



# County of Fairfax, Virginia

## MEMORANDUM

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**DATE:** April 1, 2014

**TO:** Edward L. Long Jr.  
County Executive

**FROM:** David P. Bobzien  
County Attorney 

**SUBJECT:** FY 2015 Advertised County Budget—Consideration of Possible Implications on the County Budget Process if the Virginia General Assembly Fails to Adopt a State Budget

**REF:** Matter ID 124207

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**THIS MEMORANDUM CONTAINS CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS AND IS NOT TO BE RELEASED TO THE PUBLIC. THIS MEMORANDUM IS EXEMPT FROM THE DISCLOSURE PROVISIONS OF THE VIRGINIA FREEDOM OF INFORMATION ACT. VA. CODE ANN. § 2.2-3705.1(2)(2011).**

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The 2014 Session of the Virginia General Assembly adjourned *sine die* on March 8, 2014, without having adopted a state budget. The General Assembly convened in Special Session beginning on March 24, 2014, to address the state budget, but as of the date of this memorandum it has not adopted a state budget for FY 2015-2016. You have asked what problems might result if the General Assembly does not approve the budget in a timely manner and what options the County might have in terms of budgeting and appropriating funds that could respond to this challenge.

This Office originally addressed this issue in 2004. As the laws relied upon in that memorandum have changed little since 2004, the legal analysis of this issue remains the same. Therefore, this memorandum updates the underlying facts and legal authorities where necessary, but does not change the resulting analysis or conclusion. That is, if the state does not adopt a timely budget and state funds for localities are not appropriated, then the Board can and should proceed with the adoption of a County budget. In that situation, the Board would not be certain of receiving those state funds anticipated within the County budget, so the Board should consider how to control appropriations in a way that will permit the Board to respond to

possible state revenue losses, by appropriating funds for only a portion of the year or by revising appropriations later in the year as needed.

### **Preliminary Comments**

If the General Assembly fails to pass a budget and appropriate funds for FY 2015, then we can expect significant adverse consequences for the state government, for the political subdivisions of the state, including counties and the public school divisions, and for the many other governmental entities, contractors, persons, and bondholders who rely on the appropriation of state funds.<sup>1</sup> However, the Board is not scheduled to adopt a County budget until April 29, 2014, and the School Board is not scheduled to adopt the School budget until May 22, 2014.<sup>2</sup> If a state budget with suitable funding is passed by the General Assembly and approved by the Governor in the near future, then both the Board and the School Board should be able to make their budget decisions within the existing schedule. Alternatively, if such a budget is not passed and approved, then the Board will have to make difficult adjustments.<sup>3</sup>

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<sup>1</sup> Our research to date has found no Virginia precedents or statutes that would control events in the absence of an approved state budget, but the Governor could maintain essential state services using, for instance, his general power to enforce state laws and any authorized but unspent revenues from the current biennium budget. *See* Va. Const. art. X, § 7 (2008) (appropriations payable for two years and six months); *see also* 2006 WL 1977483 (Va. A.G. June 8, 2006) (reasoning that in the absence of an adopted state budget the Governor should take actions to protect public health, safety, and welfare, but he still could not order spending by executive order). Meanwhile, the Department of Management and Budget has advised this Office that state revenues from all sources in FY 2015 are estimated at \$936.9 million. Most of those revenues are expected to be transferred to the School Operating Fund, but the County expects to receive \$376.9 million in state revenues, including \$211.3 million for reimbursement under the Personal Property Tax Relief Act, Va. Code Ann. §§ 58.1-3523 through 58.1-3536 (2013), and excluding \$169.4 million for the County's local option, one percent sales tax. The local option sales tax is collected and distributed to localities by the Virginia Department of Taxation ("VDT") based on point of sale. Whether these "pass through" funds would be disbursed to localities by VDT if a state budget is not approved is an open question at this time.

<sup>2</sup> It should be noted that the School budget calendar is designed to meet the teacher contract date of June 15. *See, e.g.* Va. Code Ann. § 22.1-304 (Supp. 2013).

<sup>3</sup> The Virginia Constitution of 1971 imposes a responsibility on the General Assembly to provide for and to fund a system of free public elementary and secondary education throughout the Commonwealth. *See* II A.E. Dick Howard, *Commentaries on the Virginia Constitution*, pp. 879-907 (1974) (discussing prior Virginia law and the constitutional change that was made to overturn state judicial precedents involving school closings and desegregation in Virginia that were decided under the previous Virginia constitution). Because of this constitutional mandate, if the General Assembly fails to fund the public schools, then the Board can expect litigation seeking to force the General Assembly to fund them.

## **Adoption of the County Budget**

Va. Code Ann. § 15.2-2503 (Supp. 2013) requires the Board to adopt a County budget for FY 2015 no later than July 1, 2014, but it is important to emphasize that the County budget is for “informative and fiscal planning purposes only.” Va. Code Ann. § 15.2-2503 (2011). The preparation and the adoption of the County budget is not an appropriation of public funds, and no public funds may be spent until those funds are appropriated by separate action of the Board. Va. Code Ann. § 15.2-2506 (2011). In short, the County budget is simply a spending plan, and, regardless of budgetary inaction by the General Assembly, the Board can and should adopt a fiscal plan for the County that contains the various revenue and expenditure estimates that the Board reasonably expects for the coming year even if the state budget is not yet available.<sup>4</sup>

Even though Va. Code Ann. § 15.2-2503 gives the Board until July 1, 2014, to adopt a budget and set the tax rates, there are two additional timing requirements relating to funds for the Fairfax County Public Schools (“FCPS”). First, Va. Code Ann. § 22.1-93 (2011) requires the Board to prepare and approve an annual budget for the FCPS by either May 1 or within 30 days of the receipt of estimates of the state funds to be received, whichever is later. Second, apparently assuming that the General Assembly would adopt a budget prior to adjournment of its annual sessions, Va. Code Ann. § 22.1-93 requires the State Superintendent of Public Instruction to advise local governing bodies of estimates of certain state aid within 15 days from the adjournment of the General Assembly. Given these deadlines, it is apparent that due to the budget impasse the State Superintendent’s notification will be delayed, and Virginia law will not require the Board to adopt a school budget until sometime after May 1.

## **Appropriation of Fuuds**

As stated above, before public funds can be spent, the Board must first separately authorize the expenditure of funds by appropriating those funds.<sup>5</sup> In recent years, after the Board has adopted the County budget, the Board has appropriated funds to County agencies and other entities for the purposes set forth in the Approved Budget. However, if time forces the Board to adopt a County budget and appropriate funds at a time when the receipt of significant state revenues remains in doubt, then the Board can address that problem in one of two ways. First, the Board could appropriate only a portion of the funds budgeted. That will give agencies and other entities spending authority that will permit them to move forward into

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<sup>4</sup> The County budget may include expected revenues even if the taxes or other actions that are expected to provide those revenues are not yet in place. *Compare* 1984-85 Op. Va. Att’y Gen. 98 (county budget could include estimated revenues from a tax the county planned to levy) *with* 1990 Op. Va. Att’y Gen. 152 (locality budget could not include funds that were not expected to be received in the current appropriation period).

<sup>5</sup> Virginia Const. art. VII, § 7 (2008) and Va. Code Ann. § 15.2-1428 (2011) provide that appropriations of more than \$500 shall be made by a recorded affirmative vote of a majority of all members elected to the Board.

FY 2015 based on the expectations in the budget, and it also will permit the Board to make any necessary fiscal adjustments later in the year when expected state revenues are known. Virginia Code Ann. § 15.2-2506 permits the Board to make appropriations on an annual, semiannual, quarterly, or monthly basis. Second, the Board could appropriate the funds as shown in the Approved Budget, but if revenues anticipated from the state were not forthcoming, then the Board would have to reduce the previous appropriations.

The difference here is Board control and administrative convenience. If the Board were to make an appropriation for only a portion of the fiscal year, then the Board would have to revisit the issue later, and County agencies and other entities would be limited in addressing agency needs for the entire fiscal year. If the Board were to make an appropriation for the full year, then agencies would have more flexibility, but the Board would not be able to stop the expenditure of those previously appropriated funds already spent or encumbered by agencies.

### **Summary**

If the state does not adopt a timely budget and state funds for localities are not appropriated, then the Board can and should proceed with the adoption of a County budget. In that situation, the Board would not be certain of receiving those state funds anticipated within the County budget, so the Board should consider how to control appropriations in a way that will permit the Board to respond to possible state revenue losses. The Board can address that by appropriating funds for only a portion of the year or by revising appropriations later in the year as needed.

If you have any questions, please feel free to contact me or Assistant County Attorney Patricia Moody McCay.

Attachments: Va. Code Ann. §§ 15.2-2503, 15.2-2506, 22.1-93, and 22.1-94

cc: Susan Datta, Chief Financial Officer  
Claudia Arko, Legislative Director  
Gail P. Langham, Deputy County Attorney  
Erin C. Ward, Senior Assistant County Attorney  
Patricia Moody McCay, Assistant County Attorney

West's Annotated Code of Virginia  
Title 15.2. Counties, Cities and Towns (Refs & Annos)  
Subtitle II. Powers of Local Government  
Chapter 25. Budgets, Audits and Reports (Refs & Annos)

VA Code Ann. § 15.2-2503

§ 15.2-2503. Time for preparation and approval of budget; contents

Effective: July 1, 2013

Currentness

All officers and heads of departments, offices, divisions, boards, commissions, and agencies of every locality shall, on or before the first day of April of each year, prepare and submit to the governing body an estimate of the amount of money needed during the ensuing fiscal year for his department, office, division, board, commission or agency. If such person does not submit an estimate in accordance with this section, the clerk of the governing body or other designated person or persons shall prepare and submit an estimate for that department, office, division, board, commission or agency.

The governing body shall prepare and approve a budget for informative and fiscal planning purposes only, containing a complete itemized and classified plan of all contemplated expenditures and all estimated revenues and borrowings for the locality for the ensuing fiscal year. The itemized contemplated expenditures shall include any discretionary funds to be designated by individual members of the governing body and the specific uses and funding allocation planned for those funds by the individual member; however, notwithstanding any provision of law to the contrary, general or special, an amendment to a locality's budget that changes the uses or allocation or both of such discretionary funds may be adopted by the governing body of the locality. The governing body shall approve the budget and fix a tax rate for the budget year no later than the date on which the fiscal year begins. The governing body shall annually publish the approved budget on the locality's website, if any, or shall otherwise make the approved budget available in hard copy as needed to citizens for inspection.

**Credits**

Acts 1997, c. 587, eff. Dec. 1, 1997; Acts 2008, c. 353, eff. Jan. 1, 2009. Amended by Acts 2013, c. 747.

Notes of Decisions (1)

VA Code Ann. § 15.2-2503, VA ST § 15.2-2503

Current through End of the 2013 Reg. Sess. and the End of 2013 Sp. S. 1 and includes 2014 Reg. Sess. cc. 1, 2, 8, 23, 29, 47 and 59.

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West's Annotated Code of Virginia  
Title 15.2. Counties, Cities and Towns (Refs & Annos)  
Subtitle II. Powers of Local Government  
Chapter 25. Budgets, Audits and Reports (Refs & Annos)

VA Code Ann. § 15.2-2506

§ 15.2-2506. Publication and notice; public hearing; adjournment; moneys not to be paid out until appropriated

Effective: July 1, 2009

Currentness

A brief synopsis of the budget which, except in the case of the school division budget, shall be for informative and fiscal planning purposes only, shall be published once in a newspaper having general circulation in the locality affected, and notice given of one or more public hearings, at least seven days prior to the date set for hearing, at which any citizen of the locality shall have the right to attend and state his views thereon. Any locality not having a newspaper of general circulation may in lieu of the foregoing notice provide for notice by written or printed handbills, posted at such places as it may direct. The hearing shall be held at least seven days prior to the approval of the budget as prescribed in § 15.2-2503. With respect to the school division budget, which shall include the estimated required local match, such hearing shall be held at least seven days prior to the approval of that budget as prescribed in § 22.1-93. The governing body may adjourn such hearing from time to time. The fact of such notice and hearing shall be entered of record in the minute book.

In no event, including school division budgets, shall such preparation, publication and approval be deemed to be an appropriation. No money shall be paid out or become available to be paid out for any contemplated expenditure unless and until there has first been made an annual, semiannual, quarterly or monthly appropriation for such contemplated expenditure by the governing body, except funds appropriated in a county having adopted the county executive form of government, outstanding grants may be carried over for one year without being reappropriated.

**Credits**

Acts 1997, c. 587, eff. Dec. 1, 1997; Acts 2009, c. 280.

Notes of Decisions (2)

VA Code Ann. § 15.2-2506, VA ST § 15.2-2506

Current through End of the 2013 Reg. Sess. and the End of 2013 Sp. S. 1 and includes 2014 Reg. Sess. ee. 1, 2, 8, 23, 29, 47 and 59.

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West's Annotated Code of Virginia  
Title 22.1. Education (Refs & Annos)  
Chapter 8. Public School Funds (Refs & Annos)  
Article 1. State and Local Funds

VA Code Ann. § 22.1-93

§ 22.1-93. Approval of annual budget for school purposes

Effective: July 1, 2011

Currentness

Notwithstanding any other provision of law, including but not limited to Chapter 25 (§ 15.2-2500 et seq.) of Title 15.2, the governing body of a county shall prepare and approve an annual budget for educational purposes by May first or within thirty days of the receipt by the county of the estimates of state funds, whichever shall later occur, and the governing body of a municipality shall prepare and approve an annual budget for educational purposes by May fifteen or within thirty days of the receipt by the municipality of the estimates of state funds, whichever shall later occur. Upon approval, each local school division shall publish the approved annual budget, including the estimated required local match, on the division's website, and the document shall also be made available in hard copy as needed to citizens for inspection.

The Superintendent of Public Instruction shall, no later than the fifteenth day following final adjournment of the Virginia General Assembly in each session, submit estimates to be used for budgetary purposes relative to the Basic School Aid Formula to each school division and to the local governing body of each county, city and town that operates a separate school division. Such estimates shall be for each year of the next biennium or for the then next fiscal year.

**Credits**

Acts 1980, c. 559; Acts 1981, c. 541; Acts 2008, c. 353, eff. Jan. 1, 2009; Acts 2008, c. 404, eff. Jan. 1, 2009; Acts 2009, c. 280. Amended by Acts 2011, c. 216.

Notes of Decisions (2)

VA Code Ann. § 22.1-93, VA ST § 22.1-93

Current through End of the 2013 Reg. Sess. and the End of 2013 Sp. S. I and includes 2014 Reg. Sess. cc. 1, 2, 8, 23, 29, 47 and 59.

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West's Annotated Code of Virginia  
Title 22.1. Education (Refs & Annos)  
Chapter 8. Public School Funds (Refs & Annos)  
Article 1. State and Local Funds

VA Code Ann. § 22.1-94

§ 22.1-94. Appropriations by county, city or town governing body for public schools

Currentness

A governing body may make appropriations to a school board from the funds derived from local levies and from any other funds available, for operation, capital outlay and debt service in the public schools. Such appropriations shall be not less than the cost apportioned to the governing body for maintaining an educational program meeting the standards of quality for the several school divisions prescribed as provided by law. The amount appropriated by the governing body for public schools shall relate to its total only or to such major classifications prescribed by the Board of Education pursuant to § 22.1-115. The appropriations may be made on the same periodic basis as the governing body makes appropriations to other departments and agencies.

**Credits**

Acts 1980, c. 559; Acts 1989, c. 94.

Notes of Decisions (5)

VA Code Ann. § 22.1-94, VA ST § 22.1-94

Current through End of the 2013 Reg. Sess. and the End of 2013 Sp. S. I and includes 2014 Reg. Sess. cc. 1, 2, 8, 23, 29, 47 and 59.

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