

Proposal Regarding Preservation of Error Issues for ALAC Work Plan

Background: The Virginia Administrative Process Act (“VAPA”) generally governs judicial review of regulations and case decisions, as defined under VAPA. While it is not expressly stated in VAPA, principles of procedural default and preservation of error have been judicially established as applying to VAPA, whereby “[a] party in an administrative proceeding must make a specific, contemporaneous objection to a ruling in that proceeding in order to challenge the ruling on appeal.” *McNally v. Virginia Dep’t of Motor Vehicles*, 80 Va. App. 483, 514 n.7 (2024). The rule, in VAPA appeals, is “analogous to those governed by Rule 5A:18,” regarding preservation of error in the trial courts to pursue on appeal. *French v. Virginia Marine Res. Comm’n*, 64 Va. App. 226, 232 n.2 (2015). Unclear in the case law is whether these same rules of procedural default apply in the context of a challenge to a regulation, i.e. must a complaining party challenging a rule or regulation have raised its issues with the agency during the regulatory process. VAPA addresses the issue in neither context—other than to say that review must generally be based only on the agency record, Code § 2.2-4027—so there is little guidance from the General Assembly on this issue.

Application of the preservation of error doctrine, whether in the context of VAPA or on appellate review, is quite harsh and with limited exceptions. As applied in the VAPA context, it often applies to individual litigants or small businesses who proceed before an agency without counsel, often due to the expense of retaining counsel, as well as a potential unawareness of the consequences of proceeding without counsel at the agency level. At the same time, the doctrine serves an essential purpose in the separation of powers between the Executive and Judicial Branches, as well as preserving judicial resources and ensuring that litigants do not treat the agency process as a mere dress rehearsal to an ultimate right of review in the circuit courts.

Proposal: That ALAC undertake a study of the preservation of error doctrine under VAPA to determine whether statutory guidelines for its application should be considered by the General Assembly. This could study (1) clarification of its application in the context of regulations versus case decisions, and (2) clarification or change of its application across the board. Comparative review of the federal and state administrative systems would be essential to inform this study. Bottom line questions to be answered: (1) how should the doctrine apply, if at all, in the context of regulations, and (2) should there be exceptions to make it less harsh? For instance, by allowing exceptions where a party is *pro se*, or adopting a plain error exception where certain plain errors of law are not subject to the doctrine.