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HOUSE BILL NO. 2500

Offered January 21, 2011

A BILL to amend and reenact §§ 2.2-4007.03, 2.2-4009, 2.2-4025, 2.2-4026, 2.2-4028, 2.2-4029, 8.01-195.3, 8.01-246, 15.2-2285, 15.2-2314, and 25.1-245 of the Code of Virginia, to amend the Code of Virginia by adding a section numbered 1-219.2, and to repeal § 2.2-4027 of the Code of Virginia, relating to the Omnibus Citizen Bill of Rights.

Patron—Armstrong

Referred to Committee for Courts of Justice

Whereas, under Article I of the Constitution of Virginia, the declaration of rights is made by the people of Virginia in the exercise of their sovereign powers, which rights do pertain to them and their posterity as the basis and foundation of government; and

Whereas, Article I, Section 1 provides that all power is vested in, and consequently derived from, the people, and that magistrates are their trustees and servants and at all times amenable to them; and

Whereas, Article 1, Section 5 provides that the legislative, executive, and judicial departments should be separate and distinct; and

Whereas, this system that is commonly referred to as the system of checks and balances was established by our founding fathers on the power of government; and

Whereas, Article 1, Section 11 provides that no one shall be deprived of life, liberty, or property nor shall their property be taken or damaged without due process of law; and

Whereas, to secure all of these guarantees, the General Assembly declares these rights available for all of its citizens; and

Whereas, there is a need to reaffirm the rights of citizens when they are engaged in litigation with state and local government entities; now, therefore,

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4007.03, 2.2-4009, 2.2-4025, 2.2-4026, 2.2-4028, 2.2-4029, 8.01-195.3, 8.01-246, 15.2-2285, 15.2-2314, and 25.1-245 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 1-219.2 as follows:

§ 1-219.2. Limitation on presumption of official regularity or government correctness in certain appeals.

There shall be no presumption in favor of official regularity and correctness for a state entity in any trial de novo instituted under Article 5 (§ 2.2-4025 et seq.) of the Administrative Process Act (§ 2.2-4000 et seq.) or for a locality or local government entity in any trial de novo instituted pursuant to § 15.2-2285 or 15.2-2314.

§ 2.2-4007.03. Informational proceedings; effect of noncompliance.

A. In the case of all regulations, except those regulations exempted by § 2.2-4002, 2.2-4006, or 2.2-4011, the proposed regulation and general notice of opportunity for oral or written submittals as to that regulation shall be posted on the Virginia Regulatory Town Hall and published in the Virginia Register of Regulations in accordance with the provisions of subsection B of § 2.2-4031. In addition, the agency may, in its discretion, (i) publish the notice in any newspaper and (ii) publicize the notice through press releases and such other media as will best serve the purpose and subject involved. The Register and any newspaper publication shall be made at least 60 days in advance of the last date prescribed in the notice for such submittals. All notices, written submittals, and transcripts and summaries or notations of oral presentations, as well as any agency action thereon, shall be matters of public record in the custody of the agency.

B. If an agency wishes to change a proposed regulation before adopting it as a final regulation, it may choose to publish a revised proposed regulation, provided the latter is subject to a public comment period of at least 30 additional days and the agency complies in all other respects with this section.

C. In no event shall the failure to comply with the requirements of this section be deemed mere harmless error for the purposes of § 2.2-4027.

§ 2.2-4009. Evidentiary hearings on regulations.

Where an agency proposes to consider the exercise of authority to promulgate a regulation, it may conduct or give interested persons an opportunity to participate in a public evidentiary proceeding; and the agency shall always do so where the basic law requires a hearing. Evidentiary hearings may be limited to the trial of factual issues directly related to the legal validity of the proposed regulation in any of the relevant respects outlined in § 2.2-4027 of this chapter.

General notice of the proceedings shall be published as prescribed in § 2.2-4007.01. In addition,

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59 where the proposed regulation is to be addressed to named persons, the latter shall also be given the
 60 same notice individually by mail or otherwise if acknowledged in writing. The proceedings may be
 61 conducted separately from, and in any event the record thereof shall be separate from, any other or
 62 additional proceedings the agency may choose or be required to conduct for the reception of general
 63 data, views, and argument pursuant to § 2.2-4007.02 or otherwise. Any probative evidence may be
 64 received except that the agency shall as a matter of efficiency exclude irrelevant, immaterial,
 65 insubstantial, privileged, or repetitive proofs, and may deny rebuttal, or cross-examination. Testimony
 66 may be admitted in written form provided those who have prepared it are made available for
 67 examination in person.

68 The agency or one or more of its subordinates specially designated for the purpose shall preside at
 69 the taking of evidence and may administer oaths and affirmations. The proceedings shall be recorded
 70 verbatim and the record thereof shall be made available to interested persons for transcription at their
 71 expense or, if transcribed by or for the agency, for inspection or purchase at cost.

72 Where subordinates preside at the taking of the evidence, they shall report their recommendations
 73 and proposed findings and conclusions that shall be made available upon request to the participants in
 74 the taking of evidence as well as other interested persons and serve as a basis for exceptions, briefs, or
 75 oral argument to the agency itself. Whether or not subordinates take the evidence, after opportunity for
 76 the submittal of briefs on request and such oral argument as may be scheduled, the agency may settle
 77 the terms of the regulation and shall promulgate it only upon (i) its findings of fact based upon the
 78 record of evidence made pursuant to this section and facts of which judicial notice may be taken, (ii)
 79 statements of basis and purpose as well as comment upon data received in any informational
 80 proceedings held under § 2.2-4007.01 and (iii) the conclusions required by the terms of the basic law
 81 under which the agency is operating.

82 § 2.2-4025. Exemptions operation of this article; limitations.

83 A. This article shall not apply to any agency action that (i) is placed beyond the control of the courts
 84 by constitutional or statutory provisions expressly precluding court review, (ii) involves solely the
 85 internal management or routine of an agency, (iii) is a decision resting entirely upon an inspection, test,
 86 or election save as to want of authority therefor or claim of arbitrariness or fraud therein, *or* (iv) is a
 87 case in which the agency is acting as an agent for a court, ~~or (v) encompasses matters subject by law to~~
 88 ~~a trial de novo in any court.~~

89 B. The provisions of this article, however, shall apply to case decisions regarding the grant or denial
 90 of Temporary Assistance for Needy Families, Medicaid, food stamps, general relief, auxiliary grants, or
 91 state-local hospitalization. However, no appeal may be brought regarding the adequacy of standards of
 92 need and payment levels for public assistance and social services programs. ~~Notwithstanding the~~
 93 ~~provisions of § 2.2-4027, the review shall be based solely upon the agency record, and the court shall be~~
 94 ~~limited to ascertaining whether there was evidence in the agency record to support the case decision of~~
 95 ~~the agency acting as the trier of fact. If the court finds in favor of the party complaining of agency~~
 96 ~~action, the court shall remand the case to the agency for further proceedings. The validity of any statute,~~
 97 ~~regulation, standard or policy, federal or state, upon which the action of the agency was based shall not~~
 98 ~~be subject to review by the court. No intermediate relief shall be granted under § 2.2-4028.~~

99 § 2.2-4026. Right to trial de novo; venue; burden of proof.

100 Any person *who is adversely affected or aggrieved by and claiming the unlawfulness of any*
 101 ~~regulation, or party aggrieved by and claiming unlawfulness of a case decision a final agency action~~ and
 102 whether *such action is* exempted from the procedural requirements of Article 2 (§ 2.2-4006 et seq.) or 3
 103 (§ 2.2-4018 et seq.) ~~of this chapter,~~ shall have a right to ~~the direct review thereof a trial de novo~~ by an
 104 appropriate and timely court action against the agency or its officers or agents in the manner provided
 105 by the rules of the Supreme Court of Virginia. *The burden shall be upon the party claiming the*
 106 *unlawfulness of the agency final action by a preponderance of the evidence. In the trial de novo the*
 107 *findings and conclusions of the agency shall not be entitled to a presumption of correctness or of*
 108 *official regularity.* Actions may be instituted in any court of competent jurisdiction as provided in
 109 § 2.2-4003, and the judgments of the courts of original jurisdiction shall be subject to appeal to or
 110 review by higher courts as in other cases unless otherwise provided by law. In addition, when any
 111 regulation or case decision is the subject of an enforcement action in court, it shall also be reviewable
 112 by the court as a defense to the action, and the judgment or decree therein shall be appealable as in
 113 other cases.

114 § 2.2-4028. Intermediate relief.

115 When ~~judicial review a trial de novo~~ is instituted or is about to be, the agency concerned may, on
 116 request of any party or its own motion, postpone the effective date of the regulation or decision
 117 involved where it deems that justice so requires. Otherwise the court ~~may shall,~~ on proper application
 118 and with or without bond, deposits in court, or other safeguards or assurances as may be suitable, issue
 119 all necessary and appropriate process to postpone the effective dates or preserve existing status or rights
 120 pending conclusion of the ~~review proceedings if the court finds the same to be required to prevent~~

121 immediate, unavoidable, and irreparable injury and that the issues of law or fact presented are not only
122 substantial but that there is probable cause for it to anticipate a likelihood of reversible error in
123 accordance with ~~§ 2.2-4027~~ *trial de novo*. Actions by the court may include (i) the stay of operation of
124 agency decisions of an injunctive nature or those requiring the payment of money or suspending or
125 revoking a license or other benefit and (ii) continuation of previous licenses in effect until timely
126 applications for renewal are duly determined by the agency.

127 § 2.2-4029. Court judgments.

128 Unless an error of law as defined in ~~§ 2.2-4027~~ appears, the court shall dismiss the review action or
129 affirm the agency regulation or decision. Otherwise, it may compel agency action unlawfully and
130 arbitrarily withheld or unreasonably delayed except that the court shall not itself undertake to supply
131 agency action committed by the basic law to the agency. Where a regulation or case decision is found
132 by the court not to be in accordance with law under ~~§ 2.2-4027~~, the court shall suspend or set it aside
133 and remand the matter to the agency for further proceedings, if any, as the court may permit or direct in
134 accordance with law. *When the petitioner has proven by the preponderance of the evidence that a*
135 *regulation or case decision is not to be in accordance with law, the court shall suspend or set it aside*
136 *and remand the matter to the agency for further proceedings, if any, as the court may permit or direct*
137 *in accordance with law. In granting any relief the court shall not itself undertake to supply agency*
138 *action committed by the basic law to the agency.*

139 § 8.01-195.3. Commonwealth, transportation district or locality liable for damages in certain cases.

140 Subject to the provisions of this article, the Commonwealth shall be liable for claims for money only
141 accruing on or after July 1, 1982, and any transportation district shall be liable for claims for money
142 only accruing on or after July 1, 1986, on account of damage to or loss of property or personal injury or
143 death caused by the negligent or wrongful act or omission of any employee while acting within the
144 scope of his employment under circumstances where the Commonwealth or transportation district, if a
145 private person, would be liable to the claimant for such damage, loss, injury or death. However, except
146 to the extent that a transportation district contracts to do so pursuant to § 15.2-4518, neither the
147 Commonwealth nor any transportation district shall be liable for interest prior to judgment or for
148 punitive damages. The amount recoverable by any claimant shall not exceed (i) \$25,000 for causes of
149 action accruing prior to July 1, 1988, \$75,000 for causes of action accruing on or after July 1, 1988, or
150 \$100,000 for causes of action accruing on or after July 1, 1993, or *\$1 million for causes of action*
151 *accruing on or after July 1, 2011, or (ii) the maximum limits of any liability policy maintained to*
152 *insure against such negligence or other tort, if such policy is in force at the time of the act or omission*
153 *complained of, whichever is greater, exclusive of interest and costs.*

154 Notwithstanding any provision hereof, the individual immunity of judges, the Attorney General,
155 attorneys for the Commonwealth, and other public officers, their agents and employees from tort claims
156 for damages is hereby preserved to the extent and degree that such persons presently are immunized.
157 Any recovery based on the following claims are hereby excluded from the provisions of this article:

158 1. Any claim against the Commonwealth based upon an act or omission which occurred prior to July
159 1, 1982.

160 1a. Any claim against a transportation district based upon an act or omission which occurred prior to
161 July 1, 1986.

162 2. Any claim based upon an act or omission of the General Assembly or district commission of any
163 transportation district, or any member or staff thereof acting in his official capacity, or to the legislative
164 function of any agency subject to the provisions of this article.

165 3. Any claim based upon an act or omission of any court of the Commonwealth, or any member
166 thereof acting in his official capacity, or to the judicial functions of any agency subject to the provisions
167 of this article.

168 4. Any claim based upon an act or omission of an officer, agent or employee of any agency of
169 government in the execution of a lawful order of any court.

170 5. Any claim arising in connection with the assessment or collection of taxes.

171 6. Any claim arising out of the institution or prosecution of any judicial or administrative proceeding,
172 even if without probable cause.

173 7. Any claim by an inmate of a state correctional facility, as defined in § 53.1-1, unless the claimant
174 verifies under oath, by affidavit, that he has exhausted his remedies under the adult institutional inmate
175 grievance procedures promulgated by the Department of Corrections. The time for filing the notice of
176 tort claim shall be tolled during the pendency of the grievance procedure.

177 Nothing contained herein shall operate to reduce or limit the extent to which the Commonwealth or
178 any transportation district, agency or employee was deemed liable for negligence as of July 1, 1982, nor
179 shall any provision of this article be applicable to any county, city or town in the Commonwealth or be
180 so construed as to remove or in any way diminish the sovereign immunity of any county, city or town
181 in the Commonwealth.

182 § 8.01-246. Personal actions based on contracts.

183 Subject to the provisions of § 8.01-243 regarding injuries to person and property and of § 8.01-245
184 regarding the application of limitations to fiduciaries, and their bonds, actions founded upon a contract,
185 other than actions on a judgment or decree, shall be brought within the following number of years next
186 after the cause of action shall have accrued:

187 1. In actions or upon a recognizance, except recognizance of bail in a civil suit, within ten years; and
188 in actions or motions upon a recognizance of bail in a civil suit, within three years, omitting from the
189 computation of such three years such time as the right to sue out such execution shall have been
190 suspended by injunction, supersedeas or other process;

191 2. In actions on any contract which is not otherwise specified and which is in writing and signed by
192 the party to be charged thereby, or by his agent, within five years whether such writing be under seal or
193 not;

194 3. In actions by a partner against another for settlement of the partnership account or in actions upon
195 accounts concerning the trade of merchandise between merchant and merchant, their factors, or servants,
196 within five years from the cessation of the dealings in which they are interested together; *and*

197 4. In actions upon any unwritten contract, express or implied, within three years, *except to the extent*
198 *such actions involve a claim for inverse condemnation, which shall be brought within five years.*

199 Provided that as to any action to which § 8.2-725 of the Uniform Commercial Code is applicable,
200 that section shall be controlling except that in products liability actions for injury to person and for
201 injury to property, other than the property subject to contract, the limitation prescribed in § 8.01-243
202 shall apply.

203 § 15.2-2285. Preparation and adoption of zoning ordinance and map and amendments thereto; appeal.

204 A. The planning commission of each locality may, and at the direction of the governing body shall,
205 prepare a proposed zoning ordinance including a map or maps showing the division of the territory into
206 districts and a text setting forth the regulations applying in each district. The commission shall hold at
207 least one public hearing on a proposed ordinance or any amendment of an ordinance, after notice as
208 required by § 15.2-2204, and may make appropriate changes in the proposed ordinance or amendment as
209 a result of the hearing. Upon the completion of its work, the commission shall present the proposed
210 ordinance or amendment including the district maps to the governing body together with its
211 recommendations and appropriate explanatory materials.

212 B. No zoning ordinance shall be amended or reenacted unless the governing body has referred the
213 proposed amendment or reenactment to the local planning commission for its recommendations. Failure
214 of the commission to report 100 days after the first meeting of the commission after the proposed
215 amendment or reenactment has been referred to the commission, or such shorter period as may be
216 prescribed by the governing body, shall be deemed approval, unless the proposed amendment or
217 reenactment has been withdrawn by the applicant prior to the expiration of the time period. In the event
218 of and upon such withdrawal, processing of the proposed amendment or reenactment shall cease without
219 further action as otherwise would be required by this subsection.

220 C. Before approving and adopting any zoning ordinance or amendment thereof, the governing body
221 shall hold at least one public hearing thereon, pursuant to public notice as required by § 15.2-2204, after
222 which the governing body may make appropriate changes or corrections in the ordinance or proposed
223 amendment. In the case of a proposed amendment to the zoning map, the public notice shall state the
224 general usage and density range of the proposed amendment and the general usage and density range, if
225 any, set forth in the applicable part of the comprehensive plan. However, no land may be zoned to a
226 more intensive use classification than was contained in the public notice without an additional public
227 hearing after notice required by § 15.2-2204. Zoning ordinances shall be enacted in the same manner as
228 all other ordinances.

229 D. Any county which has adopted an urban county executive form of government provided for under
230 Chapter 8 (§ 15.2-800 et seq.) may provide by ordinance for use of plans, profiles, elevations, and other
231 such demonstrative materials in the presentation of requests for amendments to the zoning ordinance.

232 E. The adoption or amendment prior to March 1, 1968, of any plan or ordinance under the authority
233 of prior acts shall not be declared invalid by reason of a failure to advertise, give notice or conduct
234 more than one public hearing as may be required by such act or by this chapter, provided a public
235 hearing was conducted by the governing body prior to the adoption or amendment.

236 F. Every action contesting a decision of the local governing body adopting or failing to adopt a
237 proposed zoning ordinance or amendment thereto or granting or failing to grant a special exception shall
238 be filed within thirty days of the decision with the circuit court having jurisdiction of the land affected
239 by the decision. *In such appeal, the findings and conclusions of the governing body shall not be entitled*
240 *to a presumption of correctness. Any party may introduce evidence in the proceedings, and the court*
241 *shall hear any such appeal de novo.* However, nothing in this subsection shall be construed to create
242 any new right to contest the action of a local governing body.

243 § 15.2-2314. Certiorari to review decision of board.

244 Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals,
 245 or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may file with the
 246 clerk of the circuit court for the county or city a petition that shall be styled "In Re: [date] Decision of
 247 the Board of Zoning Appeals of [locality name]" specifying the grounds on which aggrieved within 30
 248 days after the final decision of the board.

249 Upon the presentation of such petition, the court shall allow a writ of certiorari to review the
 250 decision of the board of zoning appeals and shall prescribe therein the time within which a return
 251 thereto must be made and served upon the secretary of the board of zoning appeals or, if no secretary
 252 exists, the chair of the board of zoning appeals, which shall not be less than 10 days and may be
 253 extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed
 254 from, but the court may, on application, on notice to the board and on due cause shown, grant a
 255 restraining order.

256 Any review of a decision of the board shall not be considered an action against the board and the
 257 board shall not be a party to the proceedings; however, the board shall participate in the proceedings to
 258 the extent required by this section. The governing body, the landowner, and the applicant before the
 259 board of zoning appeals shall be necessary parties to the proceedings. The court may permit intervention
 260 by any other person or persons jointly or severally aggrieved by any decision of the board of zoning
 261 appeals.

262 The board of zoning appeals shall not be required to return the original papers acted upon by it but it
 263 shall be sufficient to return certified or sworn copies thereof or of the portions thereof as may be called
 264 for by the writ. The return shall concisely set forth such other facts as may be pertinent and material to
 265 show the grounds of the decision appealed from and shall be verified.

266 If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition
 267 of the matter, it may take evidence or appoint a commissioner to take evidence as it may direct and
 268 report the evidence to the court with his findings of fact and conclusions of law, which shall constitute a
 269 part of the proceedings upon which the determination of the court shall be made. The court may reverse
 270 or affirm, wholly or partly, or may modify the decision brought up for review.

271 In the case of an appeal from the board of zoning appeals to the circuit court of an order,
 272 requirement, decision or determination of a zoning administrator or other administrative officer in the
 273 administration or enforcement of any ordinance or provision of state law, or any modification of zoning
 274 requirements pursuant to § 15.2-2286, the findings and conclusions of the board of zoning appeals ~~on~~
 275 ~~questions of fact shall be presumed to be correct shall not be entitled to a presumption of correctness.~~
 276 ~~The appealing party may rebut that presumption by proving by a preponderance of the evidence,~~
 277 ~~including the record before the board of zoning appeals, that the board of zoning appeals erred in its~~
 278 ~~decision. Any party may introduce evidence in the proceedings in the court. The, and the court shall~~
 279 ~~hear any arguments on questions of law such appeal de novo.~~

280 In the case of an appeal by a person of any decision of the board of zoning appeals that denied or
 281 granted an application for a variance, or application for a special exception, the decision of the board of
 282 zoning appeals shall be presumed to be correct. The petitioner may rebut that presumption by showing
 283 to the satisfaction of the court that the board of zoning appeals applied erroneous principles of law, or
 284 where the discretion of the board of zoning appeals is involved, the decision of the board of zoning
 285 appeals was plainly wrong and in violation of the purpose and intent of the zoning ordinance.

286 Costs shall not be allowed against the locality, unless it shall appear to the court that it acted in bad
 287 faith or with malice. In the event the decision of the board is affirmed and the court finds that the
 288 appeal was frivolous, the court may order the person or persons who requested the issuance of the writ
 289 of certiorari to pay the costs incurred in making the return of the record pursuant to the writ of
 290 certiorari. If the petition is withdrawn subsequent to the filing of the return, the locality may request that
 291 the court hear the matter on the question of whether the appeal was frivolous.

292 § 25.1-245. Costs.

293 A. Except as otherwise provided in this chapter, all costs of the proceeding in the trial court that are
 294 fixed by statute shall be taxed against the petitioner.

295 B. The court may in its discretion tax as a cost a fee, not to exceed \$1,000, for a survey for the
 296 landowner.

297 C. If an owner whose property is taken by condemnation under this title or under Title 33.1 is
 298 awarded at trial, as compensation for the taking of or damage to his real property, an amount that is *at*
 299 *least* 30 percent ~~or more~~ *and less than* 75 percent greater than the amount of the petitioner's final
 300 written offer made not later than 60 days after receipt by the petitioner of a complete copy of the
 301 owner's written self contained or summary appraisal report, as referenced in the Uniform Standards of
 302 Professional Appraisal Practice, provided it is the same type of report furnished to the landowner that
 303 complies with the requirements of the Uniform Standards of Professional Appraisal Practice in effect as
 304 of the date of such report on which the owner intends to rely to support the amount of just

305 compensation to which he claims to be entitled, the court may order the petitioner to pay to the owner
306 those (i) reasonable costs, other than attorney fees, and (ii) reasonable fees and travel costs, including
307 reasonable appraisal and engineering fees, for no more than three experts testifying at trial, that the
308 owner incurs. *If an owner is awarded at trial, as compensation for the taking of or damage to his real*
309 *property, an amount that is at least 75 percent and less than 125 percent greater than the amount of the*
310 *petitioner's final written offer, the court shall order that petitioner to pay to the owner the fees and*
311 *costs described in clauses (i) and (ii). If an owner is awarded at trial, as compensation for the taking of*
312 *or damage to his real property, an amount that is 125 percent or greater than the amount of the*
313 *petitioner's final written offer, the court shall order the petitioner to pay to the owner reasonable*
314 *attorney fees and the fees and costs described in clauses (i) and (ii).* The requirements of this subsection
315 shall not apply to those condemnation actions:
316 1. Involving easements valued at less than \$10,000.
317 2. In which the petitioner filed, prior to July 1, 2005: (i) a petition in condemnation pursuant to
318 Chapter 2 (§ 25.1-205 et seq.) ~~of this title~~; or (ii) a certificate of take or deposit pursuant to Title 33.1;
319 or Chapter 3 (§ 25.1-300 et seq.) ~~of this title~~.
320 3. In which the owner does not provide the report described herein.
321 D. All costs on appeal shall be assessed and assessable in the manner provided by law and the Rules
322 of Court as in other civil cases.
323 **2. That § 2.2-4027 of the Code of Virginia is repealed.**