [28-3.04\(a\)](#), [28-3.04\(b\)](#), [28-3.05](#) (liens to recover locality’s abatement cost), and [28-3.06](#) (Tax Code Remedies).



### 28-5.03 Housing Revitalization Zones

The governing body of any county, city, or town may apply directly to the Virginia Department of Housing and Community Development (DHCD) to have an area or areas declared to be a “housing revitalization zone.” Among the benefits of a housing revitalization zone designation is the availability of state funding for certain qualified business firms and owner-occupants undertaking construction or rehabilitation activities within the zone. See Va. Code §§ 36-165 through 36-167. If a locality submits an application to DHCD, the application must include a description of proposed local incentives to complement the state’s financial incentives. See Va. Code §§ 36-160(A), 36-168. Following approval of a zone, if a locality is unable or unwilling to provide the incentives that were referenced within its application, then the approval of the revitalization zone terminates. See Va. Code § 36-169(A).

The Governor may approve a revitalization zone for a period of fifteen years, upon the recommendation of DHCD. No locality can receive approval for more than two revitalization zones. Each revitalization zone must consist of contiguous U.S. Census tract(s), or portions thereof, in accordance with current U.S. Census data or the most current data available from the local planning district commission. Not more than 10 percent of a locality’s land area can be included in a single housing revitalization zone, and in order for a locality to seek designation, a proposed zone must also meet at least one of the following criteria:

1. per capita income that is less than 80 percent of the median per capita income for the planning district, or
2. a residential vacancy rate that is at least 120 percent of the average vacancy rate for the planning district.

Va. Code § 36-160(B).

Within ninety days following the state’s designation of a housing revitalization zone, the locality in which the zone is located must adopt an ordinance providing that all, or a specified percentage of the real estate taxes within the zone, will be assessed, collected, and allocated in accordance with a special procedure. Va. Code § 36-170(1)-(3). At least 25 percent of any increase in real estate taxes attributable to the difference between the most current tax assessment and a base assessment established at the time of approval, must be appropriated by the locality for enhanced tax incentives; law enforcement and other governmental services; or financing of transportation projects. Appropriations required by a locality must be made in the taxable year immediately following the payment of any DHCD grant. However, if no DHCD grants are paid out in a particular calendar year, the locality is excused from making the required appropriation in its immediately following taxable year. Va. Code § 36-170(3).

### 28-5.04 Redevelopment Areas and Conservation Zones

#### 28-5.04(a) Redevelopment Areas

A “redevelopment area” refers to an area that has been designated by a local housing authority, or a redevelopment and housing authority,<sup>43</sup> as being in a state of blight that meets the definition of a “blighted area,” including any “slum” area. (A slum refers to an area in which there exists a predomination of residential dwellings that, by reason of dilapidation, overcrowding, lack of ventilation, light or sanitary facilities, or any combination of those factors, is detrimental to safety, health, or morals). See definitions set forth within Va. Code § 36-3.

<sup>43</sup> See definition of “redevelopment area” in Va. Code § 36-3; see also Va. Code § 36-48 regarding creation of redevelopment areas.



**28-5.04(a)(1) Redevelopment Plan**

Following the designation of a redevelopment area, a redevelopment plan may be adopted to address the conditions that are causing blight. It has been said that the Commonwealth has given housing and redevelopment authorities and cities “vast powers” to impose conditions and limitations under which property may be redeveloped within a redevelopment area, including prescription of certain anticompetitive measures, designed to encourage private developers to invest heavily within an area, in accordance with a “blackout” agreement. See *Reasor v. City of Norfolk*, 606 F. Supp. 788 (E.D. Va. 1984). The plan is prepared and adopted by an authority, but cannot become effective unless and until notice has been sent to affected property owners, and until the governing body of the locality approves it. Va. Code §§ 36-49(B), 36-51(A).<sup>44</sup> Once the plan takes effect, however, an authority will have broad authority to carry out work or projects within the area in furtherance of the plan.

**28-5.04(a)(2) Historic Resources within a Redevelopment Area**

A locality may also, by ordinance, identify areas of unique architectural value located within a designated redevelopment area, and may provide in the ordinance that applicants seeking approval of development within such area will preserve or accommodate historical or archaeological resources. See Va. Code § 15.2-2306(A). Owners of locally-designated historic landmarks, buildings, or structures may be required to follow special procedures prior to a demolition. Va. Code § 15.2-2306(A)(3).

See *also* Chapter 3, Redevelopment and Housing Authorities, section [3-8.02](#) (Redevelopment Projects).

**28-5.04(b) Conservation Zones**

A “conservation zone” refers to an area that has been designated by a local housing authority,<sup>45</sup> or a redevelopment and housing authority, as being in a state of deterioration that is in the early stages of becoming a “blighted area.”

**28-5.04(b)(1) Conservation Plan**

Following the designation of a conservation zone, the authority may adopt a conservation plan for the zone. A conservation plan does not become effective, unless and until notice has been sent to affected property owners, and until the governing body of the locality approves it. Va. Code §§ 36-49.1(B), 36-51.1(A). Once effective, however, an authority will have broad authority to carry out work or projects within the area, to prevent further deterioration and to prevent the area from becoming blighted.

**28-5.04(b)(2) Historic Resources**

Just as within a designated redevelopment area, a locality may, by ordinance, identify areas of unique architectural value and require applicants for development approvals to preserve or accommodate them. Va. Code § 15.2-2306(A). Special procedures may apply prior to demolition of a local historic landmark, building, or structure. Va. Code § 15.2-2306(A)(3).

See *also* Chapter 3, Redevelopment and Housing Authorities, section [3-8.03](#) (Conservation Areas).

**28-5.04(c) Rehabilitation Areas**

Whenever it appears to a locality’s governing body that a portion of the locality, adjacent to an area embraced within a “conservation plan,” is in the early stages of deterioration, and if the governing body determines that, if not rehabilitated, such area is likely to continue to

<sup>44</sup> The governing body of a locality may choose to approve redevelopment plans itself, or may designate an agency of the locality for that purpose. Va. Code § 36-51(A).

<sup>45</sup> See definitions within Va. Code § 36-3; see *also* Va. Code § 36-48.1 (creation of conservation areas).

deteriorate and become eligible for designation as a conservation area, then the governing body of the locality may, by ordinance, create a rehabilitation area, see Va. Code § 36-52.3. The ordinance must satisfy three criteria:

1. outline specific boundaries for the rehabilitation area;
2. establish that the rehabilitation area is adjacent to an existing conservation area; and
3. include such properties as are in need of rehabilitation.

The rehabilitation area will not become effective until written notice has been sent to affected property owner(s) in accordance with Va. Code § 36-27(B).<sup>46</sup>

Once a rehabilitation area has been established, a local redevelopment and housing authority is empowered to encourage and assist property owners within the rehabilitation area, by suggesting standards for design, construction, maintenance, renovation, and use, and by lending money or making grants to owners and occupants, directed toward prevention and elimination of deteriorating conditions within the rehabilitation area.

### 28-5.05 Spot Blight Abatement

Under the general provisions of Virginia’s Housing Authorities Law, Va. Code § 36-1 et seq., any redevelopment and housing authority, *or any locality*, may act to acquire or repair a blighted property, whether such property is located inside or outside a conservation or redevelopment area. The express grant of power to remedy a blighted property is set forth within Va. Code § 36-49.1:1, and includes the power of eminent domain<sup>47</sup> as well as the power to recover the costs of repair or disposal from the property owner. The repair or removal of an individual blighted property is commonly referred to as “spot blight abatement.” A multi-step process is required, prior to any action taken by a locality.<sup>48</sup>

#### 28-5.05(a) Preliminary Determination

To initiate a spot blight abatement process, a locality’s chief executive or other designee must render a preliminary determination that a property is blighted. Notice of this preliminary determination, specifying the reasons why the property is blighted, must be given to the property owner(s) of record (as indicated by the treasurer’s or tax assessor’s records). The owner(s) must be afforded at least thirty days from the date the notice is sent, to give them sufficient time to respond with a written spot blight abatement plan designed to address the blight within a reasonable timeframe. Va. Code § 36-49.1:1(B). If the owner(s) respond with a suitable plan, and diligently complete it, the matter is resolved.

#### 28-5.05(b) Declaration of Blight by Ordinance

If the owner fails to respond, or does not respond with an acceptable plan, the locality may not proceed to abate the blight, unless and until the governing body for the locality adopts an ordinance containing a declaration that the property is a blighted property, in accordance with Va. Code § 36-49.1:1(C). Once the ordinance is adopted by the governing body, then the locality will have a lien on all of the property repaired or acquired under the approved

<sup>46</sup> For a locality’s authority to adopt an ordinance identifying areas of unique architectural value located within a designated rehabilitation area, see Va. Code § 15.2-2306(A).

<sup>47</sup> Use of eminent domain is not authorized for blighted property that is occupied for personal residential purposes, if acquisition by eminent domain would displace the residents, unless the locality can provide for temporary relocation of the person, and the relocation is within that person’s financial means. Va. Code § 36-49.1:1(F).

<sup>48</sup> For the remaining provisions of this section, only a “locality” will be referred to; however, the reader should note that redevelopment and housing authorities may also exercise the power of spot blight abatement.

spot blight abatement plan (see the following paragraph). The property lien authorizes recovery of the following costs<sup>49</sup>:

1. improvements made by the locality to bring the blighted property into compliance with applicable building codes, and
2. costs of disposal of the property, if any.

The lien for costs will bear interest, and may be recorded as a lien among the land records of the circuit court, which lien is treated in all respects as a tax lien. The locality is authorized to recover its “costs of repair” from the owner(s) of record, at the time the property is sold or disposed of, and if the property is acquired by the locality through eminent domain, the locality may subsequently recover its costs of repair when it sells or disposes of the property; in either case, the costs of repair are to be recovered from the proceeds of any sale.

#### **28-5.05(c) Local Spot Blight Abatement Plan**

Next, a spot blight abatement plan must be developed by the locality. A copy of the abatement plan must be sent to the record owner(s), together with written notice of the ordinance declaring the property to be blighted. Virginia Code § 36-49.1:1(D) provides that, “[i]f the repair or other disposition of the property is approved, the . . . locality may carry out the approved plan to repair or acquire and dispose of the property in accordance with the approved plan . . . .” This language implies that the spot blight abatement plan must also be approved by the governing body. Approval by the governing body of the abatement plan is advisable, as the costs of abatement may or may not be recoverable without such approval. Va. Code § 36-49.1:1(E).

#### **28-5.05(d) Alternate Procedures**

##### **28-5.05(d)(1) Declaration of Public Nuisance**

In lieu of following the spot blight abatement procedure described above or acquisition through eminent domain, any locality may, by ordinance, declare a blighted property to constitute a public nuisance. Va. Code § 36-49.1:1(G). Following the adoption of the ordinance, the locality may then proceed to abate the nuisance pursuant to Va. Code §§ 15.2-900 or 15.2-1115, without the requirement of a specific abatement plan. No such ordinance may be adopted until the record owner(s) have been given written notice of the proposed action, by certified mail. Thereafter, if the owner does not abate the nuisance, and the locality does so, the costs of removal or abatement of the nuisance will constitute a lien on the property, and will bear interest. Note that the language establishing this lien is quite different than the liens described within Va. Code §§ 15.2-900 and 15.2-1115.

##### **28-5.05(d)(2) Local Receivership**

In some circumstances, a locality may petition its local circuit court to appoint it or a land bank (see section [28-5.06](#)) to act as a receiver to repair real estate that contains any residential dwelling units. Ten criteria must be satisfied, in order for receivership to be authorized. Va. Code § 15.2-907.2(A)(1)-(10). Among the criteria are requirements that a locality must have both declared a building to be a “derelict building” in accordance with Va. Code § 15.2-907.1 (a remedy that is only available within a locality that has established a real estate tax abatement program), and declared the property to be blighted in accordance with the spot blight abatement procedures of Va. Code § 36-49.1:1. See *also* Va. Code § 15.2-907.1; sections [28-2.02\(a\)\(2\)](#), [28-3.04\(b\)\(1\)](#) (referencing derelict structures abatement procedures).

<sup>49</sup> Compare the language set forth within Va. Code §§ 15.2-906 and 15.2-1115, relative to the nature of the lien and the types of costs that may be recovered.

**28-5.05(d)(3) Richmond—Special Legislation**

The General Assembly granted special legislation authorizing the City of Richmond to take action, by ordinance, approving a sale of property for the nominal amount of one dollar, if such property has previously been declared blighted and was acquired by the city using the spot blight abatement procedure of Va. Code § 36-49.1:1. Va. Code § 15.2-958.1(A). In connection with any such sale, the city must require any purchaser, by covenants in a deed or other security instrument: (i) to begin repair or renovation of the property within six months of purchase, and (ii) to complete all repairs or renovations necessary to bring the property into compliance with the local building code within a period not to exceed two years of the purchase. The city may include any additional reasonable conditions it deems appropriate to assure that the property is repaired or renovated in accordance with applicable codes. Va. Code § 15.2-958.1(B).

**28-5.06 Land Bank Entities**

A land bank is an entity that may acquire, hold, rehabilitate, and convey real property for the purposes of assisting a locality in addressing vacant, abandoned, and tax delinquent properties. Virginia Code § 15.2-7500 et seq. sets forth the procedures and powers. After notice and a public hearing, one or more localities may create a public authority or a non-profit corporation, or designate an existing nonprofit entity, to be a land bank. A planning district commission may be designated to carry out the functions of a land bank entity. Va. Code §§ 15.2-7502, 15.2-7512. The land bank entity is governed by a board of directors, which may employ staff.

Properties may be acquired by a land bank by almost any means other than through the power of eminent domain. A locality may deem paid in full all accumulated taxes, penalties, interest, and other costs on any tax delinquent property in exchange for conveyance of the property to the land bank. Va. Code § 58.1-3970.2. The land bank entity does not have to pay taxes on property it owns. Operating funds for land banks may be received from grants or loans from local, state, or federal governmental entities, private sources, lease payments or sale proceeds, or investment income. Additionally, the locality may remit up to 50 percent of the real property tax collected on property conveyed by a land bank entity. This allocation of taxes would commence with the first tax year following the date of conveyance, and could continue for a period of up to ten years.

The land bank board must specify in its policies and procedures the terms and conditions under which property can be sold or ownership otherwise conveyed. The locality may require that the land bank entity follow a ranking of priorities for the conveyance of property, which may include use for public space, affordable housing, economic development, historic preservation, or any other use determined by the locality.