Virginia Town & City

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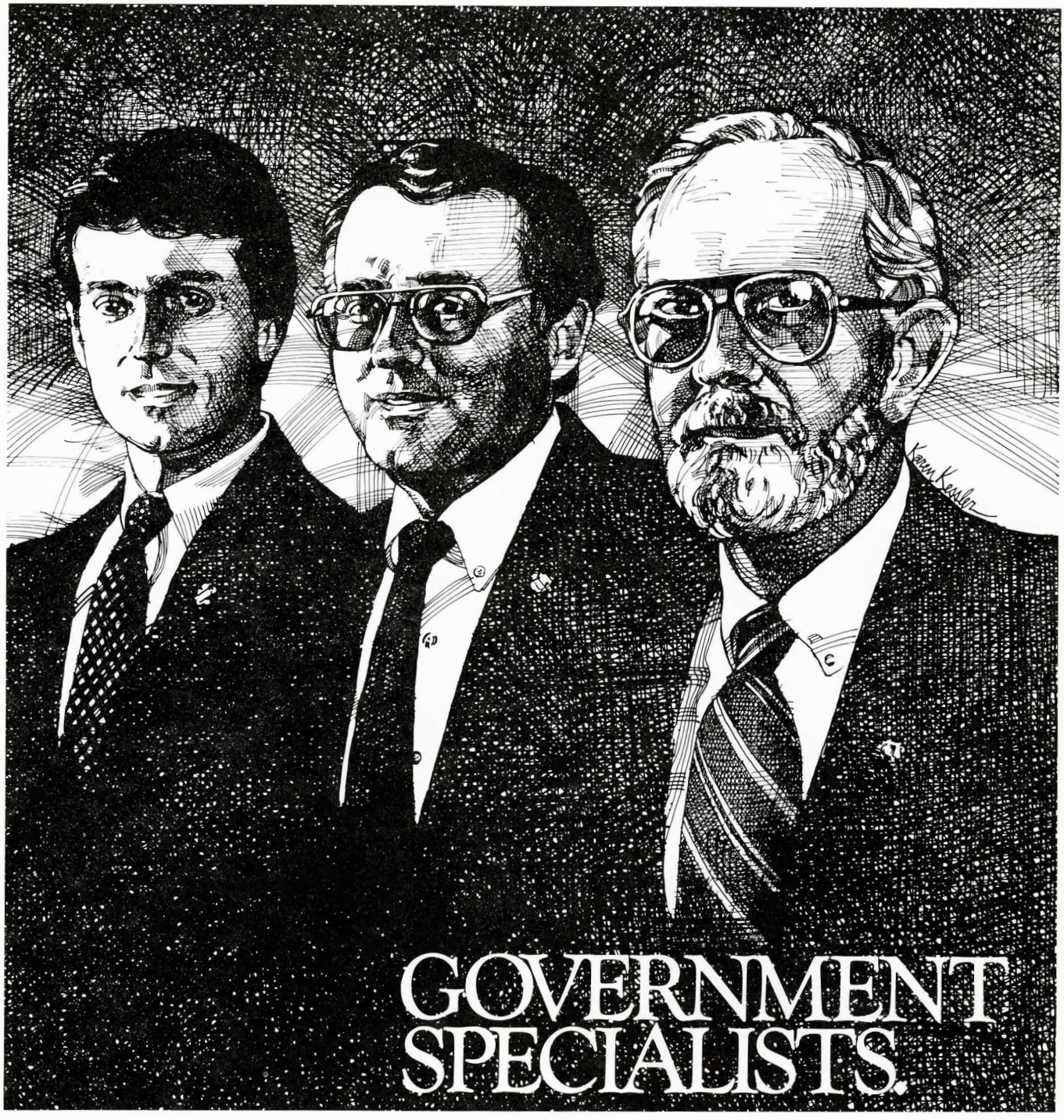
May 1985

Virginia's Highway Funding



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Volume 20 May 1985 Number 5

On the Cover

In 1982, the General Assembly directed the Joint Legislative Audit and Review Commission to review the appropriateness and equity of the state's provisions for allocating highway funds for maintenance and construction in Virginia's localities. Glen S. Tittermary, who headed that JLARC study, writes about the resulting legislation passed by the 1985 General Assembly. Read his story beginning on page eight. (Photo courtesy of Henrico County Public Information Office.)

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People

Hampton Hires Fire Educator

The city of Hampton has hired **Myra A. Carl** to be that city's first fire education specialist. She will be responsible for the development and implementation of programs for fire safety education in the city.

Carl is a native of Hampton and holds a bachelor's degree from Christopher Newport College and a master's degree in educational administration from The College of William and Mary. Prior to accepting her new position, she was employed for 11 years as a teacher in the Newport News public school system.

Evans Receives Water Works Award

Herbert W. Evans, superintendent of water plants for Chesterfield County, recently received the American Water Works Association's Fuller Award.

The award recognizes Evans for many years of outstanding service in the Virginia Section's operator training programs, for outstanding new member recruitment and for enthusiastic participation in the section's educational programs.

The Fuller Award, given annually to a member of the Virginia Section for distinguished service in the water supply field, commemorates the skill, talent and leadership characterized by George W. Fuller who was instrumental in organizing AWWA's committee structure and in codifying and standardizing waterworks practices.

Norfolk Appoints Occupancy Chief

Norfolk City Manager Julian F. Hirst recently appointed **Sharron C. Edmondson** chief of the occupancy permit bureau of the Norfolk Division of Housing Services. The occupancy permit program requires that when a home is vacated it be inspected and brought up to strict codes before it can be reoccupied.

Edmondson has 10 years experience in code administration and enforcement at state and city levels, including five years supervisory experience.

Salem Hires Planner

O. Marvin Sowers is Salem's new city planner. Sowers came to the city of Salem from Danville where he served as assistant city planner. He has also worked in the planning departments in Norfolk and Kernersville, NC.

Umbarger Earns CVA

Norfolk's coordinator of volunteers, **Catherine Shane Umbarger,** recently completed a rigorous certification process and earned the credential CVA, Certified in Volunteer Administration, held by only a small number of volunteer administrators in the country.

The certification program was implemented by the Association for Volunteer Administration and addresses the need for a wide range of competencies including management, program planning and organization, staffing and directing, controlling, interpersonal behavior, knowledge of the profession and special concerns. The competency standards were developed in tandem with a model introduced as part of a doctoral thesis.

Interpreting the Statutes

By Robert Feild

The General Assembly just completed, passed many new laws and changed many old ones. Because these statutes are so often used by local government officials, it becomes important to be able to read, interpret and apply these statutes.

Statutory interpretation is not an exact science by any means. Courts, which have the final say on meaning, have never set down their exact methods of interpreting statutes. Different judges when applying rules of interpretation to statutes which are very similar have reached dissimilar results. The process of interpretation is by no means an easy one even for a judge. Reed Dickerson says in "Interpretation and Application of Statutes" that "statutory interpretation has become a hodge-podge of principles of communication and legal guides for getting justice done in particular cases. Under such conditions confusion is inevitable." It may be helpful in eliminating some of the confusion to follow a few basic principles when interpreting the law.

The first thing to do in understanding a statute involves merely understanding the words the legislature has used. This may sound simplistic, but it is important to read the statute since the basis of a number of the canons of statutory construction grow out of a mere reading of the statute.

When reading the statute, words are to be given their normal everyday sense. Although to a great extent statutes are written by lawyers, they should not be read with any attempt to put a contrived legal meaning upon them.

The statutes while often consisting of lofty phrases or wordy clauses are meant to be the law of the people and understood in a common sense manner.

The Virginia Supreme Court in the case of *Gomes v. City of Richmond,* 220 Va. 449 (1979), said that "non-technical words in statutes are taken to be used in their ordinary sense and acceptation." The court held that the word "regularly" when used to describe an employed person means one required to work every working day. A part-time worker who comes in every Friday while working regularly in one sense does not come within the generally understood meaning of "regularly" as expressed by the court.

"Statutory interpretation is not an exact science by any means . . . . Different judges when applying rules of interpretation to statutes which are very similar have reached dissimilar results."

Once you have read the statute and are fairly certain that you understand what the wording means, you are ready to begin the main task of interpretation to ascertain the intention of the legislature and to give it effect.

In statutory interpretation, the rules for determining intent fall into three categories: those which discern intent from looking outside the statute, those which discern intent from looking inside the statute and those which tell you how much leeway you have in discerning intent.

Five major rules may be applied in the first category: the plain meaning rule; the predominance of special law over general law; the effect of statutes "in pari materia," or covering the same material; the latest in time rule and the rule presuming constitutionality in interpretation. The most important of these rules is the plain meaning rule which is essentially a rule for literalness.

The plain meaning rule was applied most clearly in *Temple v. City of Petersburg,* 182 Va. 418 (1944), a case in which the city had purchased an acre of land to expand an existing cemetery. The owners of the land near the cemetery brought suit against Petersburg under a then existing state statute forbidding the establishment of a cemetery within 250 yards of a residence without the owner's consent. The court felt that since the word "established" meant to originate or create, the meaning of the statute was plain. It was forbidden to start a new cemetery but not against the law to expand an existing one.

The court clearly stated the plain meaning rule as it is applied in Virginia. "If the language of a statute is plain and unambiguous and its meaning perfectly clear and definite, effect must be given to it regardless of what courts think of its wisdom or policy."If there is no ambiguity in the statute you are reading and the words are clear, you can simply apply the law and no further interpretation is necessary.

The remainder of the guidelines should be applied when the meaning is ambiguous. The rule for "in pari materia" covers situations when there are two statutes covering the same subject. In these situations both statutes are to be considered.

Often the legislature will pass two statutes with overlapping coverage. If one statute is ambiguous, by reading both the ambiguous statute may become clear. While this involves more interpretation and work on your part, the advantage of clarity is to be gained.

If the two statutes you are reading are ambiguous because they are in conflict, there is a simple rule which allows you to determine the proper one to apply. The last statute signed by the governor is the one which applies. While this does not often happen now that statutes are carefully scrutinized to make sure they agree, statutes in conflict still exist in our code.

The next rule is one of special importance to local governments. The rule is that special law prevails over general law.

All charters and statutes giving certain counties the right to do certain things are considered special law and predominate over general laws that apply to everyone in the state. If the legislature passed a law that is in conflict with your charter during the recent session, unless it included the phrase "notwithstanding all charters," your charter provision is still in effect.

The final rule for determining intent from outside sources is that statutes are to be interpreted to be constitutional. If you formulate two possible interpretations for a statute and one of those would deny someone their constitutional rights, then the other interpretation is assumed to be the one the legislature intended.

The next category deals with gleaning meaning from within the statute. These

rules are more technical and often have Latin names such as "ejusdem generis" and "nosciitur a sociis."

"Expressio unius est exclusio alterius" is one common rule which often applies. It states that when an enactment describes the manner in which something may be done, it also intends that it not be done another way.

In a case dealing with home instruction by the mother of the child, *Grigg v. Commonwealth,* 224 Va. 356 (1982), the Virginia Supreme Court ruled that although the mother had some education and an approved program, she was violating the law. In permitting home instruction only by a qualified tutor or teacher, the General Assembly has declared that such instruction by an unapproved person shall be impermissible.

In another example, state statutes outlining the manner by which council passes appropriation ordinances mean that other methods, though they might protect the public, are not proper and appropriations passed in an alternate manner are void.

The next rule of interpretation is one of common sense. This rule instructs you to read the whole statute and interpret it as a whole. While certain parts of a statute may be ambiguous, if you read the whole statute its meaning may become clear.

Another Latin phrase, "nosciitur a sociis," describes the next rule. In *Commonwealth v. United Airlines,* 219 Va. 374 (1971), the court ruled that "the meaning of doubtful words in a statute may be determined by reference to their association with related words and phrases. When general words and specific words are grouped together, the general words are limited and qualified by the specific words and will be construed to embrace only objects similar in nature to those objects identified by the specific words." This rule often is applied in tax statutes where a general category for taxation is limited by more specific terms later in the statute.

The final area of interpretation is that of leeway discerning meaning. This includes liberal and strict construction of statutes.

Liberal construction of a statute is to be used for remedial statutes, humanitarian statutes or statutes which the legislature itself says should be construed liberally. Examples of this type of statute are the Freedom of Information Act and human rights acts. These statutes are entitled to broad construction to give them a beneficial operation and promote justice. The Freedom of Information Act is construed liberally so that the broadest possible access to information will be available to all citizens of the commonwealth.

Strict construction is used for all statutes which might infringe on peoples' rights, such as eminent domain or penal statutes. The Dillon Rule is one of strict construction. This means that statutes will be read narrowly, confining the statute to what is definitely and affirmatively stated.

The Dillon Rule means that localities have only those powers which the legislature sets out for them. While a restrictive interpretation is generally given, it must be tempered with reason so as to avoid artificial or strained interpretations.

A remedial statute which evidenced the legislature's goal of cooperation among local governments in annexation matters though coming under the Dillon Rule is not to be mechanically interpreted due to its remedial nature. (See the attorney general's opinion to Robert Ackerman, House of Delegates, Oct. 28, 1982.)

Many other rules and methods for interpreting statutes exist, but these should give you a beginning. If the meaning of a statute is still unclear after a thorough reading or study, contact your local attorney. If your locality does not have an attorney, the VML staff can assist you.

About the Author

Robert Feild is VML's staff attorney and holds a law degree from T. C. Williams School of Law, University of Richmond.

GUESS WHAT THESE FIVE AWARD-WINNING PROJECTS HAVE IN COMMON?

Air Purification Helmet

Alaska Pipeline

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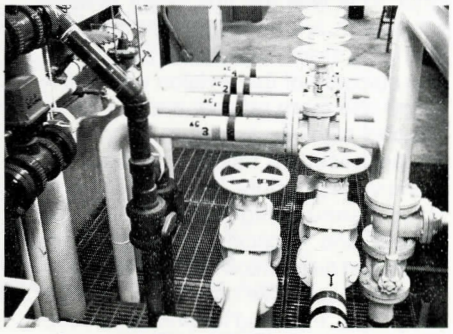

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Highway Funding Equity

By Glen S. Tittermary

In 1977 the General Assembly undertook a major review and revision of the way highway maintenance and construction funds were allocated in Virginia. This was the first major revision since 1962, and it recognized the rapidly changing transportation environment. The outcome of the revision was a simplified and more rational method for allocating highway funds. In adopting a system based on rational formulas, the General Assembly largely "depoliticized" annual highway funding decisions and implicitly established the policy that distribution of funds was to be based on objective criteria.

By 1982, the need for additional revenues for the state's Highway Maintenance and Construction Fund resurrected many questions regarding the equitable distribution of these funds. Of particular concern was the possible failure of existing formulas to account for growing highway construction needs in the state's urban and suburban localities. To meet the need for additional revenue, the 1982 General Assembly passed HB 532 which provided for increased highway user fees and a new oil franchise tax. To address questions about the fairness of the revenue's distribution, the General Assembly directed the staff of the Joint Legislative Audit and Review Commission to review the reasonableness, appropriateness and equity of the provisions for allocating highway construction funds. The 1983 General Assembly extended the scope of this study to include highway maintenance and public transportation funding.

The JLARC Study

The JLARC analysis was technical in nature and designed to be objective in evaluating existing laws. The three basic premises of the study were (1) that distribution of funds to localities should be based on technical formulas, (2) that equity of formulas should be based on measurable need for funds and (3) that counties and cities should be treated equally for both construction and maintenance funding. With this framework, JLARC staff tried to ensure proposed changes to the methods for allocating funds would satisfy the General Assembly's policy of fair distribution.

To begin its work, JLARC staff prepared a detailed, objective plan for reviewing each allocation provision. Because the issues were complex and the results of the study would have an impact on local governments, the study plan was presented to local governments in eight workshops held across the state in the summer of 1982 and spring of 1983. The Virginia Department of Highways and Transportation also reviewed the plans and suggested several important revisions. In addition, an advisory network of more than 100 representatives from local governments, planning districts, state agencies and citizen groups was established to solicit a wide range of comment and to promote a wide distribution of the staff's findings.

The study resulted in two reports. The first, "Interim Report: Equity of Current Provisions for Allocating Highway Construction Funds in Virginia," was issued in December 1982 and recommended significant revisions to the construction allocation formulas. In June 1984, the final report, "Equity of the Current Provisions for Allocating Highway and Transportation Funds in Virginia," also included recommendations for the revision of allocations of highway maintenance, urban street payments, public transportation and funding for Arlington and Henrico counties.

The key finding of JLARC's review was that the allocation provisions adopted in 1977 had become outdated and were in need of some revision. While the basic framework was sound, the specific formulas and proportions used to allot funds were no longer appropriate. In all, 30 specific recommendations were proposed to address each inequity. Among the most important recommendations were the following:

- Revise the highway system allocations for construction from 50 percent for the primary system, and 25 percent for the secondary and urban systems to one-third each for the primary, secondary and urban systems;
- Revise the various factors used in the formulas for the primary and secondary systems so as to eliminate any overlapping;
- Adopt a formula based on population for urban system construction to replace the administrative procedures used by VDH&T;
- Adjust county maintenance allocations to reflect actual levels of maintenance service;
- Establish two functional classes — arterial and collector/local — to reflect the use of streets when making urban street payments to cities and towns;
- Establish urban street payment rates per moving-lane-mile (lanes not used for parking) that better reflect the real costs of maintenance on urban roads;
- Simplify the provisions for allocating funds to Arlington and Henrico counties;
- Establish a public transportation fund with allocations to transit operators based on technical formulas; and
- Reassess the provisions for allocating funds on a regular basis.

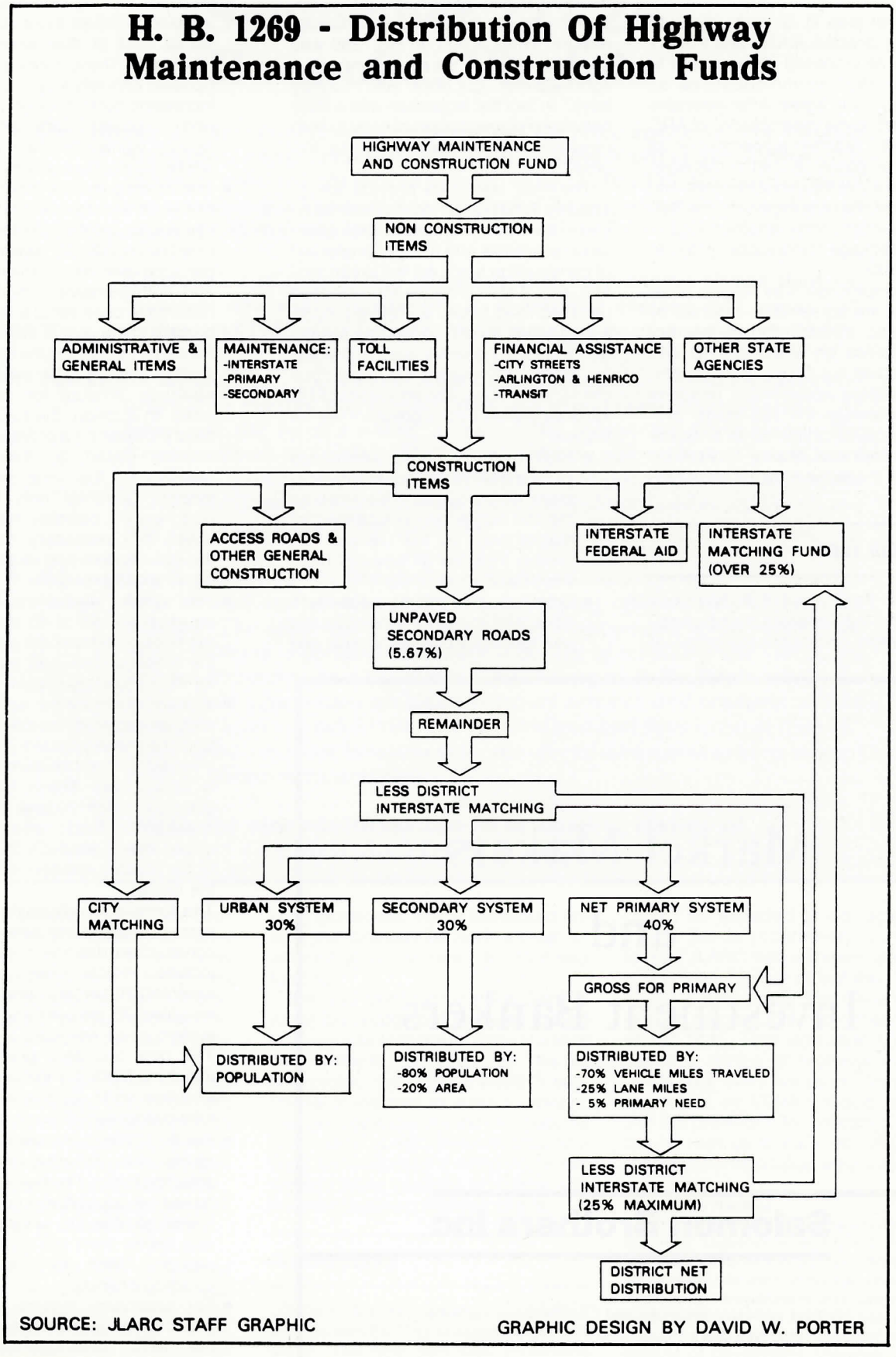
These and other recommendations from the JLARC staff report formed the framework for legislative consideration of highway funding equity.

Senate Joint Resolution 20

With completion of the JLARC staff study, it soon became clear that the complexity of the issues would make quick action by the General Assembly difficult. Many members felt careful review of proposed changes by the legislature would ensure that the technical recommendations could be developed into an appropriate legislative package. Toward this end, the legislative members of JLARC introduced SJR 20 in the 1984 General Assembly.

SJR 20 established a joint subcommittee of nine members from the House of Delegates and six members from the Senate. The task of the subcommittee was to review JLARC's recommendations and the 19 pieces of proposed

Figure 1


H. B. 1269 - Distribution Of Highway Maintenance and Construction Funds
HIGHWAY MAINTENANCE AND CONSTRUCTION FUND
NON CONSTRUCTION ITEMS
ADMINISTRATIVE & GENERAL ITEMS
MAINTENANCE: -INTERSTATE -PRIMARY -SECONDARY
TOLL FACILITIES
FINANCIAL ASSISTANCE -CITY STREETS -ARLINGTON & HENRICO -TRANSIT
OTHER STATE AGENCIES
CONSTRUCTION ITEMS
ACCESS ROADS & OTHER GENERAL CONSTRUCTION
INTERSTATE FEDERAL AID
INTERSTATE MATCHING FUND (OVER 25%)
UNPAVED SECONDARY ROADS (5.67%)
REMAINDER
LESS DISTRICT INTERSTATE MATCHING
CITY MATCHING
URBAN SYSTEM 30%
SECONDARY SYSTEM 30%
NET PRIMARY SYSTEM 40%
GROSS FOR PRIMARY
DISTRIBUTED BY: POPULATION
DISTRIBUTED BY: -80% POPULATION -20% AREA
DISTRIBUTED BY: -70% VEHICLE MILES TRAVELED -25% LANE MILES - 5% PRIMARY NEED
LESS DISTRICT INTERSTATE MATCHING (25% MAXIMUM)
DISTRICT NET DISTRIBUTION
SOURCE: JLARC STAFF GRAPHIC
GRAPHIC DESIGN BY DAVID W. PORTER

legislation included in SJR 20. The subcommittee held nine meetings, four of which were public hearings in Newport News, Blacksburg, Fairfax and Richmond.

As a first step in its work, the subcommittee directed JLARC and VDH&T to review all proposed changes and to report on the recommendations on which they could agree. After extensive review and some modification, JLARC and VDH&T reached agreement on all but a few proposals. Based on this work, the testimony at the public hearings and the suggestions of its members, the SJR 20 joint subcommittee adopted a compromise package of legislation on a vote of nine to six.

The compromise was largely a reflection of the agreements reached by JLARC and VDH&T. For those recommendations on which JLARC and VDH&T could not agree, the subcommittee adopted compromise positions halfway between the two staffs' proposals. Because of time constraints, the subcommittee was unable to work on revision of the public transportation allocations.

House Bill 1269

So, after three years of study, review and debate, the General Assembly finally had a single, comprehensive proposal for the revision of highway allocations as the compromise package was introduced in the 1985 session of the General Assembly. Not surprisingly, the bill had both strong support and strong opposition among the members of the legislature. While action on HB 1269 was often portrayed by the news media as a fight between "city boys" and "country boys," in fact the legislation was a fairly balanced representation of need in both rural and urban localities across Virginia.

The new law does provide for increased funding for most urban localities in the way of increased urban assistance payments and a larger proportion of construction funds for the urban system. But, it also provides for increased unpaved road funds, a greater proportion of funds for the secondary system and increased primary system funding for the Bristol district, the most rural district in the state. The provisions of HB 1269 as signed by the governor are as follows:

- Highway maintenance is defined to include both ordinary and replacement maintenance. This ensures that the high priority established for maintenance by the General Assembly includes all types of highway repair.
- Urban street payments are made to cities and towns for streets in two new functional classes, arterial and collector/local. The classes are based on the current functional classification system of the federal government. In addition, the rates paid per moving-lane-mile are increased to reflect more closely the actual cost of maintaining urban roadways. These rates are to be updated annually to account for the increasing costs of labor, materials and equipment. Funds can be used only for highway maintenance and will be audited annually by VDH&T.
- The funding mechanism for counties not in the state secondary road system is greatly simplified. The new law provides for payment rates per lane-mile for all maintenance and administrative activities. The rates have been set at a level comparable to the cost of state maintenance for counties in the secondary system and are to be adjusted annually to account for increasing costs. In addition, the revised process provides for a construction allocation based on the formula adopted for the state secondary system. Currently, only Arlington and Henrico counties have withdrawn their secondary roads from the state system and receive funds under these provisions.
- The system allocations for construction are set at 40 percent for the primary system, 30 percent for the urban system and 30 percent for the secondary system.
- In order to reduce the adverse impact of required matching funds from the primary system allocation, a separate interstate matching fund is established. These funds are used to match federal interstate construction funds when the required match exceeds 25 percent of the primary system allocation to the district.
- The formula for allocating primary system funds to the nine highway construction districts is revised to include vehicle miles of travel weighted 70 percent, lane mileage weighted 25 percent and primary system need weighted 5 percent. The new law also provides for matching funds for interstate construction up to 25 percent of the total district allocation.
- For the first time the law includes a formula for allocating urban construction funds. The new formula is based on population in cities and towns eligible for funding. Cities and towns must still provide a 5 percent match for urban construction projects.
- For secondary system construction, the new law no longer includes the 1977 "hold-harmless" provision. The new formula, used to

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Watch for more information in upcoming issues of VIRGINIA TOWN & CITY.

allocate all secondary system construction funds, includes population weighted 80 percent and area weighted 20 percent. The revised law also permits counties to transfer unpaved road allocations to the secondary system for use of projects in that system.

- The level of funding for unpaved roads is increased to 5.67 percent of available construction funds from 3.75 percent. The current method for allocating funds on the basis of 50 vehicles per day is kept as is.

A summary of the entire revised allocation process is shown in figure 1.

Enactment of HB 1269 established more firmly the intent of the General Assembly that funds are to be allocated on an objective, rational basis. For the first time, the allocations are based on formulas derived from statistical modeling techniques. These techniques ensure that distributions have a clear relationship to the need for highway funding.

It is also significant that the General Assembly recognized the need to fund highway maintenance for cities at a level comparable to that for counties. This will help protect the commonwealth's substantial investment in urban roadways. The General Assembly did not adopt the full range of JLARC staff recommendations, but it did enact a compromise that benefits those localities in Virginia with the most pressing highway needs.

Future Equity

One of the key findings of JLARC's studies was that highway needs are not static. The new allocation provisions adopted by the 1985 General Assembly cannot be expected to equitably distribute funds indefinitely. For this reason, JLARC staff recommended that a systematic review of highway needs be made periodically. The General Assembly adopted this recommendation as HB 1445. That legislation now requires a review of highway system needs once every five years. These assessments by VDH&T should ensure that the provisions for allocating funds can be kept up to date with Virginia's changing transportation environment.

About the Author

Glen S. Tittermary is a division chief with the Joint Legislative Audit and Review Commission. He was also project director for the highway allocation studies and has been involved in transportation and highway related research for the past five years. Previously, he was a research assistant with the Institute of Government, University of Virginia.

Report from Washington

By R. Michael Amyx

Davies Briefs Congressmen

On behalf of the membership of the Virginia Municipal League, President Lawrence A. Davies requested that a "fair play" test be applied to the proposed cuts in federal aid programs. Davies made the request at a congressional briefing held March 26 in Washington in conjunction with the National League of Cities' Annual Congressional Cities Conference.

Some 40 Virginia local government officials met with representatives of 10 of the 12 Virginia congressional delegates including Sen. Paul Trible and Congressmen Bateman, Olin, Slaughter and Sisisky.

In his remarks Davies revealed that Virginia local governments will lose an estimated $186 million in federal grants in fiscal year 1986 if the Reagan administration's proposed budget cuts are approved by Congress. This represents almost $36 per capita.

Included in the projected reductions are (1) elimination of general revenue sharing at $99.9 million annually, (2) cuts in the community development block grant program of $5.6 million, (3) elimination of the urban development action grant program, a $6.1 million loss, (4) elimination in school impact aid for funding of section B students (those whose parents either live or work on federal property) at an annual loss of $17.2 million, (5) elimination of the work incentive program, a $3.6 million loss, and (6) cuts in mass transit totaling $28 million annually.

Davies also carried to the Virginia congressional delegation the results of the league's survey on the impact of the proposed budget cuts on VML localities. The survey revealed a close to unanimous opinion ranking general revenue sharing as the most important program to local governments, and the local governments participating in the survey indicated that their current real estate tax rates would need to be increased 5 cents to 24 cents to replace the loss of general revenue sharing funds.

"Revenue sharing funds are a particularly important source of federal funds since they can be used in a variety of program areas," Davies told the audience.

"The impact of the service cuts [as a result of the loss of GRS funds] will be felt in services that touch the every day lives of our citizens. Police and fire protection, education, social services, health, streets and roads, and garbage collection and disposal will be affected by the loss of these federal dollars.

"The impact will be greatest on those people who are in the most need of services and who are least able to afford a tax increase — the elderly, the urban poor, the handicapped, the children.

"In short, Virginia localities have a limited capacity to fill the void that will be left in our communities by the wholesale withdrawal of federal grant dollars," Davies said.

Other programs cited in the survey as important to local governments included CDBG, education, UDAG, Environmental Protection wastewater construction and Farmers Home Administration rural housing and community facilities.

Davies asked the delegation not to view VML's message as saying "we totally support your efforts to reduce the federal deficit, but our grant program is unique and special and should be exempted from cuts.

"Please remember as fellow elected officials we have to prepare a budget each year and must address the needs of a wide group of community needs. In short, we have considerable practice in saying no," he said.

He also presented the guidelines developed by the VML membership in 1981 in response to President Reagan's "new federalism." The guidelines were developed by the league to address federal program cuts and were designed to provide an overall concept of "fair play" believed to be essential if Virginia's local governments were not to suffer irreparably.

The guidelines are as follows:

(1) Where the role of governments, especially that of the national government, is fundamentally altered, the impact upon state and local governments will also be fundamentally altered. If the federal government withdraws from a particular function, it is likely that local governments will not be financially able to fill the gap. The facts of life in local finance mean that some functions will be significantly curtailed or even eliminated.

(2) If cuts in programs to achieve overall deficit reduction are necessary, and it appears they are, these cuts should be applied fairly and equitably.

(3) Local government officials should be involved in determining the relative worth and effectiveness of any one program of federal assistance.

(4) Where programs are eliminated or significantly altered, adequate transition time to adjust to resulting changes should be provided to localities. (Virginia localities are well into their budget preparation process and will be adopting next year's fiscal budgets well in advance of July 1; therefore, local budgets will be left vulnerable to final congressional actions in many areas.)

(5) Where major shifts are intended in the pattern of responsibilities among levels of governments, a corresponding shift in the resources necessary to finance and carry out these responsibilities must simultaneously be made.

Davies also took advantage of the opportunity to express the league's concern regarding the recent Supreme Court decision in *Garcia v. San Antonio* which reversed the *National League of Cities v. Usery* landmark decision of 1976. The recent decision implies that the Fair Labor Standards Act may apply across the board to local governments and their employment practices.

To comply with the new ruling, many VML localities will have to bear the costs of increased overtime salaries for police and fire workers, and to the larger localities this would be a substantial cost increase. No current survey is available, but a 1975 survey done by the International City Management Association revealed a cost at that time of more than $1 billion simply to comply with the FLSA overtime provisions.

About the Author

R. Michael Amyx is executive director of the Virginia Municipal League and attended the congressional briefing.

Arlington County Loves Its Leaves

Arlington County sells leaf mulch from March through December and has provided a colorful brochure to advertise the program.

The pulverized leaf mulch is the result of the Department of Public Works' annual autumn leaf collection program. Leaves that residents rake to the curb for vacuum collection are recycled into leaf mulch for sale to residents for lawn and garden use.

The mulch also is provided to Arlington County government agencies and public schools for landscaping to beautify the county. The Park Division alone uses 200 truckloads (or 1,000 cubic yards) of leaf mulch for county gardens every year.

Arlington County residents may order the mulch for $35 per five cubic yard truckload delivered. This is one-third the cost of commercial lead mulch, and there is no load limit.

The nationally unique resource conservation program, now in its twelfth season, saves Arlington taxpayers about $100,000 a year by not burying the leaves at the Lorton Landfill.

The brochure lists 10 uses for leaf mulch, includes an order form and encourages those with small lawns and gardens to share a truckload with a friend.

Power Conference Set for June

The Municipal Electric Power Association of Virginia will hold its annual conference June 5–7 at the Cavalier Hotel in Virginia Beach. On the program will be discussion of System 37/5 load management, the Corps of Engineers' hydro projects, bar-code meter reading and the Internal Revenue Service's employee benefit regulations. MEPAV President William E. Willis of Radford will preside.

The association will also conduct its annual business meeting and election of officers and hold two cocktail receptions.

Registration is $20 for members and $25 for non-members. For more information, contact Executive Secretary Christy Everson at (804) 649-8471.

Chiefs of Police Leave League

The Virginia Association of Chiefs of Police dissolved its affiliate relationship with the Virginia Municipal League and became an independent association on May 1, 1985. VACP, which had been an affiliate of the league's since 1926, reached a level of association activity requiring support services beyond those available from the league.

"It is with mixed emotions that we leave the league," said VACP President Chief Harry Haskins.

"It's been a good relationship," he said.

VACP is currently considering the services of several association management firms as well as other alternatives. The association's membership will vote on a management plan at the VACP Annual Conference to be held Aug. 18–21 in Arlington at the Crystal City Gateway Marriott.

In the interim, Debbie Middlebrook of the Williamsburg Police Department will serve as the association's secretary. She can be reached at (804) 220-2331, and P.O. Box 3009, Williamsburg, VA 23187, will serve as the association's address.

Legal Guidelines

By Howard W. Dobbins, VML Legal Counsel

Anti-trust Liability—An Update

Less than three years ago, municipal officials across the country awoke to the realization that actions undertaken by municipal governments traditionally thought to be protected were subject to anti-trust challenges under the Sherman Act and treble damage judgements. The immediate cause of this alarm was the opinion of the United States Supreme Court in *Community Communications v. City of Boulder*, 455 U.S. 40 (1982). However, *Boulder* was simply the latest of several Supreme Court decisions which should have alerted municipal concern and which clearly led to *Boulder*.

As early as 1978, the court in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, held that the reasoning of *Parker v. Brown*, 317 U.S. 341 (1943), that activities pursuant to "state action" are exempt from federal anti-trust laws, is applicable to municipalities only if activities are exercised pursuant to (1) "clearly articulated and affirmatively expressed. . .state policy" and (2) "actively supervised" by the state.

Shortly thereafter, in the case of *California Retail Dealers Ass'n v. Midcal Aluminum Inc.*, 45 U.S. 97 (1980), the court, applying the two-pronged test announced in *Lafayette*, denied a private party's claim of state action exemption because the statute authorizing the challenged activity did not provide for state supervision even though the "clear articulation" requirement had been satisfied.

In *Boulder* the court found the general "home rule" authority conferred on municipal governments by Colorado's Constitution did not constitute a "clear articulation." The challenged action therefore failed to pass the state action test. However, in *Boulder* the court did not reach, and thus left open, the question of whether a city or town must also satisfy the "active state supervision" requirement of the two-pronged test established in *Lafayette* to be eligible for anti-trust immunity.

When cities and towns across the United States contemplated the devastating potential of *Boulder*, their representatives frantically sought emergency help in Congress and state legislatures. After analyzing the vast number and variety of actions and activities regularly undertaken by municipalities which could be the subject of anti-competitive challenges, localities generally concluded it impractical for state legislatures to articulate policy to displace competition for each such action and activity. Moreover, many of those studying the problem determined that if the courts should apply the supervision requirement to the myriad of potentially anti-competitive activities, it was impossible to predict the extent of supervision which might be required.

Hence, it was apparent that substantial relief could come only from the U.S. Congress. Accordingly, much effort was concentrated on obtaining congressional support for broad federal statutory exemption of local governments from anti-trust laws.

Sen. Strom Thurmond of South Carolina promptly filed a bill in the Senate to totally exempt local governments from anti-trust laws, and other bills were introduced in the House of Representatives by sympathetic congressmen. Thereafter ensued the expected debate and the attempt to balance what appeared to be conflicting national interests: fostering efficient administration of local governments and insulating their officials on the one hand and protecting the consuming public against uncontrolled anti-competition by local governments on the other hand.

Congress appeared to become lethargic to the problem. The fact that for the most part local governments were winning anti-trust suits brought against them tended to lessen the urgency of the problem, so the bills languished in committee.

It was not until 1984 following the Federal Trade Commission's institution of anti-trust cease and desist complaints against New Orleans and Minneapolis, which alleged anti-competitive actions as to taxi cab operations, and a jury verdict against a small Illinois city for $28.5 million for an anti-trust violation that Congress was galvanized to prompt action. Promptly thereafter, the Local Government Anti-Trust Law (the "1984 act") was passed by Congress and signed into law by the president Oct. 24, 1984.

As is frequently the case when governmental concepts are at odds, the 1984 act represents a compromise between two conflicting concepts. Total immunity has not been granted to municipalities. Instead, Congress has eliminated the right to recover damages, both compensatory ordinary damages and the treble damage penalty, as well as interest, costs and attorney's fees not only from any local government, official or employee acting in an official capacity but also in any claim against a third party based on any official action directed by a local government, official or employee acting in an official capacity.

Hence, although the threat of destructive damage awards and fees has been eliminated, the right to enjoin non-immune municipal anti-competitive actions and activities is not affected by the 1984 act. Accordingly, although the spector of bankruptcy as the result of enormous treble damage judgments has been eliminated, the legal principles of *Parker v. Brown, Lafayette, Midcal* and *Boulder* continue to be viable.

Moreover, the questions unanswered by the court remained unanswered. Furthermore, the 1984 act expressly is inapplicable to pending cases unless the court determines in light of all circumstances, including stage of litigation and availability of alternative relief under the Clayton Act, that it would be inequitable not to apply the exclusions of the 1984 act to a pending case.

One unanswered question vital to municipal governments was untouched by the Supreme Court in *Boulder*, i.e. whether the active supervision requirement stated in *Lafayette* is applicable to municipal governments. However, that question has recently been answered by the Supreme Court in its unanimous opinion in *Town of Hallie v. City of Eau Claire*, 53 L.W. 4418 (March 27, 1985).

The town of Hallie and three other Wisconsin townships located adjacent to the city of Eau Claire instituted a complaint for injunction in the United States District Court against the city under §1 of the Sherman Act alleging a monopoly of the delivery of sewerage treatment services in the area and a tying of the delivery of such services to the delivery of sewerage collection and transportation services. The towns alleged they were potential competitors of the city and that the city used its monopoly of sewerage treatment to gain an unlawful monopoly over sewerage collection and transportation services.

The district court ruled for the city and its opinion was affirmed by the United

States Court of Appeals for the Seventh Circuit. On appeal to the Supreme Court, the towns contended (1) that the Wisconsin statutory authorization failed to clearly articulate the state's policy to displace competition, citing the absence of express mention of anti-competitive conduct, and (2) that active state supervision was not provided by the statute. Hence, the towns argued the city could not rely on the state action exemption.

The opinion in *Hallie*, delivered by Justice Powell, holds that it is not necessary for the legislature to specifically express that the municipality is expected to engage in conduct that would have anti-competitive effects in order to comply with the clear articulation requirement. Rather, the court said "it is sufficient that the statutes authorize the city to provide sewerage services and also to determine the areas to be served," reasoning that "it is clear that anti-competitive effects logically would result from this broad authority to regulate."

The court summed up by saying "no legislature can be expected to catalogue all anticipated effects of a statute" of the kind involved in this case and that requiring such explicit authorization by the state might have "deleterious and unnecessary consequences." The court also determined that "clear articulation" does not require a showing that the statutory authorization "compels the locality to act." That is to say, compulsion is not a prerequisite to a finding that a municipality acts pursuant to clearly articulated state policy.

Finally, on the question of state supervision, after conceding that the court's prior opinions had not been entirely clear, the opinion in *Hallie* concludes with a flat and absolute decision that the "active state supervision requirement should not be imposed in cases in which the actor is a municipality." Hence, as to municipal governments, if it is clear that state authorization exists, the state supervision requirement is not applicable.

Volunteers Aid Police Department

Members of the Fairfax County Police Department Auxiliary volunteered 27,265 hours of service valued at approximately $300,000 during 1984, the first full year for the auxiliary program.

The auxiliary reached a strength of 90 during the year, with officers assigned to duties at all seven of the department's district stations.

In addition to services performed on a regular basis, auxiliary officers provided services at a variety of special events such as festivals. Many have volunteered more than the 288 hours required for participation in the program. The average contribution per auxiliary officer in 1984 was 403 hours, and nine individuals each provided more than 600 hours of volunteer service.

Prior to being sworn in, auxiliary officers must complete a 124-hour training program in subjects such as traffic control, report writing, arrest procedures, the motor vehicle code and constitutional law. In addition, several auxiliary officers completed advanced training in CPR, breathalyzer operation, physical evidence collection and crime analysis.

According to Fairfax County Police Chief Col. Carroll D. Buracker, plans are being developed to expand auxiliary training and to enlarge the scope of activities in which auxiliary officers may participate.

"What has been most impressive is the respect and appreciation that the auxiliaries have earned from the paid officers who welcome the help provided by the volunteers and are happy to work side-by-side with them," Buracker said.

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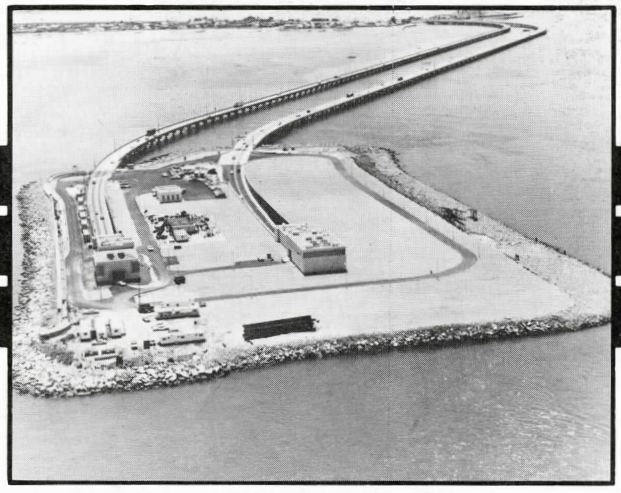

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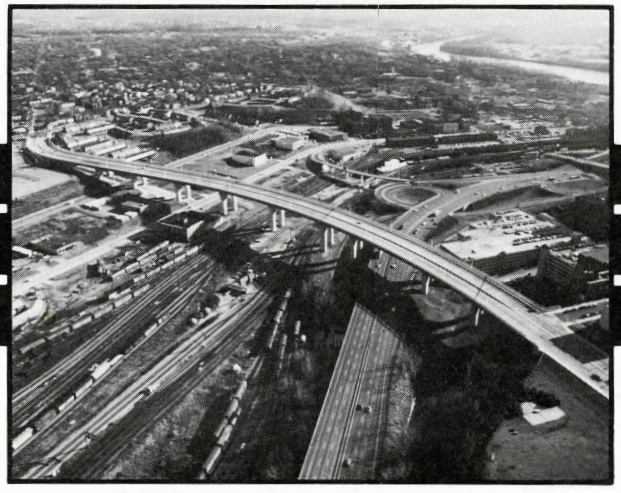

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