No. 17-2002 (L)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIAN DAVISON,

Plaintiff, Appellee and
Cross Appellant,

v.

PHYLLIS RANDALL
AND
LOUDOUN COUNTY BOARD OF SUPERVISORS,

Defendants, Appellant and
Cross Appellees.

On appeal from the United States District Court,
Eastern District of Virginia, Alexandria Division
Case No. 1:16-cv-00932-JCC-IDD

THE LOUDOUN COUNTY BOARD OF SUPERVISORS' RESPONSE BRIEF TO PLAINTIFF, APPELLEE AND CROSS APPELLANT BRIAN DAVISON'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ISSUES 2

SUMMARY OF ARGUMENT 3

STANDARD OF REVIEW 4

ARGUMENT 5

I. The District Court properly concluded that Ms. Randall did not act in her official capacity as Chairman of the Board of Supervisors when she created and maintained the "Chair Phyllis J. Randall" Facebook page 5

II. The District Court correctly concluded that Ms. Randall did not violate Mr. Davison's due process rights, either in an official capacity or otherwise, when she temporarily banned Virginia SGP from her Facebook page 11

III. The District Court did not abuse its discretion when it upheld Magistrate Judge Davis' decision to not allow Mr. Davison to amend his complaint to add a new claim that the Board of Supervisors was liable for a third party blocking Mr. Davison's ability to comment on the County's Facebook page 14

CONCLUSION 15

TABLE OF AUTHORITIES

Statutes

Article 1, § 11, Constitution of Virginia 2

Article 1, § 12, Constitution of Virginia 2

Virginia Code § 15.2-1213 (Ex. 1) 7

Virginia Code § 15.2-1415 (Ex. 2) 7

Virginia Code § 15.2-1425 (Ex. 2) 7

Case Law

Balas v. Huntington Ingalls Indus.,

711 F.3d 401 (4th Cir. 2013) 4, 14

Bose Corp. v. Consumers Union of U.S., Inc.

466 U.S. 485 (1984) 4, 7

Fields v. Durham,

909 F.2d 94 (4th Cir. 1990) 12

General Elec. Co. v. Joiner,

522 U.S. 136 (1997) 5, 14

HCMF Corp. v. Allen,

238 F.3d 271 (4th Cir. 2001) 4, 14

Hellenic Am. Neighborhood Action Comm. v. City of New York,

101 F.3d 877 (2d Cir. 1996) 12

Helton v. AT & T Inc.,

709 F.3d 343 (4th Cir. 2013) 4

Lugar v. Edmondson Oil Co.,
457 U.S. 922 (1982) 10

Monell v. Dep't of Soc. Servs. of N.Y.,
436 U.S. 658 (1978) 8

Morrissey v. Brewer,
408 U.S. 471 (1972) 11

New York Times Co. v. Sullivan,
376 U.S. 254, 285 (1964) 4

Shrader v. White,
761 F.2d 975 (4th Cir. 1985) 7

United States v. Classic,
313 U.S. 299 (1941) 10

United States v. Gypsum,
333 U.S. 364 (1948) 7

U.S. v. Pittman,
209 F.3d 314 (4th Cir. 2000) 5, 14

Volvo Const. Equip. N.Am., Inc. v. CLM Equip. Co., Inc.
386 F.3d 581 (4th Cir. 2004) 4

West v. Atkins,
487 U.S. 42 (1988) 10

Zinermon v. Burch,
494 U.S. 113 (1990) 12

INTRODUCTION

This appeal is brought by Brian C. Davison ("Mr. Davison"), Plaintiff-Appellee and Cross Appellant, against Phyllis J. Randall ("Ms. Randall") in her official capacity as Chairman of the Loudoun County Board of Supervisors and the Loudoun County Board of Supervisors ("Board of Supervisors"), Defendants-Appellees. By Memorandum Opinion issued May 10, 2017 (J.A. 50-78) the United States District Court, Eastern District of Virginia, Alexandria Division, ("District Court") granted summary judgment to the Board of Supervisors with respect to Mr. Davison's First Amendment, free speech, and Fourteenth Amendment, due process, claims under the United States Constitution, Counts I and II of Plaintiff's Second Amended Complaint. Furthermore, on May 10, 2017, the District Court overruled Plaintiff's Objections to Magistrate Judge's Orders (J.A. 73-76) which, in part, denied Mr. Davison's motion to add a claim against the Board of Supervisors under the First Amendment for maintaining a limited public forum on Facebook. After a bench trial on May 16, 2017, the District Court issued a Memorandum of Decision on July 25, 2017, setting out its factual findings and conclusions of law. J.A. 460-503. Later that day, the Court issued a corresponding Order (J.A. 504-505) and the next day the Clerk issued a Judgment (J.A. 506-507) tracking the Order and Memorandum of Decision. The District Court dismissed Mr. Davison's First

Amendment, free speech, claim ("Count V"), Fourteenth Amendment, due process, claim ("Count VI"), Article 1, § 12 of the Constitution of Virginia, free speech, claim ("Count VII"), and Article 1, § 11, due process, claim ("Count VIII") against Ms. Randall in her official capacity and dismissed the remainder of Counts VI and VIII. Mr. Davison now appeals these decisions and asserts that declaratory judgment should have been entered against the Board of Supervisors. For the reasons stated in the District Court orders below, the Response/Reply Brief For Defendant-Appellant Phyllis J. Randall and this Response Brief, Mr. Davison's appeal should be dismissed and the District Court's Order and Judgment affirmed with respect to the issues raised in Mr. Davison's cross appeal.[i]

ISSUES

1. Did the District Court err in its factual and legal determinations dismissing the free speech claims in Counts V and VII against Ms. Randall in her official capacity as Chairman of the Board of Supervisors?

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[i] Phyllis J. Randall is being represented by the law firm of Boies Schiller Flexner LLP. This Response Brief addresses Mr. Davison's appeal for declaratory judgment against the Board of Supervisors in Counts V, VI, VII and VIII and the District Court decision to deny his alleged free speech violation against the Board of Supervisors due to the action of a third party.

2. Did the District Court err in its factual and legal determinations dismissing the procedural due process claims in Counts VI and VIII against Ms. Randall in her official capacity as Chairman of the Board of Supervisors as well as dismissing the remainder of Counts VI and VIII?

3. Did the District Court abuse its discretion when it overruled Mr. Davison's Objections to Magistrate Judge's Order on May 10, 2017 by upholding Judge Davis' denial of Mr. Davison's attempt to add a free speech claim against the Board of Supervisors based on third party actions six days prior to the trial date?

SUMMARY OF ARGUMENT

Declaratory judgment against Ms. Randall in her individual capacity or her official capacity (and thereby the Board of Supervisors) is not appropriate for the reasons stated in the Response/Reply Brief For Defendant-Appellant Phyllis J. Randall filed on behalf of Ms. Randall by Boies Schiller Flexner LLP. Those arguments are adopted by the Board of Supervisors. Further, there was sufficient evidence and legal justification to affirm the District Court finding that Ms. Randall did not act in her official capacity, thereby justifying dismissal of Davison's request for declaratory judgment against the Board of Supervisors. The District Court did not abuse its discretion by denying Mr. Davison's motion to amend his Complaint

to add an alleged free speech violation against the Board of Supervisors due to the action of a third party after the close of discovery and six days before trial.

STANDARD OF REVIEW

"This Court reviews judgments stemming from a bench trial under a mixed standard: factual findings are reviewed for clear error, whereas conclusions of law are reviewed de novo." *Helton v. AT & T Inc.*, 709 F.3d 343, 350 (4th Cir. 2013). For appeals of First Amendment decisions, however, appellate courts have "to make an independent examination of the record as a whole." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 4999 (1984), (*citing New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964)). And although this Court reviews a district court's decision whether to grant a declaratory judgment for abuse of discretion, it also "review[s] *de novo* the issue of whether a district court possessed jurisdiction in a declaratory judgment proceeding." *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co., Inc.*, 386 F.3d 581, 591 (4th Cir. 2004).

The standard for this Court's review of a trial court's decision to deny a motion to amend a complaint is whether there was an abuse of discretion. *Balas v. Huntington Ingalls Indus.*, 711 F.3d 401, 409 (4th Cir. 2013) (*citing HCMF Corp. v. Allen*, 238 F.3d 271, 276-77 (4th Cir. 2001)). The abuse of discretion standard mandates a significant measure of appellate deference to the judgment calls of the

trial courts. *U.S. v. Pittman*, 209 F.3d 314, 316 (4th Cir. 2000) (*citing General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997)).

ARGUMENT

I. The District Court properly concluded that Ms. Randall did not act in her official capacity as Chairman of the Board of Supervisors when she created and maintained the "Chair Phyllis J. Randall" Facebook page.

The findings of facts and undisputed evidence showed:

- Ms. Randall's Facebook page was created before Ms. Randall took office;[ii]
- Ms. Randall's Facebook page belongs to her, not Loudoun County, Virginia;[iii]
- Every decision about Ms. Randall's Facebook page is made by her alone;[iv]
- Ms. Randall uses only personal (not County) equipment to maintain and operate her Facebook page;[v]
- Mr. Davison commented on a post on Ms. Randall's Facebook page using one of his Facebook names, "Virginia SGP;"[vi]
- The decision to temporarily ban "Virginia SGP" was made by Ms. Randall alone, without consulting any government employee, "unilateral[ly]" and "in the heat of the moment;"[vii]

[ii] J.A. 187, 254 (Trial Tr. 109:24-25; *id.* at 176:16-19).

[iii] J.A. 261 (Trial Tr. 183:12-17).

[iv] J.A. 160 (Trial Tr. 82:3-4; *id.* at 223:4-6).

[v] J.A. 190 (Trial Tr. 112:2-8; *id.* at 179:10-180:2; *id.* at 194:11-18).

[vi] J.A. 471 (Mem. of Dec. at 12).

[vii] J.A. 482 (Mem. of Dec. at 23).

- The Board of Supervisors is not Ms. Randall's superior in any relevant sense and has no formal authority to approve or disapprove anything Ms. Randall may do on her Facebook page;[viii]
- Ms. Randall is an elected official who answers only to her constituents;[ix]
- No County policy played any role in Ms. Randall's decision to ban "Virginia SGP";[x]
- Ms. Randall's creation and operation of her Facebook page was not covered by County policies; and[xi]
- The temporary ban was effectuated by Facebook, at Ms. Randall's request, by virtue of a private agreement between her and Facebook.

In addition, the District Court observed in a pre-trial order about Ms. Randall's Facebook page that she "has made a significant effort to keep it from entanglement with the County government." J.A. 67 (May 10, 2017 Memorandum Opinion at 18). The District Court found as a matter of fact that Ms. Randall "purposely created her Facebook page outside of the County's official channels so as not to be constrained by the principles applicable to the County's social media websites." J.A. 463 (July 25, 2017 Memorandum of Decision at 4). Furthermore, the District Court found that

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[viii] J.A. 483 (Mem. of Dec. at 24).
[ix] J.A. 493 (Mem. of Dec. at 34).
[x] J.A. 482 (Mem. of Dec. at 23).
[xi] J.A. 494 (Mem. of Dec. at 35).

the 'Chair Phyllis J. Randall' Facebook page will not revert to the County when (Ms. Randall) leaves office, and she will retain control over that page. *Id.*

In general, findings of fact should not be overturned unless they are clearly erroneous. Federal Rule of Civil Procedure 52(a). "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Shrader v. White*, 761 F.2d 975, 980 (4th Cir. 1985) (citing, *United States v. Gypsum*, 333 U.S. 364, 395, 92 L. Ed. 746, 68 S. Ct. 525 (1948)). Even under the more comprehensive appellate review of First Amendment cases as stated in *Bose*, there is sufficient factual evidence in the record as a whole for the District Court to conclude that Ms. Randall was not operating in her official capacity when she created and maintained her Facebook page.

The District Court considered the limited powers granted to the Chairman of the Loudoun County Board of Supervisors as set forth in Virginia Code § 15.2-1213 (copy attached as Exhibit 1). These powers are mostly ceremonial and procedural and provide no authority for the Chairman to act for or bind the Board of Supervisors. Individual Board members have no power or authority to bind the County and the Board of Supervisors may only act as a whole with a quorum present. Virginia Code §§ 15.2-1425 and 15.2-1415 (copies attached as Exhibit 2). While

issues of law are reviewed *de novo* on appeal, these Virginia Code sections are dispositive of the limited statutory authority of individual Board members, including the Chairman.

"The gravamen of Davison's official capacity claim **is that the county's policy** to afford supervisors like Randall unfettered discretion to ban individuals from their social media sites violates the First Amendment." Davison Br. 44 (emphasis added). Yet, nowhere in the record or in Cross Appellant's Brief is there any reference to a county policy. The Cross Appellant's Brief cites *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 694 (1978) as justification for its argument. *Id.* However, in *Monell*, the Supreme Court concluded that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." As stated by the Supreme Court, the *Monell* case "unquestionably involves official policy as the moving force of the Constitutional violation."

There is absolutely no evidence in the record or otherwise of any policy, custom or action of the Loudoun County Board of Supervisors regarding Ms. Randall's Facebook page. In fact, the evidence is directly to the contrary. Ms.

Randall testified that, "I have no idea what other supervisors do with their pages because we don't discuss that. We have no say or control over one another's pages. I don't know what they do." J.A. 210 (Tr. 132:12-20).

Despite Ms. Randall not being a subordinate of the Board of Supervisors and the Board of Supervisors taking no action with regard to her Facebook page, Mr. Davison argues that the Board of Supervisors should be liable under the theory of "deliberate indifference." Davison Br. 45-46. Mr. Davison further argues there is a likelihood that First Amendment violations, based on view point discrimination, could occur on individual supervisors' social media sites. *Id.*

As reflected in the District Court's decision, there is no way the Board of Supervisors or anyone else could have possibly foreseen that the District Court would find a First Amendment violation. First, the District Court correctly stated that whether a social media account maintained by a public official is considered governmental "raises a novel legal question." J.A. 473. Second, the District Court eschewed the traditional bright line test for determining when a public forum exists and instead employed, for the first time, the acting under the color of state law ("state actor") test to determine the existence of a public forum. Under the "state actor" test, the District Court made a "normative judgment" after considering a "totality of the circumstances." J.A. 474, 481. No one, not Mr. Davison, not Ms. Randall, and

certainly not the Board of Supervisors, could have foreseen the creation of this unique test or how the District Court would have used it to render its decision that Ms. Randall's Facebook page was a public forum.

On February 3, 2016, Ms. Randall made a personal decision to delete her post and then ban "Virginia SGP." [xii] This decision was made by her alone, at approximately 11:00 p.m., in the privacy of her own home without consulting any other person. The next morning, she decided to un-ban "Virginia SGP." Ms. Randall's personal decisions are in no way decisions of the Board of Supervisors, acts of the government, or matters of public business.

When Ms. Randall temporarily banned Mr. Davison's "Virginia SGP" persona from commenting on her Facebook page, she did not exercise power "possessed by virtue of state law." *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)); *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) ("[T]he deprivation must be caused by the exercise of some right or privilege created by the State..."). The District Court acknowledged this in its pre-trial order, finding that in creating and maintaining her Facebook page

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[xii] Mr. Davison describes Virginia SGP as "persona" which he alone controls. J.A. 111 (Trial Tr. 33:10-24).

Ms. Randall did not "exercise...power" she had by virtue of state law. J.A. 71 (May, 2017 Memorandum Opinion at 22).

There is more than sufficient evidence and legal justification to sustain the District Court's factual findings and legal conclusions that Ms. Randall did not operate in her official capacity as Chairman of the Board of Supervisors when she created and maintained her Facebook page.

II. The District Court correctly concluded that Ms. Randall did not violate Mr. Davison's due process rights, either in an official capacity or otherwise, when she temporarily banned Virginia SGP from her Facebook page.

As acknowledged by the District Court, Mr. Davison offered virtually no evidence or argument on the due process issue. He simply maintained that due process would always require a hearing. J.A. 491 (Mem. of Dec. at 32). That simply is not the case. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

This is a case of first impression. There is no precedent for a social media account created and maintained personally by a public official being deemed a public forum under a "state actor" test. Ms. Randall operated her Facebook page as a private citizen. She availed herself of the terms and conditions of Facebook to which every user agrees when creating a Facebook page or commenting on the Facebook pages of others.

With regard to procedural due process, the District Court cited with authority that "the Supreme Court has distinguished between (a) claims based on established state procedures and (b) claims based on random, unauthorized acts by state employees." *Hellenic Am. Neighborhood Action Comm. v. City of New York*, 101 F.3d 877, 880 (2d Cir. 1996). There is no evidence in the record of an established state or county procedure with regard to Ms. Randall's Facebook page. As stated in Ms. Randall's Response/Reply Brief, the District Court erred when it used the "state actor" test to determine whether Ms. Randall's Facebook page was a public forum and she thereby committed an unauthorized act.

In any event, in determining whether a procedural due process violation has occurred, a court must look at all pre-deprivation and post-deprivation processes available. *Fields v. Durham,* 909 F.2d 94, 97 (4th Cir. 1990) (*citing Zinermon v. Burch* 494 U.S. 113, 126 (1990)). Mr. Davison produced no evidence at trial of a substantial benefit of a pre-deprivation process other than that it would provide "notice that a comment is...targeted and under review." J.A. 496 (Mem. of Dec. at 37, Trial Tr. 240:1-2). However, deleting "Virginia SGP's" comment is not at issue in this case. Ms. Randall deleted her entire post, with all comments thereto, which she had every right to do. As stated by Mr. Davison, "[w]hile Randall's deletion of comments without providing notice and a hearing might itself be unconstitutional,

only Randall's prior restraint of speech is at issue in the current case." (Davison's Informal Opening Brief at 20, fn. 7).

The District Court noted that Mr. Davison "failed to adduce any evidence or make any argument regarding the adequacy of available post-deprivation process." J.A. 498 (Mem. of Dec. at 39). Given the incredibly short time in which "Virginia SGP" was banned, overnight for less than 12 hours, there would not have been any opportunity for a post-deprivation process.

For the reasons stated above, the District Court correctly ruled that Ms. Randall was not acting in an official capacity when she operated and maintained her Facebook page. The obvious error of the District Court's decision that Ms. Randall, in her individual capacity, was a "state actor" for the purposes of converting her otherwise private Facebook page into a public forum, leads to an illogical conundrum of how due process would even apply. An individual person has no obligation to provide due process under either the U.S. Constitution or the Constitution of Virginia. Even under the District Court's "state actor" test, due process considerations would not apply until after a court declared a private social media account to be a public forum.

III. The District Court did not abuse its discretion when it upheld Magistrate Judge Davis' decision to not allow Mr. Davison to amend his complaint to add a new claim that the Board of Supervisors was liable for a third party blocking Mr. Davison's ability to comment on the County's Facebook page.

Denial of a motion to amend is reviewed based on an abuse of discretion. *Balas v. Huntington Ingalls Indus.*, 711 F.3d 401, 409 (4th Cir. 2013) (*citing HCMF Corp. v. Allen*, 238 F.3d 271, 276-77 (4th Cir. 2001)). The abuse of discretion standard mandates a significant measure of appellate deference to the judgment calls of the trial courts. *U.S. v. Pittman*, 209 F.3d 314, 316 (4th Cir. 2000) (*citing General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997)).

By its very nature, a Facebook page is operated by a third party. Through discovery and by stipulations, it was determined that Mr. Davison's July 2016 comments on the County's Facebook page were deleted by Facebook without any involvement by the Board of Supervisors or any County employee or official. J.A. 54, 56 (Memorandum Opinion 5,7; Trial Exhibit 21). By letter dated February 24, 2017 from Facebook's counsel, John Roche, Facebook acknowledged that its systems deleted the comments without any involvement by the Defendants. The parties stipulated that Facebook deleted the comments and then made changes to its programming to prevent future deletions. *Id.*

Count IX, as referred to in Mr. Davison's Informal Opening Brief, sought to hold the Board of Supervisors accountable for the actions of Facebook as a third party; however, the third party action complained of by Mr. Davison had already been resolved. The District Court properly held that the "First Amendment guarantees freedom from governmental censorship. Plaintiff's argument that the County has not sufficiently policed the private conduct of third parties fails to state a claim under the First Amendment." J.A. 75 (Memorandum Opinion dated May 10, 2017 at 26).

There was nothing to be gained by adding Count IX, as referred to in Mr. Davison's Informal Opening Brief, in that there was not a cause of action, the issue had already been resolved by the third party and no relief was necessary or appropriate. The District Court correctly concluded that "[p]ermitting Plaintiff to amend his complaint to include this claim would be futile." *Id.* Furthermore, the District Court decision was issued after discovery was closed and just six days prior to trial. The decision of the District Court was proper and was not an abuse of discretion.

CONCLUSION

For the foregoing reasons, Mr. Davison's appeal should be dismissed and the

District Court's Order and Judgment affirmed with respect to the issues raised in Mr. Davison's cross appeal.

Respectfully submitted,

Dated: August 9, 2018

/s/ Leo P. Rogers

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that this brief complies with the type-volume limitation required by Fed. R. App. P. 32(a)(7)(B)(i) because it contains 4117 words, excluding the parts exempted by Fed. R. App. P. 32(f), as determined by the word count function of Microsoft Word. I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typeface style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Times New Roman font using Microsoft Word.

Respectfully submitted,

August 9, 2018 /s/ Leo P. Rogers

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c), I certify that the foregoing was electronically filed with the Clerk of the Court on August 9, 2018 using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Respectfully submitted,

August 9, 2018 /s/ Leo P. Rogers

Code of Virginia
Title 15.2. Counties, Cities and Towns
Chapter 12. General Powers and Procedures of Counties

§ 15.2-1213. Referendum in Loudoun County on election of the county chairman from the county at large [Not set out]

(1990, c. 895, § 15.1-527.3; 1997, c. 587; 2008, c. 778.)

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

EXHIBIT 1

Code of Virginia
Title 15.2. Counties, Cities and Towns
Chapter 14. Governing Bodies of Localities

§ 15.2-1425. Actions by localities

The governing body of every locality in the performance of its duties, obligations and functions may adopt, as appropriate, ordinances, resolutions and motions.

1997, c. 587.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

EXHIBIT 2

Code of Virginia
Title 15.2. Counties, Cities and Towns
Chapter 14. Governing Bodies of Localities

§ 15.2-1415. At what meetings governing body may act

Unless otherwise specially provided, a governing body may exercise any of the powers conferred upon it at any meeting of the governing body, regular, special or adjourned at which a quorum is present. A majority of the governing body shall constitute a quorum except as may be otherwise provided in the State and Local Government Conflict of Interests Act (§ 2.2-3100 et seq.). Meetings of governing bodies shall be subject to the applicable provisions of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

Code 1950, § 15-247; 1962, c. 623, § 15.1-542; 1997, c. 587; 2007, c. 615.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

EXHIBIT 2