



Local Tax Authority Work Group

Report of the Local Tax Authority Work Group

Pursuant to Chapters 1214 and 1263 of the Acts of Assembly of 2020

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I. Introduction

Pursuant to the fifth enactment of Chapters 1214 and 1263 of the Acts of Assembly of 2020, the Division of Legislative Services established the Local Tax Authority Work Group (the work group) made up of stakeholders with the assignment from the legislation to complete the following tasks related to local tax authority:

- Recommend any technical amendments that may be necessary to effectuate the provisions of Chapters 1214 and 1263; and
- Identify non-tax legal authorities and requirements that affect cities and counties differently, including those related to local services and sovereign immunity.¹

The legislation set a deadline of October 31, 2020, for the work group to submit a report with its findings and recommendations to the General Assembly.

Participants

The following organizations and individuals participated in the work group:

- Commissioners of the Revenue Association of Virginia: Page Johnson, Commissioner of the Revenue of the City of Fairfax; Lori Stevens, Commissioner of the Revenue of Dinwiddie County; and Gerald Gwaltney, Commissioner of the Revenue of Isle of Wight County
- The Commonwealth Institute for Fiscal Analysis: Chris Wodicka, Policy Analyst
- Department of Taxation: Steve Klos, Policy Analyst
- Office of the Governor: Carter Hutchinson, Deputy Policy Director
- Henrico County: Mike Schnurman, Assistant to the County Manager, and Tom Tokarz, County Attorney
- Treasurers' Association of Virginia: Carla de la Pava, President, and Treasurer of Arlington County; Jeff Shafer, President-Elect, and Treasurer of the City of Harrisonburg; and Dinah Babb, 1st Vice President, and Treasurer of the City of Franklin
- Virginia Association of Counties: Katie Boyle, Director of Government Affairs, and Phyllis Errico, General Counsel
- Virginia Municipal League: Michelle Gowdy, Executive Director

Meetings

The work group met electronically on August 13, 2020. Staff from the Division of Legislative Services (DLS) presented their research on different tax and non-tax authorities of cities and counties, the different services required of cities and counties, and possible technical amendments related to the implementation of Chapters 1214 and 1263. During the meeting, work group members were invited to participate and make comments, which are incorporated throughout this report. DLS staff also solicited written comments from work group members, which are also included in this document. DLS staff circulated a draft report among the members for comment before submitting it to the General Assembly.

¹ For the full text of the enactment, *see* Appendix A.



Executive Summary

This Report of the Local Tax Authority Work Group presents the work group's research on the different tax and non-tax authorities of the Commonwealth's cities and counties, as well as the different services required of cities and counties.

Beginning with non-tax authorities, the work group examined the constitutional and statutory distinction between cities and counties. The Constitution of Virginia of 1971 removed virtually all constitutional distinctions between them, so legal differences between classes of localities are mostly derived from statutory law. Cities and counties are both subject to the Dillon Rule, the principle that local governments are limited to the powers expressly granted to them by their state, and they share many authorities granted to all localities by the Commonwealth. Some powers are granted only to cities and others only to counties, and there are differences between the two relating to bonds and charters. Sovereign immunity is another distinction: cities and counties enjoy different levels of sovereign immunity, with counties being entitled to greater protection.

Regarding non-tax required services, cities and counties differ in their responsibilities for road maintenance. Cities, as well as Arlington and Henrico Counties, are responsible for maintaining their own roads, with state funding support. All other counties' roads are maintained by the Virginia Department of Transportation (VDOT). For different tax authorities, the rate caps on county taxes put in place during the 2020 Regular Session of the General Assembly remain the major difference between cities and counties.

Finally, the work group looked at possible technical amendments in accordance with Chapters 1214 and 1263. A handful of sections of the Code of Virginia (the Code) applicable to specific counties were identified as being potentially extraneous because they provide no additional authority beyond what is now granted generally to all counties. However, there was opposition to removing some of these sections, and the work group did not reach an agreement that the provisions should be changed. No technical amendments are recommended by the work group.

II. Different Non-Tax Authorities

Constitution of Virginia

Historically, the Constitution of Virginia provided different authorities to, and imposed different requirements on, cities and counties.² Generally, it afforded greater flexibility to cities to impose taxes, while also directing them to provide more services than counties. However, the Constitution of Virginia of 1971 removed almost all constitutional distinctions between cities and counties. Therefore, the legal differences between the classes of localities mostly derive from statutory law, not constitutional law.

The current Constitution of Virginia (1971) repeatedly uses the phrase "county, city, or town" but, unlike older versions of the Constitution of Virginia, treats them as a single class of

² For example, under the Constitution of Virginia of 1870, cities and counties had different powers. *Compare* VA. CONST. Art. VII, § 1-6 (1971) (form of government for counties) *with* VA. CONST. Art. VI, §§ 14-21 (1870) (form of government for cities).



localities with equivalent powers.³ It defines "city" and "county" separately,⁴ but does not differentiate between them with respect to the powers it grants.⁵ There are two main exceptions:

- By default (unless altered by statutory law), elections for city officials are held in June but elections for county officials are held in November;⁶ and
- By default, cities are allowed to incur debt up to a limit of 10 percent of the assessed value of the real estate in the city, while counties are allowed to incur debt only as authorized by the General Assembly.⁷

Overview of Statutory Structure

The majority of Code provisions differentiating between cities and counties with respect to general powers appear in Chapters 11 (§ 15.2-1100 et seq.) for cities and 12 (§ 15.2-1200 et seq.) for counties of Title 15.2.⁸ In addition, cities and counties are subject to different bonding requirements under Article 3 (§ 15.2-2632 et seq.) for cities and 4 (§ 15.2-2638 et seq.) for counties of Chapter 26 of Title 15.2. The remaining chapters of Title 15.2 generally provide equal authority to all localities, but there are many exceptions to this general rule, as discussed in this report.

General Grant of Power

Both Chapter 11 (cities) and Chapter 12 (counties) of Title 15.2 open with a provision granting general powers. Though the language of each provision is different, both seem to confer a broad array of powers on localities:

- Cities: A city "may exercise all powers . . . *pertinent to the conduct of the affairs and functions of the municipal government*, the exercise of which is not expressly prohibited by the Constitution and the general laws of the Commonwealth, and which are *necessary or desirable to secure and promote the general welfare* of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof . . ."⁹
- Counties: A county "may adopt such measures as it deems expedient to secure and promote the health, safety and general welfare of its inhabitants which are not inconsistent with the general laws of the Commonwealth."¹⁰

³ See, e.g., Subsection (k) of VA. CONST. Art. X, § 6 (allowing any "county, city, or town to provide for a partial exemption from local real property taxation . . . of improved real estate subject to recurrent flooding").

⁴ VA. CONST. Art. VII, § 1.

⁵ See generally VA. CONST. Art. VII.

⁶ VA. CONST. Art. VII, § 5.

⁷ VA. CONST. Art. VII, § 10. The Public Finance Act provides the statutory law governing city and county bonds. VA. CODE Chapter 26 (§ 15.2-2600 et seq.) of Title 15.2. It sets different rules for cities in Article 3 (§ 15.2-2632 et seq.) and counties in Article 4 (§ 15.2-2638 et seq.) of Chapter 26 of Title 15.2.

⁸ This report drew from previous research. We are especially grateful to the Commission on Local Government. See generally Commission on Local Government, House Document No. 11, *Report on Annexation Alternatives* (2018), available at <https://rga.lis.virginia.gov/Published/2018/HD11/PDF>.

⁹ VA. CODE § 15.2-1102.

¹⁰ VA. CODE § 15.2-1200.



Nevertheless, Virginia localities are subject to the Dillon Rule,¹¹ so even with the broad language in these provisions, most localities derive their authority to perform various functions from other, more specific statutes.

Specific Powers Granted to Cities and Counties

Chapter 9 (§ 15.2-900 et seq.) of Title 15.2 identifies the general powers available to all localities. These are the powers traditionally associated with local government—and they are the same for cities and counties. Chapter 9 is divided into five articles: public health, public safety, and nuisances;¹² waste and recycling;¹³ economic development, tourism, and historic preservation;¹⁴ public transportation;¹⁵ and additional powers.¹⁶ The articles cover a diverse set of local issues. Some are quite specific, for instance allowing localities to establish noise ordinances, regulate assemblies, require property owners to repair or demolish blighted or derelict buildings, build dams and levees, or run electric vehicle charging stations. Others are more general, like authorizing localities to appropriate funds and acquire property. With respect to these policies, cities and counties are equal.

Parallel Grants of Power

Several powers granted to cities have parallel provisions granting the same power to counties. The following table presents several examples of such provisions:

Power granted	City citation	County citation
<i>Giving a discount for taxes paid early</i>	§ 15.2-1104	§ 15.2-1201.2
<i>Establishing a hospital</i>	§ 15.2-1119	§ 15.2-1225
<i>Regulating auctions and pawnshops</i>	§ 15.2-1114	§ 15.2-1232.1
<i>Creating economic revitalization zones</i>	§ 15.2-1129.2	§ 15.2-1232.2

The provisions identified in the table are not necessarily identical for cities and counties. However, those where there is not a major difference between the power given to cities and counties are included in this table.

Some provisions use incorporation to grant counties the same power as cities.¹⁷

The Code also contains provisions that distinguish cities and counties, as a class, from towns.¹⁸ Generally, those provisions do not grant power to towns because towns are part of the

¹¹ *E.g., Marble Techs. v. City of Hampton*, 279 Va. 409, 417 (2010). The Dillon Rule states that localities have three types of powers: (i) expressly granted powers, (ii) powers implicitly connected to expressly granted powers, and (iii) powers that are indispensable to the locality's purpose. Furthermore, the Dillon Rule applies a rule of strict construction to statutory provisions granting power to a locality: If there is a reasonable doubt whether a statute grants a power to a locality, a court will interpret that it does not.

¹² VA. CODE Article 1 (§ 15.2-900 et seq.) of Chapter 9 of Title 15.2.

¹³ VA. CODE Article 2 (§ 15.2-927 et seq.) of Chapter 9 of Title 15.2.

¹⁴ VA. CODE Article 3 (§ 15.2-940 et seq.) of Chapter 9 of Title 15.2.

¹⁵ VA. CODE Article 4 (§ 15.2-947 et seq.) of Chapter 9 of Title 15.2.

¹⁶ VA. CODE Article 5 (§ 15.2-950 et seq.) of Chapter 9 of Title 15.2.

¹⁷ VA. CODE § 15.2-1201 (vesting county governing boards with the same powers as city councils).

¹⁸ For example, VA. CODE § 15.2-915.2 authorizes counties and cities, but not towns, to regulate transporting a loaded rifle or shotgun.



surrounding county for purposes of the provision and would be subject to whatever the county decides on that policy.¹⁹

Powers Granted Only to Cities

The Code provides that, by default, all cities and towns have the powers specified in the Uniform Charter Powers Act (§ 15.2-1100 et seq.).²⁰ A county has uniform charter powers only if the powers are specifically granted,²¹ and neither statutory law nor a county charter has granted those powers to any county.

Powers Granted Only to Counties

Chapter 12 of Title 15.2 enumerates several powers available only to counties. It's divided into four articles that cover general powers;²² procurement requirements if a county designates a purchasing agent;²³ requirements for documenting meetings of a county governing body;²⁴ and processes for counties to pay claims.²⁵

Chapters 4 through 8 of Title 15.2 allow counties the flexibility to establish different forms of government administration.²⁶ These forms are permissive to counties.

Counties were historically governed by constitutional officers and their board of supervisors. Over time, the expanding needs of certain counties led the General Assembly to allow counties to choose between different types of governments in order to give more authority to appointed officials such as a county administrator.

The Code also grants certain powers to counties exclusively. For example, counties are expressly authorized to regulate drive-in theaters,²⁷ and no parallel provision exists for cities. Likewise, counties may establish petty cash funds,²⁸ yet cities are not expressly authorized to do so. Counties have the authority to require property owners to cut grass that is taller than 12 inches²⁹ and to prevent animals from running at large on highways,³⁰ but cities do not.

Sometimes, counties are granted the authority to do things that cities have no need to do. For example, towns are considered part of the surrounding county, so counties may appropriate money to them.³¹ Cities are independent and do not include towns, so they do not have this power.

¹⁹ For more information on this type of provision, see Abigail Stephens, *Local Tax Layering* (2019), <http://dls.virginia.gov/pubs/briefs/brief64.pdf>.

²⁰ VA. CODE § 15.2-204 (conferring uniform charter powers on cities and towns).

²¹ *Id.*

²² VA. CODE Article 1 (§ 15.2-1200 et seq.) of Chapter 12 of Title 15.2.

²³ VA. CODE Article 2 (§ 15.2-1233 et seq.) of Chapter 12 of Title 15.2.

²⁴ VA. CODE Article 3 (§ 15.2-1241 et seq.) of Chapter 12 of Title 15.2.

²⁵ VA. CODE Article 4 (§ 15.2-1243 et seq.) of Chapter 12 of Title 15.2.

²⁶ See VA. CODE Chapter 4 (§ 15.2-400 et seq.) (county board); Chapter 5 (§ 15.2-500 et seq.) (county executive); Chapter 6 (§ 15.2-600 et seq.) (county manager form); Chapter 7 (§ 15.2-700 et seq.) (county manager plan); and Chapter 8 (§ 15.2-800 et seq.) (urban county executive) of Title 15.2.

²⁷ VA. CODE § 15.2-1222.

²⁸ VA. CODE § 15.2-1229.

²⁹ VA. CODE § 15.2-1215.

³⁰ VA. CODE § 15.2-1218.

³¹ VA. CODE § 15.2-1202.



Prohibitions or Restrictions That Apply Only to Counties

Whenever a county enacts an ordinance regulating motor vehicles, the ordinance is required to be consistent with laws governing state highways.³² Also, counties are prohibited from requiring the registration of pistols and revolvers.³³

Local or Regional Laws

Several statutes provide an exception to a general rule, or an additional specified power, for a single locality (in the form of a "special law" or "local law"³⁴) or a group of localities. For example, the Code generally authorizes localities to tax junkyards, and it also authorizes the City of Newport News to require "screening or landscape screening for [vacant or abandoned] retail or commercial properties."³⁵ Another provision allows the Cities of Chesapeake and Portsmouth to fine businesses that negligently fail to provide adequate security at a large public event.³⁶

Provisions like these usually result from the General Assembly choosing to address a local or regional issue when changing the legal rule for *all* localities would be inappropriate. They do not differentiate between cities and counties *as classes of localities*. In other words, they do not provide a power to a city because it is a city or deprive a county of a power because it is a county. Because such differences do not limit counties *as counties*, they are not included in this report.

Bonds

The Code provides powers and procedures that apply to all local bonds,³⁷ but also contains specific provisions that apply only to local bonds issued by municipalities³⁸ or local bonds issued by counties.³⁹

Any city may, within one year from the date of its transition to a town, contract debts, borrow money, and authorize issuance of its bonds in the principal amount of its share of all state, county, and district levies on property within the territory occupied by the city actually collected by the county treasurer in the year such transition takes place.⁴⁰ Any city may also engage in these activities to pay certain expenses associated with it becoming a city.⁴¹ No municipality may issue any bonds or interest bearing indebtedness that at any time exceeds 10 percent of the assessed valuation of real estate in the municipality subject to taxation, but certain indebtedness

³² VA. CODE § 15.2-1201.

³³ VA. CODE §§ 15.2-1207 and 15.2-1208.

³⁴ See A.E. Dick Howard, *Commentaries on the Constitution of Virginia*, 544 (1974) (differentiating a special law, one that "alters the legal rights of named persons," from a local law, which "applies in terms to a particular locality or localities").

³⁵ VA. CODE § 15.2-903.

³⁶ VA. CODE § 15.2-1130.

³⁷ VA. CODE Article 2 (§ 15.2-2604 et seq.) of Chapter 26 of Title 15.2.

³⁸ VA. CODE Article 3 (§ 15.2-2632 et seq.) of Chapter 26 of Title 15.2.

³⁹ VA. CODE Article 4 (§ 15.2-2638 et seq.) of Chapter 26 of Title 15.2.

⁴⁰ VA. CODE § 15.2-2632.

⁴¹ VA. CODE § 15.2-2633. A city may contract debts by borrowing money and authorizing issuance of its bonds maturing more than one year after their date to pay the expenses associated with becoming a city, provided that debts shall not be created after five years from the date it became a city and, during such five-year period, debt shall not exceed one percent of the assessed value of the real estate in the city subject to taxation based upon the last preceding tax assessment.



classes are excluded from that determination.⁴² Further, any ordinance or resolution authorizing the issuance of bonds by a municipality must be passed by the recorded affirmative vote of a majority of all members elected to its governing body.⁴³ The Code specifically prohibits the City of Danville from borrowing money, issuing bonds, or incurring indebtedness except in accordance with the terms of its charter.⁴⁴

By contrast, no county may contract any debt, borrow money, or issue bonds unless a majority of voters approve such action in an election on the matter, subject to three exceptions where such approval is not required.⁴⁵ Any county may, upon voter approval, elect to be treated as a city for the purpose of incurring debt and issuing bonds, but such an election subjects the county to all of the benefits and limitations of Article VII, Section 10 (a) of the Constitution of Virginia relating to bonded indebtedness for municipalities.⁴⁶

Charters

In addition to powers authorized by the Code, all cities, as municipal corporations, have powers provided by charter.⁴⁷ Only three counties—Chesterfield, James City, and Roanoke—have charters, while the remaining counties operate under the provisions of Title 15.2.

As previously noted, cities and towns receive a default set of powers from the Uniform Charter Powers Act.⁴⁸ No statute or county charter has granted a county such powers.⁴⁹

The only other Code provisions distinguishing the charters of municipalities and counties are not related to taxation. The boundaries of municipal corporations (cities and towns) must remain as currently established unless changed as provided in the Code. No municipal corporation charter shall contain its metes and bounds, as established or as amended, but the boundaries shall be incorporated by reference.⁵⁰ Finally, no county charter shall, similarly, contain the description of the county's boundaries.⁵¹

⁴² VA. CODE §§ 15.2-2634 and 15.2-2635. The classes of indebtedness excluded are those found in the Constitution of Virginia in Article VII, Sections 10 (a) (1) through (4).

⁴³ VA. CODE § 15.2-2636. If the ordinance or resolution is vetoed by the mayor where such veto power exists, it may still be adopted in accordance with Article VII, Section 7 of the Constitution of Virginia.

⁴⁴ VA. CODE § 15.2-2637.

⁴⁵ VA. CODE § 15.2-2638. Voter approval is not required for a county to (i) contract debt or issue bonds described in Article VII, Sections 10 (a) (1) and (3) of the Constitution of Virginia; (ii) to issue refunding bonds; or (iii) to issue bonds, with the consent of the school board and governing body of the county, for capital projects for school purposes that are sold to the Literary Fund, the Virginia Retirement System, or another state agency. If voter approval is not required, the governing body of the county has all powers granted to the governing body of municipalities with respect to incurring debt and issuing bonds. VA. CODE § 15.2-2640.

⁴⁶ VA. CODE § 15.2-2639.

⁴⁷ Local charters are available at <https://law.lis.virginia.gov/charters>. If there is a conflict between the Uniform Charter Powers Act and a city's charter, the charter prevails. VA. CODE § 15.2-1103.

⁴⁸ See VA. CODE § 15.2-204 (conferring uniform charter powers on cities and towns) and Chapter 11 (§ 15.2-1100 et seq.) of Title 15.2 (enumerating the uniform charter powers).

⁴⁹ VA. CODE § 15.2-204.

⁵⁰ VA. CODE § 15.2-207.

⁵¹ VA. CODE § 15.2-208.



Sovereign Immunity

Sovereign immunity is a legal doctrine that shields governmental entities and their employees from most tort claims.⁵² Cities and counties are entitled to different levels of sovereign immunity, with counties enjoying greater protection.⁵³ The intent of sovereign immunity is to protect the state from burdensome interference with its functions and to protect the public purse.

While cities and counties today perform most of the same functions, their historical origins have led to different standards of sovereign immunity.⁵⁴ Counties were created as geographical subdivisions of the Commonwealth and, as a result, are entitled to the same level of immunity as the Commonwealth. Therefore, counties are immune unless an exception is provided by statute. Cities, as municipal corporations, have a lower level of protection.⁵⁵

Cities have immunity as long as they are providing a governmental function but are not protected if providing a proprietary function.⁵⁶ A governmental function is a function performed solely for the public good or welfare, typically for general public health and safety.⁵⁷

Classic governmental functions include municipal planning and construction, responding to public emergencies (e.g., policing, snow removal, and hurricane relief), maintaining traffic signals, operating hospitals and health departments, animal control, operating schools, trash removal and operating landfills, and inspecting buildings.⁵⁸

Proprietary functions, also known as ministerial functions, are those carried out for the benefit of the municipality and not for the public at large.⁵⁹ They tend to be more commercial in nature but also include routine street maintenance. Examples of proprietary functions include operating a market, utility, airport, or public housing authority or acting as a landlord.⁶⁰

The line between governmental and proprietary functions is blurry and difficult to apply. For example, removal of newly fallen snow has been termed a governmental function, while removal of old snow a proprietary function,⁶¹ the difference being the degree to which the action constitutes a response to an emergency. When a function is determined to be partially governmental and partially proprietary, it is considered a governmental function. This resolves many borderline cases in favor of cities.

⁵² During the work group's meeting on August 13, 2020, representatives of the Virginia Association of Counties and the Virginia Municipal League expressed the opinion that they did not seek a change with respect to the doctrine of sovereign immunity. See *Niese v. City of Alexandria*, 264 Va. 230 (2012) (describing the doctrine of sovereign immunity as "alive and well" in the Commonwealth and noting that the doctrine "protects municipalities from tort liability arising from the exercise of governmental functions").

⁵³ *Massenburg v. City of Petersburg*, 298 Va. 212, 217 (2019).

⁵⁴ See *Seabolt v. County of Albemarle*, 283 Va. 717, 719 (2012) ("Counties, as political subdivisions of the Commonwealth, enjoy the same tort immunity as does the sovereign.").

⁵⁵ *Massenburg* at 217.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See generally David N. Anthony and Beth V. McMahon, *Sovereign Immunity: Can the King Still Do No Wrong?* https://www.vsb.org/docs/valawyeromagazine/apr00anthony_mcmahon.pdf (2000).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Chiles v. Gray*, 37 Va. Cir. 459, 460 (1996).



The doctrine does not apply to intentional torts, gross negligence conduct, or acts undertaken in bad faith.⁶² Some statutory exceptions also waive sovereign immunity in certain circumstances. The Virginia Tort Claims Act (§ 8.01-195.1 et seq.), which waives sovereign immunity in state courts for actions against the Commonwealth or its transportation districts, does not apply to local governments.

III. Different Non-Tax Required Services: Road Maintenance and Funding

The major difference between cities and counties in the provision of services is the maintenance of roads. In all but two counties, VDOT is responsible for maintaining county roads. Roads in cities, Arlington and Henrico Counties, and towns with populations greater than 3,500 are responsible for maintaining their own roads.⁶³ Localities whose roads are not administered by VDOT receive funding from the state to maintain their roads.⁶⁴ Under the direction of the General Assembly, there have been periodic evaluations of the policy options for reallocating the costs of road maintenance.⁶⁵

In 1932, the General Assembly passed the "Byrd Road Act," which created the secondary system of state highways.⁶⁶ Under this system, all counties were given the option to place their roads under VDOT administration. Four counties opted out of the system, and, today, only Arlington and Henrico Counties are not part of the VDOT-administered system.⁶⁷

When counties were predominantly rural, the character of city and county roads were much different. City roads traditionally experienced heavier traffic, use, and the presence of more concentrated utility and drainage systems. By contrast, a greater share of county funding could go toward roadways themselves.⁶⁸ However, as many counties have urbanized, this distinction no longer exists.

⁶² *Irby v. Gill*, 3 Va. Cir. 172, 177 (1984).

⁶³ VA. CODE § 33.2-324.

⁶⁴ Maintenance payments to cities and towns are governed by VA. CODE § 33.2-319. The amount each locality receives is determined by the number of moving-lane-miles of road available to peak-hour traffic in each locality. Different rates are applied to (i) principal and minor arterial roads and (ii) collector roads and local streets. The annual growth rate for urban system payments matches the base rate of growth of VDOT's Highway Maintenance and Operations program. For county roads, funding is not determined on a statutory per lane-mile basis. However, the fiscal impact statement for HB 2084 (2019) provided a comparison of funding levels between counties and the urban system. Under HB 2084, the Commonwealth's ten most populous counties would have received moving-lane-mile payments in the same manner as cities and towns. VDOT estimated in the fiscal impact statement to that bill that it spent \$333 million on maintenance in those counties in FY 2019. Using the rates applicable to Urban System payments instead, these ten counties would have received approximately \$436 million. The FIS also noted that without additional funding, this increased expenditure would have reduced maintenance or construction funding for other localities. The FIS is available here: <https://lis.virginia.gov/cgi-bin/legp604.exe?191+oth+HB2084F122+PDF>.

⁶⁵ E.g., Jonathan Gifford, *Policy Options for Secondary Road Construction and Management in the Commonwealth of Virginia* (2011).

⁶⁶ Audrey K. Moruza, *A Guide to Transportation Funding Options Available to Virginia Jurisdictions*, Virginia Transportation Research Council, VDOT (2019).

⁶⁷ Arlington and Henrico Counties receive their funding in accordance with VA. CODE § 33.2-366. In 2014, the General Assembly set a single per lane-mile rate for maintenance of \$17,218 for Arlington and \$12,529 for Henrico, with annual adjustments in the same manner described above for the urban system.

⁶⁸ Amy A. O'Leary, *Beyond the Byrd Road Act: VDOT'S Relationship with Virginia's Urban Counties*, Virginia Transportation Research Council, VDOT (1998).



Historically, nearly all funds for road construction and maintenance came from the state. But in recent decades, localities have opted to construct roads using local or regionally generated funds.⁶⁹ Local funding was historically limited to small matching amounts, while state funding provided the lion's share of resources for new projects.⁷⁰

The Code requires that maintenance take precedence over funding for new road construction, which at times leaves little funding available for new projects.⁷¹ In response, localities have chosen to fund new projects using locally generated revenues. Both cities and counties have opted to use this avenue for constructing new roads, blurring the lines somewhat between the funding streams for different types of localities.

IV. Different Tax Authorities

Historically, Virginia counties have had more restricted tax authority—mainly rate limits and referendum requirements—than cities. During the 2020 Regular Session, General Assembly members introduced legislation that would have removed any rate caps and other restrictions applicable to counties. However, the legislation that was enacted and is the subject of this report increased, but did not eliminate, the caps.⁷² Therefore, counties remain subject to restrictions that cities do not.

The primary statutory difference between cities and counties is that cities have general revenue-raising power, and counties do not. A city may raise revenue from any source not prohibited by law:

A municipal corporation may raise annually by taxes and assessments on property, persons, and other subjects of taxation, which are not prohibited by law, such sums of money as in the judgment of the municipal corporation are necessary to pay the debts, defray the expenses, accomplish the purposes, and perform the functions of the municipal corporation, in such manner as the municipal corporation deems necessary or expedient.⁷³

It remains a policy decision for future sessions of the General Assembly as to whether to leave the caps as they are, increase them, or eliminate them altogether. The following table shows the remaining differences after the 2020 legislation with respect to the major local taxes (admissions, transient occupancy, food and beverage or meals, and cigarette).

⁶⁹ See Moruza at vii.

⁷⁰ Peter B. Ohlms, *Local Government Funding and Financing of Roads: Virginia Case Studies and Examples from other States*, Virginia Transportation Research Council, VDOT (2014).

⁷¹ See VA. CODE § 33.2-358.

⁷² Chapters 1214 and 1263 of the Acts of Assembly of 2020. Several of the provisions have delayed effective dates, as described in subsequent footnotes.

⁷³ VA. CODE § 15.2-1104.



Tax	County rate limit	City rate limit
<i>Admissions</i>	10% (§ 58.1-3818) ⁷⁴	None
<i>Transient occupancy</i>	No limit; however, any revenue attributable to a rate from 2-5% must be used for tourism marketing ⁷⁵ (§ 58.1-3819)	None
<i>Cigarette</i>	\$0.40 per pack ⁷⁶ (§ 58.1-3830)	\$0.40 per pack or the rate in effect in January 2020, whichever is higher ⁷⁷ (§ 58.1-3830)
<i>Food and beverage</i>	6% ⁷⁸	None

V. Recommended Technical Amendments

Chapters 1214 and 1263 made several technical amendments removing provisions that the legislation made obsolete. For example, the legislation repealed §§ 58.1-3818.01, 58.1-3818.03, and 58.1-3818.04 (authorizing specific counties to impose an admissions tax at various rates) because it authorized all counties to impose an admissions tax at a 10 percent rate. Likewise, it repealed §§ 58.1-3820 and 58.1-3821 (authorizing specific counties to impose a transient occupancy tax) because those counties will be governed by the provisions of § 58.1-3819 (the general transient occupancy tax provision). Additionally, it repealed § 58.1-3831 (authorizing certain counties to impose a cigarette tax) because those counties will be authorized under a provision allowing all counties to impose a cigarette tax.

The legislation directed the work group to identify any additional technical amendments that may be necessary. During the work group's meeting on August 13, 2020, DLS staff presented possible technical amendments related to the transient occupancy tax.

Chapters 1214 and 1263 gave all counties the authority to impose a transient occupancy tax at any rate, provided that revenue attributable to the rate range of two to five percent is dedicated to tourism marketing.⁷⁹ The legislation did not repeal several Code sections that allow specifically identified counties to impose additional transient occupancy taxes up to a certain

⁷⁴ Under subsection C of VA. CODE § 58.1-3818, a county is prohibited from levying an admissions tax if it imposes an additional sales tax beyond the one percent local sales tax authorized in all localities.

⁷⁵ The provisions of Chapters 1214 and 1263 removing the rate cap for the transient occupancy tax have a delayed effective date of May 2021, so counties remain subject to current-law restrictions until then. For counties that were authorized to impose the tax at a rate higher than two percent before 2020, those counties remain subject to previously applicable restrictions on the use of revenue. Those restrictions, which are provided in VA. CODE §§ 58.1-3819.1 through 58.1-3825.4, generally require counties to use the revenue for tourism marketing.

⁷⁶ The provisions of Chapters 1214 and 1263 authorizing all counties to impose a cigarette tax at a rate of up to \$0.40 per pack have a delayed effective date of July 2021. Until then, as is the case under current law, the only counties that may impose a cigarette tax are Arlington and Fairfax at a rate of up to \$0.30 per pack.

⁷⁷ Cities were not subject to a rate cap until the enactment of Chapters 1214 and 1263.

⁷⁸ If a county held a referendum before July 2020 on imposing a food and beverage tax that was defeated, Chapters 1214 and 1263 prohibit it from imposing a food and beverage tax until six years after the referendum.

⁷⁹ Chapters 1214 and 1263 of the Acts of Assembly of 2020. This tax authority is effective May 1, 2021. The legislation also specified that "any excess from a rate over two percent shall be designated and spent solely for such purpose as was authorized under this article prior to January 1, 2020," which would have the effect of continuing any existing revenue dedication arrangements.



limit.⁸⁰ Because those counties could rely on the general authority granted under Chapters 1214 and 1263, the more specific provisions could be considered extraneous in the sense that they are more restrictive than the general provision.⁸¹

However, representatives of the Virginia Association of Counties noted that while the named counties could in theory be covered under general transient occupancy tax authority, the applicable sections identify specific arrangements between the localities and other organizations. Therefore, it recommended against altering the sections, so as to avoid creating the perception that existing local agreements related to use of transient occupancy tax revenue would be changed.

The work group also considered possible amendments related to the authority of Rappahannock and Madison Counties to impose a combined transient occupancy and food and beverage tax of up to four percent.⁸² This authority could be considered more limited than the authority granted under Chapters 1214 and 1263, because provisions in that legislation authorize counties to impose a transient occupancy tax with no rate limit and a food and beverage tax of up to six percent. It was suggested that the authority to impose a consolidated transient occupancy and food and beverage tax be retained, but the four percent cap be adjusted to authorize the consolidated tax to be levied at the combined maximum rates for transient occupancy and food and beverage taxes when levied separately by the county. In other words, if the county levied the food and beverage tax at the newly-authorized maximum rate of six percent, and the transient occupancy tax at six percent, the county could impose a consolidated transient occupancy and food and beverage tax at a maximum rate of 12 percent. The work group did not reach an agreement that the provisions should be changed.

VI. Conclusion

Through the work group's research and discussions, it compiled the various tax and non-tax legal authorities and requirements that affect cities and counties differently. In accordance with the General Assembly's mandate, the work group explored issues related to local services and sovereign immunity. However, as the goal of the work group was to compile as complete a report of the differences between cities and counties as possible, those differences are described in detail in this report. Although the work group considered and discussed possible technical amendments to accomplish the purposes of Chapters 1214 and 1263, it did not reach consensus on any amendments; therefore, the work group does not recommend any technical amendments.

⁸⁰ See VA. CODE §§ 58.1-3819.1 (Roanoke County); 58.1-3823 (Bedford and Botetourt Counties); 58.1-3825.2 (Bath County); 58.1-3825.3 (Arlington County); and 58.1-3825.4 (Prince George County).

⁸¹ The general provision is codified at VA. CODE § 58.1-3819.

⁸² VA. CODE § 58.1-3842.



Appendix A. Study Mandate.

The fifth enactment of Chapters 1214 and 1263 of the Acts of Assembly of 2020 stated the study mandate as follows:

5. That the Division of Legislative Services (the Division) shall convene a work group of stakeholders to identify and make recommendations as to other amendments necessary, including repealing obsolete provisions and making technical amendments to existing provisions, to the Code of Virginia to effectuate the provisions of this act. The Division also shall identify the different legal authorities and requirements that apply to cities and counties that are not related to taxation, including those related to the provision of local services and related to sovereign immunity. The Division shall submit a summary of its recommendations and a draft of any recommended changes to the Chairmen of the House Committees on Appropriations and Finance and the Senate Committee on Finance and Appropriations no later than October 31, 2020.



Appendix B. Presentation to the Work Group on August 13, 2020.

HB 785/ SB 588 (2020) Local Tax Authority Workgroup

August 13, 2020 Meeting

HB 785/ SB 588 Generally

- Modifies/ eliminates some restrictions on county imposed taxes
- Admissions Tax:
 - Extends authority to impose an admissions tax no greater than 10% to most counties
 - § 58.1-3818
- Transient Occupancy Tax:
 - Eliminates limit on rate of transient occupancy tax a county may impose
 - Requires any revenue attributable to a rate between 2% - 5% be dedicated to tourism marketing (effective May 1, 2021)
 - § 58.1-3819



HB 785/ SB 588 Generally

- Cigarette Tax:
 - Authorizes any county to impose a cigarette tax up to a maximum of \$0.40/ pack or \$0.02/ cigarette (effective July 1, 2021)
 - Any locality that imposes a cigarette tax at a rate higher than \$0.40/ pack may not increase that rate (effective July 1, 2021)
 - § 58.1-3830
- Food and Beverage Tax:
 - Authorizes any county to impose a food and beverage tax of up to 6%
 - Eliminates county referendum requirement before imposing tax
 - §§ 58.1-3833 and 58.1-3834
 - 4th Enactment Clause- No county that held a § 58.1-3833 referendum prior to July 1, 2020, that was defeated may impose a §58.1-3833 tax until 6 years after referendum date, unless successful referendum held after defeated referendum and before July 1, 2020

HB 785/ SB 588 Generally

- Repealed (effective July 1, 2020):
 - Admissions Tax Provisions
 - §§ 58.1-3818.01, 58.1-3818.03, and 58.1-3818.04
- Repealed (effective May 1, 2021):
 - Transient Occupancy Tax Provisions
 - § 58.1-3820 - Arlington County Transient Occupancy Tax
 - § 58.1-3821 - Transient Occupancy Tax on Certain Rentals
- Repealed (effective July 1, 2021):
 - Cigarette Tax in Certain Counties (Fairfax, Arlington)
 - § 58.1-3831

HB 785/ SB 588 Workgroup Mandate

- Fifth Enactment of Chapters 1214 and 1263
- Convene workgroup to:
 - ID and recommend any technical amendments/ repeals necessary to effectuate the Act related to taxation
 - Identify non-tax legal authorities and requirements that apply to cities and counties
 - Including:
 - Provision of local services
 - Sovereign Immunity
- By **October 31, 2020**, DLS to submit recommendations to:
 - House Committees on Appropriations and Finance
 - Senate Committee on Finance and Appropriations



Different Non-Tax Authorities

Constitutional and Statutory Overview

- Historically, cities had broader authority to impose taxes and were required to provide more services
- 1971 Constitution mostly equalized counties and cities with two main exceptions
 - (1) Election dates
 - (2) Bonds

Same Grant of Authority

- Chapter 9 of Title 15.2: General powers available to all localities
 - (1) Public health, public safety, nuisances
 - (2) Waste and recycling
 - (3) Economic development, tourism, and historic preservation
 - (4) Public transit
 - (5) Additional powers



Similar Grants of Authority

- Real estate taxes
 - Cities: Reassess once every **two** years
 - Counties: Reassess once every **four** years
- Similar or parallel grants of authority

Power granted	City citation	County citation
Giving a discount for taxes paid early	§ 15.2-1104	§ 15.2-1201.2
Establishing a hospital	§ 15.2-1119	§ 15.2-1225
Regulating auctions and pawnshops	§ 15.2-1114	§ 15.2-1232.1
Creating economic revitalization zones	§ 15.2-1129.2	§ 15.2-1232.2

Powers Granted Only to Cities

- Uniform Charter Powers Act
 - Cities may impose any tax not prohibited
- Most counties do not have a charter
 - Chesterfield, James City, and Roanoke are chartered
 - But their charters do not include general tax authority
- Police departments
 - Cities may create
 - Counties may create only with (a) approval at referendum and by the General Assembly or (b) adoption of county executive, county manager, or urban county executive form of government

Powers Granted Only to Counties

- The Code grants counties some powers for which there is no parallel city statute
 - Regulating drive-in theaters
 - Establishing petty cash funds
 - Cutting overgrown grass
 - Appropriating funds to incorporated towns



Restrictions that apply only to counties

- Any county ordinance regulating vehicles must be consistent with state highway laws
- Counties are prohibited from requiring the registration of pistols and revolvers

Bonds and Charters

Bonds

- Powers and procedures applying to all local bonds
 - Article 2 of Chapter 26 of Title 15.2, § 15.2-2604 et seq.
- Provisions specific to local bonds issued by municipalities
 - Article 3 of Chapter 26 of Title 15.2, § 15.2-2632 et seq.
- Provisions specific to local bonds issued by counties
 - Article 4 of Chapter 26 of Title 15.2, § 15.2-2638 et seq.



Bonds - Municipalities

- Cities and Towns
 - Authorized to issue general obligation bonds so long as total general indebtedness does not exceed 10% of assessed value of taxable real property in the municipality
 - Certain classes of indebtedness excluded from determination - VA Constitution Article VII, Sections 10(a)(1) through 10(a)(4)
 - No referendum required
 - Any ordinance/ resolution authorizing the issuance of bonds must be passed by the recorded affirmative majority vote of all members elected to its governing body
 - There is no amount limitation imposed regarding revenue bonds.

Bonds - Counties

- Counties
 - May not contract debt, borrow money, or issue bonds without approval of majority of voters in an election on the matter
 - Three Exceptions where voter approval is not required:
 - To contract debt or issue bonds described in Article VII, Sections 10(a)(1) and 10(a)(3) of the Constitution of Virginia
 - To issue refunding bonds
 - Certain school bonds
 - No referendum required + no amount limitation imposed for revenue bonds
 - Upon voter approval any county may elect to be treated as a city for purpose of incurring debt and issuing bonds
 - Subjects county to all benefits and limitations relating to bonded indebtedness for municipalities

Charters

- As municipal corporations, all cities have powers provided by charter in addition to those in Code of Virginia
- Three counties have charters, but most do not
 - Chesterfield, James City, and Roanoke



Charters

- Cities and towns have default powers under Uniform Charter Powers Act
 - If there is a conflict between the Uniform Charter Powers Act and a city's charter, the charter prevails
 - No statute or county charter has granted such default powers to counties

- Non-tax related provisions on municipality and county charters:
 - Boundaries of municipalities remain as now established unless changed as provided in the Code
 - No municipality charter shall contain its metes and bounds, as established or as amended, but the boundaries shall be incorporated by reference
 - No county charter shall, similarly, contain the description of the county's boundaries

Sovereign Immunity and Road Maintenance

Sovereign Immunity

- Shields governmental entities and their employees from most tort claims.
- Cities and counties are entitled to different levels of sovereign immunity.
 - The distinction is based on historical origins, not any difference in the provision of services.
 - Availability of sovereign immunity depends on the type of function the locality is performing.
- Sovereign immunity can be modified or abolished by the General Assembly.



Sovereign Immunity

- Counties are considered subdivisions of the Commonwealth.
 - Therefore, they enjoy the same level of protection as the Commonwealth.
 - Counties enjoy sovereign immunity regardless of the type of function they are providing.
- Cities are considered municipal corporations and are not entitled to the same level of protection as the Commonwealth.
 - Cities are protected by sovereign immunity if they are providing a “governmental function,”
 - Cities are not protected if they are providing a “proprietary function.”

Sovereign Immunity

- “Governmental functions” are those performed for the public good or welfare.
 - Examples of governmental functions:
 - municipal planning, regulation and construction, responding to public emergencies, maintaining traffic signals, operating schools, hospitals or health departments, animal control, trash removal.
- “Proprietary functions” are those carried out for the benefit of the municipality, not the public at large.
 - Examples of proprietary functions:
 - Routine maintenance or operation of a municipal services, i.e. operating a market, water department, airport, or public housing authority, or renting property as a landlord.
- If a function is partially governmental and proprietary, it is considered governmental.

	Negligence suits	Negligence Suits	Gross negligence, intentional torts, or bad faith acts
Locality	Governmental function	Proprietary Function	Governmental and proprietary functions
County	Immune	Immune	Not immune
City	Immune	Not immune	Not immune



Road Maintenance

- In all but two Counties, VDOT is responsible for maintaining county roads.
- Cities are responsible for maintaining their own roads, but with state funding.
 - Arlington and Henrico Counties and towns with population over 3,500 also maintain their own roads.
- Historically, city roads may have had higher maintenance needs, but for urbanized counties, this distinction does not reflect modern practices.

Road Maintenance

- Historically, road funding came almost entirely from the state.
- But in recent years transportation funding has become much more complex.
 - Both cities and counties have opted to fund road construction with locally generated funds, so their functions have begun to overlap.
 - Regional taxes imposed in the code and locally raised funds have been used for these projects.
- The major difference between cities and counties lies in maintenance, funding depends more on region and need.

Technical Amendments Included in SB 588 / HB 785

- Repealed §§ 58.1-3818.01, 58.1-3818.03, and 58.1-3818.04 (authorizing specific counties to impose admissions tax at various rates)
- Repealed §§ 58.1-3820 and 58.1-3821 (authorizing specific counties to impose transient occupancy tax)
- Repealed § 58.1-3831 (authorizing specific counties to impose cigarette tax)



Remaining Tax Differences Between Cities and Counties

Tax	County rate limit	City rate limit
Admissions	10% (§ 58.1-3818)	None
Transient occupancy	No limit; however, any revenue attributable to a rate from 2-5% must be used for tourism marketing (§ 58.1-3819)	None
Cigarette	40¢ per pack (§ 58.1-3830)	40¢ per pack or the rate in effect in January 2020, whichever is higher (§ 58.1-3830)
Food and beverage	6%	None

Transient Occupancy Tax

- SB 588/HB 785 gave general authority to counties to impose a TOT at any rate, provided that the rate 2-5% be used for tourism (Effective 5/1/21).
- They did not repeal several code sections that allow certain counties to impose additional TOT's.
 - Some of these sections may be extraneous, others are not.
 - The extraneous sections grant no authority not also granted by the new § 58.1-3819
 - Others provide authority not available under § 58.1-3819.

Transient Occupancy Tax

- Potentially Extraneous Sections; these provide authority to impose additional TOT's for tourism
 - 58.1-3819.1, Roanoke County
 - 58.1-3825.2, Bath County
 - 58.1-3825.3, Arlington
 - 58.1-3825.4, Prince George
 - 58.1-3823 (for Bedford and Botetourt)



Transient Occupancy Tax

- Sections providing additional TOT authority;
 - 58.1-3823
 - Hanover, Chesterfield, Henrico, can impose TOT for Richmond Convention Center and Virginia Performing Arts Foundation's facilities.
 - James City, York can impose \$2/night TOT to promote tourism in the Historic Triangle.
 - 58.1-3824, Fairfax may impose additional 2% rate, 1.5% for tourism, 0.5% for convention and visitor's bureau.
 - 58.1-3825, Rockbridge, Lexington, Buena Vista, 2% TOT for Virginia Horse Center

Conclusion

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