



VIRGINIA LEGISLATIVE ISSUE BRIEF

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2006 Session: *General Assembly Issues*

This Issue Brief contains descriptions of some of the issues that appear likely to capture the attention of legislators at the 2006 Session of the General Assembly. It is not intended to be a comprehensive listing of every issue that will be considered. Unanticipated issues will undoubtedly surface, and some of the issues discussed in these pages may not be considered during the 2006 Session. Finally, and most importantly, these descriptions are not predictions of how the General Assembly will respond to any issue.

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Budget Outlook

The actions of the 2006 Session of the Virginia General Assembly may be heavily influenced by the statewide elections in November of a new Governor, Lieutenant Governor and Attorney General, as well as members of the House of Delegates. Both the Governor and the General Assembly will have their budget priorities, which will need to be reconciled in the 2006-2008 Appropriations Act.

The Commonwealth was fortunate to end the fiscal year on June 30, 2005, with a general fund revenue surplus of \$544.6 million, based on surprisingly robust general fund growth of 14.8%. Although much of the surplus is already committed to the Rainy Day Fund and the Water Quality Improvement Fund, the strong

revenue growth means that Virginia's economy is expanding rapidly. The question now becomes how long will it continue?

The economic and revenue forecast will dictate the amount of resources available to the 2006 Session to meet the Commonwealth's budgetary priorities in the 2006-2008 biennium. The revenue estimates upon which the budget will be built will not be finalized until December. Most forecasters see continuing, but slightly slowing economic growth over the next two year period. However, there seems to be a growing number of clouds on the economic horizon that could affect the economic outlook, which include: the impact of skyrocketing gasoline and energy prices on the U.S. economy, as well as the possibility of gasoline shortages; the financial impact and scope of federal rebuilding of the Gulf Coast in

the wake of Hurricanes Katrina and Rita; the impact of escalating federal deficits; the pace of increasing interest rates by the federal reserve system; and heightened concerns about inflationary pressures building in the economy.

Clearly, these factors, as well as a host of others, will determine the U.S. and Virginia economic outlook as the 2006 Session approaches.

John Garka

Finance/Taxation

Sales Tax Holiday

It is likely that a bill creating a sales tax holiday will be introduced in the 2006 Session. The term "sales tax holiday" refers to the temporary exemption from sales tax of the purchase of certain specified items of tangible personal property. They are generally linked to back-to-school shopping. Accordingly, the most prevalent time period is in August, and the items that are exempt are usually one or more of the following: clothing, school supplies, and computers. In almost all cases there is a per item cost cap (e.g. any item of clothing costing \$100 or less).

In 2005, the following ten states offered one form or another of a sales tax holiday: Georgia, North Carolina, South Carolina, Massachusetts, Missouri, Iowa, Texas, Florida, New Mexico, and Connecticut. Maryland and Tennessee have passed legislation creating sales tax holidays in 2006.

Estate Tax

Bills to phase-out Virginia's estate tax have been introduced in the past four sessions. In the 2003 Session, the General Assembly passed two such bills (identical House and Senate bills), but the Governor vetoed them. In addition, bills have been introduced that would restrict but not eliminate the tax, for example: exempting estates valued at \$10 million or less, and exempting estates if the majority of their assets were in a closely held business or a working farm.

Virginia's estate tax operates by imposing a tax in an amount that equals the maximum credit allowed under federal estate tax laws for

state estate taxes paid—the taxpayer's "federal credit." The amount of the Virginia estate tax adjusts to federal changes in the amount of the federal credit, except that Virginia law sets a floor equal to the federal credit as it existed in 1978. For many years, this state tax, referred to as a "pick-up" tax, did not increase the total taxes paid by estates. The pick-up tax reduced, dollar for dollar, the amount of federal estate taxes owed—in other words, if Virginia did not collect the tax from the taxpayer, the federal government would.

However, the federal *Tax Relief Act of 2001*, among other things, reduced the amount of the federal credit below 1978 levels beginning January 1, 2002, reducing it by 25% each year until it no longer existed as of January 1, 2005. Accordingly, the Commonwealth's estate tax is no longer a "pick-up" tax, but rather constitutes a tax in addition to any federal tax the taxpayer owes (a deduction, not a dollar-for-dollar credit, is permitted in calculating federal estate taxes).

Funding Clean-up of the Chesapeake Bay and other Waters

One issue facing the General Assembly will be determining the level and source of funding for cleaning up the Chesapeake Bay and other Virginia waters on the federal impaired waters list. It has been estimated that the clean-up will cost Virginia in excess of \$2 billion over the next 10 years.

Currently, 10% of the annual revenue surplus and 10% of the annual unreserved general fund balance are dedicated to these purposes through deposits into the Water Quality Improvement Fund. The amount from this dedication was \$32.4 million for fiscal year 2006, to which an additional \$65 million was added from the general fund.

Last session, HJR 640 established a joint subcommittee to study options for a long-term funding source for the clean-up. The work of this joint subcommittee continues, and no final recommendations have yet been made. Options presented to the joint subcommittee regarding the source of funding include using current general funds (not from a particular source), dedicating the revenue from one or more current taxes or fees, imposing one or more higher or new taxes or fees, or any combination thereof.

The joint subcommittee also heard a proposal that would establish a new authority to coordinate and oversee the clean-up and to issue \$1 billion in "Bay Bonds" and dedicating a portion of the current recordation tax revenue for debt service.

David Rosenberg

Land Conservation Tax Credit

The Virginia Land Conservation Incentives Act of 1999 created the land conservation tax credit for the purpose of supplementing land conservation programs and encouraging the preservation of Virginia's natural resources. The income tax credit is available to individuals as well as corporations that donate land or an interest in land, such as a conservation easement, to a public or private conservation agency eligible to hold such interest for conservation or preservation purposes.

In 2002, the statute was amended to allow credits to be transferred or sold in the case of taxpayers who could not take full advantage of the credit on their income tax returns. Since that time, there has been a substantial increase in the amount of credits that are eligible for use on Virginia income tax returns. Concern has arisen regarding the appraisal practices surrounding the valuation of many of the larger donations.

A joint committee made up of members of the House and Senate Committees on Finance has been examining how the credit works and what can be done to ensure its continuation without it being abused and creating tremendous losses for the Commonwealth. There likely will be legislation introduced during the 2006 Session that will address the concerns of all the interested parties.

Joan Putney

Commerce/Labor

Cable Television Competition

In the 2005 Session, legislation was introduced in both the House (HB 2534) and Senate (SB 1337) that sought to encourage cable video infrastructure development and promote competition for video services by equalizing

franchise requirements for all competitors. The bills would have granted cable franchises to competitive providers of video service and eliminated the need for Verizon and other potential competitive providers of video service from complying with the current requirement that they obtain franchises from each locality in which they offer service. Though the bills died last session, the issue is being looked at by the Utilities Subcommittees of the Commerce and Labor Committees, and the issue may return in the 2006 Session.

Credit freezes

Ten states have enacted legislation that allows an individual to put a "freeze" on his credit report, which means that a credit reporting agency cannot divulge the credit report to a lender or anyone else seeking a copy of the credit report, unless the individual gives his permission. These laws are seen as a tool to make it difficult for someone who is misrepresenting his identity as the individual from getting a loan or other extension of credit based on the individual's credit report.

Workforce Development Services

In 2005, HB 2626 was introduced that would have consolidated programs funded under Title I of the federal *Workforce Investment Act* from the Virginia Employment Commission to the Department of Business Assistance. Though this bill failed, the House has been studying the issue pursuant to HJR 713, and may propose legislation next session to help ensure that employers have better access to necessary workforce development services.

Unemployment Insurance Coverage for "Trailing Spouses"

In Virginia, if your spouse is transferred to another location, and you quit your job to follow the spouse, you aren't eligible for unemployment compensation benefits. Bills have been introduced in each of the past two years that would allow trailing spouses to be eligible for benefits if the spouse is in the military and is transferred to a new, distant assignment.

Franklin Munyan

Public Education

No Child Left Behind

The 2004 General Assembly considered several measures directing the Board of Education to seek waivers to the federal *No Child Left Behind Act* (NCLB). Specifically, HB 2685 and SB 1136, passed during the 2004 Session, direct the Board to seek waivers from compliance with provisions of NCLB that (i) are in conflict with federal law prohibiting federal authorities from mandating, directing, or controlling state or local allocation of resources and from mandating state or local expenditure of funds; (ii) are duplicative of the Standards of Quality, Standards of Learning, and Standards of Accreditation; or (iii) are lacking in effectiveness. The identical bills further directed the Board to examine the fiscal and other implications for the Commonwealth and its local governments in the event that Virginia continues its compliance with, or withdraws from participation in, NCLB.

As a result of this legislation and Item 144, paragraph E.5.b. of the 2004 Appropriation Act (Chapter 4, 2004 Acts of Assembly, Special Session I), the Virginia Department of Education issued its *Report to the Governor and General Assembly on the Costs of the Federal No Child Left Behind Act to the Virginia Department of Education* on September 21, 2005. The report, cautioning that cost estimates will likely change over time, contained the following conclusions:

- Total estimated new costs to the Department of Education related to NCLB are covered by total projected revenues for the measurement period of the study (through 2008).
- Costs to the Department of Education for compliance with NCLB are funded at this time and should remain so for the foreseeable future.
- As 2014 NCLB requirements for 100% proficiency approaches, it is likely that Virginia's costs for compliance could rise at a faster rate as additional resources are needed to assist local school divisions.

The General Assembly will likely continue its consideration of the fiscal implications of seeking waivers from NCLB during the 2006 Session.

Raising Teacher Salaries to the National Average

Average teacher salaries in Virginia are currently 4.31%, or \$2,057, below the national average. During the 2004 Session, the General Assembly considered, but did not pass, HB 2075

that would have required that the state average teacher salary not be less than the annual national average teacher salary. As the issue of teacher salaries has come up in prior years, the General Assembly will likely consider similar measures during the 2006 Session.

Bryan Stogdale

Courts

Illegal Immigrants

The controversy over a publicly funded day-laborer center in Herndon has focused attention on the status of illegal immigrants in Virginia. A number of members of the General Assembly have expressed frustration with the federal government's failure to deport illegal immigrants, and recognizing that immigration law is largely federal and that states are limited in what they can do, have indicated a desire to exercise any permissible state power. Legislation in the areas of public benefits, human trafficking, employment, voting, and criminal law and procedure may arise.

Castle Doctrine

Are Virginia's laws on self-defense adequate or would it be desirable to establish by statute a presumption that someone who breaks into your home, vehicle, or business intends to cause death or do great harm justifying the use of deadly force? Although there are different variations, the *Castle Doctrine* as it is now being discussed generally removes any "duty to retreat" from your house, automobile, or workplace as long as you have a legal right to be there. Some versions provide that persons using force authorized by law will not be prosecuted and another provision prohibits the intruder from suing the homeowner for injuries. Virginia's self-defense laws are common-law rather than statutory. A defendant's actions will be justifiable self-defense, if without fault, he feared that he was in danger of being killed or in danger of great bodily harm under the circumstances as they appeared to him.

Jescey French

Methamphetamine and Methamphetamine Precursors

Last year, in response to the rapidly growing problem of the manufacture and use of a very

dangerous and inexpensive drug, the General Assembly made many changes in the laws governing the possession and manufacture of methamphetamine. An issue that remains, notwithstanding action already taken by the Governor to restrict the sale of pseudoephedrine and other precursor drugs, is legislation to do so. The penalties for possession and manufacture as well as remedies for dismantling of clandestine meth labs and payment therefore are still topical.

Sex Offenders and the Sex Offender Registry

The Crime Commission is in the midst of a study of the issues surrounding sex offenders and the Sex Offender Registry. The issues of punishment and mandatory punishment, stricter registration requirements, buffer zones (distance requirements between the homes of offenders and schools, etc.), searches, satellite tracking, etc., may all be topics before the General Assembly.

Robie Ingram

Natural Resources

Dangerous Dogs

Recently there have been several severe and highly publicized dog attacks upon children and the elderly within the Commonwealth, most notably the attack on Dorothy Sullivan by a pitbull which resulted in her death that occurred in Spotsylvania County. In light of these attacks there is anticipated to be measures to strengthen the Commonwealth's laws on vicious and dangerous dogs during the 2006 Session of the General Assembly, in particular broadening and strengthening the punitive consequences for the owner of the dog.

Michael Flaherty

Corrections

Prisoner Reentry Into Society

The process of leaving prison and returning to society or "prisoner reentry" has become a significant challenge in Virginia and nationally. Returning prisoners may generate greater costs to communities, including costs associated with crime and public safety, greater public health risks, and high rates of unemployment and

homelessness. In 2003, Virginia was selected to participate in the National Governors Association Policy Academy on Prisoner Reentry (Policy Academy). The joint subcommittee established pursuant to Senate Joint Resolution 273 is continuing the work of the Policy Academy in identifying key needs and barriers for offenders, prior to and upon leaving prison. As the work of SJR 273 progresses, the General Assembly may be asked to consider initiatives aimed at aiding the successful reintegration of offenders back into society.

Amy Marschean

Health

Medicare Part D

Beginning January 1, 2006, new Medicare prescription drug plans will be available to people with Medicare as a result of the federal *Medicare Prescription Drug, Improvement, and Modernization Act of 2003* that was signed into law by Congress in December 2003. The Centers for Medicare and Medicaid Services (CMS) will contract with private health plans and other vendors to provide the Medicare Part D benefit. Like other insurance, there is a monthly premium and a cost-sharing component. Costs will vary depending on the drug plan you choose. According to the Department of Medical Assistance Services (DMAS), there are roughly 947,000 Medicare beneficiaries in Virginia. Initial enrollment periods for this new benefit begin on November 15, 2005. Enrollment is optional, though a penalty may apply for late enrollment.

With the standard benefit, after payment of the premium and a \$250 annual deductible, the plan will pay 75 percent of the drug costs until the total drug expenses reach \$2,250. After the beneficiary reaches \$2,250 in drug expenses in a year, the coverage stops and he has to pay for the next \$2,850 in drug expenses entirely by himself. This is called the "doughnut hole." Insurance coverage doesn't start again until the beneficiary's drug expenses reach \$5,100. At that point, the beneficiary has spent \$3,600 of his own money for prescription drugs plus the \$420 premium, and he now qualifies for catastrophic coverage. For the rest of the year, the beneficiary pays either a flat copayment of \$2 for every generic drug prescription and \$5 for every

brand-name drug prescription, or 5%, whichever is greater. Plans can vary the benefit as long as it is of equal value to this standard benefit.

Medicare Part D Cost-Sharing for Medicaid Dual-Eligibles

Dual-Eligibles with Income <100% FPL	Dual-Eligibles with Income >100% FPL
<ul style="list-style-type: none"> Will receive their drug benefit through Medicare. No premium. No deductible. Not responsible for co-pays once total drug costs reach \$5,100. Below the catastrophic threshold individual will pay \$1 to \$3 co-pays. Institutionalized individuals are not responsible for cost-sharing. 	<ul style="list-style-type: none"> Will receive their drug benefit through Medicare. No premium. No deductible. Not responsible for co-pays once total drug costs reach \$5,100. Below the catastrophic threshold individual will pay \$2 to \$5 co-pays. Institutionalized individuals are not responsible for cost-sharing.

Source: Joint Commission on Health Care

Medicare Part D Cost-Sharing for Low-Income Beneficiaries

Beneficiary Income < 135% FPL with Assets < \$6,000 (\$9,000 for a couple)	Beneficiary Income < 150% FPL and Assets < \$10,000 (\$20,00 for a couple)
<ul style="list-style-type: none"> Will receive a subsidy to cover the average monthly premium for basic coverage in their region. No deductible. \$2 to \$5 co-pay. No co-pays after total drug costs reach catastrophic coverage level of \$5,100. 	<ul style="list-style-type: none"> Will receive premium subsidies on a sliding scale. \$50 deductible. 15% co-pay up to the \$5,100 catastrophic coverage limit. After the catastrophic limit is reached, a beneficiary is responsible for \$2 to \$5 co-pays.

Source: Joint Commission on Health Care

Low-income Medicare beneficiaries may apply for subsidies through DMAS or through the Social Security Administration (SSA). DMAS estimates that 136,000 Medicare beneficiaries are also Medicaid clients, called "dual eligibles." When Medicare Part D becomes effective, "dual eligibles" will receive their prescription drug coverage through Medicare, and not Medicaid. Certain individuals are automatically deemed eligible for low-income subsidies, including dual eligibles, Medicare Savings Program beneficiaries, and Supplemental Security Income beneficiaries. SSA and CMS began mailings to and accepting applications for low-income subsidy eligible beneficiaries. SSA began processing applications for assistance on July 1, 2005. Medicare will automatically enroll certain individuals if they have not chosen a plan.

Because Medicare Part D is a federal program, no changes can be made to the program requirements at the state level. However, the new Medicare drug benefit has required many changes at the state level that may prompt state legislation related to the implementation of the program. The local departments of social services have new responsibilities related to Medicare's new low-income benefit. DMAS, the Department of Social Services, the Department for the Aging, the local Area Agencies on Aging (AAAs), other human services state agencies and non-state organizations are also helping the federal government implement the Medicare Part D program in Virginia.

Medicaid Reform

Medicaid is the nation's health insurance program for low-income Americans. States are not required to provide Medicaid programs, yet if they do, they are required to provide certain mandatory services. Even though the program has extensive federal requirements and restrictions, states have many options to tailor their programs to meet their state's medical assistance needs. The federal government provides a monetary match for state expenditures, and in Virginia, the match rate is 50%. As costs for Medicaid have risen so have concerns about containing them. At both the national and state level, reform of the Medicaid program is being discussed. Legislation aimed at reforming Medicaid at the state level is likely.

Amy Marschean

Medical, Ethical, and Scientific Issues Relating to Stem Cell Research

In the last several years, the controversy surrounding stem cell research, particularly research using human embryonic stem cells, has become ubiquitous, with media attention and even hyperbole generated for virtually every new development.

Stem Cell Characteristics

Stem cells are unique in that they asymmetrically divide, producing another cell like themselves and a progeny cell that has the potential of differentiating into one or more cell types/tissues. Embryonic stem cells are said to be pluripotent, i.e., capable of maturing into any cell type depending on the surrounding environment and the signals being received. Adult stem cells, on the other hand, appear to be multipotent, able to differentiate into several cell types, but not all cell types. Some stem cells may only divide once and others can divide many times, producing many different cell types. Thus, the most difficult problem in stem cell science may be to figure out how and which stem cells have the capacity for generating specific tissues.

Stem Cell Therapies

Adult stem cells have been identified and isolated for approximately twenty years. However, human embryonic stem cells (or, as they may be referred to, germ cells) are a new research development, having only been reported on November 5, 1998, by two independent research teams in two different journals.

At this time, only adult stem cells are being used for human therapies in the United States. Adult stem cells derived from blood (peripheral and cord) and bone marrow have been used in the treatment of various cancers, such as certain leukemias and breast cancer, and some other diseases, such as sickle cell anemias, for at least 10 years. Embryonic stem cell research, on the other hand, is still in its early stages, with most of the research being preclinical and experimental. Thus, although the public wants therapies to be immediately available, the development of medical applications for embryonic stem cells will take time.

Therapeutic Cloning

Clinical applications for embryonic stem cell research may involve "therapeutic cloning," a

term regretted by many scientists. The actual process would be to match an embryonic stem cell line by performing somatic cell nuclear transfer from the patient to an oocyte and then to generate a blastocyst (an early stage embryo). The resulting stem cell line would be a precise match for the patient, thus eliminating host-graft rejection.

Stem Cell Issues

In the United States, the public discussion relating to stem cell research has been multidimensional, including religious, ethical, societal, commercial, scientific, and political views. Some religions view the destruction of a human embryo as the taking of human life. Ethicists often discuss a distinction between embryos created for research purposes and those created for reproductive purposes. The vast potential for developing therapies has excited much of the public, particularly those individuals suffering from or having relatives suffering from degenerative diseases and other disorders with little hope of recovery.

In many countries, the potential for commercialization of medical applications and the possibility of spinning ahead of American researchers has motivated government funding for human embryonic stem cell research. Among scientists the race to be first to discover the answers to the many research questions and to identify the best source of stem cells for various applications is being funded more and more frequently with private money. Scientific debate continues on proposals for resolving the human embryonic stem cell controversy through, for example, dedifferentiation or reprogramming of adult stem cells to produce pluripotent stem cell lines. Recently, the prestigious National Academies issued human embryonic stem cell research guidelines in response to concerns about the "hodgepodge of federal regulations," "the lack of regulation of privately supported human embryonic stem cell research," and "public and scientific uncertainty about the appropriate procedures for conducting stem cell research." Yet, the January 2004 report of the President's Council on Bioethics preliminarily concluded that human stem cell research "holds promise for" increasing knowledge of cell differentiation, the early stages of genetic and other diseases, and therapies for human diseases.

Federal Policies

In the political arena, many actions have taken place. From 1996 through 2004, the "Dickey Amendment," named for its sponsor

Representative Dickey, prohibited federal funding for the creation or destruction of human embryos for research purposes. In 1999, the Dickey Amendment was analyzed as banning funding of the derivation of stem cell lines from human embryos, but not banning federal funding of research on embryonic stem cells after the cell lines had been established. In 2001, President George W. Bush announced that federal funds may only be awarded for human embryonic stem cells that meet specific limiting criteria, i.e., derived prior to 9:00 P.M. EDT on August 9, 2001, derived from embryos created for reproductive purposes that were no longer needed, and donated after informed consent and without financial inducements.

Legislative Study of Stem Cells

In states across the country, legislatures have taken actions to create state-funded stem cell initiatives, to promote cord blood banking as a source of "young" stem cells, to curtail stem cell research, and more and more frequently, to study the many issues. House Joint Resolution 588 of 2005 created a 15-member joint subcommittee that is engaged in the study of the medical, ethical, and scientific issues relating to stem cell research conducted in the Commonwealth of Virginia. Materials, audio-streaming, and pictures may be viewed or heard on the study website at <http://dls.state.va.us/stemcell.htm>.

Norma Szakal

State Government

Balance of Power Between the Legislative and Executive Branches

For the past two years, the Joint Subcommittee Studying the Appropriate Balance of Power Between the Legislative and Executive Branches has reviewed various initiatives to more equitably balance the fundamental powers between the legislative and executive branches. The subcommittee was initially established to determine whether or not a constitutional amendment should be proposed to allow the Governor to serve successive terms. At the 2005 Session, the constitutional amendment for a two-term Governor, as recommended by the joint subcommittee and introduced as HJR 652 and SJR 401, was defeated in the Committee on Privileges and Elections in both houses. However, the General Assembly did pass other major legislation recommended by the

joint subcommittee that establishes a deadline for the submission of résumés and statements of the economic interests of gubernatorial appointees and creates a joint subcommittee of the Privileges and Elections Committees to review the material during the confirmation process. The joint subcommittee agreed to revisit the constitutional amendment this year while looking at the appropriate role of the General Assembly and the Governor in the revenue forecasting process, the promulgation of administrative regulations, and the appointment and confirmation of persons who serve on state boards and commissions. The General Assembly can expect to see the final recommendations of the joint subcommittee introduced at the 2006 Session. Matters still pending before the joint subcommittee include proposals to:

- Amend the Constitution to allow the Governor to succeed himself in office.
- Amend the Constitution to allow 60-day sessions during odd-numbered years without requiring a two-thirds vote.
- Amend the Constitution to permit an organizational session of the General Assembly in December. Many states hold organizational sessions prior to the regular session to swear in members, elect officers, assign members to committees, and adopt rules. The General Assembly could also use this time to confirm some of the gubernatorial appointees and hold elections for seats of incumbent judges and other judicial officers.
- Amend the Constitution to allow the General Assembly to nullify or suspend administrative regulations by joint resolution and designate standing committees and legislative commissions to suspend regulations during the interim.
- Establish a revenue-forecasting division in the legislative branch to analyze economic and tax collection data, identify economic trends, and provide independent evaluation of revenue projections.
- Give the legislature some of the gubernatorial citizen appointments to certain boards and commissions, including the Commonwealth Transportation Board and the Board of Education.
- Designate legislative appointing authorities to appoint legislators who serve on the Tourist Train Development Authority, the Chippokes Plantation Farm Foundation Board, and the Potomac River Basin Commission. Currently, the Governor makes these appointments, although it is usually customary for the legislature to appoint its own members.
- Strengthen the confirmation process by adding additional review procedures for agency heads and members of key boards and commissions. Additional review could include obtaining more information from appointees through questionnaires and interviews conducted by standing committees with subject matter jurisdiction.

Virginia Edwards

Local Government

Eminent Domain

The recent United States Supreme Court decision in *Kelo v. City of New London*, No. 04-108, has focused attention on the meaning of the "public use" requirement of the Takings Clause. In *Kelo*, the court held that economic development is a valid public use that justifies the taking of private property. The impact of the *Kelo* decision in Virginia is unclear. Any taking of property in Virginia must be authorized by the Commonwealth's constitution and eminent domain statutes. Although Virginia's statutory definition of "public use" is very broad, Virginia courts have established considerable precedent in interpreting the language. Because of the uncertain impact of the *Kelo* decision and its general notoriety, the 2006 Session will likely bring attempts to clarify the meaning of "public use" in Virginia for purposes of eminent domain.

Growth Issues

If recent history is a guide, the local government committees will continue to see many proposals in the areas of planning and zoning. Specifically, many localities can be expected to push for greater local authority to control growth and pay for the impacts of growth through measures such as impact fees and adequate public facilities ordinances.

An impact fee is a fee imposed by a locality to offset all or a part of the cost for public infrastructure improvements that are necessary to provide services to its citizens. An impact fee is typically imposed upon the developer or owner of property at the time of development. Currently, impact fee authority exists for certain localities, primarily in Northern Virginia, and applies only to roads. Previous proposals have attempted to expand this authority to additional localities and to other types of infrastructure, such as schools.

An adequate public facility ordinance would allow a locality to determine whether public facilities are adequate to support the services that will be required by a proposed subdivision or site plan. Approval of a proposed subdivision or site plan may be made contingent upon a finding by the governing body of adequate public facilities. Virginia localities currently do not have authority to adopt adequate public facility ordinances.

Jeff Sharp

Constitutional Issues

Pending Amendments

The 2006 General Assembly will act on three proposed constitutional amendments passed by the 2005 General Assembly. If the 2006 General Assembly agrees to these same amendments, they will be placed on the November 2006 ballot for approval or rejection by the voters:

- **Marriage.** This amendment adds a definition of marriage to the Constitution that states that "only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions." The amendment also disallows other unions with characteristics comparable to marriage.
- **Property tax exemptions.** This amendment authorizes the General Assembly to enact legislation that will permit localities to provide a partial exemption from real property taxation for real estate and associated new structures and improvements in conservation, redevelopment, or rehabilitation areas.
- **Incorporation of churches.** This amendment deletes language that prohibits the General Assembly from granting charters of incorporation to churches. This prohibition was held to be unconstitutional in 2002 by the United States District Court for the Western District of Virginia in *Falwell v. Miller*. The amendment deletes the now obsolete language and effects no change in current law on the powers of the General Assembly.

Future Amendments

The 2006 General Assembly can also propose other constitutional amendments that must be approved a second time in the 2008 Session before being submitted to voters in the November 2008 election. Likely topics for such amendments include:

- **Protections for transportation, highways, and other special funds.** Such proposals involve ways to protect the existing Transportation Trust Fund and other special funds so that the revenues placed in the funds are used for the purposes specified in creating the funds.
- **Successive terms for the governor and the balance of power between the executive and legislative branches.** A joint subcommittee is examining the balance of power between the executive and legislative branches including successive terms for the governor.
- **Eminent domain.** Proposals may be offered in response to the Supreme Court decision in *Kelo v. City of New London* and the taking of private property by eminent domain for the primary purpose of economic development.
- **Redistricting commissions.** There may be measures put on the table to modify the redistricting process and possibly establish a bipartisan or nonpartisan redistricting commission or procedure.

Mary Spain

Campaigns & Elections

Election Equipment

A two-year joint subcommittee to study voting equipment may propose legislation on the issue of voter-verified paper audit trail requirements for electronic and other types of voting equipment.

Campaign Finance

Legislation will likely surface on random audits of campaign reports, mandated electronic filing of campaign reports, and other refinements in Virginia's Campaign Finance Disclosure Act.

Mary Spain

Transportation

"Photo-Red" Enforcement

Although numerous bills were submitted in the 2005 Session of the General Assembly to repeal or extend the "sunset" on legislation that allowed for localities to implement the "photo-red" traffic light signal enforcement program, the 2005 Session chose to repeal this program. The impending 2006 Session may see new bills attempting to put back into place the statutory authority for localities to use this system.

Cell Phones While Driving

Most legislation in this area is directed towards teenagers and those who hold a provisional driver's license. A bill was defeated in the 2005 Session that would have restricted these drivers from using cell phones, handheld or handsfree. A number of states have placed restrictions on cell phone usage while driving. The 2006 Session may try to follow suit and again attempt to restrict young drivers.

Federal Real ID Act

Attention is sure to be placed on the *Federal Real ID Act* signed by President Bush this year that compels states to design their driver's licenses by 2008 to comply with federal antiterrorist standards. This federal legislation will have major impacts on the Department of Motor

Vehicles due to the costs of implementation and inconvenience it will have on not only to the DMV but also its customers.

Towing

Several bills emerged in the 2005 Session attempting to regulate the vehicle towing and recovery industry. A myriad of issues and controversies emerged resulting in a joint subcommittee which has been meeting during the interim. Towing and recovery rates, licensing, procedures, and oversight are all topics sure to be debated again in the 2006 Session.

Mopeds and Motor Scooters

A moped subcommittee has been meeting during the interim to look at issues involving their regulation. Many complaints have arisen in the last few years about these types of vehicles and the danger they impose on the driver's themselves and to others on the roadways. Because there has proven to be such fine lines in what makes one vehicle a motorcycle and another a moped or motor scooter, one of the largest hurdles is simply defining what these vehicles are in order to effectively regulate their use. The problems these vehicles pose are also more numerous in some areas of Virginia than in others so there are debates sure to come on statewide regulations versus the authority for localities to regulate.

Clean Special Fuel License Plates

Unless the 2006 Session acts to prevent it, the authority for vehicles bearing the special license plates for clean special fuel vehicles to use HOV lanes will "sunset" on July 1, 2006. Bills to extend the authority were submitted in the 2005 Session but were defeated, but this exception and its impending sunset will likely spark controversy in the Transportation Committees.

Stephanie Bishop

Transportation Funding

As in the past few sessions of the General Assembly, transportation funding will once again be a major focus of Virginia's legislators. There are many reasons that transportation funding will be in the spotlight. Approximately 27% of Virginia's major roads are rated either poor or in mediocre condition and approximately 26% of

Virginia's bridges 20 feet or longer are deemed to be structurally deficient or functionally obsolete. In addition, it is estimated that by 2023 Virginia's transportation revenues will be insufficient to provide matching funds for federal transportation dollars and by 2025 all transportation revenues will be required for maintenance, which means that under current estimates there will be no revenues available for funding new construction. Under current law, maintenance of existing roads takes priority over new construction. Thus, as the cost of maintaining the current network of highways and roads of the Commonwealth continues to increase, by 2025 it is estimated that all transportation revenues will be spent for maintenance.

In 2005 the General Assembly made an additional dedication of \$848 million to the funding of transportation. This one-time infusion of revenue helped to extend from 2018 to 2023 the estimated time frame when all transportation revenues of the Commonwealth will have to be spent for maintenance of existing infrastructure. Currently, there are two legislature-related groups studying transportation. The House Transportation Committee, Special Subcommittee IV, chaired by Delegate Wardrup, is conducting a study of transportation funding. In addition, the Statewide Transportation Analysis and Recommendation Task Force (START), chaired by Senator Hawkins, is a task force of legislators and citizens studying transportation funding that was established by the Senate Finance and Senate Transportation Committees. Specific legislative proposals for transportation funding may be put forth by these groups.

Finally, it is important to note that Virginia's gubernatorial candidates have emphasized additional funding of transportation as a top priority.

Mark Vucci

FOIA

Public Access to Records Under the PPEA

From a public access point of view, the *Public Private Education Facilities and Infrastructure Act* (PPEA) has been the subject of many news stories expressing concern that with the expenditure of substantial public dollars for

PPEA projects, the right of public access to these records occurs only at the end of the process. The Virginia Freedom of Information Advisory Council (FOIA Council) through its PPEA subcommittee has discussed public access to records under the PPEA. Guided by the general principle that when government is doing the public's business, the public should have access to the records, the FOIA Council has examined whether PPEA procurement records should be made more readily available to the public while the process of receiving and reviewing proposals is underway. It is clear that sometimes the public's right of access may be limited where there is a legitimate interest in protecting proprietary records and trade secrets of the private sector involved in the procurement transaction. However, the remainder of PPEA transaction records could be made publicly accessible if to do so would not compromise the negotiating posture of parties. The goal of the FOIA Council is finding the balance to facilitate competition while ensuring the public confidence in the decisions of government, especially when substantial public funds are expended. With the 2005 amendment to the PPEA to allow for interim agreements, there is sure to be legislation recommended by the FOIA Council to address public access to records under the PPEA.

Maria Everett

JCOTS

Database Breach Legislation

House Bill 2721 was introduced and referred to the Joint Commission on Technology and Science (JCOTS) during the 2005 Session of the General Assembly in response to concerns about the confidentiality of personal and private information maintained in databases. The issue of the security of these databases received heightened national attention after the breach of databases maintained by ChoicePoint, LexisNexis, and other public and private entities.

House Bill 2721, modeled after existing California legislation, would require agencies and businesses that maintain computerized

data that includes personal information of Virginia residents to notify any resident when a breach of the database containing that information is discovered. The bill provides for various means of notifying the owner or licensee of that information and requires the agency or business to coordinate notification with consumer reporting agencies if they indicate that the affected individual can obtain a credit report.

As of June 2005, 35 states have introduced some form of database breach notification legislation and 17 states have already enacted laws. JCOTS, through its Privacy Advisory Committee, is actively reviewing the issues relating to database security and identity theft in deciding whether to recommend legislation to the 2006 Session of the General Assembly. However, universal protection for citizens of all states may eventually come from federal legislation, which would preempt state efforts. Introduced in July of 2005, S.1408 has been referred to the Committee on Commerce, Science, and Transportation, which has ordered the bill to be reported.

Patrick Cushing



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E. M. Miller, Jr., Director
R. J. Austin, Manager, Special Projects
Lynda Lee Waddill, Editor

For information contact:
Special Projects
Division of Legislative Services
910 Capitol Street, 2nd Floor
Richmond, VA 23219
(804) 786-3591

<http://dls.state.va.us>

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