VIRGINIA:

IN THE CIRCUIT COURT OF CHARLOTTE COUNTY

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v. Case No. CL12000116 00

DAVID M. GUILL, *et al.*,

Defendants.

COMMONWEALTH OF VIRGINIA'S
RESPONSE TO THE DEFENDANTS'
APPOINTMENT OF A FIVE-MEMBER PANEL

Plaintiff, Commonwealth of Virginia (the "Commonwealth"), by counsel, responds to certain decisions of the Defendants, the Members of the Board of Supervisors for Charlotte County (the "Board"), regarding the appointment of the five member panel (the "Panel") under the mandamus statute, Va. Code § 15.2-1643.

I. INTRODUCTION

This proceeding has been pending for more than two years without an agreed resolution between the Commonwealth and the Board. The appointment of the Panel presents an opportunity for it to make an independent assessment and recommendation to this Court regarding what construction relating to the Charlotte County court facilities is necessary. Yet, the Board has appointed as members of the Panel one of its own Board members (and thus a named defendant), the brother-in-law of another Board member, and two employees of state agencies. Without questioning the personal integrity of these appointees, their inclusion on the Panel would likely result in the public not having

confidence in the integrity of this process. Moreover, although the mandamus statute delineates the Panel's task and enumerates matters that the Panel should consider in making its recommendations to this Court, the Board has invited the Panel to attend a public forum during which it could hear from the Board's constituents, and the Board has asked the Panel to consider matters that are not relevant to its statutory charge. In sum, the Board's actions have cast doubt on this process and the value of any recommendations that this Panel might provide to this Court.

As a result, the Commonwealth respectfully requests that this Court require that the Board reconstitute the Panel, require the Board to withdraw its invitation to the Panel to attend a public forum, and prohibit the Board from providing information to the Panel that is not relevant to the mandamus statute.

II. BACKGROUND OF THE CASE

A. The Board's Statutory Obligation and this Mandamus Proceeding

In Virginia, the General Assembly has required that counties and cities provide for suitable space and facilities for Virginia's courts:

> The governing body of every county and city shall provide courthouses with suitable space and facilities to accommodate the various courts and officials thereof serving the county or city; within or outside such courthouses, a clerk's office, the record room of which shall be fireproof; a jail; and, upon request therefor, suitable space and facilities for the attorney for the Commonwealth to discharge the duties of his office. The costs thereof and of the land on which they may be, and of keeping the same in good order, shall be chargeable to the county or city. . . . .

Va. Code § 15.2-1638. Virginia Code § 15.2-1643 then provides, in part:

> When it appears to the circuit court for any county or city, from the report of persons appointed to examine the court facilities, or otherwise, that the court facilities of such county or city are insecure, out of repair, or otherwise pose a danger to the health, welfare and safety of court employees or the public, the court shall enter an order, in the name and on

> behalf of the Commonwealth against the supervisors of the county, or the members of the council of the city, as the case may be, to show cause why a mandamus should not issue, commanding them to cause the court facilities of such county or city to be made secure, or put in good repair, or rendered otherwise safe as the case may be, and to proceed as in other cases of mandamus, to cause the necessary work to be done.

Id.

In the present situation, the Board provides facilities for the Circuit Court for Charlotte County and the General District Court for Charlotte County in buildings located on Courthouse Square in Charlotte Courthouse, and it provides facilities for the Juvenile & Domestic Relations Court for Charlotte County in the Human Services Building located on Thomas Jefferson Highway in Charlotte Courthouse.

On June 25, 2012, the Charlotte County Circuit Court entered an Order to Show Cause under Va. Code § 15.2-1643 against the Board, stating that the court facilities of Charlotte County are insecure, out of repair, or otherwise pose a danger to the health, welfare and safety of court employees or the public. Pursuant to Va. Code § 15.2-1643, this proceeding was brought "in the name and on behalf of the Commonwealth." *Id.*

In its Responsive Pleading to the Order to Show Cause, *the Board has essentially agreed with the assessment of the Charlotte County Circuit Court*, as it has "acknowledge[d] that the court facilities serving the Circuit Court of Charlotte County, the General District Court and the Juvenile and Domestic Relations District Court of Charlotte County are in need of repair to make such court facilities secure, in repair, and safe for court employees and the public." *Id.* at ¶ 1. Thus, the only issue remaining is what work or construction is necessary.

For more than two years, representatives of the Board and the Commonwealth have been in discussions regarding what work or construction is necessary so that the

Board can fulfill its statutory obligations under Va. Code § 15.2-1638 and Va. Code § 15.2-1643, including its obligation to provide suitable space and facilities to accommodate the various courts and officials of Charlotte County. It has been up to the Board to decide between renovating and adding on to existing buildings, or constructing a new facility on land contiguous to the existing circuit courthouse. *See* Va. Code § 15.2-1646. The Board and its architects have presented certain renovation plans for the circuit and general district courts to representatives of the Commonwealth for its review. They have responded to such plans with comments consistent with Va. Code § 15.2-1638, Va. Code § 15.2-1643 and the *Virginia Courthouse Facility Guidelines*.[1] But at no time have the Commonwealth's representatives requested that changes be made to the existing, interior floor plans of the Charlotte Courthouse in Courthouse Square. In fact, they have suggested that no such changes be made to the historic courthouse. The Commonwealth's representatives intend to continue to review and comment on whatever plans that the Board chooses to present to it.

B. The Circuit Judge Assigned by the Chief Justice Determines the Extent of the Necessary Work

Under the mandamus statute, the circuit judge assigned by the Chief Justice is "to hear and determine whether, after consideration of such matters as set forth in subdivisions 1 through 4, the court facilities are in fact insecure or out of repair or otherwise pose a danger to the health, welfare and safety of court employees or the public and the extent to which repairs, if any, are necessary." Va. Code § 15.2-1643. The matters set forth in subdivisions 1 through 4 are:

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[1] A copy of the *Virginia Courthouse Facility Guidelines* can be found at: http://www.courts.state.va.us/courts/vacourtfacility/complete.pdf

1. Security provisions to safeguard court personnel, participants and the public;

2. Efficient layout and circulation patterns to maximize public access, promote efficient operations, and accommodate the diverse users;

3. Provision of administrative and service areas, judges' chambers, hearing rooms, conference rooms, prison holding areas, and public information areas; and

4. Comfort, safety and obsolescence of the existing facility or any part thereof.

Id. This is the task before this Court.

C. The Appointment of the Panel under the Mandamus Statute

Yet, before this Court issues a mandamus, the statute provides for the appointment of the Panel:

> Before a mandamus is issued, if the concerned governing body elects, or if the pleadings allege that the court facilities are in fact insecure or out of repair, or otherwise pose a danger to the health, welfare and safety of court employees or the public, or that a replacement or additional courthouse may be needed, the local governing body shall appoint a five-member panel . . . .

Va. Code § 15.2-1643 (a copy of the statute that was in effect on June 25, 2012, when the Order to Show Cause was entered, is attached as Exhibit 1). As noted above, the Board's Responsive Pleading contains an admission that the court facilities for Charlotte County are, in essence, insecure or out of repair, or otherwise pose a danger to the health, welfare and safety of court employees or the public. As a result, by Order dated October 7, 2014, the Court directed the Board to appoint the Panel.

Under Va. Code § 15.2-1643, the composition of the Panel and its tasks are described as follows:

> [T]he local governing body shall appoint a five-member panel three of whom shall be qualified by training and experience as either an architect or a professional engineer, not representing the same firms, to review the

> court facilities in question and make recommendations to the local governing body and circuit court judge assigned by the Chief Justice concerning the construction or repairs deemed necessary.

Id. Similarly, the statute also provides what matters the Panel must consider to go about its task:

> In making their recommendations, the panel shall consider matters such as, but not limited to, the following:
>
> 1. Security provisions to safeguard court personnel, participants and the public;
>
> 2. Efficient layout and circulation patterns to maximize public access, promote efficient operations, and accommodate the diverse users;
>
> 3. Provision of administrative and service areas, judges' chambers, hearing rooms, conference rooms, prison holding areas, and public information areas; and
>
> 4. Comfort, safety and obsolescence of the existing facility or any part thereof.
>
> The existing facilities shall be considered in relationship to their location and the extent of their use, and their failure to meet any of these general considerations shall not necessarily be deemed a cause for determining them inadequate.
>
> In making their recommendations, the panel may consult recognized national standard works in the field.

Id. Having considered these matters, the Panel is to make its recommendation to "the local governing body and circuit court judge assigned by the Chief Justice concerning the construction or repairs deemed necessary." *Id.* Under the relevant version of Va. Code § 15.2-1643, the mandamus ultimately issued by the circuit court judge can require a county or city to erect a replacement or additional courthouse, if such replacement or additional courthouse has been recommended by the Panel. *Id.*

D. The Board's Appointment of the Panel and its Plans to Provide it with Certain Information

By its October 7, 2014 Resolution, the Board has made its appointments to the

Panel. They include a member of the Board, an architect employed by the Commonwealth who is also the brother-in-law of a Board member, and a third appointee employed by the Commonwealth who may have already determined what work she would approve.

Further, the Board has invited the Panel to attend a public forum on the courthouse. The Board also intends to provide the Panel with cost estimates of the few sets of plans that it has selected to share with the Panel, a letter from the Virginia Department of Historic Resources about historic issues, and a copy of a version of the mandamus statute that does not apply to the present proceeding.

As explained below, the public is not likely to have confidence in the integrity of a process in which the Defendants have appointed to the Panel a defendant, a brother-in-law of another defendant, and two employees of the Commonwealth. In addition, the Panel's statutory charge does not include attending public meetings of the Board's constituents. Finally, the Board should not ask the Panel to consider matters that are not relevant to its statutory charge. The Commonwealth respectfully requests that this Court rectify this situation before the Panel begins its statutory charge of reviewing the court facilities and making its recommendations to this Court.

II. ARGUMENTS AND AUTHORITIES

A. The Board's Appointments to the Panel Convey an Appearance of Partiality and Could Cause Confusion

1. The Panel's Function under the Mandamus Statute

By statute in Virginia, counties in Virginia are required to provide courthouses that are in repair, secure and safe, and have suitable space and facilities. However, if a county does not fulfill its obligations, and it appears to the circuit court that the court

facilities of such county are insecure, out of repair, or otherwise pose a danger to the health, welfare and safety of court employees or the public, then "the court shall enter an order, in the name and on behalf of the Commonwealth against the supervisors of the county . . . to show cause why a mandamus should not issue, commanding them to cause the court facilities of such county . . . to be made secure, or put in good repair, or rendered otherwise safe as the case may be." Va. Code § 15.2-1634. Once initiated, the matter is "to proceed as in other cases of mandamus" and appeals are allowed "as appeals from courts of equity are allowed." *Id.*

As noted above, the circuit judge assigned by the Chief Justice is to hear and determine, after consideration of such matters as set forth in the mandamus statute, whether the court facilities are in fact insecure or out of repair or otherwise pose a danger to the health, welfare and safety of court employees or the public and the extent to which repairs, if any, are necessary. *Id.* Yet, the mandamus statute also provides that a governing body can, *and in some instances must*, appoint a five-member panel, three of whom must be qualified by training and experience as either an architect or a professional engineer, not representing the same firms, to review the court facilities in question and make recommendations to the local governing body and circuit court judge assigned by the Chief Justice concerning the construction or repairs deemed necessary. *Id.*

To be sure, the mandamus statute does not *expressly* prohibit a local governing body from appointing to the Panel one of its own members, a brother-in-law of one of its members, and/or employees of the Commonwealth. On the other hand, the mandamus statute does not *expressly* grant a local governing body unfettered discretion to appoint panel members with such ties to the local governing body or the Commonwealth.

Inherent in the mandamus statute is the fundamental notion that the Panel is to be impartial and unbiased.

In Virginia, a statute must be construed with reference to its subject matter, the object sought to be attained, and the legislative purpose in enacting it; and its provisions should receive a construction that will render it harmonious with that purpose rather than one which will defeat it. *Esteban v. Commonwealth*, 266 Va. 605, 609 (2003). By statute, a local governing body has an obligation to provide courthouses with suitable spaces. Under the mandamus statute, an order to show cause must be filed when the local governing body fails in its obligations and its courthouse is out of repair, insecure and/or unsafe. A mandamus is brought on behalf of and in the name of the Commonwealth against the members of the local governing body as the named defendants. The circuit judge assigned by the Chief Justice is to hear and determine the extent that construction and repairs are necessary. Yet, when there is an allegation that a courthouse is out of repair, insecure and/or unsafe, the local governing body *must* appoint a Panel before a mandamus issues. The Panel, three members of which must be qualified by training and experience as either an architect or a professional engineer (not representing the same firms), reviews the court facilities and makes recommendations to the assigned circuit court judge. The fact that the Panel's architect and engineers cannot be from the same firm indicates that such professionals should be from the private sector, as opposed to the public sector, and that they be independent of one another. In light of these provisions, construing the mandamus statute as not allowing the local governing body to appoint panel members who can be perceived as partial or biased would be harmonious with the object of the statute.

The mandamus statute does not refer to the Panel as a "jury" and, indeed, there is no right to a jury trial in a mandamus action. But, drawing an analogy between the Panel and a jury asked to decide an issue of chancery – another body that makes *recommendations* to a circuit judge (*see* Va. Code § 8.01-336(E)) – certain basic tenets of fairness emerge. A person should not be asked to decide contested questions of fact in a judicial setting if he or she is "related to either party, or has any interest in the cause, or has expressed or formed any opinion . . . ." Va. Code § 8.01-358. *See also Webb v. Commonwealth.*, 397 S.E.2d 539, 540 (Va. App. 1990) ("A venireman who has an interest in the cause or who is related to a party is deemed *per se* not to be 'disinterested' and must be set aside for cause."). Otherwise, the public might not have confidence in the integrity of the Panel process. *Cf., Virginia Beach v. Giant Sq. Shopping Ctr.*, 255 Va. 467, 471 (1998) ("Under these circumstances, it is extremely unlikely the public would have confidence in the integrity of the process when a commissioner [in a condemnation case to be decided by "disinterested freeholders" (Va. Code § 25.1-227.1)] has the identity of interests demonstrated by this prospective commissioner. This is true even though, as the record shows, the commissioner is a 'respected member of the community' and 'known to be a man of integrity,' who may be determined to discharge his duties in a forthright and unbiased manner."). In the context of Va. Code § 38.2-1643, a recommendation to the presiding judge from a Panel composed of persons related to either party, having an interest in the cause, or having previously expressed or formed an opinion, could be perceived as having been influenced, or perhaps even dictated, by the named defendants who appointed them. And the named defendants are the same persons who allowed the court facilities at issue to become insecure, out of repair, or

otherwise pose a danger to the health, welfare and safety of court employees or the public.

2. The Board Has Appointed One of its Own Members to the Panel

In the present case, the Board has admitted that its court facilities are in need of repair and that they are insecure and unsafe for court employees and the public. The Board and its architects have presented certain renovation plans to representatives of the Commonwealth for its review. The Commonwealth's representatives have responded to such renovation plans with comments consistent with Va. Code § 15.2-1638, Va. Code § 15.2-1643 and the *Virginia Courthouse Facility Guidelines*. Yet, there has been no resolution in the two years since this mandamus proceeding was initiated. As a result, the appointment of the Panel presents an opportunity for an independent assessment.

When it appointed the Panel, however, the Board chose one of its members. In other words, the local government governing body has appointed *a named defendant in this mandamus proceeding* to serve on the Panel that is to make recommendations to this Court *as to how this mandamus proceeding is to be resolved*. Even if this Board member is a respected member of the community and known to be a man of integrity (and there is no evidence to the contrary), he has an interest in the outcome of this proceeding. And, upon information and belief, the local governing body may already have a strong preference as to what it considers "the construction or repairs deemed necessary." Va. Code § 38.2-1643. As a result, the Panel's current composition would call into question any later recommendation that the Panel may make, especially if such recommendation is consistent with what the Board's existing preference may be.

3. The Board Has Appointed Two Employees of the Commonwealth of Virginia to the Panel, One of Whom is also Related by Marriage to a Board Member

Under Va. Code § 15.2-1643, three members of the Panel must "be qualified by training and experience as either an architect or a professional engineer." *Id.* The Board complied with this statutory requirement. The statute indicates that such architects or professional engineers be from the private sector, as it provides that they cannot "represent[] the same firms." *Id.* But the Board has appointed to the Panel an architect who is employed by the Virginia Community College System, which is a state agency. *See* Va. Code § 23-215. In addition, this architect is related to a member of the Board of Supervisors by marriage – he is the brother-in-law of a named defendant.

Moreover, it appears that another panel member is Executive Director of the Capitol Square Preservation Council, which is also a state entity. *See* Va. Code § 30-193, *et seq.* And, according to the Virginia Department of Historic Resources' September 11, 2014 letter, a copy of which apparently was sent to the circuit court judge assigned by the Chief Justice in this proceeding (but not to counsel to the Commonwealth), this Panel member already may have formed an opinion that a "design of last fall" would be "acceptable."

There also may be the potential for confusion. This is a mandamus action brought "in the name of and on behalf of the Commonwealth" (Va. Code § 15.2-1643) and the Commonwealth has an architectural consultant for the purposes of this proceeding. But members of the Panel (and perhaps the public) might be confused because two Panel members are employees of the Commonwealth. This potential for confusion is increased if one Panel member has found acceptable a "design of last fall" (as referenced in the

Virginia Department of Historic Resources letter), but such design would not provide for a secure and safe courthouse with suitable space and facilities to accommodate the various courts and officials serving the county. *See* Va. Code § 15.2-1638; Va. Code § 15.2-1643; *Virginia Courthouse Facility Guidelines.*

By raising these issues, the Commonwealth is not challenging the integrity of the people whom that the Board has chosen to serve on the Panel. Moreover, the Commonwealth anticipates that the Board may respond by describing the value that each of these people would bring to the Panel, and the thinking that went into each selection. But there are other potential appointees to the Panel who also could bring value to the process but are not a named defendant, not related by marriage to a named defendant, and not employees of the Commonwealth. Finally, the Commonwealth does not seek to "micro-manage" the panel appointment process; this is the third time in the last dozen or so years that a local governing body has appointed a five-member panel, but this is the first time that the Commonwealth has raised issues relating to a panel's composition. The Commonwealth's response here is based on concerns about the integrity of the panel process, the public's confidence in that process and the value of any recommendations that might be made to this Court.

B. The Board Has Requested that the Panel Attend Meetings and Consider Information Outside of the Mandamus Statute

1. A Local Governing Body's Powers Regarding the Panel Are Limited

Virginia Code § 15.2-1643 defines the Panel's task: "review the court facilities in question and make recommendations to the local governing body and circuit court judge

assigned by the Chief Justice concerning the construction or repairs deemed necessary." *Id.* The statute also sets forth the matters that the Panel "shall consider," including:

1. Security provisions to safeguard court personnel, participants and the public;
2. Efficient layout and circulation patterns to maximize public access, promote efficient operations, and accommodate the diverse users;
3. Provision of administrative and service areas, judges' chambers, hearing rooms, conference rooms, prison holding areas, and public information areas; and
4. Comfort, safety and obsolescence of the existing facility or any part thereof.

Id. Thus, the Panel's task and the matters it must consider have been set forth by the General Assembly.

Under the statute, the Panel is "not limited to" the enumerated matters, but the General Assembly left it up to the Panel – the majority of whom are qualified by training and experience as either architects or professional engineers – to decide whether to consider other matters. It is not the prerogative of a local governing body to request or require that the Panel do so. The local governing body should not be allowed to commandeer the Panel – which is to make recommendations to *both* the local governing body *and* the assigned circuit judge – for the local governing body's own purposes, and even the appearance that this might be happening should be avoided.

2. The Board's Request that the Panel Attend a Public Forum is Not Consistent with the Mandamus Statute

Upon information and belief, the Board intends to invite the Panel to attend a public forum. There is absolutely nothing improper about the Board conducting a public

forum for its constituents.[2] But the Board's constituents are not the Panel's constituents, and the Panel's statutory charge does not include attending public forums or meetings. Rather, the Panel's charge is to review the court facilities in question and provide recommendations to the local governing body and the judge assigned by the Chief Justice to preside over a mandamus proceeding, based on the Panel's consideration of the matters set forth in Va. Code § 15.2-1643(B). It is unlikely that any public input at such a forum would be restricted to, or even include, the enumerated matters, and it is possible that the Panel could be influenced by the comments of participants that are based on factors other than what would provide Charlotte County with courts that are secure and safe, with suitable space and facilities. Because the Panel has been invited by the same entity (the Board) that appointed it, the Panel members may deem attending such a public forum to be part of its official duties, which it is not. Additionally, the public may perceive the Panel as being a subcommittee of the Board, which it is not.

3. The Board Plans to Provide the Panel with Cost Estimates

The Board plans to provide the Panel with three selected sets of plans that its architects have prepared, as well as cost estimates of the selected drawings.[3] However, the statutory requirements regarding a locality's provision of adequate court facilities do not vary based on their cost. Adequate courthouses are courthouses in good repair,

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[2] There may be public interest in this proceeding, as indicated by a September 18, 2014 news article, "County Tax Base Too Low for New Courthouse," a copy of which is attached as Exhibit 2. By attaching this article as an exhibit, the Commonwealth is not agreeing to the article's factual accuracy, including the article's characterizations of the Order to Show Cause or any proposals that have been discussed by representatives of the Board and the Commonwealth.

[3] Last month, the Board stated in its Response Pleading that it had eighteen (18) sets of drawings. *Id.* at ¶ 3.

secure and safe, with suitable space and facilities to accommodate the various courts and officials serving a locality. *See* Va. Code § 15.2-1638; Va. Code § 15.2-1643; *Virginia Courthouse Facility Guidelines*. Once there has been a determination of the necessary construction and repairs, if there is more than one solution that would provide adequate court facilities, localities can choose among such solutions based on their own criteria.

As discussed above, the General Assembly has required that counties, as political subdivisions of the Commonwealth, provide "courthouses with suitable space and facilities." Va. Code § 15.2-1638. This statute does not define or limit the phrase "courthouses with suitable spaces and facilities" by any reference to cost.

Similarly, under Va. Code § 15.2-1643(A), an order is entered and directed to the members of a board of supervisors requiring that they "show cause why a mandamus should not issue, commanding them to cause the court facilities of such county or city to be made secure, or put in good repair, or rendered otherwise safe as the case may be, and to proceed as in other cases of mandamus, to cause the *necessary work* to be done." *Id.* (emphasis added). Virginia Code § 15.2-1643(A) does not define the phrase "necessary work" by any reference to cost.

Likewise, the enumerated matters that both the assigned circuit judge and the Panel are to consider under Va. Code § 15.2-1643(B) do not include cost. The assigned circuit judge and the Panel are not to base their determinations as to what construction or repairs are *necessary* on what such construction or repairs cost.

Cost is omitted as a relevant factor in these statutes because necessary construction or repairs cannot be determined by the expense of providing them. For example, to provide adequate security, modern design dictates that a courthouse have

three separate and non-overlapping circulation patterns; *i.e.*, one for court staff, one for the public and one for prisoners. *See, e.g., Virginia Courthouse Facility Guidelines*, Section 2.1.4 "Circulation Patterns." Further, the design must allow for the screening of all members of the public who enter the building (*id.*, Section 2.1.10 "Building Security"), and for prisoners to be brought in through a secure sally port and kept in adequate holding cells. *Id.*, Section 2.1.10 "Building Security" and Section 2.2.15 "Prisoner Holding Facilities." These design requirements can result in a courthouse that costs more to build than other types of public buildings. But such safety and security design elements cannot be left out of a courthouse simply because of the expense of providing them. There have been unfortunate incidents of courthouse violence in recent years, and such violence is not limited to urban areas. They can occur in rural areas as well.[4]

This conclusion – that cost is not a relevant factor in the determination of what construction or repairs is necessary – is consistent with the holding by the Honorable Charles E. Poston in another mandamus proceeding under Va. Code § 15.2-1643 involving Appomattox County. In that proceeding, Appomattox County had planned to present evidence at trial of its financial condition, presumably to support a set of plans that the County proposed to remedy the statutory violations of its then-existing courts facilities. Judge Poston barred the presentation of such evidence, stating:

> The facilities have already been found to be insecure or out of repair or otherwise insufficient. The only issue before the Court at this point then is how to make these facilities secure, in repair and sufficient. *Financial feasibility or infeasibility is not an issue before the Court.* It becomes an

[4] *See, e.g., Courthouse Violence in 2010-2012: Lessons Learned* at the web site of National Center for States Courts. http://www.ncsc.org/

> issue for the supervisors once the method of making the facilities secure, in repair and otherwise sufficient has been granted.

See Transcript of February 27, 2002 proceedings at 28-29, attached as Exhibit 3 (emphasis added). To rule otherwise would have opened the door to the possibility that an inadequate courthouse could have been built solely because it cost less than an adequate one. As a result, under Va. Code § 15.2-1643, the cost of a new or renovated courts facility is not an issue for either the circuit judge assigned by the Chief Justice or the Panel.[5]

As they seek to meet their statutory obligations and provide facilities consistent with the *Virginia Courthouse Facility Guidelines*, localities can and do incur certain expenses in providing adequate courthouses. If there is more than one solution that would provide "the construction or repairs deemed necessary" (Va. Code § 15.2-1643), localities can choose among such solutions based on their own criteria. For example, in the Appomattox case, after rejecting the county's proposed plans as not adequate, Judge Poston gave the county the option to choose between two sets of plans, either of which would provide for adequate court facilities.[6] But having the Panel consider cost when it formulates, in the first instance, what the construction or repairs deemed necessary would be a departure from Va. Code § 15.2-1643, and it could play an impermissible role in the formulation of the Panel's recommendations.

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[5] At the subsequent trial, Judge Poston rejected as inadequate the plans that Appomattox County proposed.

[6] A copy of that mandamus order is attached as Exhibit 4.

4. The Board Plans to Provide the Panel with a Copy of the Letter from the Department of Historic Resources

The County proposes to provide the Panel with a copy of the September 11, 2014 letter from the Virginia Department of Historic Resources, described above. The focus of the letter is on historic considerations, and the letter indicates a "design of last fall" was "acceptable." There is the potential for confusion by the Panel (and perhaps the public) about a letter from the Virginia Department of Historic Resources, because the petitioner here is the Commonwealth of Virginia. This is especially true if the "design of last fall" would be acceptable to the Virginia Department of Historic Resources from a historical perspective, but not provide for a secure and safe courthouse with suitable space and facilities to accommodate the various courts and officials serving the county, which is the focus of this proceeding. *See* Va. Code § 15.2-1638; Va. Code § 15.2-1643; *Virginia Courthouse Facility Guidelines.*

5. The Board Plans to Provide the Panel with an Inapplicable Version of the Mandamus Statute

When a statute is amended while an action is pending, the substantive rights of the parties are to be decided in accordance with the law in effect when the action was begun, unless the amended statute shows a clear intention to vary such rights. *Washington v. Commonwealth*, 216 Va. 185, 193 (1975). *See, also, Chappell v. Perkins*, 266 Va. 413, 420 (2003) ("Legislation is presumed to effect a change in the law unless there is a clear indication that the General Assembly intended that the legislation declare or explain existing law."). Here, the mandamus statute was amended effective July 1, 2012, while the present action was already pending. That amendment shows no intention – clear or otherwise – to vary the existing rights in the statute. Nevertheless, the County

intends to provide a copy of the current mandamus statute, with the July 1, 2012 amendment, to the Panel. At the end of the day, providing any copy of the mandamus statute is not necessary, because this Court's October 7, 2014 Order includes the statutory instructions to the Panel.

WHEREFORE, the Commonwealth respectfully requests that this Court:

1. Require that the Board reconstitute the members of its Panel;

2. Specify that the Panel not attend any public meetings or forums as part of its statutory duties under Va. Code § 15.2-1643; and

3. Limit the information provided to the Panel to that information relevant under Va. Code § 15.2-1638 and Va. Code § 15.2-1643, and that information that the Panel may request on its own initiative.

Respectfully Submitted,

COMMONWEALTH OF VIRGINIA

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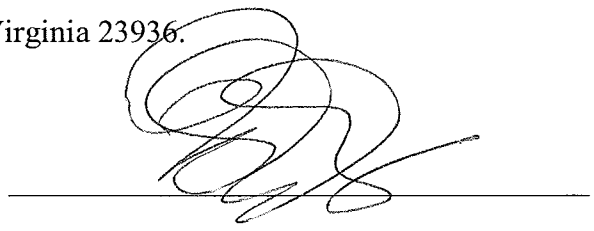
CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served this 21th day of October, 2014, by email and first-class mail, postage prepaid, on Mr. Russell O. Slayton, Jr., Slayton, Bain and Clary, 411 South Hicks St., P.O. Box 580, Lawrenceville, Virginia 23868, and Mr. Gregory J. Haley, Gentry Locke Rakes & Moore, 10 Franklin Road SE, Suite 1800, Roanoke, VA 24011, and by first-class mail, postage prepaid, on Mr. Edward W. Early, Early & Early, P.O. Box 391, Charlotte Court House, Virginia 23923; and Mr. J.R. Snoddy, III, P.O. Box 325, Dillwyn, Virginia 23936, and Mr. J. Robert Snoddy, III, 1036 Main Street, P.O. Box 325, Dillwyn, Virginia 23936.



office in the courthouse only if space is available. Board of Supvrs. v. Bacon, 215 Va. 722, 214 S.E.2d 137 (1975) (decided under prior law).

City sergeant entitled to same rights as sheriff. — A city sergeant who performs what would otherwise be the sheriff's duties and is charged with supervision of the jail and safekeeping of its inmates, is entitled to the same rights under this section that he would be entitled to if he did in fact occupy the office of sheriff. Egerton v. City of Hopewell, 193 Va. 493, 69 S.E.2d 326 (1952) (decided under prior law).

City council has power to require city sergeant to move office. — Under the facts established it was held that city council had the right and power to require city sergeant to vacate and move from an office in city municipal building to an office assigned to him at city jail located in another building. Egerton v. City of Hopewell, 193 Va. 493, 69 S.E.2d 326 (1952) (decided under prior law).

Discretion of council in determining availability of office space. — City municipal building was not in its entirety a courthouse and determination by the city council of whether or not office space was available for the city sergeant within that portion of the building which constituted the courthouse was, under this section, within its sound discretion and its discretion in that respect could not be set aside or disregarded unless abused. Egerton v. City of Hopewell, 193 Va. 493, 69 S.E.2d 326 (1952) (decided under prior law).

§ 15.2-1640. Renting rooms in courthouse. — With the approval of the judge of the circuit court for the county or for the city, any vacant rooms in the courthouse, after furnishing offices to the officers listed in § 15.2-1639, may be rented for a term of not exceeding one year to other persons for office purposes, and any public room or hall in the building may be hired for compensation for the purpose of giving public entertainments. All moneys received by the counties or cities under this section, shall constitute a fund to maintain and care for such building. (Code 1950, § 15-690; 1962, c. 623, § 15.1-259; 1997, c. 587.)

§ 15.2-1641. Leasing or other use of other buildings. — When the governing body of any county or city, pursuant to § 15.2-1638, has purchased or may hereafter purchase any land, a part of which has valuable buildings thereon, whether when so purchased or since constructed, and that portion of the land so occupied by such buildings, or the buildings thereon is, in the discretion of such governing body, not required for the purposes mentioned in § 15.2-1639, such governing body, if deemed proper by it, may either lease such building or buildings for private or other purposes, or remodel and use the same for other public purposes. However, the lease or use shall be first approved by the judge of the circuit court for the county or for the city, as the case may be, and such lease or use shall be terminated when, in the opinion of such judge, the building or buildings or the land occupied by the same, is needed for any of the purposes enumerated in § 15.2-1638. (Code 1950, § 15-691; 1962, c. 623, § 15.1-260; 1997, c. 587.)

§ 15.2-1642. Certain conveyances of courthouse grounds validated. — Any other provision of law to the contrary, notwithstanding, any conveyance made prior to January 1, 1954, by a county, of a portion of the county courthouse grounds, to a town to be used for public purposes, shall be in all respects valid. (Code 1950, § 15-692.1; 1954, c. 150; 1962, c. 623, § 15.1-263; 1997, c. 587.)

§ 15.2-1643. Circuit courts to order court facilities to be repaired. — A. When it appears to the circuit court for any county or city, from the report of persons appointed to examine the court facilities, or otherwise, that the court facilities of such county or city are insecure, out of repair, or otherwise pose a danger to the health, welfare and safety of court employees or the public, the court shall enter an order, in the name and on behalf of the Commonwealth against the supervisors of the county, or the members of the

council of the city, as the case may be, to show cause why a mandamus should not issue, commanding them to cause the court facilities of such county or city to be made secure, or put in good repair, or rendered otherwise safe as the case may be, and to proceed as in other cases of mandamus, to cause the necessary work to be done. The court shall cause a copy of such order to be served upon each supervisor or member of the council, as the case may be.

B. Upon the entry of such order, as provided in subsection A hereof, the chief judge of the circuit shall forthwith notify the Chief Justice of the Supreme Court of the entry thereof. Upon receipt of the notice, the Chief Justice shall assign a judge of a circuit remote from the circuit wherein the repairs are alleged to be necessary to hear and determine whether, after consideration of such matters as set forth in subdivisions 1 through 4 of this subsection, the court facilities are in fact insecure or out of repair or otherwise pose a danger to the health, welfare and safety of court employees or the public and the extent to which repairs, if any, are necessary.

Before a mandamus is issued, if the concerned governing body elects, or if the pleadings allege that the court facilities are in fact insecure or out of repair, or otherwise pose a danger to the health, welfare and safety of court employees or the public, or that a replacement or additional courthouse may be needed, the local governing body shall appoint a five-member panel, three of whom shall be qualified by training and experience as either an architect or a professional engineer, not representing the same firms, to review the court facilities in question and make recommendations to the local governing body and circuit court judge assigned by the Chief Justice concerning the construction or repairs deemed necessary.

In making their recommendations, the panel shall consider matters such as, but not limited to, the following:

1. Security provisions to safeguard court personnel, participants and the public;

2. Efficient layout and circulation patterns to maximize public access, promote efficient operations, and accommodate the diverse users;

3. Provision of administrative and service areas, judges' chambers, hearing rooms, conference rooms, prison holding areas, and public information areas; and

4. Comfort, safety and obsolescence of the existing facility or any part thereof.

The existing facilities shall be considered in relationship to their location and the extent of their use, and their failure to meet any of these general considerations shall not necessarily be deemed a cause for determining them inadequate.

In making their recommendations, the panel may consult recognized national standard works in the field.

All costs, fees and expenses of the five-member panel, after approval by the local governing body, shall be paid by the county or city that appointed the panel.

C. If, after hearing, the court finds that the court facilities are not insecure or out of repair or otherwise unsafe, or having been in such condition, that the necessary repairs have been made, the court shall vacate the order. If the court finds that the court facilities are insecure or out of repair or otherwise unsafe, it shall issue its mandamus as provided in subsection A. No mandamus shall require a county or city to erect a replacement or additional courthouse unless such replacement or additional courthouse has been recommended by the panel appointed pursuant to the provisions of subsection B.

D. Appeals shall be allowed to the Supreme Court of Virginia as appeals from courts of equity are allowed. (Code 1950, § 15-693.1; 1962, c. 623, § 15.1-267; 1975, c. 444; 1979, c. 507; 1997, c. 587; 2002, c. 758.)

County Tax Base Too Low for New Courthouse

Written by Noel Oliver on September 18, 2014 at 1:43 pm

A hearing was held Monday afternoon in Charlotte Court House to begin the process of determining the upgrades that, according to Circuit Court Judge Joel Cunningham and others, need to be performed on the historic county courthouse facility in order for it to remain viable. In 2012, Judge Joel Cunningham filed a show cause against the Charlotte County Board of Supervisors, and in that manner, all of Charlotte County, for failing to perform work that would "....cause the court facilities to be made secure, or put in good repair, or rendered otherwise safe." Simply put, this boils down to a matter of either making large scale upgrades and additions to the existing courthouse, which was designed by Thomas Jefferson, and the surrounding facilities, or building a new courthouse.

According to a proposal by Judge Cunningham, the best option would be a new courthouse and jail complex. The proposed facility would house three courtrooms, and new offices for staff. This proposal would cost the citizens of Charlotte County over twelve million dollars to build; an astronomical figure, according to County officials, which, agreeing with a comment by Judge Doherty, the county just does not have to spend on a facility that is, in reality, not needed.

The Board of Supervisors, in an effort to comply, hired an outside firm to develop a variety of ideas to present for approval. "We have spent $150,000 on this already. We have eighteen different plans. I don't know why they are saying we aren't doing anything," County Administrator R.B. Clark told the Southside Messenger Monday.

Retired Circuit Judge Robert P. Doherty Jr. has been appointed to preside over the case. On Monday he ruled that the County is to appoint a five person panel to develop a specific scope of work for the project. The panel is to consist of at least three architects and two other appointments deemed appropriate by the Board of Supervisors. The time limit for panel appointments is thirty days. The plan of work to be done is due ninety days from then.

A large part of the hearing yesterday was spent allowing Judge Doherty the opportunity to tour the courthouse and the rest of the preserved period buildings that make up Charlotte County Courthouse Square, as well as the offsite Juvenile and Domestic Court facilities. He made the tour with the attorneys for both sides, as well as the County Administrator and members of the Board of Supervisors in order to familiarize himself with the area. "When you guys are talking to me about certain things or specific areas, I want to know what and where you are talking about," he explained to the group. He walked the entire square, going into most of the old buildings and taking a good look around. When he was confronted with the undesirable option of tearing down in order to satisfy the complaint, he very plainly stated that, 'We don't want to tear anything down, we just want to bring it up to date." This came after earlier discussions inside the courtroom, during which he seemed to recognize the dilemma Charlotte County was in. "I drove through here on the way in, and you all don't have the tax base to pay for this."

A citizen's group has requested to be a party to the proceedings surrounding the changes. The attorneys for the Plaintiffs agreed to their involvement. Attorneys for the Defense, however, did not. The County is planning a Public presentation on the proposed plans in the near future.

4

EXHIBIT
tabbies
2

ORIGINAL

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF APPOMATTOX

COMMONWEALTH OF VIRGINIA,

Plaintiff,

V.

MEMBERS OF THE BOARD OF SUPERVISORS
OF APPOMATTOX COUNTY, VIRGINIA,

Defendants.

THE HONORABLE CHARLES E. POSTON PRESIDING

February 27, 2002
Appomattox, Virginia
2:00 p.m.

* * * * *

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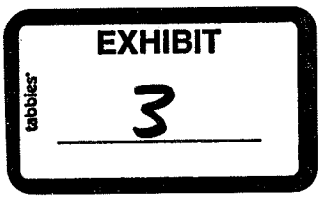


Appearances:

MICHAEL W. SMITH, ESQ.
E. FORD STEPHENS, ESQ.
R. BRAXTON HILL, IV, ESQ.
Counsel for the Commonwealth of Virginia

L. LEE BYRD, ESQ.
Counsel for Members of the Board of
Supervisors of Appomattox County, Virginia

Also Present: Darrell A. Carroll, Jr.
County Administrator
County of Appomattox

THE COURT: All right. I think it's the Commonwealth's motion.

MR. SMITH: If Your Honor please, we have two of them and, before I start, would you prefer that we stand?

THE COURT: It makes no difference, whatever is comfortable.

MR. SMITH: I'll sit only because I can see only so well and I'm a little bit closer to it if I do. We have two motions, if Your Honor, please. Do you want to take them up one at a time?

THE COURT: Yes.

MR. SMITH: And start with the financially feasible motion first? Is that okay with the Court?

THE COURT: That's fine.

MR. SMITH: Before I start, if Your Honor please, there's a lot of paper in this case, as you already know. I don't know that I'm going to talk about these four exhibits, but I will hand you, if I may, four exhibits that are in the file in various places and I may refer to all of them. I certainly will refer to some of them.

The motion in limine was triggered by the

responsive pleading filed by the Respondents. It is Exhibit One in your notebook and if you will turn to paragraph number five on the second page, you will note that the Respondents raised the issue of financial feasibility in paragraph number five.

We filed our motion in limine on the basis that financial feasibility is not an issue relevant to this case. There remains now only one issue before the Court and that issue is what work is necessary to make these court facilities suitable and sufficient. No one in this courtroom, at least those of us who are involved in the trial of this case, disagree that these court facilities are not in compliance with the statutory requirements of being secure, in repair or otherwise sufficient.

This Court will remember that last fall the Respondents provided to the Court and counsel for the Commonwealth a set of what I will refer to as schematic drawings, maintaining that those drawings were sufficient to cover the statutory deficiencies in the facility. We said at that time that we would take a look at them, that we would engage an expert qualified to do it and that we would make inquiry as to whether or not we agreed with the Respondents' position on their plans and, in any event, would get back to the Respondents and to the Court

at the end of January. We did those things.

We believe that the elements contained in the plans submitted by the Respondents are not sufficient to meet the statutory minimum and we think that's what this case is about now. If the Court will look at Exhibit Four with me for a moment, I think it important to point out a fact in this case. Depending upon how one does the valuation, and I might add that this exhibit is an exhibit provided by the Respondents, you will note that the differences between the positions are not a Taj Mahal and a one room shack, but run from a low of one point two million dollars, a house in Bay Colony, to a difference to a high of roughly two million dollars.

That's what we're talking about in terms of money so the Court can orient as it reviews these two plans, a high of two, a low of one point two. Nonetheless, the Respondents have disagreed with us and have taken the position that financial feasibility is an issue in this case and do it on the basis that this Court cannot be given a blank check.

I have two responses. One is we now know it is not a blank check. The check is somewhere between a million two and two, depending upon the underlying basis for the costs. But more importantly than that, the applicable Statutes in this case require this Court to do

what is necessary to bring the facility up to the statutory minimums necessary. I believe as a matter of common sense financial feasibility can't be relevant now.

I'm going to review the Statutes in a moment briefly, but if the Court would follow that along to its ultimate conclusion. A locality charged with the duty of maintaining its court facility could come in and say, We agree that the facility does not meet the statutory requirements. Nonetheless, it is not financially feasible for us to do anything to it, or a locality may take the position that we understand our statutory obligation and we agree with you that these facilities do not meet the requirements. Nonetheless, we think that you are entitled to require us to do something less than you think is necessary because it's financially infeasible for us to do what you think is necessary.

Both of those positions on this issue lead to absurd results and the Statutes applicable to this case make no mention of financial feasibility in that concept at all for that reason. Let me talk about those Statutes a moment, if I may. 15.2-1638 provides that the governing body of every county shall, the word shall, provide courthouses with suitable space and facilities to accommodate the various courts and officials thereof serving the county.

Virginia Code Section 15.2-1638 provides the cost thereof shall be chargeable to the county. That Statute requires suitable space in the facility. It does not say that what is suitable space in the facility depends on what a county believes is an amount feasible to spend. When a county does not provide a courthouse with suitable space and facilities, Virginia Code 15.2-1643 must be triggered because when it appears that a court facility is insecure, out of repair or otherwise insufficient a Circuit Court shall, shall, Judge Blanton had to, shall enter an order.

The Circuit Court, when it does it, enters it in the name of the Commonwealth. The order is directed to the board of supervisors and requires that it show cause why a mandamus should not issue commanding them to cause the court facilities of such county to be made secure or put in good repair or rendered otherwise sufficient, as the case may be.

Otherwise, the disjunctive is also conjunctive because all three requirements may have to be addressed. Once the order is filed by the Circuit Court, it then falls under Virginia Code 15.2-1643 to a judge appointed by the Supreme Court. In this case it falls then in your lap. You are to essentially do two things when it falls in your lap.

First, you are to hear and determine whether or not the facilities are, in fact, insecure or out of repair or insufficient. We're past that now because the parties themselves have agreed and consented to an order, which this Court has signed, finding them to be so. Secondly, you are to hear and determine the extent to which repairs, if any, are necessary. That's the operative word, necessary, and I will pause to say, Judge Poston, that these citations are in our brief, a copy of which the Court has.

There is no mention in the Statute about what a county believes to be financially feasible when determining what repairs are necessary. In fact, the Statute does give us some idea of what it's talking about, however, because in that portion where a county opts for a five person panel, there are four matters discussed that one should look at in making the determination, security provisions, efficient layout, circulation patterns, provision for administrative and service areas, judge's chambers, hearing rooms, conference rooms, prison holding areas, public information areas, comfort, safety. Those are mentioned in the Statute itself and, in fact, as we pointed out in the case of Turner against Wexler, our court at least held that mention of a specific item in a statute implies

that omitted items were not intended to be included within the scope of the Statute.

Again, the Statute doesn't mention the defense of financially infeasible. Let me say a word or or two about the Virginia Courthouse Facility Guidelines because, as I read the Respondents' brief, all of their eggs are in that basket. First, I think it's important to note that our judicial council adopted the guidelines to significantly enhance the ability of the courts to discharge their responsibilities in a safe, efficient, convenient environment.

In that regard the document itself, and since this Court will spend a lot of time with this document, I will tender one to you now so you will have one of your own. It is divided into two basic sections. Section one deals with the facility planning procedures. Section two deals with the Virginia Facilities Guidelines and it is at that section that this Court now finds itself, not one.

I should note that none of the four passages referred to by the County in its brief is from section two, the Facility Guidelines Provision. Indeed, in their first point they raise a section that is in the introduction. It provides the guidelines focus on elements required in a court facility while allowing

flexibility in how these elements are incorporated. We agree with that one hundred percent.

There are elements which are required. They have given you what they think are the basic elements and we have given you what we think are the basic elements and that's not on trial today, but they are the elements, and we agree with the phrase following that there is flexibility in how they are incorporated.

For instance, if our architect says to you, I have provided for Italian marble in the foyer, the County may well take a position that that costs a lot of money and we think that you can do it more cheaply and it still is in repair. The floor should be made of so and so, wall coverings, wainscoting, things that one would hope, since this is the most public of buildings, the most public of buildings, that a county building a new court facility would incorporate, but that's what the guidelines are talking about.

The guidelines do not shy away from the basic elements and, indeed, my mail this morning brought an additional answer to an interrogatory which you will find under tab two in your booklet, and if you will look to answer number four, you will see the name of Mr. Craddock and you will note that they say, they being, or it, the Board of Supervisors says that the renovation

plans submitted to this Court are wholly adequate to render the facility secure, in good repair and otherwise sufficient.

We say they aren't. That's the test. The test is not financial infeasibility. The second section referred to by the County in its brief comes out of that same facility or comes out of the facility planning provision. That decision, however, has already been made because section one, the facility planning part of the guidelines, deals with, is geared to deciding which approach we should take. Should we renovate the existing building? Should we renovate and add onto the existing building or should we build a new courthouse altogether? That's what that talks about, and that decision has already been made because the County submitted to you in October a strategy. It was to add onto the back of this facility and use this facility.

Our charge to our expert, as you have seen from our plans, is consistent with that. We didn't say go buy new property. We didn't say build a Taj Mahal. We said if you find their plans insufficient, then we want you to adopt their strategy to see if there is a way of adopting it that we can come up with something that in your opinion is a courthouse that meets the statutory guidelines. That's what we've done. That's why there's

no bigger difference than there is in the spread.

That section that they cite in the brief for the proposition that financial infeasibility is a defense deals with an area that is not relevant in this case, in any event, even if it meant that, because I questioned, quite frankly, though it's not a part of this case, at our instruction we wanted to use what the County, in its wisdom, thought was the way to do it and we've done so. But if this Court, on its own, heard from the architectural experts, mine and Mr. Byrd's, and decided that neither plan was sufficient and in your opinion couldn't be made sufficient, then this Court, like in an infant settlement, could decide you've got to do something else and you've got X days to get it to me and tell me what you're going to do to make it feasible and that cost may be ten million dollars more than what the County suggested and it would be this Court's obligation to do it. It would be this Court's obligation to do that. Financial infeasibility is not a limiting factor on this Court's determination at all.

Now, if Your Honor please, the third section that they use and cite as a basis for financial infeasibility being a legitimate defense in this case or an area of relevant inquiry is also out of the Facility Planning Procedures. The fourth section is a generic

piece of printing, by permission, out of an AIA contract or agreement as Appendix A and it says, A client should ask itself do you have the resources to do this project? It also says, A client should ask itself what activities do you expect to house in the project? Very generic language, but certainly nothing in that AIA adopted piece limits the Statute in Virginia or what this Court's inquiry should be.

The County says in its brief it contends that you must be limited by what the County perceives quote as the economic realities which must be considered. And I say to you, you cannot. You can look at how the footprint is incorporated into the final product and you should and if the Commonwealth has overstepped its bounds, there is nothing wrong with us being challenged by the County and you're agreeing with the County and if you think so and it has the effect of narrowing the cost or lessening it, so be it, but we don't start out with financial infeasibility.

Another problem with it if you did, financial infeasibility can take on many hats. It can take on a hat, for instance, of what are the proper priorities. We have the money. We can do it, but what priorities should we adopt? This case is a textbook example of that happening. According to the Respondent's

pleadings in this case, this County was put on notice in January of 1997 that these facilities were insecure, out of repair, otherwise insufficient. Nothing was done.

January 4, 2000, three years later, the order was filed but stayed. The Board of Supervisors here had a five year period in which it spent a lot on capital improvements but not the courthouse until the order was served. My point is this. That's yet another reason why financial infeasibility is not an issue in this case. The General Assembly has charged the County with what it is to do and the General Assembly has given any number of methods to the County to finance it and it is up to the County to decide how to do it.

Now, my mail brought late Monday afternoon, by saying it was late Monday afternoon, I'm not criticizing my friend here, Mr. Byrd. I only say to you that's when I got it. This document filed by Davenport & Company or prepared and there's some interesting things about Davenport & Company. It has in it some of my best and oldest friends. It also has professionals about whom I think a great deal, but I will tell you that nobody in Davenport & Company that I know, and I can cover a period of thirty-two years, knows one thing about what is necessary in order to make a courthouse secure, in repair, safe or otherwise sufficient.

What is interesting about what Davenport says is there is nothing in the report that I saw, but I will tell you I am not a financial planner, that says this undertaking cannot be done. The word feasible means able to do. Infeasible means unable to do. There is nothing that says it's infeasible. In fact, on close review the County, in its response to the order, says that it has a plan that is financially feasible. It nowhere says that the Court's plan is financially infeasible.

In fact, if you will turn with me in what I've just tendered to the Court and take a look, if you would, behind tab number three, there is an Estimated Incremental Impact Statement, this document being provided by the County on Friday. Please look at the twenty year amortization. If you go to the second numbered, the second line down under twenty year amortization, it says Courthouse Option One above it and you will see twenty-two cents a hundred increase.

Please look down at the bottom, All Capital Projects Courthouse Option Four, twenty-nine cents a hundred, but let me tell you option four is based on a cost of eight million dollars and we know from what they've already given us that the cost ranges somewhere between four point six and six point six. So we know

it's not that high. If, if, this were a case of financial infeasibility, unable to do, none of this says we aren't able to do it. Some of it says might be hard to do it, but this issue ought to be out of this case.

Finally, if Your Honor please on this point, can you imagine, when in this case we have all agreed that these facilities are insecure, out of repair and insufficient, coming in here now and putting on financial experts about how counties do and can raise money for capital projects and spending two or three days getting mired down in that when it has nothing at all to do with this case.

THE COURT: Do I have authority under the Statute to order the County to finance it in any particular way unless they just don't do it?

MR. SMITH: What you have the authority to do is to order the County to do it.

THE COURT: Then is it not up to the supervisors to figure that out?

MR. SMITH: Absolutely, and we don't come here now suggesting it. This is their document, not ours, raising the tax. They might change their priorities around. They may float bonds. There are any number of ways to do it, but my point to you is that's not an issue now in this case. The issue in this case is

what is necessary. That's the term used in the Statute to provide a facility that works in line with the statutory minimums.

Again, it is inescapable that if financial infeasibility is a defense, then the Statute has no teeth at all because if a locality says, We don't have the money, then a Circuit Court judge appointed to hear the case is without any authority because of financial infeasibility to order it done. Therefore, we think our motion in limine is well taken. Our friends at Davenport have no business in this case. We don't think we ought to hear from them. This is going to be about architects. They have an architect who says his plan fills all the holes. We have an architect who says, No they don't.

Let's try it on that basis and that basis alone and that's the way it ought to be done. Thank you.

MR. BYRD: Good afternoon, Your Honor. May it please the Court, Lee Byrd from Sands Anderson in Richmond on behalf of the County. Mr. Smith has obviously raised a lot of issues today. Most of this has been briefed in the last several days with respect to the issues that are raised and one of the things I thought of on the drive from Richmond today is how litigation is often ill-suited to settle problems.

THE COURT: This is the worst way to solve

this problem. I told you that months ago.

MR. BYRD: I agree, Your Honor.

THE COURT: I know nothing about architecture. I know nothing about finance. Because your clients and your clients cannot agree, I'm going to decide this for the citizens of Appomattox County and that doesn't make any sense.

MR. BYRD: And hopefully we'll be able to get beyond that, Your Honor, but for the purposes of today my point was simply that this sort of case is particularly ill-suited for judicial resolution. And one of the points Mr. Smith kept arguing to was that the County's defense is this and the County's defense is that.

This isn't your garden variety plaintiff versus defendant hit and run accident where somebody is liable and somebody has been damaged. This is about what is this facility going to look like at the end of the day whenever it is financed and constructed, hopefully in the very near future. So litigation terms of art are particularly ill-suited to use, not only in terms of having everyone come to court today, but in terms of trying to frame the issues that are before the Court on today's motion in limine.

In terms of the financial feasibility

issue, certainly the County has to look at those issues. There was a committee appointed that involved the local judiciary. There was a process that went forward. That did not end in a resolution to the satisfaction of all parties, which is precisely why we're all here today with you having to come.

In the interim that doesn't mean that financial issues do not become relevant in the considerations before the Court. It is not a defense quote, unquote, as Mr. Smith acknowledges. We don't say that this plan of the Commonwealth is not financially feasible per se. Therefore, don't go there. It's simply to allow certain reflection and the factoring in of what really needs to go into this facility in order to make it, to have the necessary repairs.

The word necessary of what's required, like Mr. Smith talked about the Statute, is certainly not a bright line term. In terms of the financial feasibility issue the section that we're dealing with 1643 at Code Section or Title 15.2 clearly does say when it's talking about, for instance, this committee that may be appointed that we're not under that provision, but certainly the factors can be considered by the Court that are under Subsection B and it says in making their recommendation, if we had this blue chip panel impaneled, the panel shall

consider such matters such as but not limited to the following.

THE COURT: Do you not agree that since we have no panel because the supervisors chose not to do that to help me with this decision and I have to do this myself, are these the factors I have to consider?

MR. BYRD: Certainly, you may consider these factors. My only point was that these are not the only factors the Court can consider and the Statute itself says it is not limited to considering these factors. So what are those factors? One of them, we propose, is the financial issues.

In terms of the Davenport report, first, my apologies for, I guess, what some might consider a late filing. The timing of it only coincided with the date our discovery responses were due and they were retained in time to meet that deadline. The discovery responses were due Monday and it was filed on Monday.

THE COURT: That happens. Don't worry about it.

MR. BYRD: So we certainly weren't trying to disadvantage them to any extent at all. In terms of the relevancy, Mr. Smith makes the point we're past the stage of determining whether or not something ought to be done or needs to be and we're trying to determine what is

it that needs to be done. Because the Commonwealth proposed a set of wholly different plans, we're really not as far along that maybe we all hoped we'd be at this point in the case. We are still debating between the Commonwealth's plans and the County's plans and there are significant differences and, frankly, two million dollars worth of difference is significant. It would be significant in the City of Richmond, in the County of Henrico and it is very significant as well in the County of Appomattox. It is not a matter of nickels and dimes, Your Honor. Two million dollars is half again the cost that the architect of the County has actually estimated as between comparisons of the two plans.

Frankly, the fact that the check has been filled in and so it's no longer a blank check is really a hollow argument. One, it is an estimate. Two, we had to fill in the information because the Commonwealth didn't provide it because it is being consistent in saying it's not relevant, which we disagree with that, but the estimates are what they are. Certainly, if we were back at the drawing board state where are we going to a new courthouse or are we going to renovate and add onto the existing courthouse, those issues would be relevant. What's the best way to proceed? And sadly, as you've suggested, you're now in that position.

However, just as the Board of Supervisors, the judges and the committee would have to consider the financial impact, it is certainly something that we think is relevant for the Court to consider. It is not the end all, be all. The Davenport report does not say the Commonwealth's plans are not workable. It does not say the County's plans are workable. The County has drawn that conclusion based on the realities of its fiscal structure and its fiscal obligations.

There seems to be an undertone here that somehow the County ought to be penalized or at least has gotten what it deserves in terms of spending money on the countless projects that are reflected in the Davenport report. Well, I challenge anybody in this courtroom today to question the wisdom of a political body as to what monies have been spent.

THE COURT: That's the discretion of the supervisors.

MR. BYRD: And that discretion of theirs is actually something that I think is reflected not only in the underlying obligation of the County to provide a suitable courthouse but also passes down to the Circuit Court when this procedure is invoked. You're right. You've come down to be a tie breaker, and I agree with Mr. Smith when I say you could add onto the County's

plans or you can subtract from them or you can add onto the Commonwealth's plans. It's not an either or situation.

THE COURT: That's why it doesn't make any sense for you folks to need me to do it. I'm talking about all of you folks.

MR. BYRD: I understand, Your Honor, and I understand you're in a difficult position. I think we all feel like we're in a difficult position. When the order was entered on December 20th that followed the December 5th hearing with regard to getting past the first stage of whether something had to be done, as the County made clear then, we weren't fighting about whether or not anything has to be done. Clearly, it does. We all agree to that.

The County has spent several years not of doing nothing, no agreement was reached, mind you, but not of doing nothing, but of actually trying to grapple with what to do here and when it came to an impasse this judicial proceeding was revoked and then later on revised because of what essentially came down to, and this will probably come up in the second argument, we thought it was down to the clerk's office.

When we received the Commonwealth's plans on January 31st, it certainly wasn't the plans with the

clerk's office on the third floor, it was a wholly different set of plans, and that really is germane to the issue of financial information that we would like the Court to consider. And that goes to the fact that the Commonwealth's plans really are a new courthouse. It does pay, I guess, homage to this same structure as a facade. It keeps it in place, but then it adds on substantial additional square footage to the back end of this courthouse, whereas the County's plan actually adds on square footage, just not to the same degree.

Obviously, the plans speak for themselves and that is not the trial that we're here for today, but if the Court considers the issue of financial feasibility of which plan is really best suited as a starting point and maybe the ending point when ultimately considered. Back to Section 1643, the Statute actually says, and I quote, The existing facilities shall be considered in relationship to their location and the extent of their use, that's obvious, and their failure to meet any of these general considerations shall not necessarily be deemed a cause for determining them inadequate.

Well, that suggests to me there's a broad latitude of discretion. If some things aren't quite up to what the guidelines suggest, then okay, can we still get by under the code? And the answer is clearly yes.

When one is trying to parse out what's strictly required and what would be nice to have, certainly financial considerations ought to be taken into account. So the Court's discretion, I believe, suggests that the financial issues that we've raised and that the Court ought to consider at the trial certainly are relevant and allowed under the Statute.

Now, with respect to the guidelines, Mr. Smith notes that the quotes that we make regarding financial feasibility and other financial considerations that are blatant throughout don't come from section two of the guidelines themselves which talk about the square footage of waiting rooms, attorney conference rooms and courtrooms but from the other sections. Well, I don't believe the Commonwealth can have it both ways and say we rely on the guidelines. The County's plans don't meet them, but forget about all of those other things you read about financial issues.

It's all part of the same document and it all suggests that it's fair game to consider that. Now, in terms of the guidelines themselves, this is really an issue for the trial itself, they argued that. The Dale versus York County case clearly says that guidelines are guidelines. They are not law. There are opinions that clearly say that the board of supervisors has broad

discretion as to what the courthouse facilities ought to be.

So what we're up against is the Board's discretion and I guess having the Circuit Court look behind that and see if it has somehow used that discretion versus what is really an attempt by the Commonwealth to impose its set of desired plans, which is really outside the statutory guidelines. All of that said, certainly the financial issues have to be considered. They had to be considered on day one and we think they ought to be considered at the end of the day as well.

Your Honor, I have a few more comments about Section 1638, but I think they would be better reserved for the discussion of the second issue on the motion in limine.

MR. SMITH: If Your Honor please, very briefly. On this issue of settlement, I said in front of the you and everybody there on October 30th--

THE COURT: We're going to talk about that before we leave.

MR. SMITH: Okay. I want you to know that and I want you to know that it's been offered in letters.

THE COURT: We'll talk about that.

MR. SMITH: So I just want to make that

point to you. I also want to make the point that nobody has suggested that the County be penalized. When I talked about this case being a textbook case, I made the point in conjunction with the over-arching point that financial infeasibility is not a defense in cases of this kind and the testimony about it is not relevant to cases of this kind because if you allowed it to happen, a number of things could happen not in compliance with the Statute's requirement that something go forward and be done, one of which would be to reprioritize and then say we have no money. That was the only point, but nobody is here to try to penalize anybody about anything.

The other point is Davenport's testimony in this case and what we've seen that it is, is not relevant. If that testimony had been provided--- Again, I am not criticizing timing. Had it been provided earlier in the normal course of things, we may well have filed a motion to prohibit this expert testimony. That may have been the way it came on. What we had in front of us at the time was the responsive pleading which gave us an inkling that somebody might come in here and talk to this Court about how to finance, which is not relevant, and I agree with you on that point.

I think that's for the Board of Supervisors to do it. It's unfortunately fallen in this Court's lap

now to say what needs to be done, but choosing from the myriad ways presented by the General Assembly for raising money, that's Board of Supervisor's business. That's not our business and we're not going to come in here with anybody that says you ought to do it this way.

What we're here to do today is limit that testimony, that testimony. It is also relevant, I believe, that once this Court has directed what elements are required, what elements are required, then there is room for debate as to how those elements are incorporated in the final product and I further agree that price is something we ought to talk about then when we incorporate the elements, but those plans are not there yet that you have in front of you.

Those plans are how many rooms do we need? How large should the district courtroom be? Where should the clerk's office be? It's those kind of issues and financial exigencies has nothing to do with those issues and that's now what's before the Court and that's why we believe that this testimony about how to do it should be excluded now and we hope the Court will do so.

THE COURT: The facilities have already been found to be insecure or out of repair or otherwise insufficient. The only issue before the Court at this point then is how to make these facilities secure, in

repair and sufficient. Financial feasibility or infeasibility is not an issue before the Court. It becomes an issue for the supervisors once the method of making the facilities secure, in repair and otherwise sufficient has been decided. The motion in limine is granted as to that point.

MR. SMITH: Now, if Your Honor please, and I don't think this second one needs but so much discussion from the lawyers, at least, because it is an issue that you, no doubt, as a judge has faced more times now since being a judge than we have faced as lawyers in our careers, but I would point the Court, if you have it close at hand, to the Respondents' memorandum that was filed Monday night in opposition to our motion in limine.

If you have that, Your Honor please, then turn to page five. You will note that their discussion about prior negotiations with the judiciary starts there. It is a two paragraph position is all. If you look on the second page, they say what they would like to do in the first sentence. The subject of evidence of negotiations that is, that has been as long as I know, matters that are not admissible in evidence, subject evidence of negotiations. And what the clerk or the judges talked about at some variant time in trying to get this thing worked out and resolved without the coming of

this lawsuit is simply not relevant to these proceedings.

What we have now in front of us are two plans, two plans, one submitted by the Commonwealth and one submitted on behalf of the Board of Supervisors. That's the issue before the Court. Nobody here suggests for one minute that the last plan that the Board of Supervisors submitted to you on October 30th was approved or seen by anybody prior to that time and as you know looking through the file and what was attached to the Respondent's responsive petition, there were eight plans at least over the years changing all the time, changing all the time.

If there were ever a case where what somebody said to somebody as negotiation in settlement of the issue needs to be excluded, this is the one. It really should be excluded in this case and, also, must we sit here and take those years and recount those years and go back through? If we're talking about Judge Kerr, then I don't know why we're sitting here talking about it. I think the law in Virginia always has been that third parties, and certainly he is that. He didn't even sign the petition and he certainly is not a named plaintiff in this case and the rule against going into settlement negotiations applies to third parties as well as the parties themselves to litigation.

I think that's always been the rule, and it is clear that the clerk, it is clear that the judges, it is clear that people other than architects and, indeed, there may be some that the Respondents may call including the clerk and the judges, have some idea of what's needed, what's needed in the courthouse under the circumstances to make these facilities secure, but discussions of negotiations and settlement of this case I respectfully submit should be barred and we should not have to sit down and go through all of that.

MR. BYRD: Your Honor, thank you. In terms of the settlement negotiation issue, I'm not sure that we were trying to settle anything in terms of the application of what obviously is a bright yellow line rule in terms of the settlement of litigation and how that doesn't come in to influence the trier of fact.

That's not what we're suggesting at all. As the brief makes clear, and it's only two paragraphs because it's a very simple position, and that is that what this locality needs by way of resources, whether it's square footage, witness rooms, jury rooms, whatever, is really something that has been hashed out a lot in these committee meetings. There was a committee appointed under these guidelines, et cetera and what those folks have come up with over time is certainly

instructive to this Court who does not oversee cases in Appomattox in terms of having some bearing. It's just a matter of evidence.

If it's about letters that came out in trying to say therefore you can't go against what this letter said, it's not about that if that's the concern. So whether it's negotiations per se or, as Mr. Smith has suggested, perhaps just calling them, I'd hate to do it, but calling the judiciary or the Clerk of Court to court and saying, What do you really need? Do you really need what the Commonwealth's plan lays out here? Certainly that's one way to handle it, but we're not trying to snare them or trap them into saying you agreed to that. That's off the table. Judge Poston can't give you that now. That's not what it is. It's only to give you a ground view of the judiciary and the clerk and the staffers of what they've agreed to to date because they know best what Appomattox needs.

THE COURT: How do you propose to present that?

MR. BYRD: Well, it sounds like we'd have to present it through subpoenaing them to come to court. In terms of what the documents-- And I wouldn't even want to do that, but in terms of what the documents say, it's actually already there, sort of like the Davenport

report. I know you've made a ruling on that.

THE COURT: I've read the documents and they're already there. They have already been filed with all this other stuff. There's no way to stop me from knowing.

MR. BYRD: Actually, I don't disagree with that, Your Honor. I guess one concern I have is they've also brought a motion to strike the pleading, the responsive pleading of the Commonwealth, because of its attachment of these various documents. Whether the Court needs to have them underscored is a different issue.

THE COURT: Quite frankly, when I look at the two schematics each of you presented, you pretty well tell me what needs to be addressed. You had different ways of doing it, but you tell me we need these courtrooms, we need these chambers, we need these restrooms. You're consistent in what you need. You just disagree where they need to be and how to build them.

MR. BYRD: Well, that is the most fundamental issue. As Mr. Smith himself acknowledged at the December 5th hearing, there's an underlying unstated issue and that is the issue of the Clerk of Court's office.

THE COURT: That continues to reverberate throughout this case.

MR. BYRD: It does, Your Honor, and it's interesting that that seemed to be the issue of the day on December 5th.

THE COURT: Is that what's holding this thing up, the Clerk's office?

MR. BYRD: Your Honor, maybe we'll learn that in chambers.

MR. SMITH: Maybe we will. Maybe you and I will learn it at the same time. I don't know if that's what holds it up. We have a position to make about the Clerk's office. I just don't know. I can't answer the question. I don't know that.

MR. BYRD: Anyway, Your Honor, the guidelines don't require it, because they are just guidelines. In fact, and I did allude to this in my prior argument, Code Section 16.2-1638 expressly says that the governing body shall provide a Clerk's Office within or outside such courthouse. So I don't know why we're even here debating that issue.

THE COURT: 15.2-1643 talks about the efficient layout, the circulation patterns, provision of administrative and service areas and comfort of the facilities, security of personnel and it sort of expands significantly.

MR. BYRD: It certainly is a factor you can

consider. The guidelines obviously take that into account, but it does seem like that is what we were talking about and when we got the plans from the Commonwealth pontificating what I honestly believed was going to be a critique of our plans, you need to add this, you need to change this, it was a totally different courthouse that came out and the Clerk's Office issue all of a sudden wasn't the main issue. In fact, it's become possibly a fairly minor issue in terms of what's at stake next month. Thank you.

THE COURT: Well, I'm going to let you present that, but I'm not going to let you take a lot of time doing it. I'll let you share what they've talked about as far as identifying the needs, but you're not going to call the clerk or the judge. That can be brought in with that document or whatever, and that's probably the best way to do it since I've already seen it, anyway. You can pretty well show it just by emphasizing the document. What else do we have today?

MR. SMITH: That's all, Your Honor.

THE COURT: Okay. Mr. Smith, I'll ask you to draft the order granting the motion in limine as to the financial information and denying it as to the discussions and also in that same order, if you would, provide that this matter is transferred from law to

chancery.

MR. SMITH: Yes, sir.

THE COURT: Let me just say a couple of things in general. I don't know who's in the audience, but I want you to take this back to your clients at least. I had said in December or November, whenever we met in Richmond for a pretrial conference, that I felt especially uncomfortable in handling this case because there's the judiciary on one hand and I know something about what the needs are and I know a lot of the desires and then the Board of Supervisors who are elected to manage the finances of this county to provide these facilities.

The judges, the resident judges, feel that at least with respect to the courthouse, that discretion is not being handled effectively or efficiently by the supervisors and it is the duty of the judges to enter the order of Judge Blanton or all three of the judges, as a matter of fact.

In fact, I think the judges of this circuit probably were obligated to do that under the law and this facility is not sufficient. It doesn't take an architect to say that. It's very insecure. It's a dangerous place for litigants to be and it's a dangerous place for the public to be and just because it's a rural area doesn't

mean it's any less dangerous. The last time someone was killed in a courthouse in Virginia was in Powhatan County and York County, South Carolina where the lady killed her children by drowning them and that was a rural county. Cities or rural, it doesn't make a lot of difference to security.

I think the judges probably should have, if they had been really attentive to that Statute, should have entered this order a long time before they did. I think they've simply done their duty and the function of that Statute, as I see it, is in a formal way bring to the attention of the supervisors that this has to be done.

The Code provides a type of mediation or a panel of experts to make recommendations and that would be really a nice way to handle it. It certainly makes more sense that having me decide it. If you don't want to do that, mediation is available. There are mediators skilled in construction matters and let a mediator try to help you work these problems out. That certainly makes a lot more sense than having me do it. It's also less expensive than going through a trial.

Almost five years has been spent talking about the issue in a relatively informal way and I assume before the five years started it was a matter of

discussion, anyway. Folks, it doesn't make any difference what the Clerk desires. It doesn't make any difference what the Judge Blanton or Judge Wellons or any of the other judges around here think about this case. Because of the way the Statutes works, I am the Circuit Court of Appomattox County. What I say in this case is what is going to count until the Supreme Court says differently. You don't want me to do that. You really don't want me to do it. I don't want to do it, but I'm going to do it. We have a trial set for March what, 26th or something like that?

CLERK: 20th and 21st, Your Honor.

THE COURT: On that day we're going to have a trial. It's not going to be sufficient for you to come in here and say, Judge, we're negotiating and we're close to settlement. If you haven't settled this case and reached something that results in an order being entered, we're having a trial that day. There's not going to be any continuance. So the time is there. We know what the limits are. We're going to get this problem resolved one way or the other.

Friends I have in Lynchburg and other areas that are served by the Lynchburg newspaper have, on occasion, sent me newspaper articles about this case. I'm surprised at how much interest this case has gathered

in the press. I want to remind the attorneys that your role in this case is to try the case in court. It's rarely helpful for attorneys it make any comment to the press about pending cases and I hope you would take that to heart. If there's nothing further, then we'll be adjourned.

(Whereupon the proceedings were concluded at 2:55 p.m.)

COMMONWEALTH OF VIRGINIA AT LARGE:

I, Beverly M. Bagby, Notary Public in and for the Commonwealth of Virginia at Large, do certify that the foregoing pages represent an accurate transcript of the proceedings to the best of my ability.

My commission expires July 31, 2004.

Given under my hand this 12th day of March, 2002.

Beverly M. Bagby

BEVERLY M. BAGBY

Court Reporter - Notary Public

CHANCERY ORDER INST. # 2002-055

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF APPOMATTOX

COMMONWEALTH OF VIRGINIA,

Petitioner,

v. Chancery No. CH-000001-01

MEMBERS OF THE BOARD OF SUPERVISORS
OF APPOMATTOX COUNTY, VIRGINIA,

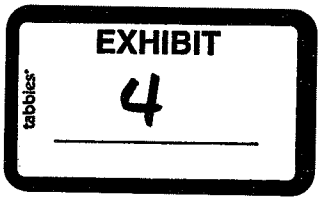
Respondents.

DECREE

Upon consideration of the pleadings in this case, the evidence presented at trial and the arguments of counsel, and for reasons stated by the Court at the conclusion of the evidence, this Court hereby finds as follows:

1. In addition to its earlier findings about the inadequacies of the court facilities of Appomattox County as set forth in the Court's order of December 20, 2001, the Court finds that the current court facilities of Appomattox County have not been improved and remain insecure, out of repair and otherwise insufficient.

2. At the pretrial conference on October 30, 2001, the respondent, Members of the Board of Supervisors of Appomattox County (the "Board"), waived its right under Va. Code § 15.2-1643 to request that the Court appoint a five-member panel to review the court facilities in question and make recommendations to the Court concerning the construction or repairs deemed necessary.



3. The Board's plans for renovated and expanded court facilities, submitted to the Court at trial as County Exhibit A and attached to the agreed upon Decree dated May 10, 2002 as Exhibit 6, are inadequate as a remedy and will not render the court facilities secure, in repair or otherwise sufficient.

4. The plans for renovated and expanded court facilities ("Renovation Plans") presented by the petitioner, the Commonwealth of Virginia (the "Commonwealth") and introduced at trial as County Exhibit B, and attached to the agreed upon Decree dated May 10, 2002 as Exhibit 1, would result in suitable court facilities that are secure, in repair and otherwise sufficient.

5. The plans for new court facilities ("New Court Plans") introduced at trial as County Exhibit C and attached to the agreed upon Decree dated May 10, 2002 as Exhibit 2, would likewise result in suitable court facilities that are secure, in repair and otherwise sufficient.

WHEREFORE, it appearing appropriate to do so, the Court hereby ADJUDGES, ORDERS and DECREES that:

1. Pursuant to Va. Code § 15.2-1643, a mandamus hereby is issued and the Court hereby commands the Board to cause the court facilities of Appomattox County to be made secure, put in good repair and rendered otherwise sufficient and safe, by either:

A. Renovating and expanding the existing courthouse in accordance with and as depicted on the Renovation Plans, a copy of which is attached hereto as Exhibit 1;

or

B. Building the new court facilities in accordance with and as depicted on the New Court Plans, a copy of which is attached hereto as Exhibit 2.

2. Regardless of whether the Renovation Plans or the New Court Plans are used for the remedial construction, such construction shall take place in accordance with the following schedule and procedure, unless otherwise modified by order of the Court for good cause shown:

A. The Board shall, through its attorneys and with notice to counsel for the Commonwealth, notify the Court on or before June 30, 2002 of its decision whether to construct in accordance with Exhibit 1 or Exhibit 2 attached hereto;

B. In view of the current condition of the court facilities and the already lengthy delay in making necessary repairs, the Board's compliance with the deadlines set forth in this Decree, including the choice of court facility as set forth in 2(A) above, shall not be delayed by any election conducted under Va. Code § 15.2-1644;

C. The Board shall have prepared and submitted the following phase documents:

I. A final Schematic Design submittal including the schematic floor plans (as depicted in either Exhibit 1 or Exhibit 2) and schematic building elevations;

II. Final Design Development Documents; and

III. Final Construction (bidding) Documents.

Copies of each of the phase documents referred to above shall be presented to the Court, and counsel and the architect for the Commonwealth, for their review. Each of the phase documents, including the Final Construction (bidding) Documents, shall be presented in sufficient time for review and comment by the Commonwealth and approval by the Court in order for the Final Construction (bidding) Documents to be approved by the Court on or before February 27, 2003. The review by the Commonwealth of the various documents referred to in this paragraph is to ensure compliance with the programmatic requirements, spatial adjacencies and general building concepts as required by Exhibit 1

or 2, depending on which is chosen by the Board. The Commonwealth shall report to the Court and to the counsel and architect for the Board within one week of its receipt of the documents at each phase as to whether, in its opinion, the Board is maintaining the programmatic requirements, spatial adjacencies, and general building concepts as required by Exhibit 1 or Exhibit 2. By prior agreement of the Commonwealth with the Board, any review by the Commonwealth made in conjunction with this paragraph shall not be taxable as costs;

D. The Board shall complete the bid process and select a construction contractor on or before March 31, 2003;

E. The Board shall cause construction of the court facilities to commence on or before April 30, 2003;

F. The court facilities shall be suitably furnished, as approved by a Committee comprised of not more than two representatives appointed by the Board and two representatives appointed by the Commonwealth. The members of the Committee shall be appointed on or before January 12, 2004. Any dispute over furnishings shall be submitted to the Court for final decision;

G. Construction shall be completed and a final Certificate of Occupancy issued no later than July 31, 2004;

H. The Board shall maintain up-to-date construction schedules so as to ensure completion of the construction efforts in accordance with the requirements of this Decree, and the Board shall provide copies of the schedules to the Court and the Commonwealth so that they may be advised of the project status;

I. Once the court facility is completed, it shall be designated as the Courthouse for the Circuit Court for Appomattox County, the General District Court for Appomattox County, and the Juvenile & Domestic Relations Court (or Family Courts should such courts be created) for Appomattox County, pursuant to Va. Code § 15.2-1638.

3. The Commonwealth is directed to file any pleadings or brief on or before Friday, June 7, 2002, in support of its request for an award of costs and attorneys' fees ("costs"). The Board shall file its Response brief, if any, on or before Friday, June 21, 2002. The Commonwealth shall file its Reply brief, if any, on or before Friday, June 28, 2002. A hearing on the Motion for An Award of Costs shall be held no later than Wednesday, July 24, 2002. The issues in the briefs, and at the hearing, shall be limited to the entitlement of the Commonwealth to an award of costs, unless otherwise agreed or waived in writing by the Commonwealth, incurred during the pendency of this litigation. In the event the Court rules that the Commonwealth is entitled to an award of costs, the Commonwealth shall provide detailed billing/cost information to counsel for the Board as to any category of costs determined by the Court to be awardable to the Commonwealth. If the parties cannot thereafter stipulate to a reasonable sum to be awarded to the Commonwealth, the parties shall file briefs on the reasonableness of the Commonwealth's costs. Briefing for costs incurred to and including July 31, 2002 shall be pursuant to the following schedule: the Commonwealth's opening brief shall be filed on or before Friday, August 9, 2002; the Board's Brief in Response shall be filed on or before Friday, August 23, 2002; and the Commonwealth's Reply Brief shall be filed on or before Friday, September 6, 2002. A hearing on the amount of costs that shall be awardable to the Commonwealth shall be held no later than Friday, September 20, 2002. Absent agreement by the parties, briefing schedules for costs subsequent to July 31, 2002 shall be set by the Court.

4. The Court expressly retains jurisdiction over this case, which is continued on the docket pending completion of the requirements of this Decree within the specified time period and issuance of the final Certificate of Occupancy. Should the Board order the transcript, upon completion by the Court Reporter, the complete, original transcript of the proceedings held on May 17, 2002, shall be filed with the Court and deemed a part of the Record of this cause.

The Clerk is hereby instructed to send certified copies of this Decree to counsel of record.

ENTER: 5/31/02

Charles E. Poston, Judge Designate

WE ASK FOR THIS:

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Counsel for Petitioner, The Commonwealth of Virginia

SEEN AND OBJECTED TO as to the Court's finding in Paragraph No. 3 and Paragraphs 1A and 1B of the Decree insofar as such paragraphs do not allow construction of the Board's trial "County Exhibit A" as a remedy sufficient to make the court facilities secure, in repair and otherwise sufficient:

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