



COMMONWEALTH of VIRGINIA

Office of the Attorney General

William C. Mims
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

June 10, 2009

The Honorable Clarence E. "Bud" Phillips
Member, House of Delegates
P.O. Box 36
Castlewood, Virginia 24224

Dear Delegate Phillips:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask several questions regarding the authority of the Virginia Gas and Oil Board¹ ("the Board") to issue compulsory pooling orders pursuant to the Virginia Gas and Oil Act² (the "Act").

Question 1

You present a situation in which a gas owner fails to make an election under a compulsory pooling order³ of the Board. You ask whether the Board's authority to deem that the gas owner has leased his interest in the gas to the unit operator, a private entity, arises out of the Commonwealth's police power. If so, you ask whether the Board's action is a valid exercise of such police power.

¹See VA. CODE ANN. § 45.1-361.13(A) (2002) (establishing Virginia Gas and Oil Board).

²See tit. 45.1, ch. 22.1, §§ 45.1-361.1 to 45.1-361.44 (2002 & Supp. 2008).

³Although the term "compulsory pooling" is not defined in the *Code*, it is a term of art in the gas and oil industry and for purposes of this opinion, the term means the pooling of interests within a drilling unit pursuant to § 45.1-361.21 or § 45.1-361.22. The federal government provides for a "compulsory unitization" and may require "lessees to unitize operations ... if unitized operations are required" to prevent waste, conserve natural resources, or protect correlative rights. See 30 C.F.R. § 250.1301(b) (2008); see also E.H. Shopler, Annotation, *Validity of compulsory pooling or unitization statute or ordinance requiring owners or lessees of oil and gas lands to develop their holdings as a single drilling unit and the like*, 37 A.L.R.2D 434, 435 (1954) (defining "compulsory pooling" as "[a] statute under which owners of small or irregularly shaped tracts can be required to develop their lands as a single drilling unit for conservation purposes").

Applicable Law and Discussion

The Act has an extensive history that was outlined in an opinion of this Office issued contemporaneously herewith.⁴ The “deemed leased” language in the Board’s pooling orders is mandated by the General Assembly. It is not an exercise of the Board’s general discretionary authority to carry out its duties under the Act. Section 45.1-361.21(E) provides that “[a]ny person who does not make an election under the pooling order *shall be deemed to have leased* his gas or oil interest to the gas or oil well operator as the pooling order may provide.” (Emphasis added.) Further, § 45.1-361.22(6) provides that “[a]ny person who does not make an election under the pooling order *shall⁵ be deemed ... to have leased* his gas or oil interest to the coalbed methane gas well operator as the pooling order may provide.” (Emphasis added.)

The Board has no discretionary power to alter the legislative mandate of the General Assembly. Therefore, the Board must include such options and language in its orders. Such a mandate is a valid exercise of the general police powers of the Commonwealth. The police power of a state is that broad authority not ceded to the federal government to protect the public interest.⁶ It is the power retained by the individual states “to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, *develop its resources*, and add to its wealth and prosperity.”⁷

The General Assembly may enact any law or take any action “not prohibited by express terms, or by necessary implications, by the State Constitution or the Constitution of the United States.”⁸ Such vast power is inherent in the legislature.⁹ While there is no exact definition for

⁴See 2009 Op. Va. Att’y Gen. No. 09-018 (issued June 10, 2009, to Bradley C. Lambert, Chairman, Virginia Gas and Oil Board), available at <http://www.vaag.com/OPINIONS/2009opns/index.html> (follow link to June opinions); see also REPORT OF VA. COAL & ENERGY COMM’N, THE STUDY OF THE REGULATION OF INDEPENDENT POWER PRODUCERS AND THE OIL AND GAS ACT, H. DOC. NO. 79 (1990) (discussing current Act); Elizabeth A. McClanahan, *Coalbed Methane Myths, Facts, and Legends of Its History and the Legislative and Regulatory Climate into the 21st Century*, 48 OKLA. L. REV. 3, 471 (1995) (including discussion of Act and comparison of Act to federal legislation, which was based on Virginia’s Act).

⁵The word “shall” as used in a statute ordinarily implies that its provisions are mandatory. See, e.g., *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that statute using “shall” required court to summon nine disinterested freeholders in condemnation case); see also 2006 Op. Va. Att’y Gen. 19, 23 (noting that “shall” generally is construed to be mandatory); but see *Harris v. Commonwealth*, 52 Va. App. 735, 744, 667 S.E.2d 809, 814 (2008) (finding that criminal statute using “shall” was directory and procedural, rather than mandatory and jurisdictional). It is my opinion that in the context of §§ 45.1-361.21(E) and 45.1-361.22(6), “shall” is mandatory rather than permissive.

⁶See *City of Roanoke v. Elliott*, 123 Va. 393, 406, 96 S.E. 819, 824 (1918) (noting legislative powers of General Assembly are without limit).

⁷*Barbier v. Connolly*, 113 U.S. 27, 31 (1885) (emphasis added) (discussing police powers of states in context of due process clause of Fourteenth Amendment); see also *Blue Cross of Va. v. Commonwealth*, 221 Va. 349, 358, 269 S.E.2d 827, 833 (1980) (noting that police power “includes the power to prescribe regulations to promote the health, peace, morals, education and good order of the people”).

⁸*Kirkpatrick v. Bd. of Supvrs.*, 146 Va. 113, 126, 136 S.E. 186, 190 (1926).

⁹*Id.*

police power, this power is expansive and a necessary and intrinsic attribute of a state.¹⁰ “The police power of the Commonwealth to regulate the affairs of corporations, the same as individuals, shall never be abridged.”¹¹

A presumption of validity attaches to every statute enacted into law by the General Assembly.¹² Since all acts of the General Assembly are presumed to be constitutional,¹³ such presumption would include the “deemed leased” language in §§ 45.1-361.21(E) and 45.1-361.22(6). A general summary of the Board’s duties includes:

With respect to oil and gas, the Virginia Gas and Oil Board and the [Department of Mines, Minerals and Energy], through its Division of Gas and Oil, are responsible for administering the statutory provisions directed to prevention of waste in exploration and production, prevention of pollution of state waters, protection of rights of adjacent owners, restoration of disturbed sites, and protection of mining and public safety.^[14]

These regulatory duties and powers of the Board and of the Division of Gas and Oil, both of which are agencies of the Commonwealth, are in conformity with the broad definition of “police power.”¹⁵

The extensive listing of duties and responsibilities cataloged in § 45.1-361.15 enumerates powers that not only allow the Board to take this action, but arguably would require it to do so:

¹⁰ *Blue Cross*, 221 Va. at 358, 269 S.E.2d at 833.

¹¹ VA. CONST. art IX, § 6, *quoted in Blue Cross*, 221 Va. at 358, 269 S.E.2d at 833.

¹² *See Coleman v. Pross*, 219 Va. 143, 153, 246 S.E.2d 613, 619 (1978); *Elliott*, 123 Va. at 406, 96 S.E. at 824. “[W]hen the constitutionality of a statute is challenged, we are guided by the principle that all acts of the General Assembly are presumed to be constitutional. Therefore, ‘a statute will be construed in such a manner as to avoid a constitutional question wherever this is possible.’” *Yamaha Motor Corp., U.S.A. v. Quillian*, 264 Va. 656, 665, 571 S.E.2d 122, 126-27 (2002) (quoting *Eaton v. Davis*, 176 Va. 330, 339, 10 S.E.2d 893, 897 (1940)); *see also Va. Soc’y for Human Life, Inc. v. Caldwell*, 256 Va. 151, 157, 500 S.E.2d 814, 816-17 (1998) (noting statutes are narrowly construed to avoid constitutional questions where possible); *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 52-53, 392 S.E.2d 817, 820 (1990) (noting courts will declare act unconstitutional only when clearly repugnant to some provision of state or federal constitution).

¹³ “A reasonable doubt as to the constitutionality of a legislative enactment must be resolved in favor of its validity. The courts will declare the legislative judgment null and void only when the statute is plainly repugnant to some provision of the state or federal constitution.” *Blue Cross*, 221 Va. at 358, 269 S.E.2d at 832. “‘To doubt is to affirm. The mere passage of a statute is an affirmance by the General Assembly of its constitutional power to adopt it.... These principles have been repeatedly announced by this court from a very early date.’” *Harrison v. Day*, 201 Va. 386, 397, 111 S.E.2d 504, 511 (1959) (quoting *Elliott*, 123 Va. at 406, 96 S.E. at 824).

¹⁴ 4 VA. ADMIN. CODE 25 Agcy. Sum. (2005); *see also* §§ 45.1-361.14(B), 45.1-361.15 (2002) (outlining powers and duties of Board).

¹⁵ *See supra* notes 6-11 and accompanying text.

A. In executing its duties under [Chapter 22.1], the Board shall:

1. Foster, encourage and promote the safe and efficient exploration for and development, production and conservation of the gas and oil resources located in the Commonwealth;

2. Administer a method of gas and oil conservation for the purpose of maximizing exploration, development, production and utilization of gas and oil resources;

3. Administer procedures for the recognition and protection of the rights of gas or oil owners with interests in gas or oil resources contained within a pool;

4. Promote the maximum production and recovery of coal without substantially affecting the right of a gas owner proposing a gas well to explore for and produce gas; and

5. Hear and decide appeals of Director's decisions and orders issued under Article 3 of [Chapter 22.1].

B. Without limiting its general authority, the Board shall have the specific authority to issue rules, regulations or orders pursuant to the provisions of the Administrative Process Act (§ 2.2-4000 et seq.) in order to:

1. Prevent waste through the design spacing, or unitization of wells, pools, or fields.

2. Protect correlative rights.

3. Enter spacing and pooling orders.

4. Establish drilling units.

5. Establish maximum allowable production rates for the prevention of waste and for the protection of correlative rights.

6. Provide for the maximum recovery of coal.

7. Classify pools and wells as gas, oil, gas and oil, or coalbed methane gas.

....

12. Take such actions as are reasonably necessary to carry out the provisions of [Chapter 22.1].

Therefore, it is my opinion that the Board is authorized and, in fact, is mandated to issue compulsory pooling orders to deem that unleased interests are leased when gas owners fail to elect to participate in the operation of the well. Further, it is my opinion that such action by the Board is a valid exercise of the Commonwealth's police power.

Question 2

You ask whether a compulsory pooling order of the Board would constitute a taking under Article I, § 11, of the Constitution of Virginia ("Article I, § 11") when the order deems the interest of a gas owner leased to the unit operator, after the owner fails to make a statutory election.

Applicable Law and Discussion

The Supreme Court of the United States has affirmed the constitutional power of individual states “to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landholders of the *migratory gas* and oil underlying their land, fairly distributing among them the costs of production and of the apportionment.”¹⁶ This ruling comports with the significant power held by the states pursuant to their retained police power.¹⁷

The Fifth Amendment of the Constitution of the United States provides that private property shall not “be taken for public use, without just compensation.”¹⁸ This restriction applies to the states through the Fourteenth Amendment.¹⁹ Additionally, Article I, § 11, provides that no “private property shall be taken or damaged for public uses, without just compensation, the term ‘public uses’ to be defined by the General Assembly.”²⁰

However, “[a]ll citizens hold property subject to the proper exercise of the police power for the common good.”²¹ Valid exercises of police power are not “takings” within the meaning of the state or federal constitutions; such is the case even when the state’s exercise of the police power results in regulation that imposes some economic burden or loss upon property.²² Even where such exercise results in substantial diminution of property values, an owner has no right to

¹⁶ Hunter Co. v. McHugh, 320 U.S. 222, 227 (1943) (emphasis added).

¹⁷ See *id.*

¹⁸ U.S. CONST. amend. V.

¹⁹ *Id.* amend. XIV; see also, e.g., Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 481 n.10 (1987) (noting Fifth Amendment is applicable to states through Fourteenth Amendment).

²⁰ See VA. CODE ANN. § 1-219.1(A) (2008) (defining “public uses,” as used in Article I, § 11, “to embrace only the acquisition of property where: (i) the property is taken for the possession, ownership, occupation, and enjoyment of property by the public or a public corporation; (ii) the property is taken for construction, maintenance, or operation of public facilities by public corporations or by private entities provided that there is a written agreement with a public corporation providing for use of the facility by the public; (iii) the property is taken for the creation or functioning of any public service corporation, public service company, or railroad; (iv) the property is taken for the provision of any authorized utility service by a government utility corporation; (v) the property is taken for the elimination of blight provided that the property itself is a blighted property; or (vi) the property taken is in a redevelopment or conservation area and is abandoned or the acquisition is needed to clear title where one of the owners agrees to such acquisition or the acquisition is by agreement of all the owners”).

²¹ Commonwealth v. County Utilities Corp., 223 Va. 534, 542, 290 S.E.2d 867, 872 (1982).

²² See Miller v. Schoene, 276 U.S. 272, 279-80 (1928) (noting that “where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property”; justifying act that provided for cutting of ornamental cedar trees on private property to prevent spread of plant disease); see also Bowman v. Va. State Entomologist, 128 Va. 351, 362, 105 S.E. 141, 145 (1920) (noting that when enforcement of police power regarding public welfare submits owner to inconvenience or loss, he must sustain such loss without remedy).

compensation for legislation which, in the judgment of the legislature, was of greater value to the public.²³

The United States Supreme Court has held that no taking occurs in circumstances related to the promotion of the general welfare, unless the regulation interferes with all reasonable beneficial uses of the property taken as a whole.²⁴ In situations similar to the one you present, courts have found that regulation of gas production is in the best interest of the overall public good.²⁵

The regulation of the production of gas does not interfere "with rights in the parcel as a whole."²⁶ Further, gas owners are compensated with a guaranteed royalty interest in the gas produced.²⁷ This is a change from the owner's situation at common law where the "rule of

²³ *County Utilities*, 223 Va. at 542, 290 S.E.2d at 872.

²⁴ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978). "The constitutional inquiry, however, is not whether the remaining uses are economically feasible *to the owner*. The loss of the ability to develop or use the land as originally intended is not a categorical taking if another economic use for the land is available, even if the value of the use is less than the value attached to the owner's desired use. Thus, action which limits the ability to develop or use land as originally intended or in a manner producing the largest return on investment does not qualify as a categorical taking if another economic use for the land is available. The proper inquiry is whether the action complained of stripped *the land* of all economic uses." *Bd. of Supers. v. Omni Homes, Inc.*, 253 Va. 59, 67-68, 481 S.E.2d 460, 464 (1997) (emphasis in original); *see also* *Bd. of Supvrs. v. Greengael, L.L.C.*, 271 Va. 266, 287, 626 S.E.2d 357, 369 (2006) (discussing regulatory taking in the context of three significant factors: (a) economic impact; (b) extent that regulation interferes with distinct investment-backed expectations; and (c) character of government action). The *Greengael* court determined that although the regulations in question were in place when the owner acquired the property, it did not preclude a regulatory taking claim. *Id.* at 288, 626 S.E.2d at _____. [Editor's note: The opinion for *Greengael* published in the South Eastern Reporter differs from the opinion published in the official Virginia reporter. Therefore, no page numbers for the South Eastern Reporter are provided for the final two citations of this case. I note that the opinion is dated March 3, 2006, and was revised on May 26, 2006. *See* <http://www.courts.state.va.us/opinions/opnscvw/p/1050461.pdf> (footnote 1)]. Further, the court noted that such a challenge must assert that the "'State's regulatory power is so unreasonable or onerous as to compel compensation.'" *Id.* (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001)). In the situation you present, the owner is deemed to have leased his gas to the unit operator. Further, the owner is compensated with a royalty payment, and the use of his land is not so severely restricted to be considered unreasonable or onerous.

²⁵ In all courts that have considered the constitutionality of compulsory pooling statutes or ordinances, even though the challenges were based on a variety of legal arguments, the laws have been upheld. *See* *Superior Oil Co. v. Foote*, 59 So. 2d 85, 93 (Miss. 1952); *see also* *Shopler*, *supra* note 3, at 435 (noting that all courts addressing compulsory pooling statutes or ordinances have upheld them as valid); *id.* at 435-48; 35-37 A.L.R.2D SUPP. 434-448, pp. 400-04 (1954-2002) (containing extensive listing of cases and discussion regarding validity of compulsory pooling statutes/ordinances, concerns regarding due process, and constitutional objections).

²⁶ *Penn Central*, 438 U.S. at 130-31.

²⁷ *See* §§ 45.1-361.21, 45.1-361.22 (Supp. 2008). "The term 'Royalty' in the oil and gas industry is commonly and ordinarily understood to be that share or part of production reserved or to be paid during the life of a lease; courts will take judicial notice that the usual royalty in an oil and gas lease is one-eighth of the oil and gas produced." *Badger v. King*, 331 S.W.2d 955, 958 (Tex. App. 1959).

capture” did not provide any compensation or remedy when a neighbor’s legal well drained an entire pool of underlying migratory gas.²⁸ Additionally, pursuant to the statutorily-mandated elections and as reflected in the Board’s orders, each owner within the unit has the option to participate in the operation of the well.²⁹ This right of election represents another right or protection that gas owners did not have at common law.

In the seminal regulatory “takings” case, the United States Supreme Court has determined that a compensable taking exists when state regulations compel property owners “to suffer a physical ‘invasion’ of [their] property” or when regulatory action “denies all economically beneficial or productive use of land.”³⁰ The Court addressed the issue of regulatory taking within the context of the Fifth Amendment to the United States Constitution.³¹ The Supreme Court of Virginia, in interpreting Virginia’s constitutional takings provision, cited *Lucas* and reviewed cases that involved takings under the Fifth Amendment.³² The Board’s compulsory pooling orders do not involve a permanent physical invasion of an owner’s property or any action that would deny all other economically beneficial or productive use of the property included in the unit. There has been no taking or damage to private property for public use.³³ The Board merely follows its statutory mandate to regulate the recovery of energy resources.

Also, a property owner may seek redress for a categorical taking only when the state is exercising regulatory power over the “bundle of rights” that the owner acquired when first obtaining title to the property.³⁴ Since the “rule of capture” did not provide a right to

²⁸ “[T]he owner of a tract of land acquires title to the oil and gas *which he produces* from wells on his land, though part of the oil or gas may have migrated from adjoining lands. He may thus appropriate the oil and gas that have flowed from adjacent lands without the consent of the owner of those lands, and without incurring liability to him for drainage.” *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 561-62 (Tex. 1948) (emphasis added). With the “rule of capture,” there was no taking and no protection of correlative rights of others in the pool. *Id.* at 562; *see also* § 45.1-361.1 (2002) (defining “correlative rights” as “the right of each gas or oil owner having an interest in a single pool to have a fair and reasonable opportunity *to obtain and produce* his just and equitable share of production of the gas or oil in such pool or its equivalent without being required to drill unnecessary wells or incur other unnecessary expenses to recover or receive the gas or oil or its equivalent”) (emphasis added).

²⁹ *See* § 45.1-361.21(C)(7) (establishing statutory elections); *see also* § 45.1-361.22 (applying elections established in § 45.1-361.21 to Board orders pooling interests in coalbed methane gas drilling units).

³⁰ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (discussing regulations in context of Fifth Amendment).

³¹ *Id.*

³² *See* *Va. Beach v. Bell*, 255 Va. 395, 400, 498 S.E.2d 414, 416-17 (1998) (citing *Lucas*, 505 U.S. at 1015; *Va. Beach v. Va. Land Inv.*, 239 Va. 412, 417, 389 S.E.2d 312, 314 (1990); *County Utilities*, 223 Va. at 542, 290 S.E.2d at 872).

³³ *See supra* note 20.

³⁴ *Lucas*, 505 U.S. at 1027; *see also* *Bell*, 255 Va. at 400, 498 S.E.2d at 417 (citing *Lucas*, 505 U.S. at 1015).

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compensation when a neighbor’s legal well drained an entire pool of migratory gas, the right to compensation was not part of the “bundle of rights” held by an owner.³⁵

As noted by the Virginia Supreme Court, the Commonwealth previously followed the common law “rule of capture”: “[t]he courts are practically unanimous in holding that a landowner, under whose land there is oil, gas, or water, cannot complain of a neighbor who in pumping on his own property drains the oil, gas, or water from his lands.”³⁶ In view of the common law “rule of capture” applicable to gas ownership prior to the passage of the state’s earliest Gas and Oil Act, gas owners did not acquire the right to unilaterally prevent lawful production of the gas in their original “bundle of rights.”³⁷

To address any inequity under the “rule of capture” and protect correlative rights of others in the same pool, as well as to eliminate the race to drill unnecessary competing wells and to maximize the recovery of the Commonwealth’s natural resources to meet growing energy needs, the 1990 Session of the General Assembly enacted the current Virginia Gas and Oil Act³⁸ that allows compulsory pooling and has established the Board with statewide jurisdiction.

The issuance of a land use permit determines only the rights of an applicant in relation to the Commonwealth and the public.³⁹ Such a decision of this nature is not a determination of the rights of the parties *inter se*.⁴⁰ This analysis equally is applicable to a compulsory pooling order issued by the Board in conjunction with a gas operator’s permit.

Therefore, it is my opinion that absent an election by the owner, a Board order that deems the interest of a gas owner leased to the unit operator does not constitute a taking pursuant to Article I, § 11.

Question 3

In the event a Board order that deems the interest of an owner to be leased does not constitute a taking under Article I, § 11, you ask whether the Act is unconstitutional because it

³⁵ Conversely, even if such had been the right of the fee property owner at common law, it is unlikely that such right would now be considered a taking. “[W]here an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking because the aggregate must be viewed in its entirety.” *Keystone*, 480 U.S. at 497 (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)).

³⁶ *Couch v. Clinchfield Coal Corp.*, 148 Va. 455, 460, 139 S.E. 314, 315 (1927).

³⁷ *Id.* at 460-61, 139 S.E. at 315; *see also Lucas*, 505 U.S. at 1027; *Keystone*, 480 U.S. at 480-81 (discussing property owners’ “bundle of rights” relating to “takings” jurisprudence).

³⁸ *See* 1990 Va. Acts ch. 92, at 150, 150-69 (codified at §§ 45.1-361.1 to 45.1-361.44). Prior to 1990, the Gas and Oil Act provided for drilling units and compulsory pooling, but did not define coalbed methane or include provisions regarding coalbed methane in the drilling unit or compulsory pooling statutes. *See McClanahan*, *supra* note 4, at 540 n.532.

³⁹ *Zappulla v. Crown*, 239 Va. 566, 570-71, 391 S.E.2d 65, 68 (1990).

⁴⁰ *Id.*

fails to provide due process to such gas owners. Specifically, you ask whether the Act fails to guarantee these gas owners the right to a jury trial to determine the fair market value of their gas.

Applicable Law and Discussion

As previously noted, acts of the General Assembly are presumed to be constitutional.⁴¹ Further, the General Assembly is presumed to know what legislation it has passed and its effect.⁴² Consequently, there is a presumption that the omission of a right to a jury trial in proceedings under the Act is both intentional and constitutional.

The Virginia Constitution guarantees that a jury will resolve disputed facts.⁴³ The resolution of disputed facts has been the sole function of juries from the adoption of the Constitution to the present time.⁴⁴ However, administrative matters generally are not actions for which jury trials are available or appropriate.⁴⁵ The technical rules for the exclusion of evidence that are applicable in jury trials do not apply in administrative proceedings.⁴⁶ For example, hearsay evidence usually is allowed in administrative proceedings, but normally would be considered too unreliable for a jury and not appropriate in a judicial setting for a jury’s consideration.⁴⁷

Historically, actions at law have included a right to jury trial, while actions in equity have not provided such rights. It is axiomatic that one must look to the original basis for the suit to determine if there exists a right to a trial by jury.⁴⁸ Administrative actions were unknown at common law. “The Constitution guarantees the right of trial by jury, however, only in those cases where the right existed when the Constitution initially was adopted.”⁴⁹ Since their inception, administrative proceedings have been considered actions in equity.⁵⁰

⁴¹ See *supra* notes 12-13 and accompanying text.

⁴² 1975-1976 Op. Va. Att’y Gen. 130, 131.

⁴³ VA. CONST. art. I, § 11.

⁴⁴ *Speet v. Bacaj*, 237 Va. 290, 296, 377 S.E.2d 397, 400 (1989); see also *Etheridge v. Med. Ctr. Hosps.*, 237 Va. 87, 95, 376 S.E.2d 525 529 (1989) (noting resolution of facts is jury’s sole function).

⁴⁵ See generally VA. CODE ANN. §§ 2.2-4000 to 2.2-4031 (2008) (Administrative Process Act).

⁴⁶ *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 155 (1941); see also *Rosedale Coal Co. v. Director*, 247 F.2d 299, 305 (4th Cir. 1957) (noting that strict rules of evidence observed in courts of law may be somewhat relaxed in administrative hearings).

⁴⁷ See *Jones v. West*, 46 Va. App. 309, 341 n.8, 616 S.E.2d 790, 807 n.8 (2005) (McClanahan, J., concurring in part and dissenting in part); *Carter v. Gordon*, 28 Va. App. 133, 141, 502 S.E.2d 697, 701 (1998) (noting that hearsay evidence is admissible at administrative hearing conducted in accordance with Administrative Process Act).

⁴⁸ See *Stanardsville Vol. Fire Co. v. Berry*, 229 Va. 578, 583, 331 S.E.2d 466, 469 (1985); *Bowman*, 128 Va. at 372, 105 S.E. at 148 (noting that constitution does not guarantee right to jury trial when right did not exist prior to adoption of constitution).

⁴⁹ *Speet*, 237 Va. at 295, 377 S.E.2d at 400.

⁵⁰ VA. SUP. CT. R. 2A:5.

Likewise, Board hearings are proceedings before an administrative tribunal “pursuant to the formal litigated issues hearing provisions of the Administrative Process Act” and are on the record.⁵¹ The Gas and Oil Act itself provides for specific notice provisions.⁵² The orders and decisions of the Board are subject to appeal to the circuit court and beyond.⁵³ The Board’s administrative process and judicial review procedures provide due process for anyone having standing to challenge an action of the Board.⁵⁴

Article I, § 11, provides, in pertinent part, “[t]hat in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred.” Again, § 11 is not applicable to proceedings in which there was no right under the common law to a jury trial when the Constitution was adopted, such as ordinary suits in chancery, even though it is clearly applicable to common law actions seeking to recover damages.⁵⁵

Additionally, the doctrine of sovereign immunity continues to be “alive and well” in Virginia.⁵⁶ As an agency of the Commonwealth, the Board enjoys the privileges of sovereign immunity.⁵⁷ The Commonwealth may waive sovereign immunity; however, the “[s]tatutory language granting consent to suit must be explicitly and expressly announced.”⁵⁸ Any action challenging an order of the Board is an action against an agency of the Commonwealth. Therefore, such action requires strict compliance with all statutes, rules, or regulations supporting any waiver of the Commonwealth’s sovereign immunity.⁵⁹

⁵¹Section 45.1-361.19(C) (Supp. 2008); *see also* VA. CODE ANN. 2005 UPL Op. 209 (Supp. 2008) (acknowledging authority of Board to carry out its duties and conduct its hearings).

⁵²*See, e.g.*, § 45.1-361.19(A)-(B) (providing that notice of Board hearings are to be given by certified mail and by publication in newspaper); *see also* *Tulsa Prof’l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 484 (1988); *Combs v. Winchester*, 25 Va. Cir. 207, 217-18 (1991) (noting that state action affecting property must generally be accompanied by notification of that action; fundamental requirement of due process in any proceeding to be accorded finality is notice to apprise interested parties and afford them opportunity to present objections).

⁵³*See* § 45.1-361.9(A) (2002).

⁵⁴*See supra* note 52; *see also* § 45.1-361.19(C) (providing that “any person to whom notice is required to be given ... shall have standing to be heard at the hearing”).

⁵⁵*Berry*, 229 Va. at 583, 331 S.E.2d at 469.

⁵⁶*Wiecking v. Allied Med. Supply Corp.*, 239 Va. 548, 551, 391 S.E.2d 258, 260 (1990) (quoting *Messina v. Burden*, 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984)).

⁵⁷*Id.*

⁵⁸*Elizabeth River Tunnel Dist. v. Beecher*, 202 Va. 452, 457, 117 S.E.2d 685, 689 (1961) (noting that such waiver cannot be implied from general statutory language or by implication).

⁵⁹*See Pearsall v. Va. Racing Comm’n*, 26 Va. App. 376, 383, 494 S.E.2d 879, 883 (1998); *Va. Bd. of Med. v. Va. Physical Therapy Ass’n.*, 13 Va. App. 458, 465, 413 S.E.2d 59, 63 (1991).

Historically, Virginia law has waived the Commonwealth's sovereign immunity from suit only for very specific actions such as: (1) recovery on claims of breach of contract against the Commonwealth;⁶⁰ (2) awards for tort claims against the Commonwealth;⁶¹ (3) payment of compensation for property condemnations by the Commonwealth or its agencies;⁶² and (4) review of state administrative agency case decisions.⁶³

While any appeal of a decision of the Board would fall within the waiver of immunity in cases seeking review of administrative agency case decisions, strict compliance with the procedural requirements precedent to such an action is mandated, which would include the Rules of the Virginia Supreme Court pertaining to appeals of administrative proceedings under the Administrative Process Act.⁶⁴ Part Two A of the Rules makes no provision for jury trials. The Board has the duty to conduct hearings on compulsory pooling applications.⁶⁵ However, I find no statutory authority under the Gas and Oil Act to conduct jury trials.

Therefore, it is my opinion that the Act is constitutional, and the Act and the Board provide appropriate protection of the due process rights of gas owners in the context of the compulsory pooling hearings and orders. Further, it is my opinion that there is no right to a jury trial associated with administrative proceedings under the compulsory pooling provisions of the Act.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read "W. C. Mims", with a stylized flourish at the end.

William C. Mims

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⁶⁰ VA. CODE ANN. §§ 8.01-192 to 8.01-195 (2007).

⁶¹ Sections 8.01-195.1 to 8.01-195.9 (2007).

⁶² Section 8.01-187 (2007).

⁶³ See §§ 2.2-4000 to 2.2-4031 (Administrative Process Act).

⁶⁴ *Id.*; V. SUP. CT. R. pt. 2A ("Appeals Pursuant to the Administrative Process Act").

⁶⁵ See generally §§ 45.1-361.15(B), 45.1-361.19(C).