ANNUAL REPORT
OF THE
ATTORNEY GENERAL
TO THE
GOVERNOR OF VIRGINIA
2018

COMMONWEALTH OF VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
RICHMOND
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May 1, 2019

The Honorable Ralph S. Northam
Governor of Virginia
Richmond, Virginia

Dear Governor Northam:

In accordance with Virginia Code Section § 2.2-516, I am pleased to present to you the Annual Report of the Attorney General for 2018. It is my honor and privilege to lead the exceptionally talented and dedicated team of legal professionals and staff members who proudly serve the citizens of the Commonwealth of Virginia. The following report presents a summary and highlights of the work of this Office in 2018.

With kindest regards, I am, 

Very truly yours,

Mark R. Herring
Attorney General
STATE SOLICITOR GENERAL

The Solicitor General of Virginia represents the Commonwealth in litigation before the Supreme Court of the United States and in other appellate courts in cases that call into question the constitutionality of a Virginia statute or touch upon sensitive policies of the Commonwealth. The Solicitor General also assists all Divisions of the Attorney General’s Office with constitutional and appellate issues. The Solicitor General serves as the primary point of contact for other state attorneys general on legal matters, whether involving the initiation or defense of litigation or the coordination of amicus briefs in a pending case. Increasingly, this responsibility involves the coordination of multistate litigation against unlawful or unconstitutional actions by the federal government, including executive branch officers and agencies.

In 2018, the Solicitor General argued three cases on the merits before the Supreme Court of the United States, two criminal cases (Collins v. Virginia and Currier v. Virginia) and one civil case (Virginia Uranium, Inc. v. Warren). Of particular note, in Virginia Uranium, the Solicitor General defended the constitutionality of Virginia’s three-decades-old statutory moratorium on uranium mining. The Solicitor General also authored amicus briefs on behalf of numerous states in two cases that implicated the Commonwealth’s sovereign interests: Merck Sharpe & Dohme Corp. v. Albrecht, which involved federal preemption of state tort law, and Montana v. Tipton, which concerned states’ ability to prosecute “cold cases” involving DNA evidence.

The Solicitor General participated in more than a dozen cases before the Supreme Court of Virginia and the U.S. Court of Appeals for the Fourth Circuit. In Corporate Executive Tax Board v. Virginia Department of Taxation, for example, the Solicitor General appeared before the Supreme Court of Virginia and successfully defended the constitutionality of the Department of Taxation’s method of apportioning tax liability for a company that sells electronic products stored on servers in Virginia to end users around the United States.

The Solicitor General continued to be active in multistate litigation filed in response to federal policy decisions that negatively impact the Commonwealth and provided extensive input and supporting data and documentation in a variety of cases involving healthcare, immigration, environmental matters, student loans, women’s reproductive rights and more. These cases include the following:

Protecting Virginians’ Healthcare—Based on well-founded concern that the Trump Administration might decline to defend against a lawsuit filed by Republican
attorneys general, Attorney General Herring intervened to defend Virginians’ healthcare and the federal Affordable Care Act, including the guarantee of health care coverage for persons with preexisting conditions. After Virginia and other states intervened to defend the Affordable Care Act, the Trump Administration confirmed it would seek to end all protections for preexisting conditions, Medicaid expansion, and all other aspects of the Affordable Care Act. In response to the federal district court’s unsupported finding that the Affordable Care Act is unconstitutional, Virginia has asked the court to clarify its ruling in the case (*Texas v. United States*, N.D. Texas).

**Defending DACA**—The Commonwealth of Virginia and several co-plaintiffs successfully challenged President Trump’s decision to end the Deferred Action for Childhood Arrivals (DACA) program, winning an injunction against President Trump’s attempted discontinuance of the program in February of 2018. The district court’s ruling is on appeal to the U.S. Second Circuit Court of Appeals (*New York v. Trump*, E.D. N.Y.).

**Protecting Contraception Coverage and Title X**—Virginia continued to successfully fight to protect the contraception coverage mandate that has provided hundreds of thousands of Virginia women with no-cost birth control without interference from their employers or government (*State of California v. Azar*, N.D. Cal.). In addition, early this year, Attorney General Herring, along with several of other state attorneys general, filed suit to block attempts by the Trump Administration to undermine Title X, a critical family planning and healthcare program that annually served more than 50,000 patients in Virginia (*State of Oregon v. Azar*, D. Or.).

**Preserving Net Neutrality**—The Commonwealth of Virginia and several co-plaintiffs sued the Federal Communications Commission to halt the unlawful rollback of “net neutrality” rules that have ensured a free, fair, and open internet (*State of New York v. Federal Communications Commission*, D.C. Cir.).

**Protecting the Census**—Virginia participated as a party in this successful multistate litigation opposing the Trump Administration’s attempt to include a citizenship inquiry in the upcoming 2020 census. The plaintiffs argued that the question was likely to suppress response rates, leading to decreased federal funding for important population-based programs such as highway funds, child development grants and more. The district court enjoined the federal government from adding the citizenship question to the 2020 census. The case is now on appeal to the Supreme Court of the United States (*New York v. U.S. Department of Commerce*, S.D. N.Y.).
Preventing Family Separation—Attorney General Herring joined a multistate lawsuit challenging the Trump Administration’s policy of forced family separation on the southern border. The lawsuit alleges the policy violates constitutional due process rights of the children and parents (State of Washington v. United States, W.D. Wash.).

CRIMINAL JUSTICE AND PUBLIC SAFETY DIVISION

The Criminal Justice and Public Safety Division includes the following Sections: Computer Crimes, Correctional Litigation, Criminal Appeals, Major Crimes and Emerging Threats, Health Care Fraud and Elder Abuse, and the Sexually Violent Predators Civil Commitment Section. It also includes the Tobacco Enforcement Unit. The Division represents the Commonwealth’s public safety and law enforcement agencies and also administers the 1998 Tobacco Master Settlement Agreement. The Division handles computer crimes and cyber-security issues, cases brought by inmates, criminal appeals, Medicaid fraud cases, petitions for the civil commitment of sexually violent predators, as well as prosecutions relating to child pornography, violent crimes, human trafficking, gangs, drug trafficking, money laundering, fraud, and patient abuse.

Computer Crimes Section

In 1998, the General Assembly authorized and funded the creation of a Computer Crimes Section (“Section”) within the Office of the Attorney General (“Office”). The long-term vision for the Section was to spearhead Virginia’s computer related criminal law enforcement in the 21st Century. In accord with the conditions established in Virginia Code § 2.2 511, the Attorney General may investigate and prosecute crimes within Virginia’s Computer Crimes Act, crimes that implicate the exploitation of children, and crimes involving identity theft. The Section includes three prosecuting attorneys and a Computer Forensic Unit consisting of three computer forensic examiners. The Section’s attorneys are cross-designated as Special Assistant United States Attorneys and prosecute cases in federal and state courts.

Prosecutions and Investigations

During 2018, the Section’s attorneys obtained 26 convictions for crimes of possession of child pornography, production of child pornography, distribution of child pornography, internet solicitation of minors, computer fraud, and computer harassment. Defendants in these cases were sentenced to a total of 398 years and 9 months of active imprisonment. The Section traveled extensively throughout the
Commonwealth to investigate and prosecute computer crimes in over 19 Virginia localities.

In addition to such investigations and prosecutions, the Section continued to serve as a clearinghouse for information concerning criminal and civil misuses of computers and the internet. In 2018, the Section handled over 200 investigatory leads and citizen complaints funneled through the Section’s email inbox and the FBI’s Internet Crime Complaint Center, which is the primary resource nationwide for computer crime complaints.

Computer Forensics Unit

In 2018, the Section’s Computer Forensic Unit (the “Unit”) continued to make progress towards alleviating Virginia law enforcement’s computer forensic backlog. The Unit handled 121 cases for 39 separate jurisdictions across the Commonwealth. As part of those cases, examiners forensically analyzed 633 pieces of digital evidence, including computer hard drives, cell phones, tablets, DVR recorders, and various storage devices. This is a new peak in the Unit’s seven-year existence and represents an almost 10 percent increase in the number of pieces of evidence analyzed as compared to 2017.

The deployment of the Unit’s mobile computer forensic lab, one of only three such labs in Virginia, continues to allow examiners to analyze seized evidence on-site at search warrant executions to determine which items are of evidentiary value and to otherwise further the investigation on the scene.

Data Breaches

The Section’s attorneys are also tasked with reviewing notifications from companies and organizations that experience database breaches of personal information to ensure compliance with Virginia’s database breach notification law in Virginia Code § 18.2-186.6. The Section received 767 such notices in 2018, and subsequently investigated and commenced actions against companies and organizations when necessary. Notably, in Commonwealth v. Uber Technologies, Inc., the Section obtained a settlement against the ride-sharing application Uber, whereby Uber paid $2,956,512.59 to the Commonwealth for violations of Virginia’s database breach notification law. In late 2016, Uber suffered a series of breaches of its drivers’ personal information at the hands of hackers, including 19,335 drivers in Virginia, and purposefully covered up the breach and did not report it for nearly a year. It is the largest data breach settlement obtained by the Commonwealth to date in the ten-year history of the law.
Collaborative Efforts

The Section remained an active member of the Richmond-based Virginia Cyber Crime Strike Force and the Southern Virginia and Northern Virginia Internet Crimes Against Children Task Forces. These task forces handle crimes committed via computer and the internet, including child exploitation and solicitation, internet fraud, computer intrusion, computer harassment, and identity theft. These partnerships between federal, state, and local law enforcement were created to coordinate the prosecution of the aforementioned computer crimes and to provide Virginians with centralized locations to report such crimes.

The Section’s prosecutors and investigators continued to educate and train prosecutors statewide. The Section also trained law enforcement, including school resource officers, and prosecutors at various conferences and police training academies in Virginia. These training sessions focused on computer crime law, obtaining search warrants for digital evidence, and the use of procedural tools in the investigation of computer crimes and identity theft.

Additionally, members of the Section traveled frequently throughout Virginia to speak to students and parents and deliver the Office’s Virginia Rules “Safety Net” presentation. “Safety Net” is an interactive presentation that addresses issues of cyber-bullying and sexting, and utilizes an actual case study to demonstrate how easily a predator may track down a child victim over the internet. The presentation continues to be in high demand among middle schools, high schools, and parent groups across the Commonwealth.

Correctional Litigation

The Correctional Litigation Section (“Section”) represents the Department of Juvenile Justice, the Parole Board, and the Department of Corrections. Additionally, the Section represents the Secretary of Public Safety and the Governor on writs and extradition matters, and the Commonwealth’s Attorneys on detainer matters. Members of the Section also serve as the official designee of the Attorney General on both the Criminal Justice Services Board and the Virginia Criminal Sentencing Commission.

Attorneys in the Section handle a variety of cases in federal and state courts. During 2018, the Section handled a total of 546 cases, including civil rights actions brought under 42 U.S.C. § 1983, claims pertaining to the Religious Land Use and Institutionalized Persons Act and the Americans with Disabilities Act, challenges to methods of execution, petitions for writs of habeas corpus and mandamus, inmate
tort claims, and declaratory judgment actions. These cases have increased in volume and complexity, with a 20% increase in the number of cases handled over the past five years. During 2018, the Section also handled 454 documented client advice matters.

Criminal Appeals

The Criminal Appeals Section (“Section”) handles an array of post-conviction litigation filed by, or on behalf of, individuals convicted of state crimes challenging their convictions, including criminal appeals, state and federal habeas corpus proceedings, petitions for writs of actual innocence, and other extraordinary writs. The Section’s Actual Innocence and Capital Litigation Unit reviews and responds to petitions for writs of actual innocence, and also defends against appellate and collateral challenges to all cases in which a death sentence has been imposed in both state and federal courts.

The Section represents magistrates in civil actions in state courts and § 1983 cases in federal district courts. The Section also represents the Capitol Police and the Commonwealth’s Attorneys’ Services Council. In addition, Section attorneys review wiretap applications and provide assistance to prosecutors statewide.

During the year, the Section defended against 802 petitions for writs of habeas corpus and represented the Commonwealth in 304 appeals in state and federal courts. The Section received 23 petitions for writs of actual innocence. The Section joined in two petitions for relief in Bush v. Commonwealth, wherein the Virginia Court of Appeals granted a writ of actual innocence, but also has diligently carried out its responsibility to identify petitions that fail to satisfy the high standards for such writs as set forth by the General Assembly.

Appellate Decision of Note: In Severance v. Commonwealth, Record No. 170829, the Supreme Court of Virginia upheld the appellant’s convictions for the murder of three Alexandria citizens in their homes. The defendant was convicted of first degree murder for the first homicide and capital murder for the second and third homicides, under the statutory provision making it capital murder to kill more than one person in a three-year period. The Supreme Court held that the appellant was not subjected to double jeopardy in being sentenced on both capital murder convictions.

Major Crimes and Emerging Threats

The Major Crimes & Emerging Threats Section (“MC&ET” or “Section”) is the primary criminal prosecution section of the Office. It is responsible for
prosecuting various crimes, either pursuant to the Attorney General’s jurisdiction under law or by request of local Commonwealth’s Attorneys. MC&ET is also responsible for representing a host of criminal justice and public safety agencies, and for advising the Secretary of Public Safety and Homeland Security as requested. In addition, the Section advises the Secure and Resilient Commonwealth Panel, an advisory board of the executive branch of state government that monitors and assesses the implementation of statewide prevention, preparedness, response, and recovery initiatives and—where necessary—reviews, evaluates, and makes recommendations relating to the emergency preparedness of government at all levels in the Commonwealth.

In 2018, the Section continued implementation of the Office’s public safety initiatives, including continued advancement of the prescription drug abuse agenda to combat the heroin/opioid epidemic in Virginia; the prosecution of homicides and other violent crimes, gun crimes, and human trafficking crimes; engagement in the prevention, intervention, and suppression of criminal street gang activity; participation in major financial crime investigations; and the targeting and prosecution of violators of Virginia’s Racketeer Influenced and Corrupt Organization (RICO) Act. Additionally, the Section initiated an ongoing statewide investigation into sexual abuse by clergy. The Section has worked diligently to build successful collaborative partnerships to better achieve these public safety initiatives.

Criminal Prosecutions

MC&ET is composed of 11 attorneys, including 10 are prosecutors who handle prosecutions in federal and state courts throughout the Commonwealth. In 2018, the Section assisted Commonwealth’s Attorneys in numerous prosecutions across Virginia, resulting in significant periods of incarceration for serious crimes.

In 2018, six of the Section’s prosecutors were cross-designated as Special Assistant United States Attorneys in the Eastern or Western Districts of Virginia to further enhance the valuable working relationship that exists between MC&ET and the United States Attorneys. Through a grant from the Washington/Baltimore High Intensity Drug Trafficking Area Program, two of these prosecutors were located at the U.S. Attorney’s Office in Alexandria. They are responsible for prosecuting significant federal cases relating to drug trafficking, with an emphasis on heroin-trafficking organizations.
Multi-Jurisdictional Grand Juries

In 2018, MC&ET prosecutors served as special counsel to the multi-jurisdictional grand juries in the Shenandoah Valley, Newport News, Portsmouth, Albemarle County, Richmond, King William, and Northern Virginia. By participating as special counsel in these Multi-Jurisdiction Grand Juries, MC&ET prosecutors can investigate crimes involving narcotics trafficking, gangs, cold-case homicide, sexual abuse, embezzlement, and other serious crimes.

Heroin/Opioid Agenda & Related Prosecutions

The Section continued to make prosecutions of heroin/opioid cases a priority. In 2018, MC&ET prosecutors worked with local and federal partners to prosecute more than 34 cases against dealers and traffickers, involving more than 80 kilograms of heroin with an estimated street value of approximately $16 million.

MC&ET attorneys and staff have established a major multi-faceted approach aimed at employing education, prosecution, and legislation to combat the heroin/opioid epidemic in Virginia. Section prosecutors have consistently sought ways to develop consensus among law enforcement, medical personnel, and other community stakeholders through task forces and working groups to address the epidemic. In 2018, an MC&ET prosecutor continued to lead the Hampton Roads Heroin Working Group, with the cooperation of the Office of the United States Attorney for the Eastern District of Virginia. The mission of the group is to aggressively and relentlessly target heroin dealers and dismantle supply organizations while reducing demand through community awareness, medical community leadership, and the support of service-based organizations and treatment facilities. During the year, another MC&ET prosecutor continued to lead the Northern Virginia Regional Heroin Task Force. The Section also worked to establish collaborative partnerships in Southwest Virginia. In addition, the Section’s attorneys provided training in methods of investigating and prosecuting cases involving overdose deaths linked to opioid distribution.

Prosecution of Firearms-Related Crimes

MC&ET prosecutors collaboratively work with the Virginia State Police and the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives to develop innovative strategies to prosecute crimes involving the illegal possession and trafficking of firearms throughout the Commonwealth. In addition, MC&ET prosecutors collaborate with Commonwealth’s Attorneys and United States Attorneys to prosecute crimes involving violence and firearms. In 2018, this
collaboration resulted in numerous noteworthy convictions in both state and federal
courts for crimes such as murder, malicious wounding, criminal gang participation,
use of a firearm during the commission of a felony, possession of a firearm by a
felon, and possession of firearms in conjunction with narcotics trafficking.

Hampton Roads Human Trafficking Task Force

MC&ET continues to play a significant role in the Hampton Roads Human
Trafficking Task Force. This task force, consisting of local, state, and federal law
enforcement officials, as well as prosecutors and victim advocates, was formed to
target and prosecute sex traffickers and to assist victims of human trafficking. In
2018, an MC&ET prosecutor collaborated with law enforcement and community
partners to investigate and prosecute sex traffickers in the Hampton Roads area.

Agency Representation & Emergency Management

MC&ET also serves as agency counsel to numerous public safety agencies,
including the Department of Virginia State Police (VSP), the Department of
Criminal Justice Services (DCJS), the Department of Forensic Science, the Office of
the Inspector General, the Department of Emergency Management (VDEM), the
Department of Fire Programs, the State Fire Marshal’s Office, the Virginia Fire
Services Board, and the Department of Military Affairs (which includes the Virginia
National Guard and the Virginia Defense Force). The Section also provides legal
services to the Virginia Board of Corrections.

Legal representation of the above-referenced agencies and entities includes, but
is not limited to, reviewing legislation proposed by the agency, reviewing proposed
regulations and amendments to regulations, and representing the agency in federal
and state courts. The Section also provides advice on a wide array of subjects,
including Freedom of Information Act requests, contracts, and personnel issues. In
addition, the Section is responsible for representing DCJS in administrative hearings
involving individuals licensed by the agency, such as bail enforcement agents and
private security services businesses. MC&ET attorneys represent VSP in courts
throughout the Commonwealth in cases involving motions to vacate improperly
granted expungements and in motions to quash subpoenas duces tecum where
attorneys attempt to subpoena VSP’s criminal investigative files in civil cases.
Attorneys from the Section also represent VSP in cases filed by registered sex
offenders petitioning the court to be relieved of their registration requirements.

While certain responsibilities of agency representation are shared among the
Section, MC&ET has one attorney dedicated solely to agency-representation
matters, particularly in the specialized area of emergency management and natural disasters. As such, MC&ET advises VDEM regarding the legality of emergency response actions before, during, and after declared states of emergency. The Section also coordinates with the Governor’s counsel and cabinet secretaries as needed during states of emergency. In 2018, MC&ET assisted with each of the state’s declared emergencies. In preparation for a second rally in Charlottesville in August 2018, MC&ET attorneys advised and represented the Secretary of Homeland Security, VDEM, the National Guard, and VSP personnel regarding various legal matters. MC&ET also advised VDEM regarding the Access and Functional Needs Advisory Committee to ensure inclusive emergency planning for the entire community, including individuals with disabilities and limited English proficiency.

MC&ET works closely with emergency management personnel at the local, state, and federal levels by participating in regional and national workgroups such as the National Capital Region Attorneys Group (NCRAG) and the National Emergency Management Association Legal Counsel Workgroup. NCRAG addresses legal issues specific to the National Capital Region with a focus on special security events, such as inaugurations and other special events in Washington, D.C.

Financial Crimes Investigators

The MC&ET financial crimes team is composed of two financial investigators and a criminal analyst. The mission of this team is to identify, target, and disrupt financial crimes and the financial aspects of all other crimes in the Commonwealth. The team assists Commonwealth’s Attorneys and law-enforcement officials by identifying targets for investigations, providing “on-site” financial investigative and analytical support during the execution of search warrants, sharing timely intelligence on money laundering and financial crimes, providing financial crime investigative training, and assisting in asset identification and forfeiture actions. The financial crimes team also provides assistance to prosecutors in the trial of financial cases. Over the course of the year, the team assisted local and federal law enforcement agencies in the investigation of various crimes with a financial nexus, including homicide, drug and cigarette trafficking, fraud, and embezzlement.

Health Care Fraud and Elder Abuse

Medicaid Fraud Control Unit

The Health Care Fraud and Elder Abuse Section, also known as the Medicaid Fraud Control Unit (MFCU), investigates and prosecutes allegations of Medicaid fraud and elder abuse and neglect in health care facilities. MFCU is composed of
attorneys, investigators, auditors, analysts, computer specialists, outreach workers, and administrative staff. Over the past 36 years, MFCU has successfully prosecuted providers in cases involving patient abuse and neglect or fraudulent acts committed against the Virginia Medicaid program, and has recovered over $2,001,915,545 in criminal and civil proceedings. In addition to prosecuting those responsible for health care fraud or abuse, MFCU recovered $25,114,543 in 2018 through court-ordered criminal restitution, equitable sharing, fines, penalties, civil judgments, and settlements.

MFCU has expanded its outreach efforts to seniors, law enforcement, and senior citizen service providers. MFCU is now helping to educate the community on the latest methods to effectively prevent and report elder abuse and provide an additional resource for investigative referrals. MFCU has designated Community Outreach Coordinators throughout Virginia, who establish and strengthen programmatic partnerships between MFCU and community organizations, government agencies, academic institutions, and law enforcement personnel. To educate the public, MFCU publishes an Annual Report and a quarterly newsletter, and it maintains a Twitter account and active Facebook page.

In 2018, MFCU had 162 active criminal investigations, and the Civil Investigations Squad opened 70 new civil cases.

**Sexual Violent Predators (SVP) Civil Commitment Section**

The Sexually Violent Predators Civil Commitment Section (“Section”) represents the Commonwealth in all matters arising out of the Virginia Civil Commitment of Sexually Violent Predators Act (“SVP Act”). The SVP Act was passed in 1999 and became effective by emergency legislation in April of 2003. The SVP Act allows the Office to petition circuit courts for the civil commitment of certain sexual offenders who have a mental abnormality or personality disorder and because of that condition are likely to commit future sexually violent offenses. Civil commitment requires participation in an intensive inpatient sex offender specific treatment program, at a facility run by the Department of Behavioral Health and Developmental Services. If civilly committed, the respondent is entitled to an annual review every year for the first five years, and biennially thereafter.

Since the SVP Act became effective through 2018, the Commitment Review Committee and the courts have referred a total of 1670 cases to the SVP Section. During that time, the Section has filed approximately 898 petitions for civil commitment or conditional release and has reviewed approximately 791 other cases.
where it was determined that offenders did not meet the statutory criteria to be declared a sexually violent predator. In 2018, fifty-nine new cases were referred to the Office, and the Section filed approximately 45 new petitions, made 421 court appearances and travelled approximately 65,470 miles. Since 2003, 774 persons have been determined to be sexually violent predators.

Tobacco Enforcement Unit

The Tobacco Enforcement Unit (“TEU” or “Unit”) administers and enforces the Tobacco Master Settlement Agreement (MSA), a 1998 agreement between 46 settling states and certain cigarette manufacturers, known as Participating Manufacturers. The MSA obligates Participating Manufacturers to make annual payments to the settling states based upon cigarette sales and other factors outlined in the agreement. TEU’s administrative and enforcement efforts are designed to ensure that Virginia is eligible to receive its full annual MSA payment allotment.

In 2018, the Commonwealth received $140,343,699.78 in MSA payments from the Participating Manufacturers. MSA settlement funds are used to fund medical treatment for low-income Virginians, to stimulate economic development in former tobacco growing areas, and to establish programs to deter youth smoking and prevent childhood obesity.

The Unit’s enforcement efforts include maintaining the Virginia Tobacco Directory, which lists tobacco product manufacturers that have been certified as compliant with Virginia law, and collecting information on cigarette stamping activity and all cigarettes sold throughout the Commonwealth. The Unit enforces the MSA’s implementing and complimentary legislation through review, legal analysis and investigation of manufacturer applications to sell cigarettes in the Commonwealth, investigation of alleged violations of law, representation of the Commonwealth in actions under the Virginia Tobacco Escrow Statute, audits of Tax Stamping Agents, retail inspections, seizures of contraband products, and participation on law enforcement task forces with federal, state, and local agencies to combat cigarette trafficking.

Specifically in 2018, TEU conducted 1,404 retail inspections, petitioned courts for destruction orders for 1,538 packs of contraband cigarettes, detected and investigated 59 false businesses involved in cigarette trafficking, provided assistance to law enforcement on 29 occasions involving search warrants and investigations, made 10 court appearances in cigarette trafficking and tobacco-related criminal cases, filed 14 civil cases involving seized contraband, and reviewed 31 certification
applications from cigarette manufacturers to determine whether they were compliant with Virginia law.

**GOVERNMENT OPERATIONS AND TRANSACTIONS DIVISION**

The Government Operations and Transactions Division provides comprehensive legal services to secretariats, executive agencies, state boards, and commissions for much of the Commonwealth’s government. Composed of six Sections—1) Financial Law & Government Support, 2) Environmental, 3) Technology and Procurement Law, 4) Transportation, 5) Real Estate and Land Use, and 6) and Construction—the Division provides legal advice across a wide range of substantive areas such as employment, contracts, technology, litigation, purchasing, environment, and the regulatory process. The Division regularly assists state agencies with complex and sophisticated transactions and also represents those agencies in court, often in close association with other attorneys in the Office of the Attorney General (“Office”).

**Financial Law and Government Support Section**

The Financial Law and Government Support Section (FLAGS or “Section”) provides legal counsel to a wide variety of agencies, boards, commissions, and authorities, including those reporting to the Secretaries of Administration, Agriculture and Forestry, Commerce and Trade, Commonwealth, Finance, Public Safety and Homeland Security, and Veterans and Defense Affairs, as well as to the Secretariats. FLAGS provides representation and advice on regulatory enforcement, administrative appeals, litigation, employment issues, Freedom of Information Act and Conflict of Interests Act matters, and contract negotiations.

The Section represents the State Board of Elections (SBE) and the Department of Elections (ELECT) on state and federal elections matters. During the year, the Section represented SBE and ELECT in all litigation arising out of the administration of the federal midterm elections.

FLAGS also provides advice to the agencies and boards directly involved with the finances of the Commonwealth, including the Departments of Planning and Budget, Taxation, Treasury, and Accounts; the Comptroller; and the Auditor of Public Accounts. During the year, as in previous years, the Section served as litigation counsel to the Department of Taxation in matters challenging the assessment and collection of state taxes.
In addition, FLAGS advises a number of boards and agencies whose mission is to foster increased expansion of the Commonwealth’s economy, including the Virginia Economic Development Partnership, the Virginia Tourism Authority, and the Virginia Film Office. The Section also represents the Tobacco Region Revitalization Commission (TRRC). Continuing with past efforts, the Section provided TRRC with legal guidance in enacting policy changes that will significantly increase the efficacy of TRRC and the stability of its funds for future years.

The Section represents the Department of Alcoholic Beverage Control and the Virginia Alcoholic Beverage Control Authority (collectively “ABC”). During the year, the Section handled a number of challenges to administrative agency decisions, and it continued to advise ABC on matters such as licensing, employment disputes, marketing efforts, regulatory action, and law enforcement operations.

FLAGS handled over 500 lawsuits on behalf of the Department of Professional and Occupational Regulation (DPOR) and the Virginia Employment Commission (VEC), and it advised the Virginia Racing Commission (VRC) on an extensive regulatory undertaking relating to the implementation of pari-mutuel wagering.

In addition to these efforts, the Section partnered with the Department of Veterans Services and the Virginia State Bar to provide free estate planning clinics for veterans. This is part of an ongoing veteran’s assistance initiative spearheaded by the Office in 2015, which is supported by volunteer attorneys from the Section who provide basic estate planning services and advice to eligible veterans.

**Environmental Section**

The Environmental Section (“Section”) represents agencies reporting to the Secretaries of Natural Resources, Agriculture and Forestry, Health and Human Resources, Finance, and Commerce and Trade, including the Department of Environmental Quality (DEQ), the Department of Conservation and Recreation, Soil and Water Conservation Districts, the Department of Taxation, the Department of Forestry, the Division of Consolidated Laboratory Services of the Department of General Services, the Department of Game and Inland Fisheries, the Marine Resources Commission, the Environmental Health Division of the Virginia

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1 Following the conversion of the Department of Alcoholic Beverage Control to an Authority on January 15, 2018, the Department continued to operate dually with the Authority for the duration of the calendar year in order to facilitate the transition.
Department of Health, the State Veterinarian’s Office and the Consumer Protection Division of the Department of Agriculture and Consumer Services, and the Department of Mines, Minerals and Energy. The Section provides a wide range of legal services, including litigation, regulatory and legislative review, counseling, transactional work, representation in personnel issues, responding to subpoenas issued to agency personnel, real estate work, and related matters.

The Section represents DEQ’s Air, Water, Land Protection and Revitalization, and Enforcement divisions. Throughout the year, the Section worked closely with DEQ senior enforcement staff to develop and implement procedures for the referral of cases for judicial enforcement actions. A dozen such cases were referred, and by year’s end, six cases had been filed in circuit courts around the Commonwealth to enforce air, water, and waste laws.

Enforcement actions include several cases involving severe erosion and sediment control and stormwater management problems in environmentally sensitive areas, including an enforcement action against the developer of the Mountain Valley Pipeline; a lawsuit requesting injunctive relief and civil penalties against a landowner in Richmond County conducting unauthorized land disturbance in the vicinity of Fones Cliffs; and an action against the operator of a landfill in Petersburg for failure to undertake daily operations critical to proper landfill management.

The Section advised the Department of Forestry on a range of matters in 2018, including numerous real estate transactions, Freedom of Information Act requests, employment issues, and various contractual arrangements.

The Section represented the Virginia Department of Health (VDH) and its Office of Environmental Health Services and Office of Drinking Water in several litigation and non-litigation matters in 2018. The Section continued to represent VDH with respect to the enforcement of an Agreed Order entered in 2017 concerning a Mecklenburg County restaurant that operated without a permit. The Section also advised VDH with respect to administrative enforcement actions against hotels, waterworks, a campground, and various onsite sewage systems and private wells.

The Section represented the Department of Game and Inland Fisheries, Department of Mines, Minerals and Energy, Virginia’s Soil and Water Conservation Districts, and Department of Conservation and Recreation in various litigation and non-litigation related matters in 2018.
The Section’s Animal Law Unit handled more than 344 criminal, civil, regulatory, training, and other animal-related matters, including assisting multiple localities with animal cruelty, seizure, neglect, and animal fighting prosecutions. The Unit was appointed as special prosecutor for 16 animal cruelty, animal fighting, and wildlife trafficking cases. Of note, the Unit concluded its large wildlife-trafficking case that resulted in the conviction of all 11 defendants for illegally buying or selling wildlife (foxes and coyotes) to stock their fox pens. This case resulted in 5 fox pens being shut down permanently. The Unit also investigated and initiated the prosecution of 6 animal fighting cases involving birds and dogs and won seizure hearings on over 300 fighting birds and 66 fighting dogs.

Since its inception three years ago, the Animal Law Unit has handled more than 900 animal-related matters. It has also trained law enforcement and prosecutors on animal crimes on a state, national, and international scale.

**Technology and Procurement Law Section**

The Technology and Procurement Law Section (“Section”) provides legal counsel to the Virginia Information Technologies Agency, the Department of General Services, the Information Technology Advisory Council, the 9-1-1 Services Board, the Virginia Geographic Information Network Advisory Board, the Innovation and Entrepreneurship Investment Authority, the Secretary of Administration (for intellectual property, procurement, supplier diversity, and data sharing issues), the State Corporation Commission (for procurement matters), the Department of Small Business and Supplier Diversity (for procurement and supplier diversity issues), the Virginia Foundation for Healthy Youth, the Data Sharing and Analytics Advisory Committee, and the Identity Management Standards Advisory Council, while also helping agencies and institutions represented by other sections of the Attorney General’s Office when assistance is needed with procurements, contracts, technology issues, intellectual property, or conflicts of interest.

In 2018, the Section provided necessary legal support to the Commonwealth’s central procurement agencies, the Department of General Services and the Virginia Information Technologies Agency, in regard to development or revision of their respective procurement regulations and policies, and to assist with numerous procurements, debarments, contracts, and associated disputes and litigation, joint procurements with other states, Freedom of Information Act requests and disputes, data privacy, and employment matters.
The Section provided legal assistance needed for Commonwealth initiatives such as transitioning the Commonwealth’s information technology infrastructure to a modernized, multi-supplier environment, ensuring equal opportunity and access in state contracting and public service, and acquiring rights and sculptures for the Virginia Women’s Monument. The Section’s assistance was vital in drafting, reviewing, and leading the negotiation of four new information technology infrastructure agreements entered in 2018 to meet the needs of all Executive Branch agencies and having an initial value exceeding $700 million. The Section provided legal advice and negotiation assistance to address challenges and disputes that arose during implementation of the new agreements and four other infrastructure agreements awarded the previous year, and in management of the litigation and negotiation of the settlement with the Commonwealth’s previous information technology vendor.

The Section assisted the Attorney General’s Opinions Counsel with analysis and drafting of several conflict of interest opinions requested by qualified officers. The Section also made statewide educational presentations to enhance the knowledge and skills of state and local government procurement officers.

The Section assisted general counsel for dozens of other Commonwealth agencies, institutions, and boards, or provided such assistance to the client agencies directly, in regard to procurement and contract matters, technology acquisitions, data security and privacy, conflicts of interest, trademark, copyright, and other intellectual property matters, electronic transactions, and litigation over procurement or small business enhancement disputes.

**Transportation Section**

The Transportation Section (“Section”) represents and advises the state agencies, offices, authorities, and boards that report to the Secretary of Transportation. These bodies include the Virginia Department of Transportation (VDOT), the Commonwealth Transportation Board, the Department of Motor Vehicles, the Commission on the Virginia Alcohol Safety Action Program, the Department of Rail and Public Transportation, the Virginia Port Authority (Port Authority), the Virginia Port Authority’s Board of Commissioners, the Virginia Department of Aviation, the Virginia Aviation Board, the Motor Vehicle Dealer Board, the Virginia Commercial Space Flight Authority, and Virginia’s Office of Transportation Public-Private Partnerships. The Section also advises and acts as counsel to the Secretary of Transportation.
Section attorneys serve their transportation clients in numerous administrative, regulatory, transactional, contractual, and litigation matters, including Public-Private Transportation Act transactions; bond issuance and bond refunding and refinancing transactions; contract negotiation, drafting, and dispute issues; eminent domain/condemnation issues and litigation; outdoor advertising and roadway sign issues relating to highway rights-of-way; land use issues, including permit agreements for the construction and operation of cell and wireless towers in highway rights-of-way; legal jurisdictional transfer requests involving federal agencies; personnel issues; environmental matters; procurement strategies and disputes; automobile titling and registration issues; driver licensure and regulation issues; motor vehicle fuels tax collection and enforcement; motor vehicle dealer licensure, regulation and disciplinary matters; motor vehicle dealer franchise laws and regulation of disputes between franchise dealers and manufacturers; Virginia Alcohol Safety Action Program administration; transportation legislation; rail and other grant agreements; Freedom of Information Act requests; agency procurement contract review; and administrative hearings involving a wide variety of issues and transportation agencies or entities.

Throughout the year, the Section advised VDOT regarding multiple key transportation projects. The Section provided extensive legal advice and drafted preliminary Public-Private Transportation Act (PPTA) transactional and procurement documents. The Section supported over $7 billion worth of transportation public-private partnership procurements and active design and construction projects in 2018. These include (i) the Hampton Roads Bridge-Tunnel Expansion ($3.5 billion, procurement phase), (ii) the Transform 66 P3 Project ($2.5 billion, design phase), (iii) the I-95 HOT Lanes Fredericksburg Extension ($600 million, procurement phase), (iv) the I-495 Capital Beltway Express Lanes Northern Extension ($500 million, procurement phase), and (v) the I-395 HOT Lanes Extension ($500 million, construction phase). In addition, the Office supported several completed P3 projects, including completion of improvements to the Downtown/Midtown Tunnels and the sale and refinance of Pocahontas Parkway.

In addition to its general counsel and transactional roles, the Section continued to represent VDOT in a variety of litigation matters. In Bruce & Tanya & Associates, Inc. v. Commissioner of Highways, the Section helped defend against a First Amendment challenge to VDOT’s control of advertisements displayed in state-owned land within the limits of the highways. The U.S. District Court for the Eastern District of Virginia upheld the sign statutes. This case is currently on appeal to the Fourth Circuit.
During the year, the Section was actively involved in advising the Port Authority. Section attorneys assisted the Port Authority and its Board of Commissioners in numerous matters related to container and rail logistics at the Port of Virginia. With the legal support of the Office, the Port of Virginia is investing approximately $750 million to double the capacity of its two largest container terminals. These civil works contracts are being managed on time, on budget, and with minimal disputes.

The Section was heavily involved in rail transportation and transit issues throughout the year and continued to assist the Department of Rail and Public Transportation (DRPT) by providing daily advice on transactional agreements relating to federal rail grants, the Washington Metrorail Safety Commission Interstate Compact, the Atlantic Gateway Project, right-of-entry agreements, and high-speed rail efforts. In particular, the Section compiled, analyzed, and completed legal reviews of nearly 30 transit grant agreements, involving funding of over $200 million, and eight railroad grant agreements, involving funding of over $25 million. The Section also assisted DRPT with three agreements related to the Washington Metropolitan Area Transit Authority (WMATA) and the 2018 General Assembly’s restructuring of the funding scheme for WMATA.

Other work commenced in 2018 included the development of three grant agreements involving DRPT, the Port Authority, the City of Norfolk, and Commonwealth Railway for the Commonwealth Railway’s marshalling yard expansion project at the Virginia International Gateway marine terminal. The current estimated cost for the project is over $28 million.

Real Estate and Land Use Section

Virginia, through its various agencies, departments, educational institutions, museums and authorities, is one of the largest holders of real property interests in the Commonwealth. The Real Estate and Land Use Section (“Section”) handles many of the attendant real estate transactions and serves as the Office’s subject matter expert in litigation involving real property interests. It also provides real estate support to public institutions of higher education, public museums that do not have the requisite authority to act independently under the Restructured Higher Education Financial and Administrative Operations Act.

The Section assumes multiple duties, including giving advice to state agencies with significant real estate activity, some in association with the Bureau of Real Estate Services of the Department of General Services (DGS). Matters routinely
handled by the Section include acquisitions, surplus sales, leases, conservation easements, utility easements, and interagency transfers of property. In 2018, the Section represented various state conservation agencies in the acquisition of 28 conservation easements covering 24,000 acres of land. The Section also assisted agencies in the acquisition of approximately 7,200 acres of land either by gift or purchase, the total purchase price of which, exclusive of donations, was approximately $55 million. The Section provided support to DGS in the sale of surplus property, including the Center for Innovative Technology, the Northern Virginia Training Center sale, and White Oak Technology Park.

In addition, the Section serves as general counsel to the Department of Historic Resources, the Virginia Outdoors Foundation and the Fort Monroe Authority, and in this capacity, facilitated the acquisition of over 50 easements over historic property covering nearly 1,000 acres of land held by the Board of Historic Resources, including the easement at Malvern Hill Battlefield in Henrico and Charles City Counties; assisted in the establishment and administration of a $40 million grant from the Forest Community Opportunities for Restoration and Enhancement Fund to mitigate forest fragmentation impacts of the Atlantic Coast Pipeline and Mountain Valley Pipeline; and provided support in the erection of various monuments in Capitol Square, including the Indian Tribute and the Women’s Monument, and other monuments such as the proposed Emancipation Proclamation and Freedom Monument on Brown’s Island.

In 2018, the Section represented the Department of Corrections in the acquisition of its headquarters in the City of Richmond and assisted Virginia Alcoholic Beverage Control Authority in the relocation of its offices and warehouse space, as well as with leases for approximately 50 stores throughout the Commonwealth. Also, in providing real estate support to the various public institutions of higher education, the Section assisted Radford University in final negotiations and closing on a master lease with the University’s Real Estate Foundation involving approximately 40 multi-family and single-family buildings to increase student housing.

In addition, the Section reviews and approves all required bid, payment, and performance bonds for construction projects managed by DGS, Norfolk State University, the Department of Military Affairs, the Department of Game and Inland Fisheries, and the Department of Conservation and Recreation and serves as special real estate counsel to independent authorities upon request. In 2018, the Section
completed 46 payment and performance bond approvals for various construction projects with a total value of just under $121 million.

**Construction Section**

The Construction Section (“Section”) handles all litigation and claims and provides advisory services concerning the construction of roads, bridges, buildings and other infrastructure for the Commonwealth’s agencies and institutions. The Section defends client agencies, makes claims, and files lawsuits against contractors, design professionals or surety companies to preserve the Commonwealth’s interest in ensuring successful projects. The Section also regularly advises VDOT and other state agencies, colleges, and universities during the administration of building, road, and bridge contracts. These efforts support effective partnerships between the Commonwealth, general contractors, and road builders, and facilitate timely and efficient completion of construction projects across the Commonwealth to benefit the residents of Virginia and its visitors.

In 2018, the Section represented the Commonwealth on approximately $112 million in formal claims and litigation. Of those matters brought to conclusion in 2018, claims and litigation seeking over $58 million from the Commonwealth were resolved for a collective total payment by the Commonwealth of approximately $1.4 million. The Section also recovered payments to the Commonwealth, its agencies, departments, and colleges and universities totaling approximately $14 million.

The Section provided legal advice to VDOT for every major transportation construction project underway in 2018. This advice was given over the course of each construction project and continued as needed throughout the claims process and any ensuing litigation. Advisory and dispute resolution services assisted the multimodal I-66 Corridor Transformation, the widening of I-64, the Bus Rapid Transit expansion in Richmond and Henrico, and dozens of other bridge rehabilitation and road improvement projects throughout the Commonwealth.

The Section advised the Virginia Port Authority on contract administration issues related to over $1 billion in construction contracts at the Port of Virginia. To date, these services are protecting the Commonwealth’s interests while proactively working with the contractors to ensure timely, cost-effective and high-caliber project completion.

The Section also handled many dispute and advisory services for a broad array of other agencies, which included contract administration and negotiation recovery
for defective work, payment and delay disputes, contractor terminations, surety recoveries, and claims.

CIVIL LITIGATION DIVISION

The Civil Litigation Division (“Division”) of the Office of the Attorney General (“Office”) is responsible for the majority of the affirmative and defensive civil litigation for the Commonwealth. The Division advances the rights of consumers, victims of discrimination and malpractice, ratepayers, and taxpayers. It also defends the interests of the Commonwealth, its agencies, institutions, and officials in civil matters. The Civil Litigation Division consists of six sections: Consumer Protection, Trial, Insurance and Utilities Regulatory, Financial Recovery, Health Professions, and the Division of Human Rights and Fair Housing. The Division handles civil enforcement actions pursuant to Virginia’s consumer protection and antitrust laws, counsels consumers with questions and complaints, and mediates disputes between consumers and businesses. The Division also prosecutes licensed medical professionals who have acted contrary to law, investigates civil rights and fair housing claims, pursues debts owed to Commonwealth agencies, and serves as consumer counsel in regulatory matters before the State Corporation Commission.

Consumer Protection Section

The Consumer Protection Section (“Section”) enforces state and federal laws to protect Virginia consumers from deceptive and illegal business practices. The Section includes five units: Predatory Lending; Charitable Solicitations and Deceptive Conduct; Antitrust; Dispute Resolution; and Counseling, Intake and Referral. During 2018, the Section’s enforcement Units recovered more than $33.3 million in relief for consumers and payments from violators. At the close of the fiscal year on June 30, 2018, the Office transferred $4,462,269.71 to the Commonwealth’s General Fund collected as a result of the Section’s efforts.

Predatory Lending Unit

The Predatory Lending Unit (PLU) investigates and prosecutes suspected violations of state and federal consumer lending statutes, including laws concerning payday loans, title loans, consumer finance loans, mortgage loans, mortgage servicing, and foreclosure rescue services.

In January 2018, PLU joined 48 other states and the District of Columbia in reaching a $45 million settlement with New Jersey-based mortgage lender and
servicer PHH Mortgage Corporation to resolve allegations that PHH improperly serviced mortgage loans from January 1, 2009 through December 31, 2012. The Consent Judgment provides for $30.4 million in payments to borrowers and requires PHH to follow comprehensive mortgage servicing standards, conduct audits, and provide audit results to a committee of states.

In February of 2018, PLU obtained court approval of an Assurance of Voluntary Compliance entered with several defendants in the case of *Commonwealth v. Field Asset Service Team, LLC* (Richmond City Cir. Ct.). In this litigation, PLU alleged that the lenders’ open-end credit plan loans violated Virginia consumer finance statutes and the Virginia Consumer Protection Act (VCPA) by imposing illegal charges on borrowers during the required finance-charge-free grace period and by misrepresenting that the loans were legal and permissible. The suit also alleged that the debt collectors violated the VCPA by implementing illegal wage assignments and by misrepresenting that these loan debts were valid. The settlement banned the lenders from consumer lending activity in Virginia, required refunds of all interest and fees paid by consumers in excess of 12% of the loan amount—totaling approximately $85,000, required forgiveness of all outstanding remaining debt of Virginia consumers—totaling over $63,000, and required the lenders to pay $10,000 in civil penalties and $10,000 in attorneys’ fees. The settlement banned the debt collectors from all debt collection activity in Virginia and required them to pay $75,000 in civil penalties and $10,000 in attorneys’ fees.

Also in February, PLU obtained court approval of an Assurance of Voluntary Compliance entered with MoneyLion of Virginia, LLC. In *Commonwealth v. MoneyLion of Virginia, LLC* (Richmond City Cir. Ct.), PLU alleged that the lender violated the VCPA by falsely representing that it was licensed by the Virginia Bureau of Financial Institutions (BFI); by charging annual interest rates as high as 359% when it did not qualify for any exception to Virginia’s 12% interest rate cap; and by charging an unlawful $15 check processing fee for loan payments made by check. The settlement prohibited the lender from misrepresenting its licensure status, allowable interest rates and fees; required refunds of all interest and fees that consumers paid to it in excess of the principal amount loaned, plus 12% annual interest totaling $359,811.50; required forgiveness of all amounts the lender contended consumers owed in excess of 12% totaling $2,354,097.05; and required the lender to pay the Commonwealth $10,000 in civil penalties and $20,000 in attorneys’ fees.
In March of 2018, PLU filed suit against Future Income Payments, LLC; FIP, LLC; and their owner, Scott Kohn (collectively, FIP), regarding a deceptive “pension sale” scheme that targeted elderly veterans with military pensions and other public service retirees in financial distress. In *Commonwealth v. Future Income Payments, LLC* (Hampton Cir. Ct.), PLU alleged that FIP violated the VCPA by misrepresenting that it was “buying” portions of Virginia pensioners’ monthly payments when it was actually making high-cost installment loans with interest rates that far exceeded the legally-mandated 12% annual interest rate cap. In November 2018, PLU obtained a Permanent Injunction and Final Judgment against FIP. The judgment also provided $20,098,159.63 in debt forgiveness for borrowers, awarded $414,473.72 in restitution, imposed civil penalties of $31,740,000.00, and awarded the Commonwealth $198,000.00 for its costs and attorneys’ fees. This litigation was integral to forcing FIP to end its operations.

In December of 2018, PLU joined 49 other states and the District of Columbia in a multistate settlement with Wells Fargo Bank, N.A. regarding allegations that it violated state consumer protection laws by opening millions of unauthorized accounts and enrolling customers into online banking services without their knowledge or consent, improperly referring customers for enrollment in third-party renters and life insurance policies, improperly charging auto loan customers for force-placed and unnecessary collateral protection insurance, failing to ensure that customers received refunds of unearned premiums on certain optional auto finance guaranteed asset/auto protection products, and incorrectly charging customers for mortgage rate lock extension fees. Under the settlement, Wells Fargo was required to pay the states $575 million, including $11,546,080 to Virginia. Wells Fargo has provided direct consumer restitution through federal regulatory orders, class action settlements, and ongoing voluntary remediation efforts. In addition to those efforts, the settlement required Wells Fargo to implement a redress review program so that consumers who were not made whole already through other restitution efforts can have their claims reviewed.

**Charitable Solicitations and Deceptive Conduct Unit**

The Charitable Solicitations and Deceptive Conduct Unit (CSDCU) investigates and prosecutes suspected violations of the VCPA, the Virginia Solicitation of Contributions (VSOC) law, and other state and federal consumer protection statutes. CSDCU also serves as counsel to the Office of Charitable and Regulatory Programs within the Virginia Department of Agriculture and Consumer Services.
In May of 2018, CSDCU filed suit against Service Dogs by Warren Retrievers, Inc. (SDWR), a Virginia-based organization that raises, trains, and places service dogs called “Diabetic Alert Dogs” and its President/CEO Charles “Dan” Warren, Jr. In Commonwealth v. Service Dogs by Warren Retrievers, Inc. (Madison Cty. Cir. Ct.), CSDCU alleged that SDWR and Warren violated the VCPA and the VSOC law by misleading and deceiving consumers about its Diabetic Alert Dog program; the dogs’ testing, training, skills, abilities, and efficacy; what goods or services would be included in the costs of the dogs; how the dogs could be paid for; how long consumers would have to pay for them; whether consumers could receive refunds; whether the program was endorsed by JDRF (formerly called the Juvenile Diabetes Research Foundation); and whether Warren had misrepresented his military service. The Complaint seeks, among other relief, an injunction against future violations of the VCPA and the VSOC law, restitution for consumers, civil penalties, attorneys’ fees, and the Commonwealth’s expenses. The matter remains in active litigation.

In June of 2018, CSDCU filed suit against Purdue Pharma L.P., Purdue Pharma Inc., and The Purdue Frederick Company (collectively, “Purdue”), claiming that the company deceptively marketed prescription opioids; exaggerated or misrepresented the benefits of opioid use; failed to disclose or minimized the risks associated with the use of opioids, including the prevalence of side effects and addiction; overstated the ease with which addiction to opioids could be mitigated or prevented; and downplayed the prevalence of addiction by representing that many individuals who display signs of opioid addiction were actually experiencing “pseudoaddiction” (Commonwealth v. Purdue Pharma L.P. (Tazwell Cty. Cir. Ct.)). The Complaint seeks injunctive relief, restitution, civil penalties, attorneys’ fees, and the Commonwealth’s expenses, as well as abatement of the public nuisance and the damages associated with the public nuisance created by Purdue. The matter remains in active litigation.

Also in June of 2018, CSDCU filed suit against Hearts 2 Heroes, Inc. d/b/a Active Duty Support Services, Inc. alleging that the company violated the VCPA and the VSOC law by misrepresenting itself as a charitable organization, using donated funds for personal purposes, and instructing door-to-door sales staff to falsely tell consumers they were retired service members or volunteers licensed to solicit, and that donated funds would be used to send care packages overseas (Commonwealth v. Hearts 2 Heroes, Inc. (Henrico Cty. Cir. Ct.)), CSDCU The lawsuit was announced as part of “Operation Donate with Honor,” a nationwide law enforcement sweep to crack down on fraudulent charities that exploit the name of America’s veteran community to solicit donations.
In another action announced as part of “Operation Donate with Honor,” CSDCU and 15 other states reached a settlement with Operation Troop Aid, Inc., a Tennessee-based charity, and its President and Chief Executive Officer, Mark Woods. In Commonwealth v. Operation Troop Aid, Inc. (Isle of Wight Cty. Cir. Ct.), CSDCU alleged that the charity violated the VSOC law and failed to conduct proper oversight of a commercial co-venture called “Operation Teddy Bear,” in which retail stores sold teddy bears in military uniforms and supposedly would provide a fixed dollar amount to the charity for each bear sold for the express purpose of sending care packages to service members. The charity also allegedly failed to maintain donated funds as restricted funds and improperly spent funds on non-charitable purposes. The settlement required the charity to dissolve and prohibited Woods from becoming an employee, officer, director, board member, or other fiduciary with a non-profit corporation and from soliciting on behalf of a non-profit corporation. The settlement also included a $10,000 civil penalty to be held in abeyance to ensure compliance with the settlement’s injunctive terms.

In December of 2018, the Office represented the Commonwealth, which joined 41 other states and the District of Columbia in reaching a multistate settlement with Encore Capital Group, Inc. and its subsidiaries, Midland Credit Management, Inc. and Midland Funding, LLC (collectively, “Midland”), one of the nation’s largest debt buyers. The $6 million settlement required Midland to eliminate or reduce the judgment balances of 689 Virginians totaling $879,729. Midland also is required to reserve $25,000 to reimburse Virginians who paid the company for debts they did not owe or who paid the company more than what they owed. Additionally, the settlement required Midland to reform its debt buying and collection practices and to pay $157,123 to Virginia.

Antitrust Unit

The Antitrust Unit (AU) investigates and prosecutes suspected violations of state and federal antitrust laws. AU also advises state agencies on antitrust issues and reviews proposed mergers and other transactions for their potential impact on competition.

In 2017, the Office, through AU, engaged in litigation that successfully blocked the merger of Anthem and Cigna in United States v. Anthem, Inc. and Cigna Corp. (D.D.C.). This litigation was significant because the merger would have eliminated competition in several health care sectors, and the court noted in its order the particularly strong negative market consequences that would be suffered in the Richmond, Virginia area. In 2018, Virginia, 11 other states and the District of
Columbia reached a settlement agreement with the defendants to recover $2.975 million in attorneys’ fees and costs from the investigation and litigation of the case. Virginia’s share of recovered attorney’s fees and costs was $86,788.

In June of 2018, the Commonwealth, represented by AU, and 41 other states entered into a $100 million settlement with Citibank for claims related to fraudulent and anticompetitive conduct involving the manipulation of the London Interbank Offered Rate (LIBOR) between 2007 and 2010. LIBOR is a benchmark interest rate that affects financial instruments worth trillions of dollars and has a widespread impact on global markets and consumers. As a result of its fraudulent conduct, Citibank made millions of dollars in unjust gains when government entities and non-profit organizations entered into swaps and other financial instruments with Citibank without knowing that Citibank and other banks on the USD-LIBOR-setting panel were manipulating their LIBOR submissions. Virginia state agencies and not-for-profit counterparties to these transactions are expected to receive approximately $3.4 million from the settlement.

In December of 2018, the Commonwealth, represented by AU, and 39 other states entered into a $68 million settlement with UBS AG for claims related to fraudulent and anticompetitive conduct involving the manipulation of the LIBOR between 2006 and 2010. Virginia state agencies and not-for-profit counterparties are expected to receive approximately $1.25 million from the settlement.

**Counseling, Intake and Referral Unit**

The Counseling, Intake and Referral Unit (CIRU) serves as the central clearinghouse in Virginia for the receipt, evaluation, and referral of consumer complaints. All complaints are handled within CIRU, referred to the Section’s Dispute Resolution Unit or investigators, or referred to another local, state, or federal agency having specific jurisdiction. CIRU also operates the state’s Consumer Hotline through which consumers are helped and informed about where specific complaints should be filed.

In 2018, CIRU received and processed 4,054 written consumer complaints. In addition, CIRU received and handled 23,014 telephone calls through the Consumer Hotline.

**Dispute Resolution Unit**

The Dispute Resolution Unit (DRU) offers alternative dispute resolution services for complaints that do not allege or demonstrate on their face a violation of
any consumer protection law. Participation in this facilitative process is voluntary and allows both the consumer and the business representative to share their perspectives. Where a complaint alleges or demonstrates a violation of law, the matter may be referred to a Section investigator, who may either attempt to resolve the complaint, or, where a pattern or practice of violations is found, prepare a law enforcement action.

In 2018, DRU along with CIRU and the Section’s investigators resolved or closed 3,635 complaints. Consumer recoveries from closed complaints totaled $657,295.32.

**Trial Section**

The Trial Section handles most of the civil litigation filed against the Commonwealth. The cases defended include tort claims, civil rights issues, contract issues, denial of due process claims, defamation claims, employment law matters, Freedom of Information Act challenges, contested workers’ compensation claims, and constitutional challenges to state laws and regulations. The Section also represents the Commonwealth in matters involving Uninsured Motorists/Underinsured Motorists, the Birth-Related Neurological Injury Compensation Program, and the Commonwealth Health Research Board. The Trial Section consists of three Units: General Civil Unit, Employment Law Unit, and Workers’ Compensation Unit.

**General Civil Trial Unit**

The General Civil Trial Unit (“Unit”) provides legal defense in state and federal courts to all agencies of the Commonwealth, including the Virginia State Bar. It also represents all state judges, as well as clerks of the General District Courts. In addition to the matters continued from prior years, the Unit received 168 new lawsuits in 2018, including an attorney disciplinary appeal before the Supreme Court of Virginia and 10 new matters for the Birth Injury Fund Board.

The Unit worked to successfully resolve several high profile cases, taking into consideration the needs of justice and fairness as well as the interests of agencies. Among its other cases, the Unit worked closely with more than a dozen attorneys representing over 40 defendants to reach a settlement in *Roxanne Adams, Administrator of the Estate of Jamycheal M. Mitchell v. Naphcare, Inc.* (E.D. Va.). The Unit also obtained a favorable resolution in *Cecil v. Thacker* (Orange Cty. Cir. Ct.), a defamation case brought against two employees of the Virginia Department of Transportation.
In representing the Birth-Related Neurological Injury Compensation Program, the Unit provides legal advice to the Board and its Executive Director, defends appeals of Board decisions regarding specific claims for benefits to the Workers’ Compensation Commission, and represents the Program in eligibility determination cases from the Commission through the Virginia Court of Appeals. Ten new eligibility cases were filed in 2018, three of which were concluded during the year.

**Employment Law Unit**

In 2018, the Employment Law Unit (the “Unit”) provided employment law advice to, or represented in litigation, numerous state entities. The Unit also represented several individual defendants in employment-related litigation. In addition, the Unit provided training to management and human resources personnel from various state agencies and advised numerous state agencies in regard to employee matters pending before the Equal Employment Opportunity Commission.

In addition to the matters continued from prior years, the Unit handled 17 new lawsuits and grievance appeals in 2018. The Unit also reviewed and approved recommendations for 52 cases from the Division of Human Rights and Fair Housing.

The Unit handled several significant cases in 2018. For example, in *Balas v. Reveley*, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court’s ruling rejecting plaintiff’s challenge to William and Mary’s decision to deny tenure. The court found that William and Mary’s decision was a legitimate exercise of the school’s evaluation of the plaintiff’s scholarship.

**Workers’ Compensation Unit**

The Workers’ Compensation Unit (“Unit”) defends workers’ compensation cases filed by employees of state agencies. Since hearings are held throughout the state, cases are assigned to attorneys in Richmond and Abingdon. The Unit handles claims brought by injured workers, as well as employers’ applications. Claims include initial compensability and change-in-condition claims, and may be handled for the life of the matter, including the initial hearing before a Deputy Commissioner, review by the Full Commission, and appeals to the Court of Appeals of Virginia and the Supreme Court of Virginia. In 2018, the Unit handled 329 new cases.

In addition, the Unit provides advice and training to the Department of Human Resource Management’s Workers’ Compensation Services and its third-party administrator concerning claims, compensability decisions, and other legal matters.
arising from the routine handling of claims. The Unit recovers funds for Workers’ Compensation Services and works to prevent double recovery by claimants by pursuing subrogation claims in instances where the injured worker receives monies in litigation involving the accident in which he was injured. In 2018, the Unit assisted Workers’ Compensation Services and its third-party administrator with recoveries exceeding $833,000.00.

**Insurance and Utilities Regulatory Section**

The Division’s Insurance and Utilities Regulatory Section (“Section”) serves as the Division of Consumer Counsel in matters involving public utilities and insurance companies before the State Corporation Commission (SCC) and federal agencies such as the Federal Energy Regulatory Commission (FERC). In this capacity, the Section represents the interests of Virginia’s citizens as consumers in the regulation of insurance companies and regulated utilities, including electric, natural gas, water, and telecommunications companies. The Section also appears before General Assembly committees to address proposed legislation impacting consumer interests in the regulation of these industries.

In the 2018 Session of the General Assembly, Consumer Counsel provided support for the Attorney General’s opposition to those portions of Senate Bill 966 that would have allowed rate-regulated electric utilities effectively to charge consumers twice for certain infrastructure investments. This language was removed from the bill.

Consumer Counsel was active in many proceedings at the SCC throughout the year. A recurring issue in a number of cases in 2018 concerned the impact of the federal Tax Cuts and Jobs Act of 2017 on investor-owned public utility companies. In cases involving rate adjustment clauses for Dominion Energy and Appalachian Power, the Commonwealth successfully advocated for the prompt reduction in electric rates to reflect the utilities’ lower tax costs, resulting in more than $100 million in annual savings for utility customers in Virginia. In Dominion’s annual Integrated Resource Plan (IRP) case, Consumer Counsel joined other parties in questioning the reasonableness of the company’s load growth forecasts, which serve to support the need for new generation facilities. The SCC found that the company’s forecasts have been consistently overstated, and it directed changes in future forecasting methods. Based on this and several other issues, the SCC, for the first time, found that the utility’s IRP was not reasonable and in the public interest, and the Commission ordered that a corrected IRP be refiled in 2019.
In the area of renewable energy, Consumer Counsel supported a Dominion voluntary tariff in connection with the announced Facebook data center in Henrico County, with the condition that it should be implemented in a manner that holds non-participating customers harmless. In a related case for approval of two utility-owned solar generating facilities, the SCC adopted Consumer Counsel’s recommendation to impose a first-of-its-kind performance guarantee to coincide with the 20-year term of the Facebook contract to protect all other customers who would be at risk for additional costs if the facilities underperformed. Consumer Counsel also supported a Dominion purchase power agreement with the developer of a solar facility in Halifax County. Under this arrangement, the developer, and not Dominion’s customers, bore the performance risk of the projects.

Financial Recovery Section

The mission of the Financial Recovery Section (FRS)\(^2\) is to provide all appropriate and cost-effective legal services related to the collection of funds owed to the Commonwealth. The Section litigates claims to recover damages to state infrastructure for the Department of Transportation. In addition, FRS recovers civil penalties imposed by state agencies for violations of administrative regulations. The Section also enforces medical liens on personal injury and wrongful death claims to recover the cost of related medical services provided by state hospitals or paid for by state programs. In 2013, FRS assumed oversight and coordination responsibilities for non-Medicaid related recoveries under the Virginia Fraud Against Taxpayers Act (FATA). In addition to litigating claims, the Section provides advice on creditors’ rights, bankruptcy, and legislative issues to client agencies and to other sections within the Office.

During the 12 month period from July 1, 2017 through June 30, 2018, gross recoveries for 44 agencies totaled more than $16.4 million in debt collection recoveries. Approximately $1.3 million was returned to FRS’s client agencies. During this same fiscal period, FRS recovered $191,300 under FATA.

Health Professions Section

The Health Professions Section (HPS) conducts administrative prosecution of cases involving healthcare professionals before the 13 health regulatory boards within the Virginia Department of Health Professions. The Section provides advice and representation of a prosecutorial nature to the Boards within the Department,

\(^2\) Formerly known as the Division of Debt Collection.
including the Boards of Medicine, Nursing, Pharmacy, Dentistry, Veterinary Medicine, Funeral Directors & Embalmers, Audiology & Speech-Language Pathology, Counseling, Long-Term Care Administrators, Social Work, Psychology, Physical Therapy, and Optometry. Many of the cases that HPS prosecutes involve standard of care violations, patient abuse, incompetence, substance misuse, or inappropriate sexual contact. Following full evidentiary formal hearings before the Boards, disciplinary sanctions, including suspension and revocation of licenses, are often imposed.

As in past years, HPS vigorously prosecuted physicians who facilitate the current opioid addiction crisis by prescribing controlled substances in a non-therapeutic or unsafe manner. Such practices include the prescription of opioids in escalating doses and quantities without establishing a bona fide medical condition justifying the prescriptions, without obtaining prior treatment records, without monitoring the effects of the medications on patients, and without monitoring and managing the patients’ appropriate use of the medications. HPS successfully prosecuted 96 cases involving opioid misuse, overprescribing, and standard-of-care issues in 2018. Since the beginning of the Herring Administration, 381 such cases have been successfully prosecuted, averaging more than one per week.

In one significant case, the Board of Medicine accepted the voluntary permanent surrender of a doctor’s license to practice psychiatry. HPS established that the doctor prescribed opioids without sufficient justification and without performing physical examinations; that she failed to monitor patients who were prescribed addictive medications; and that she prescribed addictive medications to patients who were being treated concurrently by other providers for substance abuse.

Another case involved the prosecution of a licensed assisted living facility administrator before the Board of Long-Term Care Administrators. HPS proved by clear and convincing evidence that, notwithstanding a recent suspension of her license for 90 days, the respondent continued to administer her facility in an unsafe and unhealthy manner that jeopardized the safety and welfare of the residents. The Board summarily suspended her license and, in lieu of a formal hearing, the respondent executed a Consent Order with the Board providing for the revocation of her license.

**Division of Human Rights and Fair Housing**

The Division of Human Rights and Fair Housing (DHR) performs two main functions with regard to civil rights laws. First, DHR receives and investigates
complaints alleging discrimination in employment and places of public accommodation in violation of the Virginia Human Rights Act or corresponding federal laws. In its second function, DHR serves as counsel to the Commonwealth’s Real Estate Board and Fair Housing Board for allegations of housing discrimination filed by complainants.

With respect to its first function, DHR provides mediation services throughout the complaint process so the parties may attempt to resolve the dispute. At the conclusion of an investigation, DHR is charged with determining whether there is reasonable cause to believe discrimination occurred. DHR participates in a work-share agreement with the federal Equal Employment Opportunity Commission (EEOC) to investigate and make determinations regarding alleged violations of Title VII of the Civil Rights Act of 1964 and related civil rights laws. During 2018, DHR received 258 complaints of discrimination (up from 168 in 2017) and completed 56 investigations of new and existing charges of discrimination. Specifically, DHR completed 45 investigations alleging violations of federal employment discrimination laws through its EEOC work-share agreement, and 11 investigations alleging violations of the Virginia Human Rights Act. Eight of the investigations were resolved through mediation, resulting in over $89,000 in recoveries for charging parties.

DHR also prosecutes the alleged violation of the Virginia Fair Housing Law through a civil action filed in the appropriate local circuit court. DHR initiated four civil enforcement actions in 2018. Two of these cases involved disability discrimination, one alleged sex and disability discrimination, and one alleged familial status discrimination. DHR also provided consultation opinions for eight fair housing investigations to the Boards. These cases involved the protected classes of disability, race, and familial status. DHR resolved seven fair housing matters during the year, providing over $125,000 in compensatory relief to the complainants and aggrieved persons. DHR also provided advice on other legal matters and in several other fair housing investigations.

HEALTH, EDUCATION, AND SOCIAL SERVICES DIVISION

The Division of Health, Education, and Social Services (“HESS”) represents agencies and institutions of the Commonwealth in the Secretariats of Health and Human Resources and Education. Health and Human Resources agencies oversee the provision of social services, health and disability services, and vocational rehabilitation to vulnerable populations. They also regulate medical professionals and protect public health by monitoring and advising on contagious diseases.
Education agencies and institutions strive to ensure a quality statewide system of K-12 and higher education, and help fulfill significant artistic, historic, and cultural missions.

**Child Support Section**

The Child Support Section represents the Division of Child Support Enforcement (DCSE) of the Virginia Department of Social Services by providing legal advice and program guidance, conducting training for agency staff, and appearing in both state and federal courts to determine paternity and to establish, modify, and enforce child support obligations. The Section continued its efficient and vigorous enforcement of child support cases, handling 97,899 child support hearings during the year. The Section established new child support orders totaling nearly $1.4 million, enforced existing orders by obtaining lump-sum payments of almost $9 million, and secured coercive sentences for nonpayment totaling nearly 500,000 days in jail.

The Section’s Bankruptcy Unit handles all child support issues that arise in bankruptcy cases and in this regard, processed almost 1,000 new cases filed under Chapters 7 and 13 of the U.S. Bankruptcy Code. The Unit also filed nearly 800 pleadings, including proofs of claims, objections to Chapter 13 plans, and motions to dismiss. As of December 2018, the Bankruptcy Unit was handling 978 active bankruptcies affecting 1,166 DCSE cases, including 195 cases filed under Chapter 7 and 783 cases filed under Chapter 13.

The Section worked closely with DCSE management and child support offices to carry out initiatives designed to increase parental compliance with child support orders. These initiatives include implementing the Debt Compromise Program, expediting the modification of child support orders to amounts that parents can realistically afford, providing mediation alternatives, utilizing different procedures and dispositions to collect child support arrears in civil contempt cases, and coordinating with judges, clerks, and local officials to place child support payment kiosks at courthouses. The Section also continued to assist DCSE in implementing the Procedural Justice-Informed Alternatives to Contempt program, a test program that seeks to increase compliance with child support orders by fostering parents’ trust in child support agencies and processes.

During the 2018 General Assembly session, the Section reviewed 19 bills affecting substantive child support law. The Section provided advice on significant bills addressing complex child support guideline calculations in multiple custody
arrangements; attaching child support guidelines to child support orders; and compliance with the new federal rule for child support.\(^3\)

In addition to their other duties, Section attorneys participated extensively in professional development, service, and training activities throughout the year on the local, state, and national levels.\(^4\)

**Education Section**

The Education Section provides advice and guidance to the Virginia Board of Education and the Department of Education, as well as to the Commonwealth’s public institutions of higher learning and state museums.

The Section’s guidance on preK-12 issues often directly impacts local schools’ implementation of the Standards of Learning and Standards of Quality, access to special education services, maintenance of discipline and safety on school grounds, compliance with federal education programs, and improvement of school facilities. In 2018, particular focus was given to providing guidance on statewide initiatives designed to enhance preschool education, address teacher shortages, and track and analyze student data to assess educational outcomes. In addition, the Section assisted the Board of Education in making significant revisions to the procedures used for handling teacher licensure decisions.

With respect to higher education, the Section provides advice to Virginia’s universities and community colleges, each of which is a self-contained community with a full range of legal needs. The Section addresses a multitude of issues, including those relating to campus safety and security, admission and educational quality, data security and management, student discipline, athletic compliance, administration of federal grants and aid, human resources, protection of intellectual property, complex contracting, financing, facility construction, and the institutions’ relationships with other Commonwealth agencies. The Section also continues to advise on institutional responses to sexual violence on campus, assisting the Sexual Violence Advisory Committee of the State Council of Higher Education to submit detailed comments to the U.S. Department of Education on proposed federal

\(^3\) *Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs*, 81 Fed. Reg. 93492.

\(^4\) Notably, one of the Section’s attorneys, Mitch Broudy, received the prestigious 2018 Family Law Service Award from the Virginia State Bar for his commitment to advancing family law in Virginia.
regulations governing investigations of Title IX complaints by the Office of Civil Rights.

**Health Services Section**

The Health Services Section represents numerous agencies in the Health and Human Resources Secretariat, including the Department of Behavioral Health and Developmental Services (DBHDS) and its hospitals, training centers, and sexually violent predator facility (the Virginia Center for Behavioral Rehabilitation); the Virginia Department of Health (VDH); the Department of Health Professions and its regulatory boards; the Department for Aging and Rehabilitative Services and its Wilson Workforce and Rehabilitation Center; the Department for the Blind and Vision Impaired; the Department for the Deaf and Hard of Hearing; and the Virginia Board for People with Disabilities.

The Health Services Section continued to represent the Commonwealth and DBHDS in the implementation of the settlement agreement entered by the United States District Court for the Eastern District of Virginia between the United States and the Commonwealth regarding the state’s system of services for individuals with developmental disabilities. Throughout the year, the Section provided legal advice to the DBHDS on many issues including civil commitment, confidentiality, human resources, and regulatory compliance.

The Section continued its efforts assisting the Department of Health Professions and its 14 health regulatory boards in numerous disciplinary proceedings under the Administrative Process Act. The Section provided legal guidance to the Board of Pharmacy in issuing permits to five pharmaceutical processors that will grow, manufacture, and dispense cannabidiol (CBD) oil. The Section also assisted with the development of regulations allowing for the autonomous practice of nurse practitioners with five years of clinical experience in accordance with recently enacted state law.

As in past years, the Section continued to provide advice to the VDH on a variety of issues including communicable disease outbreaks, vital records, health records privacy, emergency medical services, employee grievances, and emergency preparedness. The Section also advised the State Health Commissioner regarding his supervision of the cooperative agreement issued to Ballad Health, an integrated healthcare system that serves the citizens of Southwest Virginia. The Section advised the Commissioner on issues related to the Certificate of Public Need program (COPN) and defended the Commissioner’s COPN decisions in state circuit and
appellate courts. In addition, the Section successfully defended the VDH in federal court against claims of discrimination.

The Section successfully represented the Department for Aging and Rehabilitative Services in two procurement-related lawsuits filed in state circuit courts.

Medicaid and Social Services Section

The Section represented the Department of Medical Assistance Services (DMAS), the Department of Social Services (DSS), and the Office of Comprehensive Services on several noteworthy matters in 2018 and assisted these clients in protecting the health and safety of children and other vulnerable citizens of the Commonwealth. The Section was also responsible for assisting with DMAS with identifying public funds inappropriately disbursed. In 2018, DMAS overpayments and settlements totaled $2,889,465.54.

The Section worked closely with DMAS to successfully implement measures associated with Medicaid expansion for the coverage of individuals with incomes of up to 138 percent of the federal poverty level. Over 260,000 Virginians have been newly enrolled in the expanded Medicaid program. To ensure compliance with the 2018 Appropriation Act, the Section engaged outside counsel to assist DMAS in developing the requisite Section 1115 Medicaid waiver application. The waiver application includes certain work requirements, a health and wellness program, and housing and employment supports as directed in the Appropriation Act. The waiver application was submitted by DMAS to the federal Centers for Medicare and Medicaid Services (CMS) in November 2018, and review of the application by CMS remained pending at the end of the year. The Section also assisted with the promulgation of emergency regulations to implement the provider coverage assessment and the provider payment rate assessment, two new taxes assessed on certain private hospitals pursuant to the 2018 Appropriation Act to cover Virginia’s share of the costs of Medicaid expansion and to raise the reimbursement rate paid to hospitals for Medicaid services.

In order to stop the relocation of approximately 90 Medicaid recipients outside of their current planning district, the Section negotiated a settlement allowing four nursing facilities in Virginia to continue operating, providing they comply with applicable laws and regulations.
The Section litigated a number of cases on behalf of DSS in 2018, including defending local departments’ findings of abuse and neglect of children, departments’ decisions involving various benefits programs, and decisions by DSS revoking or denying certain licenses, including for substandard child day care programs and assisted living facilities. In particular, the Section advised and represented DSS in license proceedings against Jones & Jones assisted living facility to ensure the health, safety, and welfare of approximately 70 elderly residents. As a result of this representation, the facility’s license to operate an assisted living facility was summarily suspended, the facility was closed, and the residents were moved to other locations.

The Section also assisted Virginia Board of Social Services in its investigations of several boards and board members of local departments of social services by providing guidance on investigation procedures and protocol.

**OPINIONS SECTION**

The Opinions Section is responsible for processing requests for official opinions made by state and local officials under § 2.2-505, in addition to requests for conflict-of-interests opinions made by state officers and employees under § 2.2-3121 of the State and Local Government Conflict of Interests Act. The Section also processes requests for informal opinions made by eligible state and local officers. These opinions are issued by assistants or deputies to the Attorney General. The Opinions Section works closely with the various Divisions of the Office in researching and managing all such requests for opinions. The Section also occasionally provides reference and research support for the Divisions on other matters.

In 2018, the Office issued 42 opinions, including 21 official opinions, 2 conflict-of-interests opinions, and 19 informal opinions.

In addition to its other duties, the Opinions Section is responsible for publishing the *Annual Report of the Attorney General* and presenting it to the Governor by May 1 of each year. The Annual Report contains all official opinions issued by the Attorney General during the calendar year.

**PROGRAMS & COMMUNITY OUTREACH SECTION**

The Programs and Community Outreach Section (“Section”) works to increase citizen access to the resources and services of the Office of the Attorney General.
This centralized executive team coordinates and promotes the Office’s programs and provides support and technical assistance to local chapters of the Triad Program across the Commonwealth. The Section oversees and implements these programs and initiatives with the assistance of community outreach coordinators located in each region of the Commonwealth. Outreach coordinators work with school and civic groups, organizations for seniors, law enforcement agencies, human services providers, and other stakeholders in crime prevention and public safety, and they represent the Office on a variety of task forces and work groups within their assigned regions.

Overview and Special Activities

In 2018 the Section delivered over 200 presentations to nearly 13,000 participants and exhibited at more than 100 community events and trainings, providing resources and information to over 40,000 people. Programming covered a variety of public safety topics, including opioid abuse prevention, scams and frauds, youth violence prevention, gang awareness, and Office programs and initiatives. Additionally, Section staff, in conjunction with local law enforcement partners, participated in community events such as National Night Out and Drug Take-Back Days across the state. The Section also secured $1 million in new federal grant funding in addition to the eight state and federal grant programs currently managed by the Section. The Section also commenced participation in the newly-announced Greater Gilpin initiative, a three-year community-based crime prevention program in the City of Richmond’s Gilpin Court housing community.

Triad

Since 1995, the Office has promoted the Triad Program to increase awareness of scams and frauds that target seniors and to strengthen communication between law enforcement and seniors. The Section’s outreach coordinators work closely with the Triad chapters within their regions, coordinating with the Medicaid Fraud Control Unit (MFCU), the Consumer Protection Section, local law enforcement, and aging services agencies to educate seniors on crime prevention issues. In 2018, the Office signed charters for new Triad chapters in Danville/Pittsylvania County, Winchester/Clarke County, Fauquier County, and King and Queen County. In April, Triad members from across Virginia gathered for the annual Statewide Triad Conference held in Williamsburg to discuss public safety issues affecting seniors. This two-day conference attracted nearly 200 participants, including seniors, law enforcement officers, and allied professionals. In addition, the Office once again awarded grants to Virginia Triad chapters throughout the Commonwealth to fund
crime prevention initiatives and facilitated regional summits for Triad leadership to promote networking and idea sharing.

**Victim Notification/Domestic Violence Services**

The Victim Notification Program provides victim assistance in cases prosecuted by the Major Crimes and Emerging Threats Section or by MFCU, including notifying victims of any appeal or habeas corpus proceedings associated with their case and assisting surviving family members of victims in capital cases. The Victim Notification Program also administers the Commonwealth’s Identity Theft Passport Program. In 2018, the Identity Theft Passport statute was amended (H.B. 1246), allowing individuals applying for the Passport to submit a police report to the Attorney General as sufficient evidence of identity theft. During the year, the Victim Notification Program provided assistance to 1,778 victims of crime\(^5\) and issued 43 Identity Theft Passports. The Program also hosted the second annual Unsung Hero Awards to honor excellence in victim services. Recipients were honored by the Attorney General at a ceremony in Richmond during National Crime Victims’ Rights Week in April. Additionally, the Section’s Domestic Violence Services enrolled 42 new families into Virginia’s Address Confidentiality Program, a confidential mail-forwarding service managed by the Office for victims of domestic violence and stalking.

**Lethality Assessment Protocol**

In its ongoing effort to prevent domestic violence homicides, the Section continued to provide training and technical assistance on the Lethality Assessment Program (LAP). The LAP is an evidence-based screening tool that first responders use to identify victims who are at high risk of serious injury or death by their abusers and refer them to local domestic violence services. Since 2015, thirty-three local geographic jurisdictions in Virginia have implemented LAP through collaborations with domestic violence crisis centers. In 2018, the Section provided LAP training to law enforcement agencies and domestic violence programs in Essex, Tappahannock, and Bedford to assist these localities in implementing LAP. The Section also provided ongoing technical assistance to localities using LAP, including hosting a LAP Coordinator Summit in November.

\(^5\) A single victim may be counted more than once depending on the number of cases the individual is involved in.
Hampton Roads Human Trafficking Task Force

The Hampton Roads Human Trafficking Task Force is a partnership between the Office, the U.S. Department of Homeland Security, state and local law enforcement agencies, Commonwealth’s Attorneys, and the Samaritan House in Virginia Beach. This multi-disciplinary task force, which is staffed by a coordinator from the Office, identifies victims, promotes awareness of the realities of human trafficking, and investigates and prosecutes trafficking crimes. In 2018, the task force conducted 89 new investigations, made 32 arrests, completed 7 cases, and identified 61 confirmed victims of human trafficking. Additionally, the task force launched a public awareness campaign, placing billboards on major highways throughout the region promoting the National Human Trafficking Resource Center’s hotline. Legislation recommended by the task force (HB 1260) was signed into law during the year establishing a rebuttable presumption that certain offenses related to the act of human trafficking are not entitled to bail, thereby helping keep traffickers in jail to protect their victims.

Sexual Assault Kit Testing Initiative

The Section continued to lead the Office’s initiative eliminate Virginia’s backlog of untested rape kits, known as Physical Evidence Recovery Kits (or PERKs). The first phase of the project, which involved testing kits collected prior to June 30, 2014, was completed in 2018. The second phase of the project, which is funded by a $2 million grant from the federal Sexual Assault Kit Initiative, commenced during the year and focuses on testing kits that were collected between June 30, 2014, and July 1, 2016. As of the end of the year, 1770 kits from the first phase of the project had been tested, and 179 kits from the second phase. Those tested kits yielded 519 DNA profiles which were entered into the Combined DNA Index System (CODIS), generating 208 CODIS hits. Section staff promoted the project statewide throughout the year, meeting with Sexual Assault Response Teams in 15 localities, developing education and outreach materials to assist localities in building response protocol to the project. The Section also hosted a two-day Cold Case Sexual Assault conference in September that provided training to law enforcement officers, victim advocates, and prosecutors on best practices in reinvestigating sexual assault cases. The conference, which featured nationally recognized experts in sexual assault case investigations, included guidance on handling sexual assault backlog cases.
Re-Entry Program

The goal of the Re-Entry Program is to assist sheriffs and local and regional jails in providing resources to inmates to prepare them for successful release and re-integration into their communities. During the year, the Section launched VirginiaReEntry.org, an online re-entry portal that serves as an information clearinghouse for Sheriffs, practitioners, and citizens who desire to help formerly-incarcerated individuals. The Section also hosted the 2018 Statewide Re-Entry Conference in Virginia Beach in October, attended by over 170 re-entry stakeholders. The Section assisted with implementation of the Norfolk Supervision Treatment and Operations Plan (Norfolk STOP), a grant-funded re-entry project designed to reduce recidivism among gang-involved and other violent offenders. These efforts included providing programming to inmates at the Norfolk City Jail focused on identifying the underlying risk factors of criminal behavior, as well as building skills in communication, decision making, and anger management. Re-entry staff also participated in a Department of Criminal Justice Services workgroup and Crime Commission review of pre-trial services across the Commonwealth.

Virginia Rules

The Section oversees Virginia Rules, an educational program for teens featuring 28 independent modules covering a wide variety of legal issues. Drugs, bullying, and internet safety are among the topics included in the curriculum. During the year, 243 new instructors were enrolled in the Virginia Rules program, increasing the total number of instructors to 2,254 statewide. Instructors shared Virginia Rules lessons with nearly 50,000 students across the Commonwealth. In addition, the Section sponsored Virginia Rules Camps in 28 localities, helping provide nearly 1,600 middle and high school students with a week-long summer day camp experience. The students experienced traditional camp fun, learned about Virginia law, and built positive relationships with school resource officers and other law enforcement officers who served as camp counselors.

Project Safe Neighborhoods

Having secured funding in late 2017 to implement a Project Safe Neighborhoods (PSN) initiative in Richmond’s East End, the Section held a PSN Strategic Planning meeting, convening stakeholders from city government, non-profit organizations, and the community to discuss community needs and brainstorm action items to promote violent crime reduction. The Section also hired a PSN Outreach Coordinator to implement community programming and coordinate crime-
reduction strategies within the geographic focus area of the grant. Additionally, the “Respect Richmond” campaign continued throughout the year, using digital messaging to display anti-retaliation ads in neighborhoods with the highest risk of gun violence. The ads are displayed on social media, gaming networks, and other internet venues where disputes can often escalate into violence. In addition, the ads can be adjusted and deployed to target areas where violence has recently occurred and where retaliation may be more likely. The campaign also has its own dedicated website.

Data showed that during the summer relaunch of the “Respect Richmond” campaign, violent crimes were down across the City compared to the year before, particularly in priority neighborhoods that were a focus of the campaign, where results included a 50% decrease in homicides, a 41% decrease in robberies with a firearm, and a 31% decrease in aggravated assaults. For its innovative approach to public safety, the “Respect Richmond” campaign was the recipient of two awards in 2018: a Commonwealth Award in Public Service from the Richmond Chapter of the Public Relations Society of America and a 2018 Excellence in New Communications Award in the Communications, Communities, and Collaboration category (Government Division) from the Society for New Communications Research.

**Heroin and Opioid Abuse**

In support of the Attorney General’s ongoing efforts to combat current heroin and opioid abuse, the Section oversaw continued distribution of the Office-produced documentary, “Heroin: The Hardest Hit” and the roll call video for law enforcement officers, “When Seconds Count: How Law Enforcement Can Save a Life during an Overdose.” Section staff served on numerous local and regional substance abuse coalitions and task forces and participated in over 30 town halls, community forums, documentary screenings, and other events across the Commonwealth to raise awareness of the dangers of heroin and opioid addiction. In April and October, the Section assisted with community Drug Take-Back events, in conjunction with law enforcement and substance abuse coalition partners. Drug Take-Back events provide an opportunity for citizens to safely dispose of old or unused prescription drugs, which in turn prevents drugs from reaching the wrong hands and being misused.

**Partnerships and Collaborations**

Throughout the year, the Section collaborated with a variety of partners to promote safe communities, including local and state government agencies, non-profit organizations, businesses, schools, universities, and faith-based organizations.
Ongoing partners included the Commonwealth’s Attorneys’ Services Council, Department of Criminal Justice Services, the Department of Forensic Science, local law enforcement agencies, the Office of the Executive Secretary of the Supreme Court of Virginia, Parents Against Bullying, the Virginia Association of Chiefs of Police, the Virginia Coalition for the Prevention of Elder Abuse, the Virginia Department of Corrections, the Virginia Gang Investigators Association, the Virginia Sexual and Domestic Violence Action Alliance, the Virginia Sheriffs’ Association, the Virginia State Police, and the Virginia Victim Assistance Network. Ongoing partnerships with these and numerous other organizations are crucial to the Section’s continued promotion of secure and thriving communities in Virginia.

LEGISLATIVE ACCOMPLISHMENTS

In the wake of the violence occurring in Charlottesville in August of 2017, Attorney General Herring focused his 2018 legislative package on eliminating hate crimes and domestic terrorism in the Commonwealth of Virginia. The 2018 legislative package also supported the Attorney General’s continuing effort to end human trafficking, increase support of crime victims, eliminate the rise in fatal overdoses and ensure compliance with the Tobacco Master Settlement Agreement.

During the demonstrations in Charlottesville, thousands of white supremacists assembled in support of a Confederate monument, some carrying firearms and other weapons in an apparent intent to intimidate civilians and coerce the municipal government. The violence that erupted resulted in several injuries and one death. In order to prevent this type of threat to public safety from recurring, the Attorney General worked with legislators in drafting legislation (SB 987) to prohibit any person from assembling with another person with the intent of intimidating any person or group of persons by drilling, parading, or marching with any firearm or explosive or incendiary device, or any components or combination thereof. Such paramilitary activity would be punishable as a crime. The Senate Committee on Courts of Justice failed to report the bill.

In order to track any rise in extremist violence and hate rhetoric, the Attorney General also introduced legislation (HB 1601) to prohibit domestic terrorism activity. The bill provided a definition for “domestic terrorism organization” to include “any organization, association, or group of three or more persons, whether formal or informal, which has an identifiable name or identifying sign or symbol and either (i) has as one of its primary objectives or activities an act of domestic terrorism; or (ii) whose members individually or collectively have engaged in the commission of, attempt to commit, conspiracy to commit, or solicitation of two or
more acts of domestic terrorism, provided such acts were not part of a common act or transaction." The bill then made it unlawful for three or more members of a domestic terrorist organization to assemble together with the intent of advancing some unlawful goal, mission, or purpose. The bill also directed the Superintendent of the Department of State Police to promulgate regulations, to be updated annually, designating all organizations, groups, or associations meeting the definition of a domestic terrorist organization. House Bill 1601 was not reported out of the House of Delegates’ Committee on Courts of Justice.

Additional legislation (HB 718) was introduced to address the continued rise in hate crimes; specifically, to add disability, gender, gender identity, and sexual orientation to the categories of victims whose intentional selection for a hate crime involving assault, assault and battery, or trespass for the purpose of damaging another's property results in a higher criminal penalty for the offense. The bill also added disability, gender, gender identity, and sexual orientation status to the categories of hate crimes that are to be reported to the central repository of information regarding hate crimes maintained by the Virginia State Police. House Bill 718 was left in committee by the House of Delegates’ Committee on Courts of Justice.

Further, legislation (HB 833) was introduced to add hate crimes to the list of crimes subject to a multijurisdictional grand jury, to be reported to the Attorney General when appropriate. This bill was left in committee by the House of Delegates’ Courts of Justice.

In order to protect victims of crimes, the Attorney General submitted a bill (HB 1260) that came as a recommendation from the Hampton Roads Human Trafficking Taskforce to provide a rebuttable presumption that certain offenses related to the act of human trafficking are not entitled to bail. This bill was signed into law effective July 1, 2018, and will protect victims of human trafficking from their perpetrators by helping to insure that these traffickers are kept behind bars until their court date.

Additionally, the Attorney General submitted a bill (HB 1246) that would support the Identity Theft Passport program by allowing any person whose name or other identification has been used without his consent or authorization by another person to file with the Attorney General a copy of a police report showing that he has reported the identity theft to a law-enforcement agency. Upon receipt by the Attorney General of a copy of the police report, the Office of the Attorney General, in cooperation with the State Police, may issue an Identity Theft Passport stating that
such a police report has been submitted. This bill was signed into law effective July 1, 2018.

As a key stakeholder in the implementation and enforcement of the Tobacco Master Settlement Agreement (MSA), the Office of the Attorney General is charged with ensuring that Virginia’s laws are in compliance with the MSA so that the Commonwealth may continue to receive settlement payments paid by tobacco product manufacturers into a qualified escrow fund. The MSA is between forty-six states and leading cigarette manufacturers. Virginia’s funds are used to fund medical treatment for low-income citizens, education programs and economic development in former tobacco-growing areas. In 2017, the MSA reached a critical point where many states completed years of arbitration with the “non-participating manufacturers” concerning their escrow payments into the MSA. This arbitration agreement required that participating states obtain authority by statute or court order to allow a designated third party to review tax records of tobacco companies. The Attorney General sought legislation (HB 1605) to ensure compliance. The legislation passed subject to a re-enactment clause.6

Lastly, the Attorney General continued to work towards a solution for the sale of lethal doses of illicit opioids, which has resulted in the highest rate of opioid deaths in the history of the Commonwealth. The legislation (HB 1469) provided that a person is guilty of felony homicide, which constitutes second degree murder and is punishable by confinement of not less than five nor more than 40 years, if the underlying felonious act that resulted in the killing of another involved the manufacture, sale, gift, or distribution of a Schedule I or II controlled substance to another, and (i) such other person’s death results from his use of the controlled substance and (ii) the controlled substance is the proximate cause of his death. The bill (HB 1469) was not approved by the House of Delegates.

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6 House Bill 1605 was not re-enacted in 2019. Accordingly, the Attorney General must seek court orders to allow a designated third party to review the tax records of tobacco manufacturers as a condition of the arbitration agreement.
PERSONNEL OF THE OFFICE

Mark R. Herring ................................................................. Attorney General
Cynthia E. Hudson .................................................. Chief Deputy Attorney General
Kevin C. O’Holleran .................................................. Chief of Staff
Toby J. Heytens ............................................................. Solicitor General
Trevor S. Cox ............................................................. Senior Appellate Counsel
Matthew Robert McGuire .................................. Principal Deputy Solicitor General
Michelle Shane Kallen ........................................ Deputy Solicitor General
H. Lane Kneedler III .................................................. Senior Counsel to Attorney General
Shawri Jenica King-Casey ........................................ General Counsel
George Timothy Oksman ......................................... Opinions Counsel
Jan L. Proctor ............................................................. Opinions Counsel
Cynthia V. Bailey .......................................................... Deputy Attorney General
Stephen A. Cobb .......................................................... Deputy Attorney General
John W. Daniel II .......................................................... Deputy Attorney General
Victoria Nathalie Pearson ........................................ Deputy Attorney General
Samuel T. Towell .......................................................... Deputy Attorney General
Diane Marie Abato .................................................. Senior AAG/Chief, Correctional Litigation Section
Jeffrey R. Allen .................................................. Senior AAG/Chief, Transportation Section
Donald David Anderson ........................................ Senior AAG/Chief, Environmental Section
C. Meade Browder Jr. ........................................ Senior AAG/Chief, Insurance & Utilities Reg. Section
Rita Poindexter Davis .................................................. Senior AAG/Chief, Trial Section
Victoria W. Dullaghan ........................................ Sr. AAG/Chief, Div. of Child Support Enforcement
Samuel E. Fishel IV .................................................. Senior AAG/Chief, Computer Crimes Section
Beth J. Edwards .................................................. Sr. AAG/Chief, Div. of Child Support Enforcement
Wayne T. Halbleib .................................................. Senior AAG/Chief, Health Professions Section
Michael A. Jagels ........................................ Sr. AAG/Chief, Major Crimes & Emerging Threats Section
Chandra Dore Lantz .................................................. Senior AAG/Chief, Construction Litigation Section
Heather H. Lockerman ........................................ Sr. AAG/Chief, Financ. Law & Gov’t Support Section
Carrie S. Nee ............................................................. Senior AAG/Chief, Education Section

1 This list includes all persons employed by the Office of the Attorney General during calendar year 2018, as provided by the Office’s Division of Administration. The most recent title is used for any employee whose position changed during the year. The acronym “AAG” herein refers to the title “Assistant Attorney General,” and the acronym “MFCU” refers to the Medicaid Fraud Control Unit. In addition, the acronym “CIRU” refers to the Counseling, Intake and Referral Unit of the Consumer Protection Section, and the acronym “DRU” refers to the Dispute Resolution Unit of the Consumer Protection Section.
Ronald C. Forehand............................. Senior AAG/Associate University Counsel
K. Anne G. Gentry ...................... Senior AAG/Associate System Counsel
David C. Grandis................................. Senior Assistant Attorney General
Margaret Elizabeth Griffin......................... Senior Assistant Attorney General
Stephanie L. Hamlett............................... Senior AAG/University Counsel
Timothy John Heaphy............................ Senior AAG/University Counsel
Kay K. Heidbreder.................................. Senior AAG/University Counsel
Flora L.T. Hezel........................................ Senior Assistant Attorney General
Beth C. Hodsdon...................................... Senior AAG/Associate System Counsel
Catherina F. Hutchins............................. Senior Assistant Attorney General
David B. Irvin............................. Senior AAG/Unit Manager, Predatory Lending Unit
Joseph V. Jagdmann.............................. Senior Assistant Attorney General
Donald E. Jeffrey III.......................... Senior Assistant Attorney General/Team Leader
Brian R. Jones ..................................... Senior Assistant Attorney General
Michael T. Judge....................................... Chief of Special Projects
John F. Knight...................................... Senior AAG/Associate University Counsel
Paul Kugelman Jr................................ Senior Assistant Attorney General
Robin V. Kurz ...................................... Senior Assistant Attorney General
Marsha B. Lambert............................... Senior Assistant Attorney General
Alison P. Landry...................................... Senior AAG/Associate University Counsel
Williams Michael Lepchitz...................... Senior Assistant Attorney General
Deborah Love....................................... Senior AAG/College Counsel
Richard A. Mahevic II......................... Senior Assistant Attorney General
Curtis Gilbert Manchester....................... Senior Assistant Attorney General
Maureen R. Matsen............................. Senior AAG/Associate University Counsel
Marvin Hudson McClanahan.................... Senior AAG/Associate University Counsel
Janice L. McDaniel............................... Senior Assistant Attorney General
Robert B. McEntee Jr........................... Senior Assistant Attorney General
Cameron S. Meals.................................. Senior Assistant Attorney General
Barry T. Meek...................................... Senior AAG/Associate University Counsel
Mikie F. Melis................................. Senior AAG/Associate University Counsel
Eugene P. Murphy............................... Senior Assistant Attorney General
Nicholas S. Murphy............................... Senior Assistant Attorney General
Richard E. Nance............................... Senior AAG/University Counsel
G. William Norris Jr........................... Senior AAG/University Counsel
Cynthia H. Norwood............................. Senior Assistant Attorney General
Andrew C. O’Brion.............................. Senior AAG/University Counsel
Josh S. Ours........................................ Senior AAG/Director of Legal Operations
Keven B. Patchett.............................. Senior Assistant Attorney General
William B. Fiske ............................................................... Assistant Attorney General
Elizabeth Kiernan Fitzgerald ............................................. Assistant Attorney General
James Michael Flaherty ..................................................... Assistant Attorney General
Claire C. Foley .................................................................. Assistant Attorney General
Stephen L. Forster ............................................................. Assistant Attorney General/Lead Attorney
W. Clay Garrett ......................................................... AAG/Associate University Counsel
Mark A. Gess ......................................................... AAG/Associate University Counsel
Madeline Markelz Gibson .................................................. Assistant Attorney General
Jennifer L. Gobble ............................................................. Assistant Attorney General
Matthew L. Gooch ............................................................. Assistant Attorney General
Joelle E. Gotwals ............................................................. Assistant Attorney General
Kristin L. Gray ............................................................. Assistant Attorney General
Sandra Snead Gregor ........................................................ Assistant Attorney General
Steven W. Grist ......................................................... Assistant Attorney General/Prosecutor
Elizabeth M. Guggenheim ................................................ .Assistant Attorney General
Elizabeth Leigh Gunn ........................................................ Assistant Attorney General
Joseph Samuel Hall ........................................................ Assistant Attorney General
Timothy P. Halpin ............................................................ Assistant Attorney General
Ryan S. Hardy ............................................................... Assistant Attorney General
Susan M. Harris ............................................................ Assistant Attorney General
Kristina Julia Hartman ...................................................... Assistant Attorney General
John F. Haugh ................................................................. Assistant Attorney General
Euticha B. Hawkins ........................................................ Assistant Attorney General/Publications Coordinator
Mary Hendricks Hawkins ................................................ Assistant Attorney General
Tyler T. Henry ............................................................... Assistant Attorney General
Joshua D. Heslinga .......................................................... Assistant Attorney General
Kamaria F.M. Hopkins ..................................................... Assistant Attorney General
Matthew G. Howells ........................................................ Assistant Attorney General
Laurel S. Huerkamp .......................................................... Assistant Attorney General
Caitlyn Alyse Huffstutter .................................................. Assistant Attorney General
Daniel Winthrop Ingersoll IV .............................................. Assistant Attorney General
Erica Wessling Jafari ......................................................... Assistant Attorney General
Sarah Dearing Johns ........................................................ Assistant Attorney General
Victoria L. Johnson ........................................................ Assistant Attorney General
Brittany Marie Jones ........................................................ Assistant Attorney General
John Ira Jones IV ............................................................ Assistant Attorney General
Nicholas Stephen Kalagian ................................................. Assistant Attorney General
Adam L. Katz ................................................................. Assistant Attorney General
Benjamin H. Katz ............................................................ Assistant Attorney General
William Ryan Waddell...................................................... Assistant Attorney General
Geoffrey L. Ward............................................................. Assistant Attorney General
Scott F. Weber .............................................................. Assistant Attorney General
Alex Walker West .......................................................... Assistant Attorney General
Steven M. Westermann .................................................. Assistant Attorney General
Erin Dugan Whealton..................................................... Assistant Attorney General
Ann-Marie White ......................................................... Assistant Attorney General
Alvin M. Whitley .......................................................... Assistant Attorney General
Alexandra Nicole Fitzgerald Williams ............................ Assistant Attorney General
Braxton M. Williams ...................................................... Assistant Attorney General
Susan Bass Williams ..................................................... Assistant Attorney General
Megan Alma Winfield .................................................... Assistant Attorney General
William E. Winters Jr. ...................................................... Assistant Attorney General
Erin E. Witte................................................................. Assistant Attorney General
Holly Reeves Wood ........................................................ Assistant Attorney General
Katherine Parrott Wright ............................................... Assistant Attorney General
Rachel Lysnie Yates ....................................................... Assistant Attorney General
Rebecca A. Young........................................................ Assistant Attorney General
Lisa Abraham ......................................................................... Nurse Investigator
Crystal V. Adams ........................................................... Legal Secretary Senior
J. Hunter Allen Jr. ................................................................ Investigator
Jody L. Allen ...................................................................... Claims Representative
S. Elizabeth Allen .......................................................... Legal Secretary Senior Expert
Alexandra Danielle Aloba .................................................. Financial Investigator
Brittany A. Anderson ....................................................... Director, External & Legislative Affairs
Esther Welch Anderson .................................................... MFCU Administrative Manager
James W. Anderson ........................................................ Investigator
Matthew Patrick Anderson ............................................ eDiscovery Analyst
Susan M. Antonelli ......................................................... Senior Claims Representative
Leigh E. Archer ............................................................... Director of Administration
Darchel Glover Atkins ...................................................... Claims Representative
Christine Renee Aubin ...................................................... Investigator
Sheerie C. Ayres ............................................................ Administrative Coordinator
David S. Barber ............................................................... Investigator
Andrew P. Barone ......................................................... Chief of Fraud and Corporate Neglect Investigations
Delilah Beamer .............................................................. Legal Secretary Senior Expert
Deborah Hurley Bell ....................................................... Community Outreach Coordinator
Ethan Paul Benson ........................................................ Claims Representative
Elizabeth K. Beverly ....................................................... Investigator
Yongsheng Bian ....................................................................................... Data Analyst
Heather K. Blanchard ...................................................... eDiscovery Project Manager
Althea Ann Boling .................................................................. Intake Specialist Senior
Kevin Marcelle Boone ............................................................. eDiscovery Supervisor
Elizabeth Cullen Bray .............................................................. Legal Secretary Senior
Charles Henry Brown Jr. ................................................................ Investigator
Linda F. Browning .......................................................... Employee Relations and Training Manager
Amy B. Bullock ............................................................................ Legal Secretary Senior
Julia Ann Bullock ............................................................................. Legal Secretary
Howard K. Burkhalter .................................................................. Investigator
Collette Justine Canady .............................................................. Investigator
Diana Tas Cardelino .................................................. Equal Employment Opportunity Investigator/Mediator
Kelly Gardner Carpenter ....................................................... Sexual Assault Kit Initiative Project Manager
George Cary Cartin II .............................................................. Application Systems Developer
Miranda Sapphire Chamberlayne ......................................................... Buyer
Addison L. Cheeseman ......................................................... MFCU Computer Forensic-IT Supervisor
Stephanie B. Clark .................................................................... Paralegal
Randall L. Clouse .................................................................. Director and Chief, Medicaid Fraud Control Unit
Betty S. Coble ............................................................................ Legal Secretary Senior Expert
Christina I. Coen ............................................................................. Legal Secretary Senior Expert
Sharon T. Colescott ......................................................................... Legal Secretary Senior
Carlos I. Collazo ........................................................................... Dispute Resolution Specialist
Deborah P. Cook ................................................................. Claims Specialist Senior Expert
Jill S. Costen ................................................................................. Deputy Director, Investigations and Audits
Thomasina Margaret Cunningham ........................................................ Auditor
Katrin Neill Cisne Currens ................................................................ Investigator
Beverly B. Darby ................................................................................ Investigator
Jennifer S. Dauzier .............................................................. Criminal Analyst Senior
Demetrice A. Davis .............................................................. Unit Manager, CIRU and DRU
Diane W. Davis ............................................................................. Legal Secretary
J. Randall Davis ...................................................................... Community Outreach Coordinator
Shanell Marshae Day ................................................................ Senior Human Resources Generalist
Mark de Almeida ........................................................................ Senior Financial Investigator
Tunisia M. Dean ........................................................................... Accountant Senior
Robert A. DeGroot ........................................................................ Senior Investigator
Doyle W. DeGuzman .................................................................... Senior IT Support Specialist
Linda A. Dickerson .............................................................. Unit Manager, Counseling, Intake and Referral Unit
Deborah Daniels Dip ............................................................... Administrative Legal Secretary Senior
Charles Edward Doane Jr. .............................................................. IT Support Specialist
Amy Rush Duncan ................................................. Community Outreach Coordinator
Elizabeth A. Edmond ................................................................. Paralegal Senior
Melinda S.C. Edwards ................................................................. Paralegal
Sonya L. Edwards ................................................................. Claims Representative
Devin A. England ................................................................. Senior Financial Investigator
Harold Ewers ................................................................. Investigator
David Buck Farmer ................................................................. Investigator
Beth Fauerbach ................................................................. Financial Services Specialist
Mark S. Fero ........................................................................ Public Safety Financial Manager
Grace B. Figueroa .................................................... Criminal Investigator/Computer Forensic Examiner
Teresa J. Finch ................................................................. Intake Specialist Senior Expert
Tosha A. Fischetti ................................................................. Investigator
Cheryl D. Fleming ................................................................. Administrative Legal Secretary Senior
Heather M. Ford ................................................................. Administrative Legal Secretary Senior
April Shannon Freeman ............................................................. Director of Programs and Community Outreach
Lisa Garren Furr ............................................................... Sexual Assault Kit Initiative Project Manager
Weston Thomas Gobar ................................................................. Confidential Assistant and Executive Aide
Sharon K. Goggin ................................................................. Paralegal
Charlotte P.L. Gomer ................................................................. Press Secretary
Michelle Renee Gopez ................................................................. Records Manager
John M. Gordon ................................................................. Investigative Supervisor
John Anthony Grazioso III ................................................................. Investigator
Elizabeth Via Grimesey ................................................................. Legal Secretary
Karl E. Grotos ................................................................. Business Manager
Tracy Lee Hall ................................................................. Web Specialist
Lyn J. Hammack ................................................................. Administrative Coordinator
Kathleen Kildea Harrison ................................................................. Legal Secretary
Paul Gabriel Hastings Jr. ................................................................. Investigator
Thomas E. Haynesworth ................................................................. Facilities Assistant
Jennifer Peterson Heatherington ................................................................. Investigator
Deborah J. Henderson ................................................................. Legal Secretary Senior
Howard J. Hicks III ................................................................. Investigative Supervisor
Shaquita I. Hicks ................................................................. Office Support Specialist
Ashley Ryan Hogue ................................................................. Legal Secretary
Margaret C. Horn ................................................................. Chief of Civil Investigations and Elder Abuse
Shante S. Howell ................................................................. Claims Representative
Keith Lamont Ingram ................................................................. Facilities Supervisor
Steven D. Irons ................................................................. Investigative Supervisor
Ruben S. Jefferson Jr ................................................................. IT Support Specialist
2018 REPORT OF THE ATTORNEY GENERAL

Jacqlyn W. Melson .............................................................. Investigator
David J. Miller ..................................................................... Investigator
Shatrice Mykia Miller ........................................................... Legal Secretary
Lynice D. Mitchell ................................................................. Office Services Specialist Senior
Karen G. Molzhon ................................................................. Paralegal
Eda M. Montgomery ............................................................ Senior Investigator
Terrie Darnell Montour ........................................................... Legal Secretary
Tim R. Morley ....................................................................... Investigator
Howard M. Mulholland ......................................................... Senior Financial Investigator
Mary C. Nevetral ................................................................. Office Support Specialist
Meaghan E. O’Brien ............................................................... Outside Counsel Program Coordinator
Trudy A. Oliver-Cuoghi .......................................................... Paralegal
Christopher M. Olson ........................................................... Investigator
Janice R. Pace ....................................................................... Administrative Coordinator
Hailey Jeanine Paladino ......................................................... Human Resources Assistant
Sharon P. Pannell ................................................................. Legal Secretary Senior Expert
Doris M. Parham .................................................................... Intake Specialist
Erick Daniel Paulson .......................................................... Unit Manager, Computer Forensics Unit
John W. Peirce ...................................................................... Investigative Supervisor
Coty D. Pelletier .................................................................... Investigative Supervisor
Seth Duncan Peltier .............................................................. Investigator
Duncan Allen Pence .............................................................. Investigator
Kyanna Milena Perkins ........................................................ Program Director, Victim Notification
Broadus D. Pettiford ............................................................. Director of Information Technology
Nicole Therese Phelps ........................................................ Victim Advocate
Genea C. Poole-Johnson ......................................................... Paralegal
Sandra L. Powell ................................................................. Legal Secretary Senior
Syed A. Rahman ................................................................... Auditor
Cynthia Denise Ready ........................................................... Investigator
Christine Wendy Reed ........................................................ Administrative Coordinator
Dennis Vernon Rice ............................................................ Deputy Director, Information Technology
Sharon Renee Rice ............................................................... Legal Secretary Senior
David A. Risden .................................................................... Investigator
Ashley Elizabeth Rivera ...................................................... eDiscovery Technician
Dean Nicholas Rolle Jr ........................................................ Re-Entry Case Manager
Frank Matthew Sasser III ...................................................... Investigator
Constance S. Saupé ............................................................... Paralegal
Theresa Renee Scales ........................................................ Community Outreach Coordinator
Patricia L. Tyler ............................................................... Paralegal Senior Expert/Manager
David M. Varcoe ........................................................................................ Investigator
Ebony E. Velazquez ........................................... Human Trafficking Task Force Coordinator
Laura C. Verser ................................................................. Paralegal Senior
Mary Frances Davis Waddell ................................................. Legal Secretary Senior
Megan Lee Wallmeyer Rose .................................................. Paralegal Senior
Jonathan Glenn Ward ............................................ Dir. of Constituent Affairs/Special Projects Assistant
Mary Vail Ware ............................................................. Director, Programs and Community Outreach
Kaffa Asoanna Alecia Warren .................................................... Legal Secretary
Amy Elizabeth Weatherly .................................................. Paralegal Senior
Christie A. Wells ............................................................... Director of Finance
Nanora W. Westbrook ........................................................... Claims Representative
Gerard Joseph White ............................................................ Director of Office Operations
Carlisle M. Williams .............................................................. Auditor
Tiffany D. Williams ................................................................... Intake Specialist
Timothy L. Wilson .............................................................. Administration/Operations Manager
Carla Nagel Winters ............................................................... Paralegal
Tonya Ellis Woodson ............................................................. Director of Human Resources
Brian E. Wray ........................................................................... Investigative Supervisor
Josephine Wright-Crawley ................................................... Claims Representative
Michael J. Wyatt ............................................................... Senior Investigator
Abigail T. Yawn ............................................................... Legal Secretary Senior Expert
James A. Zamparello ............................................................... Senior Investigator
Aaron Montreal Ziglar ............................................................. Dispute Resolution Specialist
Edmund Randolph ................................................................. 1776–1786
James Innes ................................................................. 1786–1796
John J. Marshall 1 ....................................................... 1794–1795
Robert Brooke ............................................................ 1796–1799
Philip Norborne Nicholas ............................................. 1799–1819
John Robertson ............................................................. 1819–1834
Sidney S. Baxter ....................................................... 1834–1852
Willis P. Bocock ........................................................ 1852–1857
John Randolph Tucker ................................................ 1857–1865
Thomas Russell Bowden .............................................. 1865–1869
Charles Whittlesey (military appointee) ......................... 1869–1870
James C. Taylor ......................................................... 1870–1874
Raleigh T. Daniel ....................................................... 1874–1877
James G. Field ............................................................ 1877–1882
Frank S. Blair ............................................................ 1882–1886
Rufus A. Ayers .......................................................... 1886–1890
R. Taylor Scott .......................................................... 1890–1897
R. Carter Scott .......................................................... 1897–1898
A.J. Montague ........................................................... 1898–1902
William A. Anderson ................................................ 1902–1910
Samuel W. Williams .................................................. 1910–1914
John Garland Pollard .................................................. 1914–1918
J.D. Hank Jr. 2 .......................................................... 1918–1918
John R. Saunders ...................................................... 1918–1934
Abram P. Staples 3 ....................................................... 1934–1947
Harvey B. Apperson 4 ............................................... 1947–1948
J. Lindsay Almond Jr. 5 ............................................... 1948–1957

1 The Honorable John J. Marshall served as acting Attorney General in the absence of James Innes from mid-October 1794 until late March 1795.

2 The Honorable J.D. Hank Jr. was appointed Attorney General on January 5, 1918, to fill the unexpired term of the Honorable John Garland Pollard, and served until February 1, 1918.

3 The Honorable Abram P. Staples was appointed Attorney General on March 22, 1934, to fill the unexpired term of the Honorable John R. Saunders, and served until October 6, 1947.

4 The Honorable Harvey B. Apperson was appointed Attorney General on October 7, 1947, to fill the unexpired term of the Honorable Abram P. Staples, and served until his death on January 31, 1948.
Kenneth C. Patty\textsuperscript{6} .......................................................... 1957–1958
Albertis S. Harrison Jr. ................................................................. 1958–1961
Frederick T. Gray\textsuperscript{7} ......................................................... 1961–1962
Andrew P. Miller ............................................................................. 1970–1977
Anthony F. Troy\textsuperscript{8} .......................................................... 1977–1978
Gerald L. Baliles .............................................................................. 1982–1985
William G. Broaddus\textsuperscript{9} .................................................. 1985–1986
Mary Sue Terry .............................................................................. 1986–1993
Stephen D. Rosenthal\textsuperscript{10} ............................................... 1993–1994
Richard Cullen\textsuperscript{11} .......................................................... 1997–1998
Mark L. Earley ................................................................................. 1998–2001
Randolph A. Beales\textsuperscript{12} ................................................... 2001–2002
Jerry W. Kilgore .............................................................................. 2002–2005
Judith Williams Jagdmann\textsuperscript{13} ........................................ 2005–2006

\textsuperscript{5} The Honorable J. Lindsay Almond Jr. was elected Attorney General by the General Assembly on February 11, 1948, to fill the unexpired term of the Honorable Harvey B. Apperson, and resigned September 16, 1957.

\textsuperscript{6} The Honorable Kenneth C. Patty was appointed Attorney General on September 16, 1957, to fill the unexpired term of the Honorable J. Lindsay Almond Jr., and served until January 13, 1958.

\textsuperscript{7} The Honorable Frederick T. Gray was appointed Attorney General on May 1, 1961, to fill the unexpired term of the Honorable Albertis S. Harrison Jr. upon his resignation on April 30, 1961, and served until January 13, 1962.

\textsuperscript{8} The Honorable Anthony F. Troy was elected Attorney General by the General Assembly on January 26, 1977, to fill the unexpired term of the Honorable Andrew P. Miller upon his resignation on January 17, 1977, and served until January 14, 1978.

\textsuperscript{9} The Honorable William G. Broaddus was appointed Attorney General on July 1, 1985, to fill the unexpired term of the Honorable Gerald L. Baliles upon his resignation on June 30, 1985, and served until January 10, 1986.

\textsuperscript{10} The Honorable Stephen D. Rosenthal was elected Attorney General by the General Assembly on January 29, 1993, to fill the unexpired term of the Honorable Mary Sue Terry upon her resignation on January 28, 1993, and served until noon, January 15, 1994.

\textsuperscript{11} The Honorable Richard Cullen was appointed Attorney General to fill the unexpired term of the Honorable James S. Gilmore III upon his resignation on June 11, 1997, at noon, and served until noon, January 17, 1998.

\textsuperscript{12} The Honorable Randolph A. Beales was elected Attorney General by the General Assembly on July 10, 2001, and was sworn into office on July 11, 2001, to fill the unexpired term of the Honorable Mark L. Earley upon his resignation on June 4, 2001, and served until January 12, 2002.
Robert F. McDonnell................................................................................... 2006–2009
William C. Mims14 ...................................................................................... 2009–2010
Kenneth T. Cuccinelli II.............................................................................. 2010–2014
Mark R. Herring .......................................................................................... 2014–

13 The Honorable Judith Williams Jagdmann was elected Attorney General by the General Assembly on January 27, 2005, and was sworn into office on February 1, 2005, to fill the unexpired term of the Honorable Jerry W. Kilgore upon his resignation on February 1, 2005, and served until January 14, 2006.

14 The Honorable William C. Mims was elected Attorney General by the General Assembly on February 26, 2009, and was sworn into office on February 27, 2009, to fill the unexpired term of the Honorable Robert F. McDonnell upon his resignation on February 20, 2009, and served until January 16, 2010.
CASES
IN THE
SUPREME COURTS
OF THE
UNITED STATES
AND
VIRGINIA
SUPREME COURT OF THE UNITED STATES

DECIDED

Collins v. Commonwealth, No. 16-1027. In an 8-1 decision, the Court reversed the Supreme Court of Virginia’s judgment, holding that the automobile exception to the Fourth Amendment’s warrant requirement does not apply to vehicles parked on the curtilage of a home.

Currier v. Commonwealth, No. 16-1348. In a 5-4 decision, the Court affirmed the Supreme Court of Virginia’s judgment, holding that the issue preclusion component of the Double Jeopardy Clause does not bar a second prosecution when the defendant consents to multiple trials for severed charges.


REFUSED

Charnock v. Commonwealth, Record No. 17-128. Petition for writ of certiorari denied on April 16, 2018. Plaintiff claimed violation of his constitutional rights in the course of various domestic relations proceedings involving the distribution of his military veteran and disability benefits in state court. A federal action was then brought against the Commonwealth and others and appealed to the Fourth Circuit Court of Appeals, which denied relief on October 11, 2017.

Clowdis v. Virginia Board of Medicine, No. 18-397. Certiorari denied in a case challenging the Board’s order sanctioning a physician.

Coleman v. Commonwealth, No. 17-546. Certiorari denied in a case questioning whether Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984), requires an appeals court reviewing a child-pornography conviction to conduct an independent review of the photograph that is the basis of the prosecution, or whether it may simply review a jury determination for clear error.

Rountree v. Clarke, No. 17-7425. Certiorari denied in a case raising statutory and constitutional challenges to the Virginia Department of Corrections’ refusal to approve yoga mats as a personal faith object that prisoners could possess, store, and use in their cells.

Snodgrass v. Messer, No. 17-635. Certiorari denied in appeal challenging the Fourth Circuit Court of Appeal’s decision that a verbal statement of a prison inmate to a corrections officer that he intended to file a grievance against the officer is not constitutionally protected conduct for purposes of stating a First Amendment retaliation claim.

PENDING

Delaware v. Pennsylvania (formerly Arkansas v. Delaware), Nos. 22O145, 22O146. Original action brought by a group of States against Delaware for failing to distribute to other States their share of funds from unclaimed official checks issued by the money-transfer company MoneyGram.

Department of Commerce v. U.S. District Court for the Southern District of New York, No. 18-557. Appeal challenging the inclusion of a citizenship question on the federal census.

Malvo v. Mathena, No. 18-217. Petition for certiorari filed arguing that the writ should be granted to resolve a conflict between the United States Court of Appeals for the Fourth Circuit and the Supreme Court of Virginia over how to interpret Miller v. Alabama and Montgomery v. Louisiana.

Patterson v. Clarke, No. 18-265. Petition for certiorari filed arguing that the dismissal of a habeas petition by a state circuit court violated the Due Process Clause.


Virginia Uranium, Inc. v. Warren, No. 16-1275. Appeal challenging the Fourth Circuit’s decision, which upheld Virginia’s statutory moratorium on uranium mining.
Wolfe v. Commonwealth, No. 18-227. Petition for certiorari filed arguing that the Supreme Court of Virginia’s judgment was inconsistent with Class v. United States.

SUPREME COURT OF VIRGINIA

DECIDED

Arthur v. Commonwealth, Record No. 170672. Dismissing defendant’s appeal as procedurally insufficient, in that the defendant failed to assign error to the determination of the Court of Appeals. The defendant’s conviction for possession of a firearm by a person previously convicted of a violent offense stands.

Bennett v. Beale, Record No. 171326. Awarding a writ of habeas corpus limited to the issue of the denial of the petitioner’s right to appeal.

Bishop v. Warden, Record No. 180284. Dismissing the petition for a writ of habeas corpus, which included allegations that trial counsel was ineffective for failing to object and allowing the petitioner to appear before the jury in shackles, and holding that the petitioner failed to show that any juror noticed the restraints or that they affected his convictions or sentences.

Botkin v. Commonwealth, Record No. 171555. Affirming the decision of the Court of Appeals that mandatory minimum terms of confinement ordered pursuant to § 18.2-308.2(A) must run consecutively with any other sentence, including other mandatory minimum terms ordered pursuant to the same statute; and directing that the case be remanded to the circuit court for resentencing consistent with the ruling.

Bryant v. Commonwealth, Record No. 170712. Affirming the decision of the Court of Appeals that the offense of unlawfully discharging a firearm within an occupied building does not require the Commonwealth to prove that the firearm was discharged intentionally.

Carter v. Clarke, Record No. 171240. Dismissing the petition for a writ of habeas corpus, which included allegations that the petitioner was denied effective assistance of counsel when his attorney did not object to the testimony of a probation officer.

Chapman v. Commonwealth, Record No. 171417. Affirming the decision of the Court of Appeals that the victim’s failure to wear a seat belt was not a proximate
cause of the victim’s death that relieved the appellant of criminal liability for felony reckless driving.

*Commissioner of Highways v. Karverly, Inc.*, Record No. 170282. Reversing the circuit court’s exclusion of testimony by the appellant’s expert witness as to damages to the residue of property acquired by eminent domain for a multi-use trail. The Supreme Court ruled that the Commissioner’s expert should have been allowed to testify and remanded the case for retrial.

*Commonwealth v. Commonwealth ex rel. Hunter Labs., LLC*, No. 170995. Affirming the Fairfax County Circuit Court’s allocation of settlement proceeds under the Virginia Fraud Against Taxpayers Act.

*Commonwealth v. Giddens*, No. 171224. Reversing and remanding for further proceedings, the Court found that the trial court erred in dismissing the Commonwealth’s petition to have the appellant committed as a sexually violent predator, based on Giddens’ allegations that the Commonwealth’s failure to investigate his complaint about the accuracy of his recidivism risk assessment score constituted gross negligence.

*Commonwealth v. Gregg*, Record No. 170586. Affirming the decision of the Court of Appeals that the Double Jeopardy Clause prohibits a defendant from being convicted and sentenced in a single trial for both the common law offense of involuntary manslaughter and the statutory offense of involuntary manslaughter under § 18.2-154.

*Commonwealth v. Perkins*, Record No. 170437. Reversing, in part, a decision by the Court of Appeals and holding that the evidence was sufficient to establish intent for malicious wounding, where Perkins struck the victim in the back of the head with a gun while a co-defendant hit the victim with his fist.

*Crawford v. Commonwealth*, Record No. 180410. Dismissing as untimely a petition for appeal challenging the sufficiency of evidence to support the trial court’s finding that appellant remains a sexually violent predator.

*Cuff v. Commonwealth*, Record No. 171239. Affirming a decision by the Court of Appeals that there was no factual support for the contention that guilty pleas were the product of coercion from Appellant’s attorney.
Curley v. Commonwealth, Record No. 170732. Affirming a decision by the Court of Appeals that the search of Appellant’s vehicle was supported by probable cause.

Davis v. Clarke, Record No. 171301. Dismissing as untimely a petition for a writ of habeas corpus that alleged ineffective assistance of counsel.

DuFresne v. Commonwealth, Record No. 161633. Vacating a judgment of the Court of Appeals and ruling that if error had been made by the trial court, it had been invited by the Appellant, such that the trial court had not abused its discretion in denying the Appellant’s Motion to Set Aside the Verdict on the basis of error.

Frouz v. Commonwealth, Record No. 171450. Upon finding that it was the appropriate venue for hearing appeals of dangerous dog determinations under Virginia Code § 3.2-6540, upholding the circuit court’s finding that the dog in question was a dangerous dog under the statute.

Garcia Tirado v. Commonwealth, Record No. 170458. Affirming the decision of the Court of Appeals that the trial court had not erred in ruling that Appellant had knowingly and voluntarily waived his Miranda rights.

George Mason University v. Malik, No. 180005. Reversing a decision of the Circuit Court of Fairfax County, and holding that the University’s determination that a student was ineligible for in-state tuition was not arbitrary, capricious, or otherwise contrary to law.

Gerald (Patricia) v. Commonwealth, Record No. 161844, and Gerald (Tarsha) v. Commonwealth, Record No. 170356. Affirming in a joint opinion the decisions of the Court of Appeals upholding defendants’ convictions for perjury and driving on a suspended license, including the Court of Appeals’ decision that the Albemarle Circuit Court was the proper venue for perjury committed in the Albemarle General District Court.

Gordon v. Kiser, No. 180162. Appeal of decision of Wise County Circuit Court to deny an inmate’s motion for nonsuit and to prospectively deny in forma pauperis status under Virginia Code § 8.01-692. The Circuit Court’s judgment denying Gordon prospective in forma pauperis status is affirmed. Portion of the judgment imposing pre-service review and summary dismissal on any future complaints Gordon might file in the Wise County Circuit Court is vacated.
Hall v. Commonwealth, Record No. 180197. Reversing a decision of the Court of Appeals and holding that a disclosure under § 18.2-248(C)(e)(part of the “safety valve” provision) is timely made when it is provided to the Commonwealth prior to the commencement of a sentencing hearing.

Holloway v. Commonwealth, Record No. 170258. Affirming a decision of the Court of Appeals that the trial court did not err in finding that a traffic stop due to an air freshener dangling from the car’s rear-view mirror was supported by reasonable suspicion.

In re: Brown, Record No. 161422. Dismissing a petition for a writ of actual innocence based on analysis of biological evidence by a private laboratory, and holding that the testing statute limited the Court to considering only test results certified by the Virginia Department of Forensic Science.

In re: Phillips, Record No. 171438. Dismissing a petition for writ of actual innocence based on analysis of biological evidence performed by a private laboratory, i.e., the results of tests not performed or certified by the Department of Forensic Science.

In re: Watford, Record No. 161187. Granting a petition for writ of actual innocence, upon holding that a statutory change required the Court to “examine the likelihood of a reasonable juror finding the petitioner guilty beyond a reasonable doubt once all of the evidence has been fairly considered.”

Jackson v. Clarke, Record No. 170843. Dismissing the petition for a writ of habeas corpus alleging that trial counsel rendered ineffective assistance of counsel when challenging the sufficiency of the evidence to support the charge of possession of a firearm by a felon.

Johnson v. Commonwealth, Record No. 170963. Affirming a decision of the Court of Appeals, and holding that the trial court’s admission of hearsay evidence in a probation revocation proceeding did not violate the Appellant’s right to confront witnesses against him.

Jones v. Clarke, Record No. 180498. Dismissing as moot petition for a writ of mandamus requesting the court to compel petitioner to comply with the subpoena duces tecum that was served on him for production of the requested records.
Jones v. Commonwealth, Record No. 180052. Affirming a decision of the Court of Appeals and holding that that a conviction for shooting at an occupied vehicle does not require proof that the shooter was located outside of the vehicle when he fires the shots.

Jones v. Commonwealth ex rel. Moll, Comptroller, Record No. 170639. Affirming the circuit court’s dismissal of the appellant’s claim for health insurance benefits under the Line of Duty Act based on a finding that he did not qualify as a “disabled person” under the statute.

Jordan v. Commonwealth, No. 161527. Affirming the decision of the Greyson County Circuit Court denying an inmate’s motion for a name change on grounds that it would frustrate legitimate law-enforcement purposes.

Kohl’s Department Stores, Inc. v. Virginia Department of Taxation, Record No. 160681. Following a petition to rehear filed by Kohl’s, the Supreme Court issued a revised opinion upholding the circuit court’s ruling that under the “subject-to-tax” exception, royalties paid to a related member are not taxable in Virginia if tax was paid on such royalties in another jurisdiction, and reversing and remanding the circuit court’s ruling that the tax paid in another state must have been paid by the entity receiving the royalties to qualify for the exception.

Leonard v. Commonwealth, No. 170965. Reversing the decision of the Prince George County Circuit Court to deny an inmate’s name change application under Virginia Code § 8.01-217.

Lewis v. Commonwealth, Record No. 170518. Affirming a decision by the Court of Appeals and holding that a conviction of assault and battery of a family, third or subsequent offense, requires two predicate convictions to exist at the time of the indictment, rather than at the time of commission of the offense; and further, that it is not necessary for the defendant to have been sentenced on the predicate convictions in order for them to qualify as such.

Martinez v. Commonwealth, Record No. 180179. Dismissing an appeal of a circuit court’s order for continued treatment of an incompetent defendant charged with capital murder, holding that the Supreme Court had no jurisdiction to hear such a criminal appeal, and declining to transfer the case to the Court of Appeals as it had no jurisdiction to hear an appeal of such a non-final order.
McGinnis v. Commonwealth, Record No. 180055. Reversing a decision by the Court of Appeals that the Appellant had failed to preserve error, but affirming the Appellant’s three convictions for passing worthless checks on the merits.

Osburn v. Virginia Department of Alcoholic Beverage Control, No. 161777. Affirming a decision of the Court of Appeals to uphold ABC’s termination of an employee for violating the Fourth Amendment rights of a license applicant during a search of the applicant’s premises.


Sears v. Clarke, Record No. 180464. Dismissing petition for writ of habeas corpus alleging the trial court improperly modified its sentencing order after petitioner had been transferred to the Department of Corrections.

Secret v. Commonwealth, Record No. 170540. Affirming a decision of the Court of Appeals upholding the defendant’s convictions for arson and nine attempted murder counts.

Severance v. Commonwealth, Record No. 170829. Affirming a decision of the Court of Appeals that the defendant suffered no double jeopardy violation by being sentenced on two separate capital murder convictions for two premeditated homicides in a three-year period.

Smith v. Commonwealth, Record No. 180198. Affirming a decision of the Court of Appeals holding that agreed jury instructions which failed to instruct the jury as to the definition of “reasonable provocation” in a voluntary manslaughter case bound the parties under the “law of the case” doctrine and finding, under the jury instructions given, that the evidence was sufficient to convict for voluntary manslaughter.

Terry v. Commonwealth, Record No. 170279. Affirming a decision by the Court of Appeals that it did not have jurisdiction to hear the appeal of the denial of a motion to vacate a criminal conviction because the collateral attack is a civil proceeding, and affirming the conviction because the defendant failed to establish extrinsic fraud from the police detective’s alleged perjury in a search warrant affidavit.
Thomas v. Commonwealth, Record No. 170707. Reversing a decision of the Court of Appeals holding that a sentencing order complied with Virginia law in its wording imposing a suspended sentence in addition to the active sentence set by the jury.

Turner v. Commonwealth, Record No. 161804. Affirming a decision of the Court of Appeals that the defendant’s act of hanging a noose in public view on his private property was prohibited conduct under Virginia’s noose statute.

Vesilind v. Virginia State Board of Elections, Record No. 170697. Upholding the judgment of the circuit court that certain state legislative districts do not violate the compactness requirement in Article II, § 6 of the Constitution of Virginia.

Walton v. Clarke, No. 171078. Appeal of the Richmond Circuit Court dismissal of a petition for writ of habeas corpus as untimely. Circuit Court decision is found to be based on incorrect facts. The holding of the Circuit Court is reversed and the matter remanded.

Wardrett v. Clarke, Record No. 170649. Dismissing the petition for a writ of habeas corpus including allegations of ineffective assistance and trial error.

White v. Commonwealth, Record No. 180939. Dismissing as untimely the petition for appeal challenging the trial court’s continuance of sexually violent predator’s annual review hearing.

Wright v. Woodson, Warden, Record No. 170163. Dismissing the petition for writ of habeas corpus and holding, inter alia, that while an attorney’s ignorance of the law may render his performance deficient, courts must examine the totality of the circumstances of the representation to determine whether the attorney’s acts or omissions were outside the wide range of professionally competent assistance.

REFUSED

Artis v. Commonwealth, Record No. 180660. Refusing petition for appeal that alleged insufficient evidence to support the trial court’s finding that appellant violation of his conditional release rendered him no longer suitable for conditional release.
Azar v. Virginia Department of Taxation, Record No. 171225. Refusing a petition for appeal of a circuit court’s decision to uphold the Tax Commissioner’s ruling with respect to application of the three-year period of limitations for refunds.

Bellamy v. Commonwealth, Record No. 171306. Refusing appeal of a Virginia Tort Claims Act matter due to failure to exhaust remedies.

Braxton v. Clarke, Record No. 180353. Refusing petition for writ of habeas corpus alleging petitioner should have been released from jail because he had served his entire active sentence.

Brown v. Democratic Party of Virginia, Record No. 181175. Refusing a petition for appeal on procedural grounds of the circuit court’s dismissal of claims concerning ballot access.

Clowdis v. Virginia Board of Medicine, No. 180328. Refusing a petition for appeal in a case challenging the Board’s order sanctioning a physician.

Davis v. Commonwealth, Record No. 180033. Refusing petition for appeal which alleged insufficient evidence to support the trial court’s finding that appellant’s violation of his conditional release rendered him no longer suitable for conditional release.


Diamond v. Clarke, Record No. 171754. Refusing a petition for a writ of habeas corpus alleging ineffective assistance of counsel.

Diamond v. Clarke, Record No. 180186. Refusing a petition for a writ of habeas corpus alleging ineffective assistance of counsel.

Fauconier v. Martin, Record No. 171686. Refusing appeal of a Virginia Tort Claims Act matter alleging that appellant suffered permanent injuries to his person.

Gryder v. Holcomb, Record No. 180517. Refusing, on procedural grounds, a petition for appeal of the circuit court’s dismissal of claims against the Department of Motor Vehicles for allegedly failing to register a vehicle.

Harris v. Commonwealth, Record No. 180137. Refusing petition for appeal which alleged insufficient evidence to support the trial court’s finding at the annual review hearing that appellant remains a sexually violent predator.

Holcomb v. Virginia Automobile Dealers Association (VADA), Record No. 180403. Refusing a petition for appeal of the Court of Appeals’ finding that it did not have jurisdiction to review VADA’s interlocutory appeal because the circuit court’s determination that VADA has standing to appeal the DMV’s decision that Tesla qualified to open a manufacturer-dealership did not adjudicate the merits of the cause.

Holloway v. Newton, Record No. 171464. Refusing a petition for a writ of habeas corpus alleging that the circuit court lacked jurisdiction to revoke Petitioner’s suspended sentence and that he was denied effective assistance of counsel at that hearing.

Johnson v. Commonwealth, Record No. 180926. Refusing petition for appeal which alleged, among other things, that the evidence was insufficient to support the trial court’s findings that appellant is a sexually violent predator and that appellant needs secure inpatient treatment.

King v. Young, Record No. 171677. Refusing appeal of a Virginia Tort Claims Act matter alleging appellant was not protected from an attack by another inmate.

Kittles v. Commonwealth, Record No. 180457. Refusing petition for appeal which alleged insufficient evidence to support the trial court’s findings at the annual review hearing that appellant remains a sexually violent predator and in need of continued inpatient treatment.

Kubweza v. Burns, Record No. 180780. Refusing a petition for appeal from the circuit court’s decision to uphold the Department of Taxation’s determination that the appellant has outstanding tax liabilities.
Leonard v. Commonwealth, Record No. 171484. Refusing petition for appeal which alleged insufficient evidence to support the trial court’s finding at the annual review hearing that appellant remains a sexually violent predator.

Lockett v. Clarke, Record No. 171300. Refusing petition for writ of mandamus contending the petitioner’s sentences were not being accurately reflected on state records.

Manzo-Hernandez v. Commonwealth, Record No. 171257. Refusing appeal of a Virginia Tort Claims Act matter alleging appellant was raped by another inmate.

Milgrim v. Booker, Record No. 170593. Refusing petition for writ of habeas corpus alleging ineffective assistance of counsel and flawed parole proceedings.

Mooney v. Commonwealth, Record No. 181164. Pending appeal from the decision of the Court of Appeals upholding the trial court’s admission of hearsay at a probation violation hearing.

Ofori v. Commonwealth, Record No.170888. Refusing appeal of Virginia Tort Claims Act matter wherein plaintiff alleged that state prison staff harmed and deprived him of rights secured and protected by the Constitution.

Passaro v. Virginia State Police, No. 170378. Refusing a petition for appeal of the Court of Appeals decision to affirm an employee’s termination following his failure to follow instructions.

Rankin v. Commonwealth, Record No. 180812. Pending appeal from the decision of the Court of Appeals upholding the trial court’s admission of evidence that, following his shooting of a suspected shoplifter, Rankin told a security officer that “it’s my second one.”

Small v. Commonwealth, Record No. 171309. Refusing petition for appeal which alleged insufficient evidence to support the trial court’s finding that appellant’s violation of his conditional release rendered him no longer suitable for conditional release.

Spinner v. Commonwealth, Record No. 180583. Pending appeal from the decision of the Court of Appeals upholding the trial court’s ruling that the warning given before police questioning complied with Miranda v. Arizona.
Stokes v. Commonwealth, Record No. 180510. Pending appeal from the decision of the Court of Appeals upholding the trial court’s ruling that Stokes was not denied his right to a preliminary hearing.

Stone v. Commonwealth, Record No. 180564. Pending appeal from the decision of the Court of Appeals upholding the trial court’s ruling that firearms were involved in the drug sales, and thus the safety valve provision of Code § 18.2-248 would not permit the trial court to ignore the mandatory sentences for his drug distribution convictions.

Thormac, LLC v. Department of Alcoholic Beverage Control, Record No. 180127. Refusing a petition for appeal of a decision of the Court of Appeals to uphold the issuance of a civil penalty for violation of Virginia’s alcoholic beverage laws.


Trinity Building Company, LLC v. Board for Contractors, Record No. 180570. Refusing a petition for appeal of the circuit court’s denial of requests for injunctive relief to bar the Board for Contractors from hearing certain evidence and writ of mandamus to require the Board to hold a formal hearing.

Turner v. Commonwealth, Record No. 180664. Pending appeal from the decision of the Court of Appeals upholding Turner’s conviction for failure to register as a sexually violent offender under the Virginia Sex Offender Registry Act.

Welch v. Kanode, Record No. 180868. Refusing petition for writ of habeas corpus alleging petitioner was denied due process during an institutional disciplinary process.

Willis v. Commonwealth, Record No. 180458. Refusing petition for appeal which alleged insufficient evidence to support the trial court’s finding that appellant’s violation of his conditional release rendered him no longer suitable for conditional release.

Woodson v. Commonwealth, Record No. 180930. Refusing petition for appeal that alleged insufficient evidence to support the trial court’s finding that appellant is a sexually violent predator.
Young v. Commonwealth, Record No. 180515. Pending appeal from the decision of the Court of Appeals upholding the trial court’s ruling that the defendant’s statutory speedy trial rights were not violated.

**PENDING**

Adkins v. Commonwealth, Record No. 180485. Pending appeal from the decision of the Court of Appeals challenging the trial court’s denial of a motion to suppress statements on Fifth Amendment grounds and denial of a mutual combat instruction.

Anderson v. Warden, No. 171562. Appeal of decision of Powhatan County Circuit Court decision that an inmate’s due process rights were not violated through a disciplinary proceeding that resulted in a fine.

Baughman v. Commonwealth, Record No. 181376. Petition for interlocutory appeal as to whether the Office of the Attorney General can hire its own expert for use at trial or is required to use the expert designated by the Commitment Review Committee.

Bethea v. Commonwealth, Record No. 180527. Pending appeal from the decision of the Court of Appeals challenging the trial court’s overruling of a Batson challenge to the Commonwealth’s peremptory strike of an African-American juror.

Bobbs v. Clarke, Record No. 180814. Pending petition for writ of habeas corpus alleging that the denial of the petitioner’s request for geriatric conditional release pursuant to Virginia Code Section 53.1-40.01 violated his due process rights.

Boerstler v. Commonwealth, Record No. 181482. Petition for appeal challenging the trial court’s finding at the annual review hearing that appellant remains a sexually violent predator.


Brown v. Commonwealth, Record No. 180537. Pending appeal from the decision of the Court of Appeals upholding the trial court’s denial of a motion to withdraw guilty pleas to petit larceny and trespassing.
Bryant v. Commonwealth, Record No. 180561. Pending appeal from the decision of the Court of Appeals finding that cases were not “tried together” for purposes of perfecting an appeal under Rule 5A:12(f).

Candelaria v. Commonwealth, Record No. 180759. Pending appeal from the decision of the Court of Appeals finding that any error in admitting verbal and written hearsay statements was harmless.

City of Virginia Beach v. Virginia Marine Resources Commission, Record No. 18231. Pending appeal to review the decision of the Court of Appeals to uphold the circuit court’s ruling that the Virginia Marine Resources Commission did not err in issuing a riparian oyster-planting lease.

Collins v. Commonwealth, Record No. 151277. On remand from the U.S. Supreme Court to determine next steps in light of the Court’s holding that the automobile exception to the Fourth Amendment’s warrant requirement does not apply to vehicles parked on the curtilage of a home.


Commonwealth v. Murgia, Record No. 180946. Pending appeal by the Commonwealth from the decision of the Court of Appeals reversing conviction appellee for computer solicitation of a minor.

Commonwealth v. Watson, Record No. 180940, and Watson v. Commonwealth, Record No. 180819. Pending cross-appeals from a circuit court order granting in part and denying in part motion to vacate a number of sentencing orders, challenging the court’s determinations that (1) sentences were void because they were below the statutory minimum, and (2) Watson lacked standing to allow him to challenge similar sentencing orders of other inmates.

Cox v. Commonwealth, Record No. 171380. Pending appeal from the decision of Court of Appeals of Virginia challenging (1) whether the trial court’s order providing that the court would reconsider Cox’s sentence after a year was a final order, and (2) whether the order was void ab initio.
**Dennis v. Commonwealth**, Record No. 171599. Pending appeal from the decision of the Court of Appeals to dismiss a petition for writ of actual innocence, based on non-biological evidence, without an evidentiary hearing.

**Gettings v. Commonwealth**, Record No. 181481. Petition for appeal challenging the trial court’s finding that the appellant’s violation of his conditional release was sufficient to render him no longer suitable for conditional release.

**Harris v. Clarke**, Record No. 180853. Pending petition for writ of habeas corpus claiming that (1) petitioner was not afforded due process prior to his parole being revoked; and (2) Virginia Code Section 53.1-159 applied retroactively, thereby causing petitioner to serve earned good time received before being paroled.

**Harvey v. Commonwealth**, Record No. 180015. Pending on appeal are whether the trial court erred in denying appellant’s request for a court appointed expert to assist him in the emergency custody hearing and by admitting into evidence the report of the expert designated by the Virginia Department of Behavioral Health and Developmental Services.

**Helmick Family Farm, LLC v. Commissioner of Highways**, Record No. 180691. Pending appeal to determine whether the circuit court erred in an eminent domain action by excluding evidence and exhibits related to the reasonable probability of rezoning, and by limiting testimony of the landowner’s representative relating to valuation techniques used by licensed appraisers.

**Hill v. Commonwealth**, Record No. 180681. Pending appeal from the decision of the Court of Appeals upholding the trial court’s denial of a motion to suppress evidence resulting from search and seizure.

**Hodnett v. Commonwealth**, Record No. 180528. Pending appeal from the decision of the Court of Appeals upholding the trial court’s finding that Hodnett had requisite knowledge to convict for possession of ammunition by a convicted felon.

**Hostetter v. Commonwealth**, Record No. 181615. Petition for appeal challenging the trial court’s finding at the annual review hearing that appellant remains a sexually violent predator and is not suitable for conditional release.

**In re: Scott**, Record No. 171286. Pending petition for a writ of actual innocence claiming that DNA excludes the petitioner from a 1975 rape and sodomy case.
Irving v. Clarke, Record No. 181039. Pending petition for writ of mandamus alleging that the respondent unlawfully refused to return $1,000 belonging to the petitioner.

Morrissey v. Virginia State Bar ex rel. Third District Committee, No. 181311. Pending appeal of an attorney’s license revocation for violating Rules of Professional Conduct 5.1(b), 5.5(c), and 8.4(b) in connection with attorney supervision and wrongful conduct with a minor.

Owens v. State Building Code Technical Review Board, Record No. 181158. Pending appeal challenging the decision of the Court of Appeals to uphold the circuit court’s ruling that the State Building Code Technical Review Board was correct in deciding an appeal of the issuance of a building permit to be moot.

The Corporate Executive Board Company v. Virginia Department of Taxation, Record No. 171627. Pending appeal to determine whether the Department of Taxation’s assessment of corporate income tax against the appellant violated the dormant Commerce Clause and whether the tax was assessed in an equitable manner.

Thomas v. Commonwealth, Record No. 180764. Pending on appeal is whether appellant has a constitutional right to have a court appointed expert to assist him during an emergency custody proceeding.

Trainum v. Commonwealth, Record No. 181636. Petition for appeal challenging the trial court’s finding at the annual review hearing that appellant is not suitable for conditional release.
Each opinion in this report is preceded by an opinion number and main headnote(s) briefly describing the subject matter of the opinion. For purposes of citing an opinion, each opinion begins on the page on which the opinion number preceding the opinion first appears. Cite an opinion in this report as follows: 2018 Op. Va. Att’y Gen. ____.

Opinions of the Attorney General beginning with opinions issued in January 1996, and certain Annual Reports of the Attorney General may be accessed on the Internet at www.oag.state.va.us. Opinions of the Attorney General are also available on LEXISNEXIS, beginning with opinions issued in July 1958; on WESTLAW, beginning with opinions issued in July 1976; on HeinOnline, beginning with opinions issued in 1895; and on CaseFinder, beginning with opinions issued in July 1967.
COUNTIES, CITIES AND TOWNS—LOCAL POLICE POWERS

Pittsylvania County and the Town of Chatham have police power authority to prohibit the use of motorboats on two privately owned lakes, where the lakes serve as public reservoirs for the two localities.

THE HONORABLE LES R. ADAMS
MEMBER, HOUSE OF DELEGATES

FEBRUARY 15, 2018

ISSUES PRESENTED

You inquire regarding the general police power authority of Pittsylvania County and the Town of Chatham to prohibit the operation of watercraft powered by internal combustion engines on two privately owned lakes, when these lakes contribute to the public water supply for both the County and the Town. If such prohibition is permissible, you ask whether the County and the Town may impose penalties, either civil or criminal, for violations thereof.

BACKGROUND

Your inquiry pertains to two man-made lakes—Cherrystone and Roaring Fork lakes—which are located northwest of the Town of Chatham in Pittsylvania County. You indicate that these lakes are privately owned and that the Town obtained the right to construct them on private property by means of an easement. Each lake adjoins a dam and connects to a creek, with both creeks merging into Cherrystone Creek.1 The Town of Chatham has operated and maintained these two dams by means of a land use permit since their construction in 1967.2 The dams regulate the flow of water to the Chatham Water Treatment Plant, which serves as the Town’s sole water treatment facility.3 The plant is located in Pittsylvania County, less than

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1 The two dams are known as Cherrystone Creek dams 1 and 2A. See USDA, Chatham to hold public meeting to discuss rehabilitation projects, GODANRIVER.COM (May 12, 2016), available at http://www.godanriver.com/news/pittsylvania_county/usda-chatham-to-hold-public-meeting-to-discuss-rehabilitation-projects/article_b9169782-1893-11e6-84b7-87b9fe1e0b49.html. See also Cherrystone Lake, Virginia, GOOGLE MAPS, available at https://www.google.com/maps/place/Cherrystone+Lake+Rd,+Chatham,+VA+24531/@36.8468382!-79.4311469 (last visited Feb. 12, 2018).


3 Id. at 14. Water is taken from the creek and then pumped to the plant for purification. Id.
one mile west of the Town of Chatham.\textsuperscript{4} The two lakes serve as the main source of water for the Town’s public water supply and also provide a partial source of water for the County’s public water supply.\textsuperscript{5}

The 2016 Chatham Comprehensive Plan notes that “[p]rotection of the watersheds is essential to the provision of an adequate future water supply. Especially noteworthy is the Cherrystone watershed. Should the water supply in this watershed area become polluted, it would be physically and economically difficult for Chatham and the County to develop another alternate watershed.”\textsuperscript{6}

\textbf{APPLICABLE LAW AND DISCUSSION}

The Commonwealth possesses inherent police powers that may be exercised “in the interest of the public welfare, the public health and the public safety.”\textsuperscript{7} “The extent of this power is difficult to define, but it is elastic, and expands automatically to protect the public against the improper use of private property to the injury of the public interest.”\textsuperscript{8} It is well established that these powers embrace the authority to prevent contamination of the public water supply.\textsuperscript{9} Virginia abides by the Dillon Rule of strict construction, pursuant to which a locality may exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable.\textsuperscript{10} Section

\textsuperscript{4} See \textit{id. See also Chatham Water Plant, GOOGLE MAPS}, available at https://www.google.com/maps/place/Chatham+Water+Plant/@36.8273401,-79.4582867,13z/data=!4m8!1m2!1stown+of+chatham,+Virginia+water+treatment+plant!3m4!1s0x8852aa9dc0de40c7:0x1dec977b8e374912!m21!d36.822223!4d-79.409752 (last visited Feb. 13, 2018).


\textsuperscript{6} 2016 CHATHAM COMPREHENSIVE PLAN at 5, \textit{supra} note 2.

\textsuperscript{7} Kirkpatrick v. Bd. of Supvrs., 146 Va. 113, 126 (1926).


\textsuperscript{9} “It is, of course, settled that the protection of the public health is a valid object for the exercise of the police power. A pure water supply is so intimately connected with the health of the community that the provisions with regard to it are properly a part of the police power of the State.” Weber, 196 Va. at 1150.

\textsuperscript{10} Richmond v. Bd. of Supvrs., 199 Va. 679, 684 (1958) (citations omitted) (setting forth the Dillon Rule as it applies to municipal corporations); Bd. of Supvrs. v. Horne, 216 Va. 113, 117 (1975) (citations omitted) (applying the Dillon Rule to boards of supervisors).
15.2-1200 of the Code of Virginia extends general police powers to counties and specifically delegates the authority to prevent the contamination of water for the purpose of safeguarding public health:11

Any county may adopt such measures as it deems expedient to secure and promote the health, safety and general welfare of its inhabitants which are not inconsistent with the general laws of the Commonwealth. Such power shall include, but shall not be limited to . . . the adoption of regulations for the prevention of the pollution of water which is dangerous to the health or lives of persons residing in the county.[12]

Prior opinions of this Office acknowledge that the general grant of police power afforded by this statute is broadly construed for the purpose of protecting public health.13

Section 15.2-1102 provides a general grant of police powers to cities and towns, and it specifically limits the exercise of these powers to “the area within the corporate limits of the municipality, unless otherwise conferred in [applicable state law].”14

The Chatham Town Charter, however, grants extraterritorial jurisdiction to the Town for the purpose of protecting its water supply:

[i]n addition to the powers elsewhere mentioned in this charter and powers conferred by general law, and the Constitution, the . . . Town of Chatham shall have the . . . power[.] . . . to make reasonable rules and regulations for promoting the purity of its . . . water supply, and for protecting the same from pollution; and for this purpose to exercise full police powers and sanitation patrol over all land comprised within the limits of the water shed, tributary15 to any such

11 See VA. CONST. art. VII, § 2 (“The General Assembly shall provide by general law for the . . . powers . . . of counties, cities, towns, and regional governments.”); id. art. VII, § 3 (“The General Assembly may provide by general law or special act that any county, city, town, or other unit of government may exercise any of its powers or perform any of its functions . . . .”).
14 Section 15.2-1102 (2012).
15 “A true watershed is an area of land and water defined by a boundary such that all surface drainage within the boundary converges to a single point.” See Hydrologic Unit Geography, VA. DEP’T OF CONSERVATION AND RECREATION (May 18, 2017), available at http://www.dcr.virginia.gov/soil-and-water/hu. A tributary is “[a] stream that flows into a larger stream or other body of water.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE p. 1841 (4th
water supply wherever such lands may be located in this Commonwealth;\textsuperscript{16} to impose and enforce adequate penalties for the violation of any such rules and regulations; and to prevent by injunction any pollution or threatened pollution of such water supply, and any and all acts likely to impair the purity thereof, and to carry out the powers herein granted . . . .\[17\]

Section 15.2-1103 provides that “[w]henever there appears to be a conflict between any provision of [Title 15.2, Chapter 11, Article 1] . . . and that of any charter of a municipal corporation, the provisions of the charter shall be construed and held to take precedence over such conflicting or apparently conflicting provisions of this article or of any amendment hereof.”\textsuperscript{18} Thus, the Town possesses police power jurisdiction over Cherrystone and Roaring Fork lakes for the purpose of protecting its water supply, even though they are located outside town boundaries.

I note that the broad grant of extraterritorial jurisdiction contained in the Charter is not in conflict with § 15.2-2109, which provides that a “locality may . . . prevent the pollution of water and injury to waterworks for which purpose its jurisdiction shall extend to five miles beyond the locality.”\textsuperscript{19} “A recognized principle of statutory construction is that where a charter and a statute conflict, the

\textsuperscript{16} The general rule applicable to all local ordinances is that they are effective only within the boundaries of the locality unless a State statute specifically provides otherwise. A town has no powers beyond its corporate limits except those which are clearly and unmistakably delegated to it by the General Assembly for such exercise, and its extraterritorial acts are ultra vires in the absence of an authorizing statute.” 1983-1984 Op. Va. Att’y Gen. Va. 111, 111-12 (citing Kelley v. County of Brunswick, 200 Va. 45, 48 (1958); Jordan v. Town of South Boston, 138 Va. 838, 843 (1924)). See also § 15.2-1102; Richmond v. Bd. of Supvrs., 199 Va. 679, 684 (1958) (citation omitted) (“The legislature has undoubted authority to confer upon cities and towns jurisdiction for sanitary and police purposes in territory contiguous to the corporation.”).

\textsuperscript{17} CHARTER FOR THE TOWN OF CHATHAM, VA., § 3.7, available at https://law.lis.virginia.gov/charters/chatham/ (last visited Feb. 13, 2018). See also VA. CONST. art. VII, § 2 (“The General Assembly may . . . provide by special act for the organization, government, and powers of any county, city, town, or regional government . . . .”).

\textsuperscript{18} Section 15.2-1103 (2012). “A municipal corporation, in addition to the powers granted by § 15.2-1102, shall have all the powers granted to it in its charter; and nothing contained in this article shall be construed to in anywise repeal, amend, impair or affect any provision of any existing charter or of any charter hereafter granted to a municipal corporation or any provision of any other applicable law, unless such amendment or repeal so provides.” Id.

\textsuperscript{19} Section 15.2-2109 (2012).
charter controls.”20 The fact that the General Assembly enacted § 15.2-2109 subsequent to the Chatham Town Charter does not alter this conclusion.21

I further note that this grant of extraterritorial jurisdiction should not be construed to encompass only dry land, thereby excluding bodies of water. The Charter does not define the term “land.” “Ordinarily, when a particular word in a statute is not defined therein, a court must give it its ordinary meaning.”22 “[This] rule also requires that the courts should be guided by ‘the context in which [the word or phrase] is used.”23 Black’s Law Dictionary provides that “[i]n its legal significance, ‘land’ is not . . . confined to solids, but may encompass within its bounds such things as gases and liquids.”24 Further, the Charter mentions land within the context of two terms—watershed and tributary—both of which include bodies of water.25 Thus, the Charter’s grant of extraterritorial jurisdiction extends both to dry land and bodies of water thereon, including the two private lakes at issue.26

As provided in the relevant statutory provisions, local governing bodies in receipt of properly delegated police powers must exercise this authority in a manner


24 BLACK’S LAW DICTIONARY p. 1008 (10th ed. 2014) (internal quotation marks omitted) (quoting PETER BUTT, LAND LAW 9 (2d ed. 1988)). “Land” is also defined at law as “[a] tract that may be owned, together with everything growing or constructed on it.” AMERICAN HERITAGE DICTIONARY p. 983 (4th ed. 2009). The term “tract,” in turn, means “[a]n expanse of land or water.” Id. at 1829 (emphasis added).

25 See supra note 15.

26 “[I]f the language of the statute ‘is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute.’” Cucinelli v. Rector & Visitors of the Univ. of Va., 283 Va. 420, 425 (2012) (quoting Kozmina v. Commonwealth, 281 Va. 347, 349-50 (2011)).
consistent with applicable state and federal law. However, “[local] ordinances are not deemed inconsistent with state statutes and regulations unless they are so contradictory that the two cannot coexist,” such as when “the ordinance purports to authorize what the statutes prohibit, or prohibit what the statutes expressly authorize.” However, “they are not deemed inconsistent because of mere lack of uniformity in detail.” I can find no state law that would thus conflict with the proposed prohibition. In addition, state law may preempt local police power when “state regulations [are] so comprehensive that the state may be considered to occupy the entire field.” Nevertheless, “[t]he Commonwealth and localities may have concurrent jurisdiction over the same subject matter, and the fact that the Commonwealth, in the exercise of its police power, has made regulations with respect to a subject does not necessarily prohibit a county from legislating on the same subject.” Thus, although federal and state regulatory schemes exist for the purpose of protecting public drinking water, these programs would not preempt the proposed prohibition.

In light of the clear delegation of police power, I therefore conclude that both the County and the Town possess the authority to enact an ordinance establishing the proposed prohibition. I note that if the Town exercises extraterritorial police power

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30 Id.


34 However, a locality may not enact water quality standards that are more stringent than applicable state or federal standards, because “the degree of federal and state regulation of water quality standards is comprehensive.” 2013 Op. Va. Att’y Gen. 222, 226.
over the lakes, “persons and businesses in this area must comply with both county and town regulatory requirements.” A “[c]harter provision [granting a town extraterritorial jurisdiction] . . . does not remove the affected area from the regulatory jurisdiction of . . . [the] County, nor does it require the County board to obtain the Town Council’s approval before the County may exercise its regulatory authority. Rather, [a] grant of limited extraterritorial jurisdiction to [a] Town results in the governing bodies’ having concurrent jurisdiction over the area.” Further, any ordinance enacted by the Town of Chatham affecting property in Pittsylvania County may not conflict with County zoning ordinances.

This conclusion is not altered by the fact that the proposed prohibition would affect privately-owned lakes. In Virginia, “[a] citizen holds his property subject to the proper exercise of the police power either by the General Assembly directly, or by municipal corporations or other State agencies to which such power has been delegated.” Thus, “[t]he legislature may, in the exercise of the police power, restrict personal and property rights in the interest of public health . . . and for the promotion of the general welfare.” Further, “this power to restrain a private injurious use of property is very different from the right of eminent domain. It is not a taking of private property for public use.”

You next inquire regarding enforcement of the proposed prohibition through the imposition of penalties. Section 15.2-1429 of the Code provides that “[a]ny locality may prescribe fines and other punishments for violations of ordinances, which shall be enforced by proceedings as if such violations were misdemeanors.” Further, a locality may petition a “court of competent jurisdiction” to “enjoin . . . [a]

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36 Id.
37 See § 15.2-1101 (2012).
38 Weber, 196 Va. at 1148. See id. at 1143, 1147-48 (holding that a city requirement that property owners connect to city waterworks and abandon use and consumption of any other private water supply was necessary to safeguard public health and fell “directly within the police power delegated by the State”; therefore, the restriction did not constitute an “unconstitutional deprivation of property”).
39 Id. at 1149. A locality “may, by police regulations, so direct the use of [private property] that it shall not prove pernicious to . . . neighbors, or . . . citizens generally.” Id. at 1148-49.
40 Id. Laws and ordinances enacted pursuant to the police power in order to protect the public health may be enforced “against all similarly situated though they may disturb the enjoyment of individual rights. Such laws do not appropriate private property for public use but simply regulate its use and enjoyment by the owners.” Id. at 1148.
41 Section 15.2-1429 (2012). “[N]o fine or term of confinement for the violation of ordinances shall exceed the penalties provided by general law for the violation of a Class 1 misdemeanor, and such penalties shall not exceed those penalties prescribed by general law for like offenses.” Id.
continuing violation” of the ordinance.\textsuperscript{42} The Charter likewise provides that the Town may “impose and enforce adequate penalties for the violation of [its] rules and regulations” and “to prevent by injunction any pollution or threatened pollution of such water supply, and any and all acts likely to impair the purity thereof.”\textsuperscript{43} Thus, the County and the Town possess the authority outlined above to enforce their respective ordinances by imposing penalties.

**CONCLUSION**

Accordingly, it is my opinion that both Pittsylvania County and the Town of Chatham possess the police power authority to protect the public water supply by prohibiting the use of watercraft powered by internal combustion engines upon Cherrystone and Roaring Fork Lakes, and that an ordinance enacted for this purpose may be enforced through the imposition of penalties and by injunction when appropriate.

\textsuperscript{42} Section 15.2-1432 (2012).

\textsuperscript{43} CHARTER FOR THE TOWN OF CHATHAM, VA., § 3.7, supra note 17.
COUNTIES, CITIES AND TOWNS—DONATIONS TO CHARITABLE INSTITUTIONS AND ASSOCIATIONS

Section 15.2-953 of the Code of Virginia restricts contributions by localities to organizations controlled in whole or in part by any church or sectarian organization. While the statute is presumed to be constitutional, the decision of the U.S. Supreme Court in *Trinity Lutheran* could expose it to constitutional challenge under the Free Exercise Clause.

THE HONORABLE MICHAEL P. MULLIN
MEMBER, HOUSE OF DELEGATES

FEBRUARY 15, 2018

ISSUES PRESENTED

You ask whether, in light of the decision of the United States Supreme Court in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), Virginia localities may now contribute funds to churches or sectarian societies either in furtherance of their religious activities or for activities that do not directly impact their religious activities. You further inquire whether localities that continue to make contributions only to non-sectarian charitable institutions in accord with § 15.2-953 to the exclusion of those “controlled in whole or in part by any church or sectarian society” due to the absence of enabling legislation under the Dillon Rule would be subject to suit under the First and Fourteenth Amendments of the United States Constitution.¹

BACKGROUND

The First Amendment to the United States Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”² These two clauses—known as the Establishment Clause and the Free Exercise Clause, respectively—apply to the States through the

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¹ Your request also contained the following question: “[I]f § 15.2-953 needs to be amended, what language would you recommend to address the issues raised by the *Trinity Lutheran* decision.” Providing such a recommendation would exceed the traditional role of this Office in providing official opinions. See 2010 Op. Va. Att’y Gen. 56, 58; 2002 Op. Va. Att’y Gen. 266, 267. Further, it would contravene the constitutional mandate that “[t]he legislative, executive, and judicial departments shall be separate and distinct.” VA. CONST. art. III, § 1. Thus, I must respectfully decline to answer this portion of your request.

² U.S. CONST. amend. I.
Due Process Clause of the Fourteenth Amendment. The Establishment Clause generally requires government neutrality towards religion. As evident in its name, the Free Exercise Clause prohibits government interference with the free exercise of religion, such as through discrimination or burdensome regulation. The Supreme Court has "long said that ‘there is room for play in the joints’" between the two religion clauses, such that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."

In Trinity Lutheran Church of Columbia, Inc. v. Comer, the case that is central to your inquiry, the United States Supreme Court recently clarified, to a degree, the contours of this "room for play in the joints." Trinity Lutheran involved a church-run preschool and daycare center (the "Center") that applied to the Missouri Department of Natural Resources ("the Department") for competitive grant funding through the Missouri Scrap Tire Program, which awards funding to qualified nonprofit organizations for the purchase of playground surfaces made from recycled tires. The Center ranked highly among applicants and would have been selected, but for the Department’s "policy of categorically disqualifying churches and other religious organizations from receiving grants under its playground resurfacing program."
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program.\textsuperscript{10}

The Court held that the Department’s policy violated the Free Exercise Clause, because it led to “expressly denying a qualified religious entity a public benefit solely because of its religious character.”\textsuperscript{11} The Court reasoned that “the exclusion of [the Center] from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand.”\textsuperscript{12} Applying the “strictest scrutiny,”\textsuperscript{13} the Court declared that “only a state interest ‘of the highest order’ [could] justify the Department’s discriminatory policy.”\textsuperscript{14} Further, the Court found that the Department’s policy interfered with the free exercise of religion, because it “put[] [the Center] to a choice,” such that it must decide whether to “participate in an otherwise available benefit program or remain a religious institution.”\textsuperscript{15}

Although the “parties agree[d]” that the Establishment Clause did not bar inclusion of the Center in the grant program,\textsuperscript{16} the Department contended that a provision of the Missouri Constitution forbidding both direct and indirect state funding of any religious entity “compelled” their policy.\textsuperscript{17} Unpersuaded, the Court found that “[i]n the face of . . . clear infringement on free exercise,” such an interest “cannot qualify as compelling.”\textsuperscript{18}

The Court distinguished \textit{Trinity Lutheran} from its prior decision in \textit{Locke v.}

\textsuperscript{10} Id.
\textsuperscript{11} Id. at 2024.
\textsuperscript{12} Id. at 2025.
\textsuperscript{13} Id. at 2019 (quoting \textit{Church of Lukumi}, 508 U.S. at 533).
\textsuperscript{14} Id. at 2024 (quoting \textit{McDaniel}, 435 U.S. at 628).
\textsuperscript{15} Id. at 2021-22. “[W]hen the State conditions a benefit in this way, . . . the State has punished the free exercise of religion . . . .” Id. (citing \textit{McDaniel}, 435 U.S. at 626). \textit{Cf. Locke}, 540 U.S. at 720-21 (citations omitted) (upholding the policy of the State of Washington to deny scholarship funding to students pursuing devotional degrees to train for the ministry, because it did not force “students to choose between their religious beliefs and receiving a government benefit”).
\textsuperscript{16} 137 S. Ct. at 2019.
\textsuperscript{17} Id. at 2017. Article I, section 7 of the Missouri Constitution provides

\begin{quote}
[i]nto no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.
\end{quote}

\textsuperscript{18} 137 S. Ct. at 2024. The Court found that “the Department offer[ed] nothing more than Missouri’s policy preference for skating as far as possible from religious establishment concerns.” Id.
Davey,\textsuperscript{19} pointing out that in \textit{Locke} the State of Washington provided scholarships to students attending religious schools and had “merely chosen not to fund a distinct category of instruction.”\textsuperscript{20} The Court further noted that Davey “was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do—use the funds to prepare for the ministry.”\textsuperscript{21} “[T]here is no question that Trinity Lutheran was denied a grant simply because of what it is—a church.”\textsuperscript{22}

**APPLICABLE LAW AND DISCUSSION**

1. Whether, in light of \textit{Trinity Lutheran}, localities may now contribute funds to churches or sectarian societies either in furtherance of their religious activities or for activities that do not directly impact their religious activities.

Virginia abides by the Dillon Rule of strict construction, which provides that a locality may exercise only those powers expressly granted by the Commonwealth, those necessarily or fairly implied therefrom, and those that are essential and indispensable.\textsuperscript{23} Section 15.2-953(A) of the Code of Virginia delegates to localities limited authority to contribute funds, donations, and gifts to churches or sectarian organizations. This statute provides that

\begin{quote}
[a]ny locality may make appropriations of public funds, of personal property or of any real estate and donations to . . . any charitable institution or association, located within their respective limits or outside their limits if such institution or association provides services
\end{quote}

\textsuperscript{19} \textit{Locke}, 540 U.S. at 717, 722, 724 (holding that, “[e]ven though the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution,” the decision of the State of Washington to withhold state scholarship money from a student training to become a minister did not violate the Free Exercise Clause due to the State’s substantial antiestablishment interests). See also supra note 15.

\textsuperscript{20} \textit{Trinity Lutheran}, 137 S. Ct. at 2023 (quoting \textit{Locke}, 540 U.S. at 721).

\textsuperscript{21} Id.

\textsuperscript{22} Id. After issuing its decision, the Court decided to vacate the judgment in two cases and remand them to the appropriate state supreme court for further consideration in light of \textit{Trinity Lutheran}. See Douglas Cty. Sch. Dist. v. Taxpayers for Pub. Educ., 137 S. Ct. 2327 (June 27, 2017), No. 15-577; N.M. Ass’n of Non-public Sch. v. Moses, 137 S. Ct. 2325 (June 27, 2017), No. 15-1409. The first overturned judgment had invalidated a school district’s voucher program under an antiestablishment provision of the Colorado constitution. Douglas Cty. Sch. Dist. v. Taxpayers for Pub. Educ., 351 P.3d 461 (Colo. 2015). The second remanded case concerns a state-funded textbook lending program in New Mexico, which was found to violate a provision of the New Mexico Constitution that forbade the provision of books for use by students attending private schools, whether such schools were secular or sectarian. Weinbaum v. Skandera, 367 P.3d 838 (N.M. 2015).

\textsuperscript{23} Richmond v. Bd. of Supvrs., 199 Va. 679, 684 (1958) (citations omitted) (setting forth the Dillon Rule as it applies to municipal corporations); Bd. of Supvrs. v. Horne, 216 Va. 113, 117 (1975) (citations omitted) (applying the Dillon Rule to boards of supervisors).
to residents of the locality; however such institution or association shall not be controlled in whole or in part by any church or sectarian society.\textsuperscript{24}

But the statute does not prohibit all gifts to churches and sectarian organizations. Subsection A further provides that the restriction does not apply to nondenominational Young Men’s Christian Associations or nondenominational Young Women’s Christian Associations.\textsuperscript{25} And subsection B specifically exempts the following types of organizations from the restriction: “(i) any charitable institution or nonprofit or other organization providing housing for persons 60 years of age or older or operating a hospital or nursing home; (ii) any association or other organization furnishing voluntary firefighting services; [and] (iii) any nonprofit or volunteer emergency medical services agency, within or outside the boundaries of the locality.”\textsuperscript{26} In addition, subsection B authorizes gifts and donations to certain other types of nonprofit organizations, regardless of whether they are sectarian or nonsectarian.\textsuperscript{27} For example, “[a] locality may make . . . gifts and donations to any and all public and private nonprofit organizations and agencies engaged in commemorating historical events.”\textsuperscript{28} I note, however, that a locality acting pursuant to one of these statutory exceptions must comply with the Establishment Clause.\textsuperscript{29}

\textsuperscript{24} VA. CODE ANN. § 15.2-953(A) (Supp. 2017) (emphasis added). Subsection A further provides that “[n]othing in this section shall be construed to prohibit any county or city from making contracts with any sectarian institution for the care of indigent, sick or injured persons.” Id.

This statute authorizes localities to provide funds, donations, and gifts to private charitable institutions. The Constitution of Virginia, however, prohibits the General Assembly from making such expenditures. See VA. CONST. art. IV, § 16 (emphasis added):

\begin{quote}
[t]he General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society. \textit{Nor shall the General Assembly make any like appropriation to any charitable institution which is not owned or controlled by the Commonwealth}; the General Assembly may, however, make appropriations to nonsectarian institutions for the reform of youthful criminals \textit{and may also authorize counties, cities, or towns to make such appropriations to any charitable institution or association.}
\end{quote}

\textsuperscript{25} Section 15.2-953(A).

\textsuperscript{26} Section 15.2-953(B).

\textsuperscript{27} Id.

\textsuperscript{28} Id.

\textsuperscript{29} See Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citations omitted). Under the \textit{Lemon} test, government action comports with the Establishment Clause when “(1) it has a predominately secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive government entanglement with religion.” 2006 Op. Va. Att’y Gen. 164, 167 (citing Mellen v. Bunting, 327 F.3d 355, 367 (4th Cir. 2003); McCreary County v. A.C.L.U., 125 S. Ct. 2722, 2735-36 (2005) (discussing the secular-purpose prong of the \textit{Lemon} test)).
In answer to your question, I thus conclude that § 15.2-953(A) generally prohibits localities from contributing funds, gifts, or donations to charitable institutions that are “controlled in whole or in part by any church or sectarian society” unless permitted by one of several narrow statutory exceptions. Whether the contribution would be used in furtherance of religious activities, as opposed to activities that do not directly impact religious activities, does not alter this conclusion.

Although Trinity Lutheran does not alter the scope of authority possessed by Virginia localities, your inquiry raises the question whether specific applications of their authority under § 15.2-953 may contravene the Free Exercise Clause in light of Trinity Lutheran. “In assessing the constitutionality of [§ 15.2-953], . . . I am guided by the doctrine that a statute is not to be declared unconstitutional unless the court is driven to that conclusion.”30 “There is a strong presumption in favor of the constitutionality of statutes.”31 “Indeed, ‘[t]here is no stronger presumption known to the law than that which is made by the courts with respect to the constitutionality of an act of Legislature.’”32 Prior opinions of this Office have concluded that

[e]very reasonable doubt should be resolved in favor of the constitutionality of an act of the legislature. Following this doctrine, it has been a longstanding practice of Virginia’s Attorneys General to refrain from declaring a statute unconstitutional unless its unconstitutionality is clear beyond a reasonable doubt. This practice has its origins in well-founded considerations. Unlike a court, the Attorney General has no power to invalidate a statute. Thus, when an Attorney General opines that a statute violates the Constitution, that statute nevertheless remains in force. Further, by opining that a statute is unconstitutional, an Attorney General, in effect, is advising the enforcing state agency to ignore the statute. This an Attorney General should not do unless he is certain beyond a reasonable doubt that a reviewing court would strike down the statute.33

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32 FFW Enters., 280 Va. at 590 (quoting Whitlock v. Hawkins, 105 Va. 242, 248 (1906)).
Further, in one opinion dating back to 1995, this Office was unable to “conclude beyond a reasonable doubt that a court would declare that [a section of the Code of Virginia] violate[d] the First and Fourteenth Amendments of the Constitution of the United States,” even though “there [were] serious questions concerning the constitutionality of [the statute] and it was “possible, perhaps even probable, that a court reviewing [the statute] would find that it” is unconstitutional.  

In light of *Trinity Lutheran*, § 15.2-953 likely would run afoul of the Free Exercise Clause if it required a locality to deny generally available public benefits to qualifying churches or sectarian organizations solely upon the basis of their religious status, when such benefits are expended for non-religious purposes. One could argue that § 15.2-953’s explicit prohibition against providing funding, gifts, or donations to religiously-controlled or -affiliated charitable institutions violates *Trinity Lutheran*’s proscription against “denying a generally available benefit solely on account of religious identity.”

Because the ruling in *Trinity Lutheran* concerned the provision of “generally available public benefit[s],” the definition of what constitutes a “generally available public benefit” is central to the analysis. A prior opinion of this Office describes such benefits to include police and fire protection, road and sidewalk maintenance, sanitation services, and bus transportation for public school students. This opinion goes on to note that “[n]either the federal constitution nor the Virginia Constitution prohibits religious groups from receiving such publicly funded

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36 *Id.* at 2024.

37 1995 Op. Va. Att’y Gen. 149, 151 (”[T]here are certain public benefits that, under long-established constitutional doctrine, do not implicate Establishment Clause concerns when such benefits are extended to religious groups.”). *See also id.* (citing Widmar v. Vincent, 454 U.S. 263, 274-75 (1981); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993) (”[W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge . . . .”); Lee v. Weisman, 505 U.S. 577, 630 n.8 (1992) (Souter, J., concurring) (Establishment Clause is not violated when “the State has, without singling out religious groups or individuals, extended benefits to them as members of a broad class of beneficiaries defined by clearly secular criteria”); Mueller v. Allen, 463 U.S. 388, 398, 403 (1983) (upholding constitutionality of Minnesota program permitting all parents, including parents who chose religious schools, to deduct from their state taxes certain educational expenses); *Walz*, 397 U.S. at 666, 672-73, 680 (upholding property tax exemptions for churches as part of general statutory exception for variety of nonprofit institutions)).
benefits.” Trinity Lutheran arguably expands this category to a limited degree by classifying the Missouri Scrap Tire Program as such a benefit. Similar to the examples cited above, the competitive grant program allocated benefits based on neutral, secular objectives, and the grant funding was “generally available” to all qualified applicants.

Thus, to defend against constitutional challenge, a locality could contend that § 15.2-953 does not require the provision of generally available public benefits; rather, it authorizes localities to render selective assistance in the form of discretionary appropriations, donations, and gifts. Subsection F confirms that this statute does not require localities to make public benefits generally available to charitable organizations. It clearly states that “[n]othing in this section shall be construed to obligate any locality to appropriate funds to any entity,” and that any “[s]uch charitable contribution shall be voluntary.” Unlike the specific program at issue in Trinity Lutheran, § 15.2-953 arguably does not involve “generally available public benefits,” nor does it oblige localities to provide such benefits to qualified organizations.

Even if a court were to find that a specific application of § 15.2-953 violated the Free Exercise Clause, the statute nevertheless may withstand facial challenge. The Supreme Court of Virginia has stated that, “because our jurisprudence favors upholding the constitutionality of properly enacted laws, we have recognized that it is possible for a statute or ordinance to be facially valid, and yet unconstitutional as applied in a particular case.”

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38 1995 Op. Va. Att’y Gen. 149, 151. Certain public benefits, such as “furnishing fire or police protection, or access to public highways . . . are matters of common right, part of the general need for safety. Certainly the fire department must not stand idly by while the church burns.” Everson, 330 U.S. at 60-61.

39 The dissent in Trinity Lutheran disagreed with the broadening of this classification, remarking that “[t]he Scrap Tire Program offers not a generally available benefit but a selective benefit for a few recipients each year. In this context, the comparison to truly generally available benefits is inapt.” Trinity Lutheran, 137 S. Ct. at 2040 (Sotomayor, J., dissenting, joined by Ginsburg, J.). “To fence out religious persons or entities from a truly generally available public benefit—one provided to all, no questions asked, such as police or fire protections—would violate the Free Exercise Clause.” Id.

40 Id. at 2017.

41 Id. at 2024.

42 Section 15.2-953(F).

43 Volkswagen of Am., Inc. v. Smit, 279 Va. 327, 336 (2010) (citations omitted). “[A] statute . . . may be held constitutionally invalid as applied . . . although its general validity as a measure enacted in the legitimate exercise of state power is beyond question.” Id. at 336 (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).
unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . . .”44 Thus, “[a] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”45

Supposing a court were to find a particular application of § 15.2-953 unconstitutional, the statute may still survive facial challenge on the basis that it is not unconstitutional in all applications. For example, the statute may constitutionally apply to prohibit a local grant of funds or other gifts that would further sectarian purposes, have the primary effect of advancing religion, or foster excessive government entanglement with religion.46 Under such circumstances, one could argue that the statute does not function to prohibit local grants on account of the religious identity of the recipient, but rather to limit the authority of localities in accord with the Establishment Clause.

Although I am unable to opine on the merits of a free-exercise challenge to § 15.2-953 absent the particular details of such a claim,47 I note that in a scenario analogous to that in Trinity Lutheran, a court likely would require a locality to demonstrate a compelling interest to justify its actions under strict judicial scrutiny.48 Just as the Court in Trinity Lutheran held that compliance with a provision of the Missouri Constitution did not constitute a compelling interest that would justify religious discrimination, a locality likely could not rely upon an analogous provision in the Virginia Constitution to defend against a similar challenge.49

For the reasons stated above, it is my opinion that Trinity Lutheran renders § 15.2-953 vulnerable to constitutional challenge under the Free Exercise Clause. In light of the historical deference of this Office to acts of the General Assembly and

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45 Id. at 745. See Manning v. Hunt, 119 F.3d 254, 268 n.4 (4th Cir. 1997) (internal citations omitted) (noting that “this Court is bound to apply the Salerno standard as it has been repeatedly applied . . . in the context of challenges to legislative acts based on other constitutional grounds”). See also Reno v. Flores, 507 U.S. 292, 300-01 (1993) (applying the Salerno standard to evaluate a facial challenge to a federal regulation under the guarantees of due process contained in the Fifth and Fourteenth Amendments).

46 See Lemon, 403 U.S. at 612-13 (citations omitted). In Lemon, the Court invalidated under the Establishment Clause two state aid programs that partially subsidized teachers’ salaries at church-related elementary and secondary schools. Id. at 606-10, 624-25. One of the invalidated programs also provided funding for textbooks and other instruction materials. Id. at 610-11. See also supra notes 19-22.


48 Trinity Lutheran, 137 S. Ct. at 2022.

49 See VA. CONST. art. IV, § 16, supra note 24.
for other reasons set forth above, however, I am unable to conclude that § 15.2-953 “is unconstitutional beyond a reasonable doubt.” Further, in the absence of the details of a particular claim, I am unable to opine as to either the likelihood that a reviewing court would invalidate the statute or the probability that an as-applied challenge would succeed under the Free Exercise Clause.

2. Whether a locality that continues to make contributions only to non-sectarian charitable institutions in accord with § 15.2-953 to the exclusion of those “controlled in whole or in part by any church or sectarian society” could be subject to suit for allegedly violating the First and Fourteenth Amendments.

You also ask whether withholding funding, gifts, and donations from religiously-controlled or -affiliated charitable organizations under § 15.2-953 could expose a locality to liability under the United States Constitution. It is possible that disparate treatment on the basis of religious status may give rise to liability under the First or Fourteenth Amendment, depending on the particulars of the claim. But because assessing the validity of such a claim would require additional, hypothetical facts, I am unable to opine on that question.

CONCLUSION

It is my opinion that a locality may only contribute funds, gifts, or donations to charitable organizations “controlled in whole or in part by any church or sectarian society” when authorized by one of the narrow exceptions contained in § 15.2-953 of


51 See, e.g., Hobbie v. Unemployment Appeals Comm’n, 480 U.S. 136, 137-38, 146 (1987) (holding that the State’s refusal to award unemployment benefits violated the Free Exercise Clause, when the employee was discharged after refusing to work certain scheduled hours because of sincerely held religious convictions).

52 See, e.g., Blagman v. White, 112 F. Supp. 2d 534, 539-40 (E.D. Va. 2000) (finding that Muslim inmates were not treated differently from Christian inmates in violation of the Equal Protection Clause of the Fourteenth Amendment, because they were afforded essentially equal opportunities). “Challenges to discrimination based on religion are hardly ever brought under the Equal Protection Clause,” and “are almost always analyzed under the Free Exercise and Establishment Clauses.” Susan Gellman & Susan Looper-Friedman, Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause), 10 U. PA. J. CONST. L. 665, 666 (2008). See also Trinity Lutheran, 137 S. Ct. at 2024 n.5 (“Based on this holding, we need not reach the Church’s claim that the policy also violates the Equal Protection Clause.”).

53 See, e.g., 2010 Op. Va. Att’y Gen. 56, 58 (“In instances when a request . . . involves application of facts to the law, and does not involve a question of law[,] . . . this Office traditionally has declined to render an opinion. . . . I refrain from commenting on matters that would require additional facts or the application of facts to the appropriate provisions of law.”).
the Code of Virginia in accord with the Dillon Rule. For the reasons set forth above, I am unable to conclude beyond a reasonable doubt that a reviewing court would invalidate this statute under the Free Exercise Clause in light of *Trinity Lutheran*.

I further conclude that withholding funding, gifts, and donations from religiously-controlled or -affiliated charitable organizations under § 15.2-953 could expose a locality to liability under the First and Fourteenth Amendments of the Constitution of the United States, depending on the particulars of the claim. But because assessing the validity of such a claim would require additional, hypothetical facts, I am unable to opine on that question.
A public park authority may adopt rules and regulations governing the takeoff and landing of drones on park property.

**ISSUE PRESENTED**

You ask whether the Fairfax County Park Authority may bar the use of unmanned aircraft systems ("drones") except with the Authority’s written permission, and when used in designated areas.

**BACKGROUND**

You state that the Fairfax County Park Authority (the “Authority”) was created by Fairfax County under the Virginia Park Authorities Act.\(^1\) It is the titled owner of the parks it maintains. For some time, it has had in place a rule precluding the use of drones in its parks except in designated areas with the Authority’s written permission. The Authority intends to regulate only the launch and landing of drones in its parks, but not overflight by drones launched and landed from other locations.

**APPLICABLE LAW AND DISCUSSION**

By statute, “[n]o locality may regulate the use of a privately owned, unmanned aircraft system . . . within its boundaries.”\(^2\) By its express terms, this restriction applies only to localities. The term “locality” means only “a county, city, or town.”\(^3\) There are numerous other types of governmental entities under Virginia law, some

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2. Section 15.2-926.3 (Supp. 2017). See also VA. CODE ANN. § 19.2-60.1(A) (2015) (defining the term “unmanned aircraft” to mean “an aircraft that is operated without the possibility of human intervention from within or on the aircraft” and the term “unmanned aircraft system” as “an unmanned aircraft and associated elements, including communication links, sensing devices, and the components that control the unmanned aircraft”).
of which are referred to as either political subdivisions or bodies corporate and politic, or as both. Examples include a county health commission, an airport commission, a community development authority, an electric authority, and an economic development authority.

Again, the statute in question restricts the authority only of “localities,” i.e., counties, cities, and towns, to regulate drones. A park authority is not a county, city, or town. It is instead “a body politic and corporate,” created by a locality pursuant to authorizing statutes duly enacted by the General Assembly. It is “deemed to be performing essential governmental functions providing for the public health and welfare.”

We must assume that the General Assembly chose with care the words it used when enacting any statute. Here, the key term chosen in the statute restricting the power to regulate drones was “locality” rather than “park authority” or “body politic and corporate.” Rules of statutory construction prohibit adding language to a statute to give it meaning not intended by the legislature. See Miller v. County of Rockingham, No. 5:06CV00053, 2007 U.S. Dist. LEXIS 58157, at *18-19 (W.D. Va. Aug. 9, 2007) (“The determination that a park authority is not an arm of the Commonwealth entitled to sovereign immunity does not affirmatively establish that the Park Authority is merely a part of the Counties, rather than an independent public entity. While park authorities are indeed created by localities, the Park Authorities Act clearly establishes that, upon their creation, they operate as separate and distinct public entities.”).


5 County of York v. Peninsula Airport Comm’n, 235 Va. 477, 481 (1988) (“We conclude . . . that the General Assembly meant for [the Peninsula Airport Commission] to occupy the status of a political subdivision.”) (emphasis added).

6 Section 15.2-5155 (2012) (authorizing the creation of “a community development authority, a public body politic and corporate and political subdivision of the Commonwealth”) (emphasis added).

7 Section 15.2-5403 (2012) (providing that an electric authority created by one or more localities “shall be a political subdivision of the Commonwealth and a body politic and corporate”) (emphasis added).

8 Section 15.2-6200 (2012) (“The Alleghany-Highlands Economic Development Authority . . . is created as a body politic and corporate, a political subdivision of the Commonwealth”) (emphasis added); § 15.2-6000 (2012) (“The Virginia Coalfield Economic Development Authority . . . is created as a body politic and corporate, a political subdivision of the Commonwealth.”) (emphasis added).

9 See Miller v. County of Rockingham, No. 5:06CV00053, 2007 U.S. Dist. LEXIS 58157, at *18-19 (W.D. Va. Aug. 9, 2007) (“The determination that a park authority is not an arm of the Commonwealth entitled to sovereign immunity does not affirmatively establish that the Park Authority is merely a part of the Counties, rather than an independent public entity. While park authorities are indeed created by localities, the Park Authorities Act clearly establishes that, upon their creation, they operate as separate and distinct public entities.”).

10 Section 15.2-5702(A).

11 Section 15.2-5704.

statute,\textsuperscript{13} and thus one cannot conclude that the General Assembly intended to bar park authorities from regulating drones, as that term was not used. Only counties, cities, and towns are barred, but not park authorities.

Further, a park authority is statutorily empowered “[t]o adopt such rules and regulations . . . concerning the use of properties under its control as will tend to the protection of such property and the public thereon.”\textsuperscript{14} Based on this statutory grant of authority, a park authority rule protecting public safety by controlling the launch and landing of drones within park property is legally authorized.

\textbf{CONCLUSION}

For the foregoing reasons, it is my opinion that a public park authority may adopt rules or regulations concerning the operation of unmanned aircraft systems, commonly known as drones, in its parks.


\textsuperscript{14} Section 15.2-5704(17).
U.S. CONSTITUTION—EQUAL RIGHTS AMENDMENT

The General Assembly may still pass a resolution ratifying the Equal Rights Amendment to the United States Constitution despite the lapse of the ERA’s ratification period. Congress has substantial power over the process for amending the Constitution and may choose to further extend the ERA’s ratification deadline and recognize as valid a State’s intervening ratification for purposes of determining whether the ERA has been approved by the requisite number of States.

THE HONORABLE RICHARD H. BLACK
MEMBER, SENATE OF VIRGINIA

MAY 11, 2018

ISSUE PRESENTED

You have requested that I “render a formal opinion on the following question: Would ratification of the ERA [Equal Rights Amendment] by the Virginia General Assembly have any legal effect?”

BACKGROUND

Article V of the U.S. Constitution governs the process by which the Constitution can be amended. It provides, in relevant part:

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress . . . .[1]

The Equal Rights Amendment (ERA) was first introduced in Congress in 1923,[2] but it was not until March 22, 1972 that two-thirds of Congress agreed to the

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[1] U.S. CONST. art. V.
[2] See S.J. Res. 21, 68th Cong., 65 CONG. REC. 150 (1923) (known at that time as the “Lucretia Mott Amendment”).
proposal and submitted it to the States for their consideration. Although the text had changed over the years, the version submitted to the States read as follows:

**Section 1.** Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

**Section 2.** The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

**Section 3.** This amendment shall take effect two years after the date of ratification.

The proposing resolution to the amendment prescribed a seven-year period for ratification: “[T]he following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress.” By placing the seven-year limit in the proposing resolution rather than in the text of the amendment itself, Congress followed its practice for the Twenty-third through Twenty-sixth Amendments, all of which had been ratified within seven years.

Between 1972 and March 22, 1979, thirty-five States ratified the ERA—three States short of the requisite three-fourths needed for adoption. In 1978, following extensive debate and committee testimony, Congress extended the ratification deadline by approximately three years and three months. Its legal justification for doing so relied in part on the location of the time limitation in the text of the

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4 NEALE, supra note 3, at 2.


6 Id.

7 NEALE, supra note 3, at 8-9. Previously, for the Eighteenth, Twentieth, Twenty-first, and Twenty-second Amendments, Congress had included time limitations in the text of the amendments themselves, but then changed its practice because including the limits in the text “cluttered up” the Constitution. Id. at 8.

8 Id. at 9.

9 See H.R.J. Res. 638, 95th Cong., 92 Stat. 3799 (1978) (“[N]otwithstanding any provision of House Joint Resolution 208 of the Ninety-second Congress, second session, to the contrary, the article of amendment proposed to the States in such joint resolution shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States not later than June 30, 1982.”).
proposing resolution, rather than the text of the amendment itself. On June 30, 1982, the extended ratification period elapsed, without any additional State having ratified the amendment. On March 22, 2017, Nevada became the 36th State to ratify the ERA, the only other State to do so since 1982.

The fourteen States that have never ratified the ERA are Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Utah, and Virginia. Five other States have purported to rescind their votes ratifying the ERA: Nebraska (1973), Tennessee (1974), Idaho (1977), Kentucky (1978), and South Dakota (1979). Although the Virginia General Assembly has never ratified the Equal Rights Amendment, the Senate of Virginia has passed a ratifying resolution at least five times, most recently in 2016. Similar measures have been introduced in the House of Delegates, but have not been considered.

**APPLICABLE LAW AND DISCUSSION**

You ask whether ratification of the ERA by the General Assembly would have “any legal effect.” In responding to your inquiry, I will assume that you do not

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12 NEALE, supra note 3, at 9 n.47.


question the General Assembly’s power to vote on or pass joint resolutions expressing its sentiment on a variety of issues, including about whether a proposed amendment to the U.S. Constitution should be ratified. Historically, the General Assembly has passed ratifying resolutions even after an amendment had become part of the Constitution—having already been ratified by the requisite number of States—and after the ratification period prescribed for a proposed amendment had lapsed. To the extent you question whether those resolutions have legal effect as official expressions of the will of the General Assembly, I cannot agree.

Rather, I take your question to be whether the General Assembly’s passage of a resolution ratifying the ERA at this point could ever be treated as legally effective for purposes of determining whether the ERA has been ratified by the requisite number of States, given that the ERA’s original ratification deadline lapsed in 1979 and an extended deadline lapsed in 1982. In light of Congress’s significant control over the amendment process, I cannot conclude that it lacks the power to extend the period in which an amendment can be ratified and recognize a State’s intervening ratifying resolution as legally effective for purposes of determining whether the ERA has been ratified.

Although the precise issue you raise has not been conclusively resolved, the historical evidence and case law demonstrate Congress’s significant, even plenary, power over the amending process. In 1978, when Congress was debating and ultimately approved extending the original ERA deadline, the House Judiciary Committee found that the power-to-extend question was a matter of “first impression.” But after reviewing the limited historical and legal precedent and taking extensive testimony from numerous constitutional experts, the House Judiciary Committee concluded that “the period for an amendment’s ratification lies...
exclusively within congressional control.” Both the full House and Senate debated Congress’s power to extend the ERA’s ratification deadline, but effectively resolved that issue when they agreed to a joint resolution setting a new deadline of June 30, 1982.

As recognized by the constitutional scholars who testified before Congress and in the report of the House Judiciary Committee recommending extension, the limited Supreme Court precedent in this area suggests that Congress has authority to extend a ratification deadline. Two cases chiefly support that conclusion. In *Dillon v. Gloss*, the Court turned away a challenge to the Eighteenth Amendment based on the fact that the text of the proposed amendment prescribed a time period of seven years for ratification by the States, the first amendment to contain such a limitation. In ruling that Congress could set a definite period for ratification, the Court in *Dillon* emphasized two points: that the time period for ratification must be “within reasonable limits” so that ratification expresses the “sufficiently contemporaneous . . . will of the people,” and that it was within Congress’s authority to determine what period is reasonable. It underscored that the “general terms” of Article V “leav[e] Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require.” Thus, in the Court’s opinion, whether to fix a term of years for ratification was a matter for Congress, “as an incident of its power to designate the mode of ratification.”

Two decades after *Dillon*, in *Coleman v. Miller*, the Court extended *Dillon’s* analysis and concluded that the reasonableness of the ratification period at issue there was a matter for Congress alone to decide. In 1924, Congress had submitted an amendment to the States, without a prescribed time limit, that prohibited the use of child labor. The Kansas legislature rejected the amendment in 1925 but when it reconsidered and passed the amendment in 1937, opponents sued, arguing that the time period had lapsed. The Court rejected the contention that “in the absence of a limitation by the Congress, the Court can and should decide what is a reasonable

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22 256 U.S. 368 (1921).
23 Id. at 371-72.
24 Id. at 375-76.
25 Id. at 376.
26 Id.
period within which ratification may be had.”\textsuperscript{28} Rather, “Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications.”\textsuperscript{29} The Court reasoned that the task of determining reasonableness would require an “appraisal of a great variety of relevant conditions, political, social, and economic”—conditions that “can hardly be said to be within the appropriate range of evidence receivable in a court of justice” but that are “appropriate for the consideration of the political departments of the Government.”\textsuperscript{30} Four justices signed a concurring opinion to express, in strong language, the even broader view that Congress has “sole and complete control over the amending process, subject to no judicial review.”\textsuperscript{31}

These cases figured prominently in the 1977 and 1978 congressional hearings on the proposed extension to the ERA deadline.\textsuperscript{32} A number of scholars testified before the House Judiciary Committee’s Subcommittee on Civil and Constitutional Rights on the various issues raised by the proposed extension, including the extent of congressional control over the amendment process in general. With a few exceptions, there was general consensus among the scholars that extending the ratification period was within Congress’s power.\textsuperscript{33} A representative of the Office of Legal Counsel agreed, reasoning that “the power of extension is reserved to the Congress, and reconsideration of the extension period is within the power of the Congress.”\textsuperscript{34} The scholars gave several reasons for that conclusion, including the

\textsuperscript{28} Id. at 452.
\textsuperscript{29} Id. at 456.
\textsuperscript{30} Id. at 453-54.
\textsuperscript{31} Id. at 459 (Black, J., concurring, joined by Roberts, Frankfurter, and Douglas, JJ.).
\textsuperscript{33} Compare id. at 115 (statement of William Van Alstyne, Professor, College of William & Mary, Marshall-Wythe School of Law) (“In brief, extension of the period by Congress is solely for Congress to determine . . . .”), and id. at 125-26 (testimony of Ruth Bader Ginsburg, then-Professor, Columbia Law School) (“Congress, as director under our constitutional scheme of the amendment process, is not locked into a 7-year period; 14, 16, 18 years would constitute a rational constitutional time period for ratification of the proposed equal rights amendment. The issue, then, is simply whether Congress may accomplish in two steps what it might have accomplished in one.”), with id. at 112 (testimony of Erwin N. Griswold, former Solicitor General of the United States) (“I do not think that anyone can say with confidence that Congress has the power to make the change. It does seem to me that there are strong reasons why Congress should not undertake to exercise such a power.”).
\textsuperscript{34} Id. at 28 (testimony of John M. Harmon, Assistant Attorney General, Office of Legal Counsel, Department of Justice).
location of the time limit in the proposing resolution rather than in the text of the amendment.\textsuperscript{35} Later testimony by these and other scholars before the Senate Judiciary Committee’s Subcommittee on the Constitution similarly supported Congress’s power to extend the deadline.\textsuperscript{36} Since then, no Supreme Court case has questioned Congress’s authority over the amending process, including whether it can extend a ratification period and whether the lapse of the ratification period would make a difference.\textsuperscript{37}

In light of the foregoing, I cannot conclude that Congress lacked the authority to extend the ratification deadline from 1979 to 1982, or—critical to your opinion request—that it would lack the authority to extend the deadline further if it chose to do so. Indeed, resolutions currently pending in both houses of Congress seek to accomplish just that; the proposed resolutions would remove the deadline for ratification of the ERA and treat States’ ratifications as valid “whenever” they occur.\textsuperscript{38}

Assuming that the ERA ratification deadline were again extended, the ratification of the Amendment may still be subject to a congressional judgment regarding whether it met the requirement of “contemporaneous consensus.”\textsuperscript{39} While

\textsuperscript{35} See, e.g., id. at 6 (testimony of John M. Harmon); id. at 63 (statement of Thomas I. Emerson, Professor, Yale Law School); id. at 119 (statement of William Van Alstyne); see also 124 CONG. REC. 29,135 (1978) (incorporating House Report No. 95-1405, which acknowledged that, in the case of a proposed amendment on Congressional representation for the District of Columbia, a deadline was included in the body of the amendment because of “a recognition on the part of the committee that unless the language appeared in the body of the proposed amendment it may not be controlling on subsequent Congresses or on the State legislatures”).

\textsuperscript{36} See, e.g., Equal Rights Amendment Extension: Hearings on S.J. Res. 134 Before the Subcomm. on the Constitution of the Comm. on the Judiciary, 95th Cong. (1978), at 114 (testimony of Thomas I. Emerson, Professor, Yale Law School) (“The first issue is [the] power of Congress to extend the time for ratification of the equal rights amendment. I think there is very little doubt in the minds of most constitutional lawyers that Congress has such powers.”).

\textsuperscript{37} In 1981, the federal district court in Idaho ruled that whether Congress acted beyond its authority in extending the deadline was a justiciable question, and it proceeded to find that it had acted beyond its authority, but the Supreme Court vacated that decision as moot when the ERA’s extended deadline lapsed. See Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981), vacated, 459 U.S. 809 (1982).

\textsuperscript{38} See S.J. Res. 5, 115th Cong. (2017) (“That notwithstanding any time limit contained in House Joint Resolution 208, 92d Congress, as agreed to in the Senate on March 22, 1972, the article of amendment proposed to the States in that joint resolution shall be valid to all intents and purposes as part of the Constitution whenever ratified by the legislatures of three-fourths of the several States.”); H.R.J. Res. 53, 115th Cong. (2017) (same). I decline to speculate on the likelihood that these resolutions will pass or that Congress would otherwise act to recognize a State’s ratification of the ERA as effective.

\textsuperscript{39} See Dillon v. Gloss, 256 U.S. 368, 375 (1921) (“[R]atification scattered through a long series of years would not do.”); see also JOHN ALEXANDER JAMESON, A TREATISE ON CONSTITUTIONAL
some constitutional scholars who testified before the House of Representatives prior to the first extension of the ERA’s ratification deadline doubted whether even fourteen years would satisfy that requirement, the intervening ratification of the Twenty-seventh Amendment, governing congressional pay raises, serves as a notable counterexample. First proposed in 1789, that amendment was not ratified until 1992.

CONCLUSION

It is my opinion that the lapse of the ERA’s original and extended ratification periods has not disempowered the General Assembly from passing a ratifying resolution. Given Congress’s substantial power over the amending process, I cannot conclude that Congress would be powerless to extend or remove the ERA’s ratification deadline and recognize as valid a State’s intervening act of ratification. Indeed, legislation currently pending in Congress seeks to exercise that very power.

40 See, e.g., House ERA Extension Hearings, supra note 32, at 153 (testimony of Erwin N. Griswold, former Solicitor General of the United States); see also Dillon, 256 U.S. at 375 (pronouncing as “quite untenable” the idea that amendments first proposed in 1789, 1810, and 1861 were still eligible for ratification).

41 See Archivist of the U.S., U.S. Constitution, Amendment 27, 57 Fed. Reg. 21187, 21187-88 (May 19, 1992). “Although the Archivist was specifically authorized by the U.S. Code to publish the act of adoption and issue a certificate declaring the amendment to be adopted, many in Congress believed that, in light of the unusual circumstances surrounding the ratification, positive action by both houses was necessary to confirm the [amendment’s] legitimacy.” NEALE, supra note 3, at 18. Accordingly, both the Senate and House passed resolutions “declaring the amendment to be duly ratified and part of the Constitution.” Id. at 18-19 & 19 nn.90-91 (citing S. Con. Res. 120 and S. Res. 298, 138 CONG. REC. 11,869 (May 20, 1992); H. Con. Res. 320, 138 CONG. REC. 12,051 (May 20, 1992)).
CRIMES AND OFFENSES GENERALLY—CRIMES INVOLVING HEALTH AND SAFETY

The words “a dead body” as used in Virginia Code § 18.2-323.02 punishing concealment of a dead body as a felony, do not include the remains of a human fetus that expired in utero.

THE HONORABLE RALPH S. NORTHAM
GOVERNOR OF VIRGINIA

MAY 25, 2018

ISSUE PRESENTED

You have asked whether the words “a dead body,” as used in § 18.2-323.02 of the Code of Virginia, include the remains of a human fetus that expired in utero.

BACKGROUND

Through two provisions of the Code of Virginia, the General Assembly has criminalized certain conduct with respect to “a dead body” when such conduct is undertaken with malicious and specific intent. Section 18.2-323.02 provides:

Any person who transports, secretes, conceals or alters a dead body, as defined in § 32.1-249, with malicious intent and to prevent detection of an unlawful act or to prevent the detection of the death or the manner or cause of death is guilty of a Class 6 felony.[1]

Section 32.1-249(1), in turn, defines “dead body” as follows:

“Dead body” means a human body or such parts of such human body from the condition of which it reasonably may be concluded that death recently occurred.[2]

APPLICABLE LAW AND DISCUSSION

As explained above, your question turns on whether a fetus constitutes “a human body” as used in § 32.1-249(1). The term “a human body” is not defined in § 32.1-249 or anywhere else in the Code of Virginia. Nor has the Supreme Court of

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1 VA. CODE ANN. § 18.2-323.02 (2015).
Virginia previously construed the term “a human body,” either as used in § 32.1-249 or elsewhere in the Code.

Your question thus involves a matter of statutory construction, where the “central focus is to ascertain and give effect to the intention of the General Assembly.” Legislatiived “from the words used in the statute,” and the text is “to be given [its] ordinary meaning unless it is apparent that the legislative intent is otherwise.”

There is considerable reason to doubt that the ordinary meaning of the words “a human body,” standing alone, would be understood as including a fetus. There is, however, no need to answer that question here, because it is “[a] cardinal rule of statutory construction . . . that a statute be construed from its four corners and not by singling out a particular word or phrase.”

The statutory context makes clear the legislature did not intend for the definition of “dead body” contained in § 32.1-249(1) to include a fetus. At least three different sections of the Code of Virginia—including another definition contained in § 32.1-249 itself—specifically distinguish between a dead body and a fetus by providing that they apply to “a dead body or fetus” (emphasis added). For example, § 32.1-249(4) defines “[f]inal disposition” as “the burial, interment, cremation, removal from the Commonwealth or other authorized disposition of a dead body or fetus.” Another provision of the same statutory chapter governs transfers in or out of the Commonwealth (as well as disinterments or reinterments) and contains three separate uses of “a dead body or fetus” and three separate uses of “the body or fetus.” The third provision imposes record-keeping obligations on funeral directors, embalmers, and others “in charge of final disposition of a dead body or fetus.” These provisions demonstrate that the Code of Virginia distinguishes between a dead body and a fetus and show that the General Assembly knows how to indicate that a

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4 Id. (internal quotation marks and citation omitted).
7 Section 32.1-249(4) (emphasis added).
8 Section 32.1-265(A), (C), & (E) (2015); see also id. at subsection (D) (referring to “dead bodies or fetuses”).
9 Section 32.1-274(C) (2015) (emphasis added).
given statutory provision applies to both.\textsuperscript{10} It is therefore telling that the provision at issue here—§ 18.2-323.02—refers only to “a dead body” and omits the words “or fetus.”\textsuperscript{11}

It is especially appropriate to consider these statutes \textit{in pari materia} because “‘they relate to . . . the same subject or to closely connected subjects or objects.’”\textsuperscript{12} All three of the statutory provisions listed above are contained in the same statutory chapter as § 32.1-249(1)’s definition of “dead body.” The chapter in question is Chapter 7 (Vital Records) of Title 32.1 (Health). Section 32.1-249 is the first section of that Chapter, and its first words are: “As used in this chapter . . . . ” So if § 32.1-249(1)’s definition of “a dead body” already included a fetus, every use of “a dead body or fetus” throughout that chapter would be superfluous. “[S]tatutory language,” however, should be interpreted “so as to give effect to every word,”\textsuperscript{13} and construing § 32.1-249(1)’s general definition of “a dead body” as already encompassing a fetus would violate the “rule[ ] of statutory construction that discourage[s] any interpretation of a statute that would render any part of it useless [or] redundant.”\textsuperscript{14}

Other provisions of § 32.1-249 reinforce the same conclusion. The very next statutory subsection defines the term “fetal death,” and uses the words “product of human conception” rather than “human body.”\textsuperscript{15} “When the General Assembly uses two different terms in the same act, it is presumed to mean two different things,”\textsuperscript{16} which suggests that “a human body” and a “product of human conception” are not the same thing. Another provision of § 32.1-249—the definition of “vital records”—

\textsuperscript{10} See May Dep’t Stores Co. v. Commonwealth, 29 Va. App. 589, 600, 513 S.E.2d 880, 885 (1999).

\textsuperscript{11} See Russello v. United States, 464 U.S. 16, 23 (1983) (stating that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”) (internal quotation marks and citation omitted).

\textsuperscript{12} Lucy v. Cty. of Albemarle, 258 Va. 118, 129, 516 S.E.2d 480, 485 (1999) (“[T]he reason for considering statutes \textit{in pari materia} is that this permits any apparent inconsistencies [to] be ironed out whenever that is possible.”) (internal quotation marks and citation omitted).


\textsuperscript{14} \textit{Id.}

\textsuperscript{15} Section 32.1-249(2); \textit{accord} § 32.1-249(2)(B) (also using “product of human conception” rather than “human body” for purposes of defining “spontaneous fetal death”); § 32.1-249(6) (same for purposes of defining “live birth”).

specifically distinguishes between “deaths [and] fetal deaths,” which reinforces the same distinction.

The relevant statutory histories also support the conclusion that a fetus that expired in utero is not encompassed within either § 32.1-249(1) (the definition of a “dead body”) or § 18.2-323.02 (the underlying criminal prohibition). The definitions now contained in § 32.1-249 were first enacted in 1960 as Senate Bill 249. Although the list of defined terms (and their order) was somewhat different than in the current Code of Virginia, the original 1960 enactment already included all of the essential features listed above, including (a) a definition of “final disposition” that referred separately to “a dead body or fetus”; (b) separate definitions for “dead body” and “fetal death”; (c) two provisions that used the words “product of human conception” rather than “human body”; and (d) a provision that specifically distinguished between “death [and] fetal death[s].” The same 1960 legislation also contained other provisions distinguishing between “a dead body or fetus” and referring separately to “death, or fetal death.”

In contrast, the criminal statute at issue (§ 18.2-323.02) was enacted in 2007. At that point, Virginia law in general—and the Health title in particular—had been distinguishing between a dead body and a fetus (and between a human body and a product of human conception) for nearly 50 years. For that reason as well, the legislature’s decision in 2007 to use the words “a dead body, as defined in § 32.1-249” is most logically understood as a considered and deliberate choice.

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17 Section 32.1-249(10); accord § 32.1-265(D) (drawing same distinction); § 32.1-274(D) (same); see also VA. S. CT. R. 2:803(9) (same).
19 Id. § 32-353.4(h).
20 Id. § 32-353.4(f) & (g).
21 Id. § 32-353.4(e) & (f).
22 Id. § 32-353.4(a).
23 Id. § 32-353.22(a); § 32-353.22(e).
24 Id. § 32-353.12(b); accord id. § 32-353.13 (“death, and fetal death”).
26 Section 18.2-323.02.
27 Subsequent unsuccessful attempts to amend the criminal code to expressly cover certain actions involving “remains” following a “fetal death” also support this interpretation. See, e.g., S.B. 962, 2009 Reg. Sess. (unsuccessful proposal that would have made it a Class 1 misdemeanor to “remove, destroy, or otherwise dispose of any remains” when “a fetal death occur[red] without medical attendance”); see also generally Tabler v. Bd. of Supvrs., 221 Va. 200, 202, 269 S.E.2d 358, 360 (1980) (“In determining legislative intent, we have looked both to legislation adopted and bills rejected by the General Assembly.”) (Emphasis added).
For these reasons, it is my view that the best reading of § 18.2-323.02 is that it does not apply to the remains of a human fetus that expired in utero. To the extent any doubt remained, however, the rule of lenity also would counsel in favor of the same conclusion. It is important to reiterate that the rule of lenity applies at the end of the process of statutory construction rather than the beginning and that it is properly used to resolve ambiguity rather than to create it in the first place.\(^\text{28}\) That said, § 18.2-323.02 is a criminal law that imposes significant penalties. The statute thus must be “strictly construed,” with “any reasonable doubt concerning the statute’s construction” being resolved against expanded criminal liability.\(^\text{29}\)

I am aware that a recent brief filed by this Office urged a different view about the proper interpretation of § 18.2-323.02 and that that case resulted in an unpublished and non-precedential opinion upholding a criminal conviction. I have concluded, however, that the position set forth in that brief was incorrect and did not serve the ends of justice. Although that particular case is now over because the defendant did not seek further review in the Supreme Court of Virginia, this opinion sets forth my official view about how § 18.2-323.02 should be applied going forward.

**CONCLUSION**

For the reasons stated above, it is my opinion that the words “a dead body,” as used in Virginia Code § 18.2-323.02, do not include the remains of a human fetus that expired in utero.

\(^{28}\) See, e.g., Johnson v. Commonwealth, 292 Va. 738, 743 n.2, 793 S.E.2d 321, 324 n.2 (2016) (stating that “the rule of lenity . . . does not apply when the statute is unambiguous”); Fitzgerald v. Loudoun Cty. Sheriff’s Office, 289 Va. 499, 508 n.3, 771 S.E.2d 858, 862 n.3 (2015) (stating that “the rule of lenity serves only to resolve genuine ambiguities and ‘does not abrogate the well-recognized canon that a statute should be read and applied so as to accord with the purpose intended and attain the objects desired if that may be accomplished without doing harm to its language’” (alteration, and citations omitted)).

\(^{29}\) Turner v. Commonwealth, 295 Va. 104, 109, 809 S.E.2d 679, 681 (2018) (internal quotation marks and citations omitted); accord Washington v. Commonwealth, 273 Va. 619, 629, 643 S.E.2d 485, 490 (2007) (“[A]n accused cannot be punished unless his or her case falls plainly and unmistakably within the statute.” (internal quotation marks and citations omitted)).
ADMINISTRATION OF GOVERNMENT—
STATE AND LOCAL GOVERNMENT CONFLICT OF INTERESTS ACT

While the State and Local Government Conflict of Interests Act does not prohibit a member of a county board of supervisors from remaining on the board while employed as executive director of a public service authority, the board member must take care to follow the requirements of the Act to address the continuing risk of transactional conflicts by disqualification or disclosure as the need arises in either capacity.

THE HONORABLE A. BENTON CHAFIN JR.,
MEMBER, SENATE OF VIRGINIA

JUNE 15, 2018

Your request relates to § 2.2-3107 of the Code of Virginia, which is part of the State and Local Government Conflict of Interests Act (the “Act”).

ISSUE PRESENTED

You ask whether § 2.2-3107 prohibits a member of a county board of supervisors (or “board”) from retaining his or her position on the board upon the acceptance of employment as executive director of a public service authority, where a majority of members of the public service authority are appointed by the board.

APPLICABLE LAW AND DISCUSSION

The Act provides mandatory ethical rules for state and local government officers and employees in areas such as: (1) accepting something of value from a third party; (2) holding a personal interest in a government contract; and (3) participating in transactions in which they have a personal interest.

Section 2.2-3107(A) provides as follows:

1 VA. CODE ANN. §§ 2.2-3100 through 2.2-3131 (2017). This opinion is not an “advisory opinion” within the meaning of § 2.2-3121 and does not provide the protection described in that section. A local government officer or employee desiring the protection of that section may seek an advisory opinion either from the Commonwealth’s Attorney in his jurisdiction or from the Virginia Conflict of Interest and Ethics Advisory Council, and the local officer or employee must include with his request a full disclosure of facts. See § 2.2-3121(B).

2 See, e.g., §§ 2.2-3103 and -3103.1.

3 See §§ 2.2-3105 through -3110.

4 See §§ 2.2-3111 and -3112.
No person elected or appointed as a member of the governing body of a county, city or town shall have a personal interest in (i) any contract with his governing body, or (ii) any contract with any governmental agency that is a component part of his local government and which is subject to the ultimate control of the governing body of which he is a member, or (iii) any contract other than a contract of employment with any other governmental agency if such person’s governing body appoints a majority of the members of the governing body of the second governmental agency.\[5\]

A public service authority has legal existence separate from the board of supervisors,\[6\] and therefore it is not a component part of county government. Accordingly, the broad prohibition on contractual interests set forth in clauses (i) and (ii) above does not apply. While the narrower prohibition on contractual interests set forth in clause (iii) categorically applies, it contains an exception for contracts of employment. Accordingly, I conclude that § 2.2-3107 of the Act does not prohibit a member of a county board of supervisors from also holding a position of employment with a public service authority, including the position of executive director.

Although a contract of employment by itself would not violate the Act, there is the potential for conflicts of interest to arise if an individual remains a county supervisor while employed as executive director of the authority. Section 2.2-3112 of the Act requires an officer or employee to make formal disclosures and disqualify himself from participating in a transaction before his agency if it applies only to a business or governmental agency in which he has a personal interest or if he is unable to participate pursuant to certain exceptions for matters that apply to multiple parties.\[7\]

\[5\] Section 2.2-3107(A) (emphasis added).

\[6\] See 15.2-5102(A) (2012) (stating that an authority “shall be a public body politic and corporate and a political subdivision of the Commonwealth).

\[7\] See § 2.2-3112(A) and (B) (specifying when officers or employees who have a personal interest in a transaction must disqualify themselves, and specifying formal disclosures that must be made); see also § 2.2-3101 (defining “personal interest in a transaction” to “exist[] when an officer or employee . . . has a personal interest in property or a business or governmental agency, or represents or provides services to any individual or business and such property, business or represented or served individual or business (i) is the subject of the transaction or (ii) may realize a reasonably foreseeable direct or indirect benefit or detriment as a result of the action of the agency considering the transaction.”).
Because an individual in the position you describe would have a personal interest in both governmental agencies,\(^8\) he would have to remain alert at all times to conflicts that may require formal disclosures or disqualification and other actions under § 2.2-3112.\(^9\) For example, conflicts of this sort could arise from decisions by the board of supervisors pertaining to or having a financial effect on the authority, or from transactions of the authority pertaining to or affecting the county. The result could be the individual having a personal interest in multiple transactions, requiring formal disclosures, disqualifications, and other compliance as noted above.

A transaction where a county supervisor participates in the board’s appointment of members of the authority, who in turn would have power over his employment and salary as executive director of the authority, is a clear example of one requiring formal disclosure and disqualification under § 2.2-3112 of the Act.

To avoid violating the Act, an individual in the position you describe should, as a local government officer and employee, seek advice on a regular basis from either the Commonwealth’s Attorney or the Virginia Conflict of Interest and Ethics Advisory Council. Also, because the Act’s formal disclosure and disqualification requirements must be fulfilled promptly when conflicts of this sort arise,\(^10\) an individual in the position you describe would need to obtain necessary guidance well in advance.

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\(^8\) See § 2.2-3101 (defining “personal interest” in a business or governmental agency to include “salary . . . paid or provided by a business or governmental agency that exceeds, or may reasonably be anticipated to exceed, $5,000 annually”). I assume, for purposes of this opinion, that the individual’s salary as executive director of the authority, and as a member of the board of supervisors, each would meet this monetary threshold and therefore give rise to a “personal interest” in both governmental agencies.

\(^9\) Other actions required by the Act include abstention of the disqualified officer or employee from “(i) attending any portion of a closed meeting authorized by the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) when the matter in which he has a personal interest is discussed, and (ii) discussing the matter in which he has a personal interest with other governmental officers or employees at any time.” Section 2.2-3112(A).

\(^10\) See § 2.2-3115(F) (local officer or employee who is disqualified from participating in a transaction due to a personal interest must make disclosures “forthwith”). The Act also requires that required declarations be made promptly, in the event the individual is able to participate in a transaction under one of the exceptions noted in § 2.2-3112(B)(1) & (2). See § 2.2-3115(H) and (I) (requiring declarations to be made either “prior to participation in the transaction” or “by the end of the next business day”).
For the reasons stated, it is my opinion that the Conflict of Interests Act does not prohibit a member of a county board of supervisors from remaining on the board while employed as the executive director of a public service authority. However, such service likely creates a continuing risk of transactional conflicts of interest that might require a person who holds both positions to make prompt formal disclosures of personal interests and often disqualify himself from participating in transactions for either public body that pertain to the other public body, or that may have a reasonably foreseeable direct or indirect benefit or detriment for the other public body.
OP. NO. 17-027

TAXATION—ELECTRIC UTILITY CONSUMPTION TAX & NATURAL GAS CONSUMPTION TAX

Community services boards and behavioral health authorities are exempt from state and local electric utility and natural gas consumption taxes.

THE HONORABLE JUDITH WILLIAMS JAGDMANN
COMMISSIONER, STATE CORPORATION COMMISSION

JUNE 15, 2018

 ISSUES PRESENTED

You ask whether community services boards and behavioral health authorities are exempt from state electric utility and natural gas consumption taxes under §§ 58.1-2900 and -2904 of the Code of Virginia. You further inquire whether the exemption extends to the portion of those taxes remitted to localities.

BACKGROUND

Sections 58.1-2900 and -2904 of the Code of Virginia establish a tax on the consumption of electricity and natural gas, respectively. Both taxes include a portion due the Commonwealth and a portion due the locality in which the electricity or natural gas was consumed. You relate that electric service providers, pipeline distribution companies, and gas utilities collect these consumption taxes from consumers as a line item on the consumers’ monthly service bills. The businesses then remit the state portion of the taxes to the State Corporation Commission and the local portion to the appropriate locality.

APPLICABLE LAW AND DISCUSSION

Section 58.1-2900(B) establishes that the electric utility consumption tax “shall not apply to municipalities’ own use or to use by divisions or agencies of federal, state and local governments.” Similarly, § 58.1-2904(D) provides that the “natural gas consumption tax “shall not apply to municipalities’ own use or to use by divisions or agencies of federal, state and local governments.”

3 See §§ 58.1-2901, -2905. A portion known as the special regulatory tax is also remitted to the State Corporation Commission. See §§ 58.1-2900 to -2903 (2017), and §§ 58.1-2904 to -2907 (2017). The conclusions set forth in this opinion also apply to the special regulatory tax portion of the electric utility and natural gas consumption taxes.
gas consumption] tax shall not apply to use by divisions or agencies of federal, state and local governments.” Thus, if the use of electricity or natural gas is by a division or agency of local government, it is exempt from these taxes.

Section 37.2-500 of the Code provides that every county and city in the Commonwealth “shall establish a community services board by itself or in any combination with other cities and counties, unless it establishes a behavioral health authority” pursuant to §§ 37.2-600 to -615. A community services board is the local entity “responsible for providing public mental health, developmental, and substance abuse services” to residents. Each community services board functions either as a department (i.e., a “division”) or an agency of the local government that established the board.

A behavioral health authority fulfills a similar role, although it possesses certain additional powers and duties not delegated to community services boards. The statutory framework for a behavioral health authority provides that it shall be established by its host locality and that it “shall be deemed to be a public instrumentality, exercising public and essential governmental functions.” Thus, for purposes of the tax exemption, a behavioral health authority is an agency of local government.

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5 DBHDS, 2015 Overview of Community Services, supra note 4, at 18; see also § 37.2-500(D) (providing that a community services board shall “function as the single point of entry into publicly funded mental health, developmental, and substance abuse services”).

6 See § 37.2-504 (2014) (establishing the powers and duties of community services boards); DBHDS, 2015 Overview of Community Services, supra note 4, at 11-12 (explaining how some community services boards function as departments of city or county government, while others function as agencies of city or county government); see also 2004 Op. Va. Att’y Gen. 159, 161 (community services boards are agencies or instrumentalities of local government).

7 See § 37.2-605 (2014); DBHDS, 2015 Overview of Community Services, supra note 4, at 11.

8 See § 37.2-601 (Supp. 2017); see also supra note 4.

9 Section 37.2-605.

10 See § 37.2-600 (2014) (providing that the board of directors of a behavioral health authority is “appointed by and accountable to the governing body of the city or county that established it”).
Because each of these entities is a division or agency of local government, I conclude that each is exempt from the electric utility and natural gas consumption taxes in question. The exemption statute applies to both the state portion of these taxes and the portion payable to the locality.

**CONCLUSION**

Accordingly, it is my opinion that community services boards are divisions or agencies of local government for purposes of §§ 58.1-2900 and -2904 of the Code of Virginia. Behavioral health authorities are agencies of local government for purposes of these same statutes. As such, both community services boards and behavioral health authorities are exempt from the state share and the local share of electric utility and natural gas consumption taxes.
Section 37.2-809 of the Code of Virginia authorizes the issuance of a temporary detention order lasting up to 72 hours in order to conduct a mental health examination and initiate stabilizing mental health treatment. This order may only be extended by weekends, holidays or other dates on which the court is lawfully closed. As used in this statute, the word “court” refers to the general district court within the relevant jurisdiction, and the phrase “lawfully closed” refers to days on which the court is not open for the transaction of business on any portion of the day. In the interest of due process, the statute does not authorize the detention of an individual in a mental health facility beyond this 72-hour period without an involuntary civil commitment hearing, provided no exception for continued detention applies.
Specifically, you ask whether the word “court” refers to the “special justice,” or the general district court of the relevant jurisdiction.

2) Whether, if the 72-hour period ends on a day when the “court” as described in § 37.2-809(H) is open, but at a time when the court has already closed for that day, the individual subject to the TDO may be detained until the close of business on the next day the court is open.

3) What lawful authority exists to detain an individual in a medical hospital after the 72-hour limit for a TDO expires, when the individual is receiving ongoing treatment at that facility and has not yet been transferred to the designated mental health facility because he has not been “medically cleared,” and no exception for continued detention under § 37.2-809(H) applies;

4) What agency or office is responsible for monitoring the 72-hour time limit and exceptions in § 37.2-809(H) to ensure the TDO does not expire prior to a hearing.

To frame these questions, you present a hypothetical situation in which a TDO is issued on a Sunday at 11:00 p.m. The individual is taken into custody and transported by a deputy sheriff to a local medical hospital for assessment. Upon assessment, the individual is admitted to the medical hospital for medication and monitoring. The mental health facility designated on the TDO refuses to authorize admission of the individual because the individual is not yet “medically cleared,” and the deputy sheriff maintains custody of him in the medical hospital during the 72-hour period. The 72-hour period expires on Wednesday at 11:00 p.m., while the individual is still receiving treatment in the medical hospital. The Wednesday in question is not a legal holiday, and the circuit court and general district courts are operating within the judicial circuit. The special justice appointed pursuant to § 37.2-803 does not conduct hearings on Wednesdays, but only on Mondays and

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2 “Medical clearance” means the patient has been medically screened and, if necessary, assessed, and it has been determined that no medical needs exist that would prevent his transfer to the psychiatric facility. See Va. Dep’t of Behavioral Health and Developmental Services, Medical Screening and Medical Assessment Guidance Materials (2nd ed., eff. Apr. 1, 2014), at 6-7, available at http://www.dbhds.virginia.gov/library/mental%20health%20services/140401medicalscreeningguidance%20(2).pdf.
Thursdays. A question therefore arises as to whether the individual may be detained on the TDO until Thursday for a hearing before the special justice.

**APPLICABLE LAW AND DISCUSSION**

**Question One**

You first inquire what the definition of “court” is for purposes of § 37.2-809(H). In particular, you ask whether it is the hearing schedule of a special justice, or the operating hours of the general district court, that determines whether a given day is “a day on which the court is lawfully closed.”

Before addressing this inquiry, it is helpful to briefly define the role of a special justice in Virginia. A special justice is a judicial officer who is authorized to preside over certain types of mental health proceedings in the place of a judge. Specifically, § 37.2-803 provides that “[t]he chief judge of each judicial circuit may appoint one or more special justices” to perform the duties of a judge in designated mental health proceedings, which include adult civil commitment hearings. Regardless of the appointment of a special justice, however, general district court judges retain concurrent authority to conduct the same types of mental health proceedings. There is no requirement in the law, or even preference, that an adult civil commitment hearing be conducted by a special justice.

With respect to your inquiry, § 37.2-809 does not define the word “court,” nor is the term defined elsewhere in Title 37.2. Although the word “court” is sometimes used to refer to the judicial officer who presides over a matter (e.g., “The court stated . . .” or “The court found . . .”), within the context of § 37.2-803(H) the word is clearly intended to refer to the general district court itself. Two observations support this conclusion. First, if the word were interpreted to refer to a special justice, it would contradict the plain language of the statute that specifies “the court” is the relevant authority.

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3 Emphasis added.
4 See VA. CODE ANN. § 37.2-100 (Supp. 2017); § 37.2-803 (2014). “Each special justice shall be a person licensed to practice law in the Commonwealth or a retired or substitute judge in good standing and shall have all the powers and jurisdiction conferred upon a judge.” Section 37.2-803.
5 See § 37.2-803. Special justices also are authorized to preside over certain other proceedings, such as hearings for judicial authorization of medical treatment under § 37.2-1101. See id.
7 The Supreme Court of Virginia has observed that the word “court” refers “sometimes to the judicial institution” having jurisdiction over a matter and “at other times to the judicial officer [presiding].” REVI, LLC v. Chi. Title Ins. Co., 290 Va. 203, 211 (2015). The context of the word generally determines which meaning is intended.
justice, rather than the general district court, an individual could be detained past the 72-hour limit, without regard for the operating schedule of the court, whose judge has concurrent authority to conduct a hearing. This would frustrate the object of the statute to provide a hearing as quickly as possible. Second, unlike an institutional court, a special justice cannot logically be said to be “closed.” While the Code sets out specific instances in which the general district court itself may be “lawfully closed,” it contains no comparable provisions referring to “closure” for special justices. Therefore, the most logical reading of the statute is that the General Assembly intended the term “court” to refer to the general district court itself.

For these reasons, it is my opinion that the court is only “closed” for purposes of § 37.2-809(H) when the general district court within the relevant jurisdiction is not open for the transaction of business. An individual may not be denied a hearing under the facts you present based solely upon the unavailability of the special justice, on a day when the court is in operation.

Question Two

Your next question is whether, if the 72-hour limit on detaining an individual pursuant to a TDO ends on a day when the general district court is open, but ends at a time when the court has already closed for that day, the individual may be detained until the close of business on the next day the court is open. The language in § 37.2-809(H) refers to the time period expiring on a Saturday, Sunday, legal holiday, or “day” on which the court is lawfully closed. As a general rule, words in a statute are to be given their usual and commonly understood meaning. The word “day” is generally understood to mean “[a]ny 24-hour period; the time it takes the

8 “Any construction that has the effect of impairing the purpose of [an] enactment or which frustrates, thwarts or defeats its objects should be avoided.” Gough v. Shaner, 197 Va. 572, 575 (1955).


10 See § 16.1-69.35(5) (Supp. 2017) (providing that “[t]he chief judge or presiding judge of any district court may authorize the clerk’s office to close on any date when the chief judge or presiding judge determines that operation of the clerk’s office, under prevailing conditions, would constitute a threat to the health or safety of the clerk’s office personnel or the general public”); see also § 17.1-330 (2015) (providing for closure by the Chief Justice of the Supreme Court in the event a judicial emergency is declared).

earth to revolve once on its axis.” Therefore, it is my opinion that the correct inquiry is whether the court is open on any portion of the day that the TDO expires, not whether the court is open at the actual hour that the TDO expires. If the court is open on any portion of that day, then the hearing must be held before the 72-hour period expires, and the individual may not be detained until the next business day.

**Question Three**

Your third inquiry is what lawful authority exists, if any, for a law enforcement officer to detain an individual in a medical hospital after the 72-hour limit for a TDO expires, when the individual is receiving ongoing treatment at that facility and has not yet been transferred to the designated mental health facility because he has not been “medically cleared,” and no exception for continued detention under § 37.2-809(H) applies.

Assuming no other legal proceeding is pending that would provide a basis to detain the individual, it is my opinion that the individual may not be detained after the 72-hour limit expires. The United States Supreme Court has consistently stated that civil detention and commitment involve a significant deprivation of personal liberty that requires due process protection. The requirements of due process mandate, among other things, that a hearing be provided as quickly as possible following an individual’s involuntary detention in a mental health facility. As discussed above, Virginia has provided for this in § 37.2-809 of the Code, which unambiguously states that a civil commitment hearing must be held within 72 hours of execution of a TDO, except as extended by weekends or holidays or other days on which the court is lawfully closed. In an attempt to protect the right to a speedy

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12 BLACK’S LAW DICTIONARY 479 (Bryan A. Garner et al. eds., 10th ed. 2014).
15 Section 37.2-809(H) provides that “temporary detention shall . . . not exceed 72 hours prior to a hearing. If the 72-hour period herein specified terminates on a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed, the person may be detained, as herein provided, until the close of business on the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed.” (Emphasis added).

Similarly, § 37.2-814(A) provides that “The commitment hearing for involuntary admission . . . shall be held within 72 hours of the execution of the temporary detention order as provided for in § 37.2-809; however, if the 72-hour period herein specified terminates on a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed, the person may be detained, as
hearing, prior Attorneys General have concluded on more than one occasion that these statutory provisions do not authorize involuntary detention beyond the length of time specified.16

**Question Four**

Your final inquiry is what agency or office is responsible for monitoring the 72-hour time limit and exceptions in § 37.2-809(H) to ensure that a TDO does not expire prior to a hearing. Title 37.2 of the Code of Virginia is silent on this issue. The facility in which the individual is being detained, however, must remain vigilant that it does not maintain someone involuntarily when it no longer has legal authority to do so.

**CONCLUSION**

Accordingly, it is my opinion that court is only “closed” for purposes of conducting the hearing required by § 37.2-809(H) when the general district court within the relevant jurisdiction is not open for the transaction of business. If the court is open on any portion of the calendar day upon which the 72-hour period expires, then the hearing must be held before that 72-hour period expires, and the individual may not be detained until the next business day. Further, it is my opinion that there is no legal authority for any facility to involuntarily detain an individual pursuant to a TDO beyond the length of time specified in the statute.

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In considering an appeal to a board of zoning appeals from a determination of a zoning administrator: (1) a board of zoning appeals is required to provide notice of hearing to the general public and to adjacent property owners as the outside parties most likely to be impacted by the decision; and (2) affected persons are permitted to participate in the hearing, and aggrieved parties may address the board for a specified amount of time.

Arthur L. Goff, Esquire
Rappahannock County Attorney

July 27, 2018

Issue Presented

You have asked what public notice and what public participation, if any, are required for an appeal of a determination by a zoning administrator to the local board of zoning appeals (BZA).

Background

You relate that the Rappahannock County BZA issued a conditional use permit on the condition that certain road improvements be completed within a specified time. The owner of the property for which the conditional use permit was issued failed to complete the improvements within the required time, and the permit expired. The Zoning Administrator so notified the owner. The owner appealed that decision to the BZA. The neighboring landowners asserted a statutory right to notice of the hearing, as well as the right to participate in the hearing as aggrieved persons.

Applicable Law and Discussion

1. Notice of the BZA Hearing

The initial issue is who is legally entitled to notice of an appeal to the BZA

1 Rappahannock County is one of a number of jurisdictions in which conditional use permits (sometimes also known as special use permits or special exception permits) are initially issued by the BZA rather than the zoning administrator or the local governing body. See Rappahannock County, Va., Code ch. 170, art. VI, § 170-47(D). This opinion concerns the BZA acting in a quasi-judicial capacity while hearing and deciding an appeal. It does not apply to a BZA acting in a legislative capacity such as when deciding a request for a conditional use permit.
from a determination by the Zoning Administrator that a conditional use permit has expired. Section 15.2-2309(3) empowers a BZA “[t]o hear and decide appeals from the decision of the zoning administrator after notice and hearing as provided by § 15.2-2204.” This subsection further states “. . . when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.” This precise language is used elsewhere in § 15.2-2309 in reference to the grant of variances and special exception permits.

Section 15.2-2204 sets forth various types of decisions for which there are notice provisions, including: amendment of a comprehensive plan, zoning change of 25 or fewer parcels, zoning of part of a tract of not less than 500 acres owned by the Commonwealth or the federal government, zoning change of more than 25 parcels, and zoning change that decreases density. Written notice to adjacent landowners is expressly required for a request to change the zoning classification of 25 or fewer parcels of land. The statute is silent as to the type of notice required for BZA proceedings, including appeals and requests for variances and special exceptions, with the exception that appeals to the BZA by someone other than the owner of the property or the owner’s agent require written notice to such owner within ten days of receipt of the request.

Additional notice provisions relative to BZA proceedings are found in § 15.2-2312, which requires public notice of a hearing to consider an appeal and “due notice to the parties in interest.” Section 15.2-2206 authorizes localities to adopt an ordinance requiring BZA applicants to assume responsibility for “all required notices,” including written notice. Similar to § 15.2-2309 this statute specifically requires adherence to § 15.2-2204.

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2 Section 15.2-2309(3) (2018).
3 Id.
4 Section 15.2-2309(2).
5 Section 15.2-2309(6).
6 Section 15.2-2204 (2018).
7 Section 15.2-2204(B).
8 Section 15.2-2204(H).
9 Section 15.2-2312 (2018).
10 Section 15.2-2206 (2018).
As a basic principle of statutory interpretation, the “primary objective is to ascertain and give effect to legislative intent” based on the words contained in the statute.\textsuperscript{11} “[I]t is well established that every act of the legislature should be read so as to give reasonable effect to every word and to promote the ability of the enactment to remedy the mischief at which it is directed.”\textsuperscript{12}

The legislative intent of § 15.2-2204 is “to afford property owners who are closest to the land involved an opportunity to be heard.”\textsuperscript{13} In a case involving the BZA’s consideration of an application for a conditional use permit, the Supreme Court of Virginia found that adjacent property owners abutting and across the road from the affected property were entitled to written notice as required by § 15.1-431, now § 15.2-2204.\textsuperscript{14} A similar ruling was made in a case involving a request for a variance in which the owner of an abutting lot was not given written notice of the hearing. The Supreme Court ruled that without this written notice, the BZA did not have the authority to grant the requested variance.\textsuperscript{15}

Although the Supreme Court has not yet considered whether written notice must be given to adjacent property owners for appeals to BZA, the General Assembly used the same language in requiring notice for appeals as it did for variances and special exceptions. It follows that the language should be construed in the same manner to require written notice to adjacent property owners for appeals before the BZA. Further, if written notice were not required for appeals, the statutory language allowing such notice to be sent by first-class mail would have no meaning. “The rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it \textit{useless}, repetitious, or absurd.”\textsuperscript{16}

Based on the clear legislative intent in Chapters 22 of Title 15.2 to afford notice to adjacent property owners who are most likely to be affected by the decision of the BZA, and based upon the decisions of the Supreme Court with respect to

\textsuperscript{13} Lawrence Transfer & Storage Corp. v. Bd. of Zoning Appeals, 229 Va. 568, 571, 331 S.E.2d 460, 462 (1985).
\textsuperscript{14} \textit{Id}.
\textsuperscript{15} Parker v. Miller, 250 Va. 175, 459 S.E.2d 904 (1995).
\textsuperscript{16} Jones, 227 Va. at 181, 314 S.E.2d at 64 (emphasis added).
variances and special exceptions, it is my opinion that written notice to adjacent property owners is required for BZA hearings on appeals of a zoning administrator’s determination.

2. Participation in the BZA Hearing

Your next question is whether adjacent landowners have a right to participate in the appeal to the BZA. There are several statutes relevant to this inquiry. Section 15.2-2309(3) requires notice and hearing as required by § 15.2-2204, which, in turn, requires notice of the time and place of the hearing at which “persons affected may appear and present their views.”¹⁷ Section 15.2-2312 requires notice to the public and the parties in interest. Public notice is a means of giving notice to the general population of a proceeding occurring at a specific date, time, and place. The term “parties in interest” signifies those persons having a substantive interest in the outcome of a proceeding or protecting a right in the matter.¹⁸ Finally, § 15.2-2308(C) gives the appellant, applicant, and aggrieved parties an equal amount of time to participate in a BZA hearing as is given the staff of the local governing body. In relevant part, the statute provides:

Notwithstanding any other provision of law, general or special, for the conduct of any hearing . . . the board shall offer an equal amount of time in a hearing on the case to the applicant, appellant or other person aggrieved under § 15.2-2314 . . . .¹⁹

Section 15.2-2314 governs the appeal of a BZA decision to the circuit court and provides that “any person or persons jointly or severally aggrieved” by a decision of the BZA may file a petition with the court specifying the grounds upon which aggrieved within 30 days of the decision. The court “shall allow a writ of certiorari to review the decision” and may permit intervention by persons jointly or severally aggrieved.²⁰

¹⁷ Section 15.2-2204(A).
¹⁸ Party, BLACK’S LAW DICTIONARY 1297-98 (Bryan A. Garner et al. eds., 10th ed. 2014) (describing the term “party in interest” as archaic and directing the reader instead to the term “real party in interest,” meaning a person who “possesses the right sought to be enforced”).
¹⁹ Section 15.2-2308(C) (2018) (emphasis added). Although you maintain that this statute does not apply to consideration of an appeal, based on the last sentence of § 15.2-2309(1), that subsection merely governs the burden of proof and mandates the consideration of applicable ordinances, laws, and regulations. Notice of and participation in the BZA hearing is addressed in subsection (3) of the same statute is and is not exclusive of other laws.
²⁰ Section 15.2-2314 (2018).
Section 15.2-2314 does not define the term “aggrieved.” Because there is no statutory definition, the legislative intent must be discerned under the rules of statutory construction. The term “aggrieved” has been discussed in several decisions of the Supreme Court of Virginia. The most recent case is *Friends of the Rappahannock v. Caroline County Board of Supervisors*, which involved an appeal of a land use decision. A special exception permit had been granted for sand and gravel mining operations on a tract of land fronting on a river. Several nearby landowners and a conservation organization appealed the grant of the permit to circuit court. A key issue was whether they had standing to proceed with the case. In holding there was no standing, the Supreme Court applied the “aggrieved person” standard, which entails a two-part test:

First, the complainant must own or occupy real property within or in close proximity to the property that is the subject of the land use determination, thus establishing that it has a direct, immediate, pecuniary, and substantial interest in the decision.

Second, the complainant must allege facts demonstrating a particularized harm to some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally. Absent an allegation of injury or potential injury not shared by the general public, complainants have not established standing.

Applying this standard in the present context, the questions are, first, whether the particular neighbors who wish to participate in the BZA appeal as an “aggrieved party” own or occupy real property in close proximity to the subject property; and, second, whether they can demonstrate a particularized harm, or a burden or


22 Id. at 41-42, 743 S.E.2d at 133.

23 Id.

24 Id. at 43, 743 S.E.2d at 134.

25 Id. at 48-49, 743 S.E.2d at 137 (citations and quotation marks omitted). See also Deerfield v. City of Hampton, 283 Va. 759, 766, 724 S.E.2d 724, 727 (2012) (holding that a committee formed under the city charter had no standing, because it had no rights under the charter to file suit challenging a proposed land use after the purpose for which the committee had been formed had ceased to exist); Vulcan Materials Co. v. Bd. of Supervisors, 248 Va. 18, 24, 445 S.E.2d 97, 100 (1994) (quoting Va. Beach Beautification Comm’n v. Bd. of Zoning Appeals, 231 Va. 415, 419-20, 344 S.E.2d 899, 902-03 (1986) (“The meaning of ‘aggrieved’ is settled. When used in a statute, the term contemplates ‘a denial of some personal or property right, legal or equitable.’”)).
obligation different from that suffered by the public generally. If they satisfy both parts of this test, such persons are “aggrieved,” and the BZA must provide them with equal time to participate in the hearing, along with the applicant and appellant, as the staff of the local government.26

Your specific question is whether any particular landowner is “aggrieved” by the determination of the Zoning Administrator that the conditional use permit had expired and therefore expressly entitled by statute to participate in the hearing for a specified period of time. Because that question is fact-specific, I express no opinion on whether any particular landowner meets the two-prong test described above. Attorneys General consistently have declined to render official opinions that require factual determinations.27

CONCLUSION

For the foregoing reasons, it is my opinion that the BZA is required by § 15.2-2204 to publish notice of a public hearing for the BZA’s consideration of an appeal, and to give written notice of the hearing to the adjacent property owners. It is my further opinion that the BZA must allow any affected person to participate in the hearing, and allow any aggrieved party to address the BZA for a specified amount of time as provided in § 15.2-2308(C). An aggrieved person is one who owns or occupies nearby property and can demonstrate a particularized harm, or the imposition of a burden or obligation different from that suffered by the public generally.

26 Section 15.2-2308(C) requires the BZA to offer an equal amount of time to the applicant, appellant or other person aggrieved and the staff of the local governing body. It does not prohibit other parties attending the hearing from participating, albeit without a guarantee of equal time.

COMMONWEALTH PUBLIC SAFETY—DEPARTMENT OF CRIMINAL JUSTICE SERVICES: SPECIAL CONSERVATORS OF THE PEACE

The Virginia Department of Criminal Justice Services is not authorized to issue a temporary or valid registration to teachers or other school personnel seeking appointment as armed special conservators of the peace with jurisdiction over public school grounds.

MS. SHANNON DION
DIRECTOR, VIRGINIA DEPARTMENT OF CRIMINAL JUSTICE SERVICES

AUGUST 28, 2018

ISSUE PRESENTED

You ask whether the Department of Criminal Justice Services (DCJS) may issue a valid temporary registration or valid registration to one or more public school teachers, or other school personnel, seeking to be appointed as an armed special conservator of the peace for school safety purposes.

BACKGROUND

You advise that the Lee County School Board recently voted to request that the Lee County Circuit Court appoint public school teachers and other staff members as special conservators of the peace (SCOPs), in an apparent effort to secure authorization for these individuals to carry firearms on school grounds. You have received an application from a Lee County School Board employee seeking temporary registration by DCJS as a prerequisite to appointment by the circuit court as an armed SCOP.

APPLICABLE LAW AND DISCUSSION

1. Virginia law requires a temporary registration issued by DCJS prior to a circuit court order appointing a qualified individual as a SCOP and also a valid registration after the circuit court enters an order of appointment.

Section 9.1-150.1 defines a “special conservator of the peace” as “any individual appointed pursuant to § 19.2-13 on or after September 15, 2004.”

[u]pon the submission of an application [. . .] from [. . .] any sheriff or chief of police of any county, city, or town [. . .], a circuit court judge of any county or city shall appoint special conservators of the peace [. . .] upon a showing by the applicant of a necessity for the security of property or the peace and presentation of evidence that the person or persons to be appointed as a special conservator of the peace possess a valid registration issued by the Department of Criminal Justice Services[. . .]

The order of appointment shall provide that a special conservator of the peace may perform only the duties for which he is qualified by training as established by the Criminal Justice Services Board.[2]

Prior to July 1, 2018, the order of appointment could provide that a SCOP “shall have all the powers, functions, duties, responsibilities and authority of any other conservator of the peace.”[3] This language was removed, however, with the passage of House Bill 151 in the 2018 session of the General Assembly and now provides that a SCOP “may perform only the duties for which he is qualified by training as established by the Criminal Justice Services Board.”[4] Additionally, the order of appointment shall specify the geographical limitation of the SCOP’s authority.[5] Application and procedures for the appointment of SCOPs, including the powers of DCJS with respect to training and registration, are set forth in §§ 9.1-150.1 through 9.1-150.4.[6]

Section 19.2-13 states that “[n]o person shall seek appointment as a special conservator of the peace from a circuit court judge without possessing a valid registration issued by the Department of Criminal Justice Services . . . . [A] temporary registration may be issued in accordance with regulations established by the Criminal Justice Services Board while awaiting the results of a state and national fingerprint search.”[7] “Each special conservator shall provide to the circuit court a temporary registration letter issued by the Department of Criminal Justice Services

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[5] Id.


to include the results of the background check prior to seeking an appointment by the circuit court.”

DCJS shall not issue a valid registration or temporary registration until the applicant has (i) complied with or been exempted from mandatory training, (ii) submitted his fingerprints for a national and state criminal history records search, (iii) submitted the results of a background investigation completed by a state or local law enforcement agency, and (iv) met all other requirements of state law and regulations of the Criminal Justice Services Board. DCJS “may conduct [additional] investigations to determine the suitability of applicants for registration, including a drug and alcohol screening.”

Assuming the issuance of a temporary registration by DCJS and that all statutory requirements are satisfied, the circuit court may then enter the order of appointment and the applicant may receive from DCJS a registration document.

“Each registered individual shall comply with all applicable administrative requirements and standards of conduct and shall not engage in any acts prohibited by applicable sections of the Code of Virginia . . . .”

2. DCJS cannot issue a temporary registration letter or valid registration document to a SCOP applicant seeking to possess firearms on school property because SCOPs are not legally authorized to carry firearms on school property.

Section 18.2-308.1(B) of the Code generally prohibits individuals from knowingly possessing firearms on school property and makes it a Class 6 felony to violate this statute, as follows:

If any person knowingly possesses any firearm designed or intended to expel a projectile by action of an explosion of a combustible material while such person is upon (i) any public, private or religious elementary, middle or high school, including buildings and grounds; (ii) that portion of any property open to the public and then exclusively used for school-sponsored functions or extracurricular

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8 VA. CODE ANN. § 19.2-13(F).
9 VA. CODE ANN. § 19.2-13(C).
10 VA. CODE ANN. § 9.1-150.3(A) (2012).
11 See VA. CODE ANN. § 19.2-13(E).
12 6 VA. ADMIN. CODE § 20-230-30(F); see also 6 VA. ADMIN. CODE § 20-230-140(A)(1).
activities while such functions or activities are taking place; or (iii) any school bus owned or operated by any such school, he is guilty of a Class 6 felony.[13]

The statute also provides for a mandatory minimum sentence of five years for knowingly possessing a firearm on school property with an intent or attempt to use the weapon.14

There are several exceptions to the general prohibition against carrying a firearm on school grounds, including those in §§ 18.2-308 and 18.2-308.016 incorporated into § 18.2-308.1 by reference,15 and those set out explicitly in § 18.2-308.1(C).16 However, no exemptions or exceptions apply to SCOPs. While § 18.2-308(D)(3) permits certain “conservators of the peace” to carry concealed firearms on school property in the discharge of their official duties or while in transit to or from such duties,17 there is no parallel statutory provision allowing SCOPs to possess firearms on school property.

Conservators of the peace and SCOPs are two different positions governed by two separate sections of the Code. Conservators of the peace are statutorily designated by virtue of holding a specific state or federal position. They include, for example, judges, attorneys for the Commonwealth, magistrates, special agents of the U. S. Department of Justice and criminal investigators of various state and federal

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13 VA. CODE ANN. § 18.2-308.1(B) (Supp. 2018).
14 Id. at subsection C.
15 See id. (providing that the exemptions in §§ 18.2-308 and -308.016 are incorporated into § 18.2-308.1, mutatis mutandis).
16 Included among the exemptions set out in § 18.2-308.1(C) is the possession of weapons “as a part of the school’s curriculum or activities” or “as a part of any program sponsored or facilitated by either the school or any organization authorized by the school to conduct its programs either on or off the school premises.” Earlier versions of these exemptions have been included in the statute since its original enactment in 1979 and are commonly used to accommodate student educational programs, such as Junior Reserve Officers’ Training Corps (JROTC) (§ 22.1-277.07(D)) and hunter safety education programs (§ 22.1-204.2). The language allowing firearms as part of a curriculum, activity, or program supports the use of firearms for purposes of educating and training students. The language does not expressly or impliedly authorize a program to arm educational and administrative school board employees, such as teachers and administrators, nor has the General Assembly enacted such language when presented with bills that would allow school boards to arm its teachers and other personnel. See infra, notes 37-40 and accompanying text.
agencies, among many other individuals with roles in criminal justice or administrative law enforcement, expressly identified by the General Assembly.\textsuperscript{18}

In contrast, a SCOP is not statutorily designated as such by virtue of holding a particular public office or position; but rather, as discussed above, a SCOP must be appointed by a circuit court upon application of a sheriff, chief of police, or one of various business and property owners, proprietors, and custodians.\textsuperscript{19} Also, DCJS training standards for SCOPs differ significantly in depth and scope from those required for law enforcement officers. Specifically, law enforcement officers must receive a minimum of 580 hours of training to be certified as such by DCJS.\textsuperscript{20} In contrast, armed SCOPs need only satisfy 130 hours of training under relevant statutory requirements.\textsuperscript{21}

As previously discussed, § 18.2-308(D)(3) permits, by exemption, “conservators of the peace” to carry firearms on school property “while in the discharge of their official [law enforcement] duties, or while in transit to or from such duties.”\textsuperscript{22} No such exemption from the prohibition against possessing firearms on school property exists for SCOPs. Well settled rules of statutory construction recognize the maxim \textit{expressio unius est exclusio alterius}, meaning that to express or include one thing implies the exclusion of others.\textsuperscript{23} Applied here, the General Assembly’s exclusion of SCOPs from the conservators of the peace listed in § 19.2-12 and from the exemptions in § 18.2-308(D)(3) shows an intent that the general prohibition against possessing firearms on school property applies to SCOPs.\textsuperscript{24}

\textsuperscript{18} VA. CODE ANN. § 19.2-12 (Supp. 2018).
\textsuperscript{19} VA. CODE ANN. § 19.2-13(A).
\textsuperscript{20} 6 VA. ADMIN. CODE § 20-20-21.
\textsuperscript{21} VA. CODE ANN. § 9.1-150.2 (Supp. 2018).
\textsuperscript{22} VA. CODE ANN. § 18.2-308(D).
\textsuperscript{24} In addition, I note that in 2002, the General Assembly expressly eliminated the ability of school security officers to be appointed SCOPs for purposes of maintaining safety in a public school. See VA. CODE ANN. § 19.2-13 (F) (Supp. 2018), which states that “[e]ffective July 1, 2002, no person employed by a local school board as a school security officer, as defined in § 9.1-101, shall be eligible for appointment as a conservator for purposes of maintaining safety in a public school in the Commonwealth. All appointments of special conservators of the peace granted to school security officers as defined in § 9.1-101 prior to July 1, 2002 are void.”
As also discussed above, state law provides that DCJS may issue a temporary registration to a SCOP applicant in accordance with regulations promulgated by the Criminal Justice Services Board. DCJS may also deny a registration for, among other things, certain criminal convictions, testing positive on any drug and alcohol screening, making false or misleading statements, and failing to maintain good standing in the jurisdiction where appointed. Although the regulations do not expressly state that a registration may be denied when the appointment will contravene Virginia law, such power is axiomatic under the rule of law. Section 9.1-100(B) provides that “the Director of [DCJS] shall, under the direction and control of the Governor, exercise the powers and perform the duties conferred or imposed upon him by law and perform such other duties required by the Governor or the Criminal Justice Services Board.” Additionally, the Director of DCJS is required to take an oath to uphold the Constitution of the United States and the Constitution of the Commonwealth of Virginia.

The issuance of a temporary registration to a SCOP for possession of a firearm on public school property would not comply with § 18.2-308.1 and exceeds the powers vested in DCJS. Therefore, it is my opinion that DCJS lacks authority to issue a temporary or valid registration to an armed SCOP whose geographical jurisdiction includes public school grounds.

3. Virginia law authorizes school resource officers and certain school security officers to possess firearms on public school grounds as school safety personnel, but such authority is not extended to teachers and administrators.

The General Assembly has established and defined the mechanisms for school districts to employ or otherwise secure the services of properly trained school safety personnel and for certain of these personnel to carry firearms in the execution of their school safety duties. The General Assembly has authorized local law enforcement agencies to hire school resource officers (SROs) to maintain safety on

25 VA. CODE ANN. § 19.2-13(C).
26 6 VA. ADMIN. CODE § 20-230-120.
28 VA. CODE ANN. § 9.1-100(B) (2012).
Section 9.1-101 defines an SRO as “a certified law-enforcement officer hired by the local law-enforcement agency to provide law-enforcement and security services to Virginia public elementary and secondary schools.” As certified law enforcement officers, SROs are authorized by law to possess firearms on school property.

“School security officers” (SSOs) are also statutorily charged with maintaining safety at public schools in Virginia. As defined in § 9.1-101, an SSO is “an individual . . . employed by the local school board for the singular purpose of maintaining order and discipline, preventing crime, investigating violations of school board policies, and detaining students violating the law or school board policies on school property or at school-sponsored events and who is responsible solely for ensuring the safety, security, and welfare of all students, faculty, staff, and visitors in the assigned school.” SSOs differ from SROs in that SROs are law enforcement agency employees assigned by their law enforcement command to local schools, whereas SSOs are school employees under the direction of a school principal or designee.

In 2017, the General Assembly amended § 22.1-280.2:1 to authorize SSOs meeting certain criteria to carry firearms in the performance of their official duties. Specifically, the General Assembly extended the authority of SSOs to possess firearms only to those who had been active (and, therefore, certified) law enforcement officers within 10 years immediately prior to being hired as an SSO.
And significantly, in 2017, the General Assembly rejected a specific proposal to arm teachers and other school employees. House Bill 1469 would have permitted local school boards to authorize trained employees to carry handguns on school property; however, the bill was not reported out of committee. Similar bills introduced in the 2013 Session (House Bill 1557), the 2014 Session (House Bill 21), the 2015 Session (House Bill 1467), and the 2016 Session (House Bill 76) also failed to report out of committee.

Therefore, it is clear that the General Assembly has not empowered local school boards to arm teachers, but rather, has limited such authority to currently certified law enforcement officers or former certified law enforcement officers to carry firearms to maintain safety at public schools.

CONCLUSION

Virginia law expressly limits who may possess firearms on school grounds for safety purposes, and the General Assembly declined to enact bills presented every year from 2013 through 2017 to extend this authority to school teachers and administrators. The General Assembly has provided ways for schools to employ security personnel deemed to have met stringent training requirements who may possess firearms on school grounds in the execution of their duties as school safety personnel; however, these security personnel do not include armed SCOPs. For the reasons set forth above, I conclude that the Department of Criminal Justice Services

38 See id. (reflecting the bill’s status as of February 7, 2017, as not reported out of the House of Delegates Committee on Education).
40 The general authority given to school boards under Article VIII, § 7 of the Constitution of Virginia and the more specific powers given in §§ 22.1-28, -78, -79, and -253.13:7 do not expressly or by implication authorize a program to arm educational and administrative school board employees for safety purposes.
cannot lawfully issue a temporary or valid registration for armed SCOPs with jurisdiction over public school grounds.\textsuperscript{41}

\textsuperscript{41} See VA. CODE ANN. § 18.2-308.1.
Once a part-time Commonwealth’s Attorney elects full-time status under the provisions of § 15.2-1629, the election is binding, and his successors in office cannot revert to part-time status.

THE HONORABLE MATTHEW D. HARDIN
GREENE COUNTY COMMONWEALTH’S ATTORNEY

SEPTEMBER 7, 2018

ISSUE PRESENTED

You ask whether a Commonwealth’s Attorney can reverse the election of his predecessor-in-office made under § 15.2-1629 to become a full-time Commonwealth’s Attorney, and thereby revert to part-time status.

APPLICABLE LAW AND DISCUSSION

The Code of Virginia provides generally that attorneys for the Commonwealth in counties with a population of 35,000 or fewer inhabitants may serve on a part-time basis.1 Section 15.2-1629 of the Code, however, permits such part-time attorneys for the Commonwealth to elect, with the consent of the Compensation Board, to become full-time.2 Upon electing full-time status and receiving funding from the Compensation Board, the Commonwealth’s Attorney is prohibited from engaging in the private practice of law.3

Section 15.2-1629(A) of the Code states, in relevant part, as follows:

[ANY attorney for the Commonwealth for a county may, with the consent of the Compensation Board, elect to devote full time to the duties of attorney for the Commonwealth at a salary equal to that for an attorney for the Commonwealth in a county with a population of

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1 See VA. CODE ANN. § 15.2-1628 (2018).
2 VA. CODE ANN. § 15.2-1629(A) (2018).
3 Id. at subsection C.
more than 35,000. Such an election and consent by the Compensation
Board shall be binding on the attorney for the Commonwealth and on
successors in the office.\[^4\]

“The primary objective in statutory construction is to determine and give effect
to the intent of the legislature as expressed in the language of the statute.”\[^5\] We
“must presume that the General Assembly chose, with care, the words that appear in
a statute . . . .”\[^6\] Those words must be given “their ordinary meaning, unless it is
apparent that the legislative intent is otherwise.”\[^7\] Likewise, the “plain, obvious, and
rational meaning of a statute is to be preferred over any curious, narrow, or strained
construction.”\[^8\]

In enacting § 15.2-1629, the General Assembly intended to allow part-time
attorneys for the Commonwealth to devote full-time to the duties of the office. The
Code contains no explicit statutory language that allows full-time Commonwealth’s
Attorneys to revert to part-time status once an election is made.\[^9\] Given the absence
of language allowing a reversal of an election and the statute’s plain language that
the election “shall be binding . . . on successors in the office,” I conclude that
successors in office cannot reverse the election and revert to part-time status.

Legislative history reinforces this interpretation. Traditionally,
“Commonwealth’s Attorneys [in Virginia] . . . served on a part-time basis.”\[^10\] In

\[^4\] Id. at subsection A (emphasis added).

(citing Halifax Corp. v. First Union Nat’l Bank, 262 Va. 91, 99-100, 546 S.E.2d 696, 702 (2001)).

Commonwealth, 284 Va. 1, 3, 726 S.E.2d 248, 250 (2012)).

\[^7\] Phelps v. Commonwealth, 275 Va. 139, 142, 654 S.E.2d 926, 927 (2008) (citing Lovisi
v. Commonwealth, 212 Va. 848, 850, 188 S.E.2d 206, 208 (1972); Spindel v. Jamison, 199 Va. 954,
957, 103 S.E.2d 205, 208 (1958); Meeks v. Commonwealth, 274 Va. 798, 802, 651 S.E.2d 637, 639
(2007)).

Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983)).

\[^9\] See Appalachian Power, 284 Va. at 706, 733 S.E.2d at 256 (“Rules of statutory construction
prohibit adding language to or deleting language from a statute.”) (citing BBF, Inc. v. Alstom Power,
Inc., 274 Va. 326, 331, 645 S.E.2d 467, 469 (2007)).

\[^10\] INTERIM REPORT OF THE JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION ON STATUS OF
PART-TIME COMMONWEALTH’S ATTORNEYS TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF
[hereinafter 1989 JLARC REPORT].
1976, however, the General Assembly took the first step towards attaining a system of full-time attorneys for the Commonwealth by implementing a requirement “that Commonwealth’s Attorneys in cities with populations greater than 90,000 serve on a full-time basis.”11 At the same time, it directed the Virginia Advisory Legislative Council (the “Council”) to “study further the need for full-time Commonwealth’s Attorneys.”12 The Council’s report, which was published in 1977, concluded that attorneys for the Commonwealth and their assistants should serve on a full-time basis.13 The Council recommended “that Commonwealth’s Attorneys devote full time to their duties in cities and counties with populations greater than 35,000” as the next step in “achieving a system of full-time Commonwealth’s Attorneys.”14 The General Assembly enacted the Council’s recommendation in 1977.15

In 1990, the Joint Legislative Audit and Review Commission (JLARC) released a study on the issue, concluding that “more Commonwealth’s Attorneys should have full-time status.”16 JLARC recommended full-time status for several localities.17 In 1993, the General Assembly enacted § 15.1-50.3, the predecessor statute to § 15.2-1629, allowing part-time Commonwealth’s Attorneys in certain counties with a population of 35,000 or fewer inhabitants to obtain full-time status.18 The history of statutory enactments suggests that the General Assembly intended to remedy the concerns expressed by the Council and JLARC, and enacted the statutory language in § 15.2-1629 with the ultimate goal of providing more jurisdictions with full-time attorneys for the Commonwealth. Given that an exception to the binding nature of a predecessor’s election would frustrate this goal, I conclude that the

12 1989 JLARC REPORT, at 1; H. J. RES. NO. 115, 1976 Sess. (Va.).
17 Id. at III, 15-16.
18 1993 Va. Acts ch. 826; see also 1996 Va. Acts. ch. 561 (removing the earlier limitation that the county’s population must be in excess of 10,000 for election to take place).
General Assembly intended to prevent full-time Commonwealth’s Attorneys from reverting to part-time status.

Finally, the Compensation Board has interpreted § 15.2-1629 to mean that “[s]uch election to serve on a full-time basis, once funded, is binding on that office from hence forward.”\(^{19}\) Under the Compensation Board’s interpretation, election binds a given office, as opposed to any individual Commonwealth’s Attorney, “from hence forward.” The interpretation given to a statute by the agency charged with its administration is entitled to great weight.\(^{20}\) “The General Assembly is presumed to be cognizant of the agency’s construction of a particular statute and when such construction continues without legislative alteration, the legislature will be presumed to have acquiesced in it.”\(^{21}\)

**CONCLUSION**

Accordingly, it is my opinion that once a part-time Commonwealth’s Attorney elects full-time status under the provisions of § 15.2-1629, the election is binding, and his successors in office cannot revert to part-time status.


LOCAL FIRE DEPARTMENTS—USE OF FOUR-FOR-LIFE FUNDS

A locality may use Four-for-Life funds to provide funding for its fire department, provided the department meets the definition of an “emergency medical services agency” in Title 12 of the Virginia Administrative Code, is licensed by the Office of Emergency Medical Services, and the funds are expended solely for training emergency medical services personnel or for purchasing necessary equipment and supplies for emergency medical services.

THE HONORABLE RILEY E. INGRAM
MEMBER, HOUSE OF DELEGATES

SEPTEMBER 21, 2018

ISSUE PRESENTED

You ask whether a locality is permitted to use Four-for-Life funds to provide funding for its local fire department pursuant to § 46.2-694 of the Code of Virginia.

BACKGROUND

You relate that the City of Hopewell recently voted to provide Four-for-Life funds to the Hopewell Fire Department. Previously, these funds were used to provide funding to Hopewell Emergency Crew, Inc.1

APPLICABLE LAW AND DISCUSSION

Section 46.2-694(A)(13) sets aside a portion of vehicle registration fees to be placed in a special state fund for emergency medical services purposes:

An additional fee of $4.25 per year shall be charged and collected at the time of registration of each pickup or panel truck and each motor vehicle . . . . All funds collected from $4 of the $4.25 fee shall be paid...

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into the state treasury and shall be set aside as a special fund to be used only for emergency medical services purposes.\[2\]

Monies in this fund are commonly referred to as “Four-for-Life” funds. Section 46.2-694(A)(13)(e) directs that a portion of the moneys in this fund be given to localities to provide funding for nonprofit emergency medical services agencies licensed by the State Health Commissioner:

Twenty-six percent shall be returned by the Comptroller to the locality wherein such vehicle is registered, to provide funding for training of volunteer or salaried emergency medical services personnel of nonprofit emergency medical services agencies that hold a valid license issued by the Commissioner of Health and for the purchase of necessary equipment and supplies for use in such locality for emergency medical services provided by nonprofit emergency medical services agencies that hold a valid license issued by the Commissioner of Health.\[3\]

Thus, the pivotal questions in determining whether the Four-for-Life funds may be directed to the Hopewell Fire Department, also known as the Hopewell Bureau of Fire, are: (1) whether the fire department is an “emergency medical services agency” as defined by state law; (2) whether the fire department is licensed by the State Health Commissioner as an emergency medical services agency, and (3) whether the fire department is a non-profit organization.

The term “emergency medical services agency” is defined in the state regulations governing the Virginia Department of Health’s licensure of emergency medical services agencies:\[4\]

“Emergency medical services agency” or “EMS agency” means any person engaged in the business, service, or regular activity, whether or not for profit, of transporting or rendering immediate medical care and providing transportation to persons who are sick, injured, or otherwise incapacitated or helpless and that holds a valid license as


\[3\] Section 46.2-694(A)(13)(e) (emphases added).

\[4\] The function of issuing licenses to emergency medical services agencies is carried out by the Office of Emergency Medical Services, a division of the Virginia Department of Health. 12 VA. ADMIN. CODE § 5-31-300.
an emergency medical services agency issued by the commissioner in
accordance with § 32.1-111.6 of the Code of Virginia.\[^5\]

The term “person” is also defined in the same regulation as follows:

“Person” means, as defined in the Code of Virginia, any person, firm,
partnership, association, corporation, company, or group of
individuals acting together for a common purpose or organization of
any kind, including any government agency other than an agency of
the United States government.\[^6\]

I have been able to determine that the Hopewell Fire Department, a
government agency, does indeed regularly transport or render immediate medical
care to persons who are sick, injured or otherwise incapacitated, i.e., it regularly
provides emergency medical services. I have also been able to determine that the
Office of Emergency Medical Services of the Department of Health has issued a
license to the Hopewell Fire Department to engage in emergency medical services
described as Ground Ambulance Services ALS (Advanced Life Support) and Non
Transport First Response ALS.\[^7\] If these determinations are accurate, the Hopewell
Fire Department falls within the regulatory definition of a licensed emergency
medical services agency. Finally, as an agency of a Virginia local government, it
does not operate for profit.

Under these facts, the Hopewell Fire Department appears to meet the statutory
criteria in § 46.2-694(A)(13)(e) to receive Four-for-Life funds designated by the
General Assembly for licensed non-profit emergency medical services agencies. It is
important to note that the statute limits the use of these funds to “training of
volunteer or salaried emergency medical services personnel” or “the purchase of
necessary equipment and supplies for use in such locality for emergency medical
services.”\[^8\]

\[^5\] 12 VA. ADMIN. CODE § 5-31-10.

\[^6\] Id. (emphasis added).

\[^7\] See OFFICE OF EMERGENCY MEDICAL SERVICES, EMS Agency Search, VIRGINIA DEPARTMENT
see also generally 12 VA. ADMIN. CODE § 5-31-410 (setting out various classifications of licensure
for emergency medical services agencies).

\[^8\] More specifically, the expenditure of such funds must conform to the Guidelines set forth by the
Office of Emergency Medical Services, which administers the distribution of Four-for-Life funds to
localities. See OFFICE OF EMERGENCY MEDICAL SERVICES, Guidelines for the Expenditure of the
26% Return to Locality Share of EMS Four-for-Life Funds, http://www.vdh.virginia.gov/emergency-
medical-services/ems-funding/ (last visited September 11, 2018).
CONCLUSION

It is my opinion that a locality may use Four-for-Life funds to provide funding for its fire department, provided the department meets the definition of an “emergency medical services agency” in Title 12 of the Virginia Administrative Code and is licensed by the Office of Emergency Medical Services as required by § 32.1-111.6 of the Code of Virginia. Because the Hopewell Fire Department appears to meet these criteria, it is further my opinion that it is eligible to receive Four-for-Life funds disbursed by the City of Hopewell, for purposes for which such funds may be expended.
OP. NO. 18-036

TAXATION—LICENSE TAXES:
BUSINESS, PROFESSIONAL AND OCCUPATIONAL LICENSE TAX

Because it is a grandfathered locality under § 58.1-3703(C)(7), the City of Alexandria may adjust the rate of its business, professional and occupational license tax on certain real property rentals, or eliminate it altogether.

THE HONORABLE ADAM P. EBBIN
MEMBER, SENATE OF VIRGINIA

SEPTEMBER 28, 2018

ISSUE PRESENTED

You ask whether a locality grandfathered under § 58.1-3703(C)(7) to assess business, professional and occupational license (BPOL) tax on the rental of real estate may adjust the tax rate up to the state maximum of 58 cents per $100 of gross receipts.

BACKGROUND

You relate that the City of Alexandria (“the City”) currently imposes BPOL taxes on the rental of residential and commercial real estate at rates of 50 cents and 35 cents per $100 of gross receipts, respectively. You further state that “these rates have been in place since well before 1974.” I will assume for purposes of this opinion that the rates were in place prior to 1974, and that they apply to the rental of any category of residential or commercial real estate.

APPLICABLE LAW AND DISCUSSION

In 1974, the General Assembly placed a moratorium on localities’ authority to impose a BPOL tax “[u]pon any person, firm or corporation for engaging in the business of renting, as the owner of such property, real property other than hotels, motels, motor lodges, auto courts, tourist courts, travel trailer parks, campgrounds, bed and breakfast establishments, lodging houses, rooming houses, and boardinghouses.” The Act, which was amended in 1974 and is codified at § 58.1-3703(C)(7), also includes a grandfather clause, which provides that “any county, city or town imposing such a license tax on January 1, 1974, shall not be

precluded from the levy of such tax.”

Therefore, although a moratorium exists on the imposition of BPOL taxes for real estate rentals except for the categories designated in the statute, a locality may continue to impose such taxes if they were already in place on January 1, 1974.

Although § 58.1-3703(C)(7) prohibits a locality from levying a BPOL tax on categories of residential or commercial property unless such tax was imposed on January 1, 1974, it does not follow that a locality which continues to impose the tax under the grandfather clause is prohibited from adjusting the rate of the tax, either up or down. The grandfather clause does not speak to the rate of the tax, but rather to the authority of the localities “to levy such tax.”

“We ‘assume that the legislature chose, with care, the words it used when it enacted the relevant statute.’” Had the legislature intended to limit the rate of taxation allowed by those grandfathered localities, it could have done so by using language to that effect. As it did not, § 58.1-3703(C)(7) cannot be read to limit a locality’s authority to change the rate of the BPOL tax which it is authorized to impose.

CONCLUSION

Accordingly, it is my view that the City of Alexandria, as a grandfathered locality, with an affirmative vote by its City Council may adjust, up or down, the rate of its BPOL tax on the rental of residential and commercial real estate, or eliminate it altogether.

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2 Id.

3 Section 58.1-3703(C)(7).


Because the protections conferred on certain war monuments in § 15.2-1812 do not extend to
the Dickenson Memorial High School, the Dickenson County Board of Supervisors would not
violate the statute by authorizing its demolition.

STEPHEN W. MULLINS, ESQUIRE
DICKENSON COUNTY ATTORNEY

SEPTEMBER 28, 2018

ISSUE PRESENTED

You have asked whether the Dickenson County Board of Supervisors (the “Board”) would violate § 15.2-1812 of the Code of Virginia if it authorized the
demolition of a building formerly used as a high school for Dickenson County, given
that the building was constructed in memory of the soldiers, sailors and marines of
Dickenson County who lost their lives in World War I.

BACKGROUND

In 1920, the General Assembly authorized the Board to levy a special tax in
1920 and 1921 “for the construction of a county memorial, industrial and high
school building, the said building to be built in the town of Clintwood.”¹ The
legislation provided that the resulting building would be known as the “Dickenson
county memorial, industrial and high school building” and that it “shall stand as a
monument and memorial to the soldiers, sailors and marines from the said county of
Dickenson, in the late world’s war, who lost their lives in this war.”² Two years
later, the General Assembly extended the time period for the special levy through
1924, again reaffirming that the building would stand as a monument to service
members who lost their lives in World War I.³ In 1930, the legislature authorized the
Dickenson County Board of Supervisors to convey the “Dickenson County
Memorial and Industrial High School building” and attendant property to the

² Id.
³ 1922 Va. Acts ch. 95.
Dickenson County School Board. After several decades the school, by then known as Dickenson Memorial High School (DMHS), was used as an “annex” to a newly constructed Clintwood High School.

You relate that the Clintwood High School building has itself been abandoned, and that both Clintwood High School and the DMHS building are in poor condition. In November 2015, the Dickenson County School Board declared Clintwood High School and the DMHS building to be surplus property and transferred ownership to the Dickenson County Board of Supervisors. The Board accepted ownership of the properties in March 2016. You relate that the County has no plans to use these buildings and would like to demolish them and return the property to private ownership.

**APPLICABLE LAW AND DISCUSSION**

As I have previously opined, “[t]he importance of honoring all of our veterans, especially those who have given their lives and paid the ultimate sacrifice for us, our country and our freedoms, cannot be overstated. These brave men and women deserve our full support, and the General Assembly has chosen to extend certain protections to monuments honoring their service.” But whether legal restrictions would bar removal of a war monument depends on the “circumstances surrounding the individual monument.”

Last year, this Office issued an opinion containing guidance on the protections provided by the statute now codified at § 15.2-1812 of the Code of Virginia. As currently codified, the statute authorizes any locality, within its geographic limits, to erect a monument or memorial to any war or conflict. It then provides that “[i]f such are erected, it shall be unlawful for the authorities of the locality, or any other person or persons, to disturb or interfere with any monuments or memorials so erected” or prevent citizens from taking steps to preserve or care for the same.

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6 Roderick Mullins, County accepts deeds to school properties, DICKENSON STAR (Mar. 28, 2016), http://www.thecoalfieldprogress.com/dickenson_star/news/county-accepts-deeds-to-school-properties/article_b81363d4-9dc5-5c65-a0cf-8e8c0aed876b.html.
9 See id. at 220-22.
11 Id.
As originally codified in 1904, however, the statute had a much more limited scope, applying only to “the erection of a Confederate monument upon the public square of [a] county at the county seat thereof,” when so authorized by joint action of the county’s board of supervisors and circuit court. If a monument was so erected, the statute barred anyone from “thereafter . . . disturb[ing] or interfer[ing] with” it. It was not until 1930 that the General Assembly extended these statutory protections to monuments to the “World War,” and not until 1997 that the requirement of joint action of the county’s board of supervisors and circuit court was eliminated.

The “general rule is that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or suits, and especially vested rights, unless the intention that it so operate is expressly declared.” If the General Assembly omits a clear manifestation of intent to retroactively apply a statutory change, the general conclusion is that such an application is to be avoided. It is also instructive when the General Assembly fails to enact legislation that would have made a statutory provision apply retroactively.

Applying these principles here yields the conclusion that DMHS is not a monument or memorial entitled to the protections of § 15.2-1812. First, when DMHS was constructed in the 1920s, the statute protected only monuments that had been erected by joint action of a county’s circuit court and its board of supervisors. DMHS was not constructed pursuant to that statutory scheme.

Second, the statutory protections in place in 1920 covered only Confederate monuments, not World War I monuments. When the General Assembly revised the statute in 1930 to protect World War I monuments, it omitted any intent to extend

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13 Id. In 1910, the General Assembly amended the statute, adding a second paragraph that authorized county boards of supervisors to appropriate or raise funds for the completion or erection of “a monument to the Confederate soldiers of such county upon the public square thereof, or elsewhere at the county seat,” 1910 Va. Acts ch. 17 (emphasis added), but the prohibition on disturbing and interfering with monuments found in the first paragraph continued to apply only to Confederate monuments erected “upon the public square of [a] county at the county seat thereof,” id.
14 1930 Va. Acts ch. 76.
17 Id.
18 Id. at 223-24 (noting that in the face of a decision by the Danville Circuit Court holding that § 15.2-1812 did not apply retroactively, the General Assembly failed to pass legislation that would have required retroactive application).
protections to existing monuments. While it is not dispositive, it also bears noting that earlier in that same legislative session, the General Assembly authorized the Board to convey DMHS to the Dickenson County School Board without imposing any restriction on the School Board’s ability to disturb or alter the structure.\footnote{See 1930 Va. Acts ch. 76; 1930 Va. Acts ch. 42.}

Third, at the time of DMHS’s construction, the statute protected only monuments constructed “upon the public square of [a] county at the county seat thereof.”\footnote{1910 Va. Acts ch. 17.} Notwithstanding the precatory language accompanying DMHS’s construction—that it would “stand as a monument and memorial to the soldiers, sailors and marines” who died in World War I\footnote{1920 Va. Acts ch. 145.}—the nature of a high school facility distinguishes it from the type of war monument that the General Assembly authorized county boards of supervisors and circuit courts to construct “upon the public square.”

Finally, in the case of numerous other war monuments and memorials that the General Assembly has authorized through legislation, the General Assembly has imposed permanent restrictions on the removal of the memorial.\footnote{2017 Op. Va. Att’y Gen. at 224-25.} The omission of any such language from the legislation authorizing construction of DMHS suggests that the General Assembly did not intend for the same protections to attach to the building.\footnote{See, e.g., Cuccinelli v. Rector & Visitors of the Univ. of Va., 283 Va. 420, 428, 722 S.E.2d 626, 631 (2012) (noting that “when the legislature omits language from one statute that it has included in another, courts may not construe the former statute to include that language” (citation omitted)).}

**CONCLUSION**

Although I support the worthy goal of honoring the brave service members who gave their lives defending our country, for the reasons stated it is my opinion that the protections that the General Assembly conferred on certain war monuments in § 15.2-1812 of the Code of Virginia do not extend to DMHS, and therefore, the Board would not violate the statute by authorizing its demolition.\footnote{I note, however, that separate protections outside the scope of this opinion might attach to the structure, such as those created by reason of grant funding under the National Historic Preservation Act (the “Act”), see generally 54 U.S.C. §§ 300101 to 307108, or other previous acts of the Board or the Dickenson County School Board. See, e.g., 54 U.S.C. § 302902(b)(1)(D) (LexisNexis through Pub. Law No. 115-100, excluding Pub. Law Nos. 115-91 and 115-97) (providing that recipients of grants under the Act must “compl[y] with such further terms and conditions as the Secretary may consider necessary or advisable”). The history of the property and any relevant acts of local government must be carefully investigated to insure that the proposed demolition would not violate other legal restrictions.}
OP. NO. 17-019

COUNTIES, CITIES AND TOWNS—BUILDINGS, MONUMENTS AND LANDS GENERALLY: MEMORIALS FOR WAR VETERANS

Under the facts presented, the placement of a monument to the Emancipation Proclamation in a Fluvanna County park would not implicate § 15.2-1812.

THE HONORABLE R. LEE WAR JR.
MEMBER, HOUSE OF DELEGATES

OCTOBER 12, 2018

ISSUE PRESENTED

You have asked whether Fluvanna County would be permitted, under § 15.2-1812 of the Code of Virginia, to place a stone memorial commemorating the Emancipation Proclamation in a public park owned by the County.

BACKGROUND

You relate that the Fluvanna County Historical Society has offered to donate to Fluvanna County a monument commemorating the Emancipation Proclamation. The proposed monument is “a 4-foot by 3-foot stone to be affixed with a brass plaque that reads a variant of: ‘To commemorate the sesquicentennial of the Emancipation Proclamation and the end of the American Civil War.’”¹ In September 2017, the Board of Supervisors of Fluvanna County authorized the placement of the monument in a piece of county property known as “Civil War Park.”²

APPLICABLE LAW AND DISCUSSION

Virginia Code § 15.2-1812 prohibits the removal, and in some cases alteration, of certain monuments once they are erected.

Installation of a monument to the Emancipation Proclamation, in the manner you have described, does not appear to implicate § 15.2-1812 because the county land that comprises the park does not constitute a memorial or monument, and the installation as described would not impact the previously installed memorial to

¹ Christina Dimeo, Emancipation Proclamation Monument to Join Confederate Monument in Civil War Park, FLUVANNA REV. (Sept. 24, 2017); see also Christina Dimeo, Emancipation Proclamation Monument Location Stirs Deep Feelings, FLUVANNA REV. (Nov. 10, 2016).
² Christina Dimeo, Emancipation Proclamation Monument to Join Confederate Monument in Civil War Park, FLUVANNA REV. (Sept. 24, 2017); Fluvanna Cty. Bd. of Supervisors, Regular Meeting Minutes (Sept. 20, 2017), at 100, available at https://goo.gl/xNe2VM.
Confederate soldiers. The final determination, however, should be made by local officials based on all available facts.

CONCLUSION

It is my opinion, based on the facts available to me, that the placement of the proposed Emancipation Proclamation monument in Fluvanna County’s Civil War Park would not implicate § 15.2-1812 of the Code of Virginia.
OP. NO. 18-035

COUNTRIES, CITIES AND TOWNS—PLANNING, SUBDIVISION OF LAND AND ZONING: CASH PROFFERS

Unless a local governing body approves an alternative use of an approved cash proffer in accordance with § 15.2-2298(A) or § 15.2-2303.2, the cash proffer must be used for its original purpose, or the landowner may seek an amendment to the proffer conditions subject to approval by the governing body. A public hearing concerning the proposed amendment is required unless waived by the local governing body to the extent permitted by § 15.2-2302.

THE HONORABLE AMANDA F. CHASE
MEMBER, SENATE OF VIRGINIA

NOVEMBER 2, 2018

ISSUES PRESENTED

You ask two questions regarding the administration of proffers: (1) whether a cash proffer that was approved by a local governing body prior to the codification of § 15.2-2303.4 in 2016 (“the 2016 Amendments”)\(^1\) can be used by a developer\(^2\) for a different purpose than that which the governing body approved. Additionally, you ask whether the proposed alternative use—if permissible—requires approval by the local governing body after a public hearing.

APPLICABLE LAW AND DISCUSSION

1. Background

The General Assembly has authorized localities to adopt conditional zoning in order “to provide a more flexible and adaptable zoning method . . . , whereby a zoning reclassification may be allowed subject to certain conditions proffered by the zoning applicant for the protection of the community that are not generally applicable to land similarly zoned.”\(^3\) Conditions offered by the applicant are also

\(^1\) 2016 Va. Acts ch. 322.

\(^2\) The term “developer” is not generally used in the Code of Virginia in relation to proffers, which are offered voluntarily by the landowner at the time of the rezoning application. A landowner may be a developer or a developer may be an authorized agent of, or successor in interest to, the original applicant. For purposes of this opinion, the term “landowner” or “applicant” will be used to denote the party authorized to apply for a conditional rezoning or a proffer amendment.

\(^3\) VA. CODE ANN. § 15.2-2296 (2018).
known as “proffers,” a term which has been defined by the Supreme Court of Virginia as “voluntary commitment[s] made by landowners in order to facilitate approval of conditional zoning and rezoning requests by ameliorating the impact of development of their property on the local infrastructure and the character and environment of adjoining land.”

Proffers can take many forms, including dedication of real property or interests therein, construction of public improvements, or, in certain localities, monetary contributions. Once the local governing body approves a conditional rezoning application and accepts the proffers as offered, the conditional zoning, including the proffers, then constitute an amendment to the zoning ordinance.

The 2016 Amendments, which impose more stringent criteria on the acceptance of proffers by localities, apply prospectively only to applications for “new residential development” and “new residential uses” filed on or after July 1, 2016.

2. May a landowner change the approved use of a cash proffer from that which was specified in the proffer accepted prior to July 1, 2016?

Your question addresses whether a cash proffer accepted by a local governing body before the effective date of the 2016 Amendments can subsequently be changed at the request of the landowner without submitting an application for

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5 VA. CODE ANN. §§ 15.2-2297; -2298; -2303 (2018). Localities that derive proffer authority from § 15.2-2297 are expressly prohibited from accepting cash contributions.
6 VA. CODE ANN. §§ 15.2-2297(A); -2298(A); -2303(A).
7 See VA. CODE ANN. § 15.2-2303.4(A) (2018).
8 Id. The term “new residential use” includes “any use of residentially zoned property . . . that requires a proffer condition amendment to allow for new residential development.” Id.
9 2016 Va. Acts ch. 322 cl.3. This legislation expressly states that “this act is prospective only and shall not be construed to apply to any application for rezoning filed prior to July 1, 2016, or to any application for a proffer condition amendment amending a rezoning for which the application was filed prior to that date.” Id.
10 Your letter references “dedicated credits” and “credits.” Based on Chesterfield County’s September 28, 2016 Road Cash Proffer Policy, I understand these terms to mean proffers for the dedication of real property or for the construction of in-kind improvements in lieu of all or a portion of the maximum amount of a cash proffer which may otherwise be offered to the County. COUNTY OF CHESTERFIELD, ROAD CASH PROFFER POLICY, available at https://www.chesterfield.gov/DocumentCenter/View/2396/Road-Cash-Proffer-Policy-PDF. This opinion does not address requested changes in proffers relating to the use of dedicated land or the construction of public infrastructure.
amendment to the locality. For the reasons that follow, it is my opinion that under most circumstances, the landowner is required to submit a proffer amendment to the governing body for approval of an alternative use.

It is well settled in Virginia that “proffers, once accepted, have the force of law that will bind both the local government and the current and future owner of the property to their terms.”\(^\text{11}\) Approved proffers will continue in effect until a subsequent amendment, other than a comprehensive new or substantially revised zoning ordinance, changes the zoning on the property.\(^\text{12}\) Further, as noted above, the 2016 Amendments do not supersede existing, accepted proffer conditions.\(^\text{13}\)

An alternative use of an existing, accepted cash proffers is permitted by statute, without application by the landowner, in two instances. First, § 15.2-2298(A), which is applicable to certain “high-growth” localities, states that “[i]f proffered conditions include the dedication of real property or the payment of cash, the proffered conditions shall provide for the disposition of the property or cash payment in the event the property or cash payment is not used for the purpose for which proffered.”\(^\text{14}\) It is the locality, and not the landowner, which collects and expends cash proffers and determines whether they may be used for an alternative purpose other than as expressly stated in the proffer.\(^\text{15}\)

Second, § 15.2-2303.2 provides that unless prohibited by a proffer agreement, a locality may utilize cash proffers for road improvements as a matching contribution for certain transportation improvements funded by the Virginia Department of Transportation.\(^\text{16}\) The statute also permits localities to “utilize any cash payments proffered for capital improvements for alternative improvements of the same category within the locality in the vicinity of the improvements for which the cash payments were originally made.”\(^\text{17}\)

\(^{12}\) VA. CODE ANN. §§ 15.2-2297(A); -2298(A); -2303(A).
\(^{13}\) See 2016 Va. Acts ch. 322 cl.3.
\(^{14}\) VA. CODE ANN. § 15.2-2298(A).
\(^{15}\) VA. CODE ANN. § 15.2-2303.2 (2018).
\(^{16}\) Id. at subsection C.
\(^{17}\) Id. at subsection C. The governing body must give written notice of its intent to use the cash proffer for alternative improvements to the person or entity that paid the proffer and hold a public hearing advertised in accordance with § 15.2-1427, at which the local governing body is required to make specific findings relating to the alternative use. Id.
These statutorily sanctioned alternative uses of cash proffers are made at the discretion of the local governing body and do not require the landowner to file an application for amendment of the original proffer. Where it is the landowner proposing an alternative use of a cash proffer, however, such alternative use will require an amendment to the zoning ordinance, submitted to and approved by the local governing body.18

3. Public Hearing Requirement

Your next question addresses whether an application by the landowner to use cash proffers for alternative purposes must be approved by the local governing body after a public hearing. Virginia Code § 15.2-2285 states in relevant part that

[b]efore approving and adopting any zoning ordinance or amendment thereof, the governing body shall hold at least one public hearing thereon, pursuant to public notice as required by § 15.2-2204, after which the governing body may make appropriate changes or corrections in the ordinance or proposed amendment.[19]

Once “the governing body accepts voluntary proffers, such proffers become conditions of rezoning and, once entered into law, the conditions become zoning regulations.”20 Thus, a change to an approved proffer initiated by the landowner would constitute an amendment to the zoning ordinance, and in most instances, the local governing body is required to hold a duly advertised public hearing on the proposed amendment prior to voting on same. Section 15.2-2302 states that “[s]ubject to any applicable public notice or hearing requirement . . ., any landowner subject to conditions proffered . . . may apply to the governing body for amendments to or variations of such proffered conditions provided only that written notice of such application be provided in the manner prescribed by subsection B of § 15.2-2204.”21 An advertised public hearing is required except, “where such amendment does not affect conditions of use or density, a local governing body may waive the requirement for a public hearing.”22 Additionally, the governing body may waive the public hearing and the written notice requirement when considering

18 VA. CODE ANN. § 15.2-2302 (2018). Note that in the event the landowner’s proposed amendment is filed on or after July 1, 2016 and constitutes a “proffer condition amendment” as defined in § 15.2-2303.4(A), the 2016 Amendments will apply to the application.

19 VA. CODE ANN. § 15.2-2285(C) (2018) (emphasis added).


21 VA. CODE ANN. § 15.2-2302(A).

22 Id. at subsection B.
whether to “reduce, suspend, or eliminate outstanding cash proffer payments for residential construction calculated on a per-dwelling-unit or per-home basis that have been agreed to, but unpaid, by any landowner.”

CONCLUSION

For the reasons stated herein, it is my opinion that once accepted by a local governing body, cash proffers, like all other proffers, become part of the locality’s zoning ordinance and constitute a local zoning law. Unless the local governing body approves an alternative use in accordance with § 15.2-2298(A) or § 15.2-2303.2, the cash proffer must be used for its original purpose, or the landowner may seek an amendment to the proffer conditions subject to approval by the governing body. A public hearing concerning the proposed amendment is required unless waived by the local governing body to the extent permitted by § 15.2-2302.

23 Id. at subsection E.
OP. NO. 18-031

CRIMES AND OFFENSES GENERALLY—CRIMES INVOLVING MORALS AND DECENCY: CHARITABLE GAMING

A political party may not conduct a raffle as a form of charitable gaming in the Commonwealth, as it is not an entity specifically chartered or organized for religious, charitable, community, or educational purposes.

THE HONORABLE H. FULLER CRIDLIN
LEE COUNTY COMMONWEALTH’S ATTORNEY

NOVEMBER 2, 2018

ISSUE PRESENTED

You ask whether a political party’s raffle falls within the charitable gaming permit exemption outlined in § 18.2-340.23.

APPLICABLE LAW AND DISCUSSION

Although gambling is generally prohibited in the Commonwealth,1 an exception exists for charitable gaming when conducted in strict compliance with the requirements of the Code.2 The relevant provisions of the Code governing charitable gaming are found in Article 1.1:1, Chapter 8 of Title 18.2 (§§ 18.2-340.15 to 18.2-340.38). Among other things, this article establishes the types of entities that are authorized to conduct charitable gaming in the Commonwealth and the conditions under which they are permitted to do so, including state supervision and, where applicable, possession of a valid permit issued by the Department of Agriculture and Consumer Services.

The only potential basis of authority in the article for a political party to conduct a raffle is found in § 18.2-340.16, which provides in relevant part that “[a]ny [] nonprofit organization” may “raise[] funds by conducting raffles that generate annual gross receipts of $40,000 or less.”3 As applied to this provision, however, a separate statute in the article limits the expenditure of proceeds derived from such a raffle to “those lawful religious, charitable, community or educational purposes.”

3 See VA. CODE ANN. § 18.2-340.16 (Supp. 2018) (providing also that the gross receipts from such a raffle, less expenses and prizes, must be used “exclusively for charitable, educational, religious or community purposes”).
purposes” for which the nonprofit organization “is specifically chartered or organized.” As indicated in previous opinions of this Office, a political party is not an entity specifically chartered or organized for religious, charitable, community, or educational purposes. Therefore, it may not conduct a raffle as a form of charitable gaming in the Commonwealth.

Because a political party is not authorized under the Code to conduct a raffle, it is unnecessary for me to reach the particular question you ask regarding whether a political party’s raffle would be exempt from the charitable gaming permit requirement pursuant to § 18.2-340.23.

**CONCLUSION**

Accordingly, it is my opinion that a political party may not conduct a raffle as a form of charitable gaming in the Commonwealth, as it is not an entity specifically chartered or organized for religious, charitable, community, or educational purposes.

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5 See 1975 Op. Va. Att’y Gen. 208, 209 (“A city or county political committee is an association organized for political purposes as distinguished from being organized exclusively for community or educational purposes.”); 1986-1987 Op. Va. Att’y Gen. 166, 166-67 (county committee for a political party is not an organization “operated exclusively for religious, charitable, community or educational purposes”).
6 See also VIRGINIA DEPARTMENT OF ELECTIONS, SUMMARY OF LAWS AND POLICIES: POLITICAL PARTY COMMITTEES (rev. Oct. 28, 2014), at 21/43, available at https://www.elections.virginia.gov/Files/CandidatesAndPACs/POLITICALCommittees/POLITICALParty/Party_Summary.pdf (stating that “political organizations in Virginia may not, under any circumstance, use raffles as a fundraising tool”). I note, moreover, that in 2015 the General Assembly declined to pass legislation that would have permitted political party committees to conduct charitable gaming in the Commonwealth. See H.B. 2389, 2015 Reg. Sess. (left in the General Laws Committee); see also generally Tabler v. Bd. of Supvrs., 221 Va. 200, 202, 269 S.E.2d 358, 360 (1980) (“In determining legislative intent, we have looked both to legislation adopted and bills rejected by the General Assembly.”) (Emphasis added).
CONSTITUTION OF VIRGINIA—LOCAL GOVERNMENT: DEBT

A specific financing structure proposed for school construction in the City of Bristol that does not commit the City to direct revenue or make annual appropriations will not constitute a debt of the City for purposes of the constitutional limitation on debt under Article VII, § 10(a) of the Virginia Constitution.

THE HONORABLE ISRAEL O’QUINN
MEMBER, HOUSE OF DELEGATES

THE HONORABLE CHARLES W. CARRICO SR.
MEMBER, SENATE OF VIRGINIA

NOVEMBER 2, 2018

ISSUE PRESENTED

You ask whether the Bristol Virginia School Board’s potential lease of a school facility in connection with the financing of the school’s construction pursuant to the Public-Private Education Facilities and Infrastructure Act of 2002, would be considered a debt of the City of Bristol subject to the limitations of Article VII, § 10 of the Constitution of Virginia.

BACKGROUND

The Board of Bristol Virginia Public Schools (the “School Board”) currently seeks to construct a new elementary school. You relate that a qualifying entity (the “entity”) will fund the construction of the school with proceeds from a tax-exempt bond issuance pursuant to a proposed comprehensive agreement as authorized by the Public-Private Education Facilities and Infrastructure Act of 2002.

To facilitate the project, the landowner, whether it be the School Board or the City of Bristol, would lease the land on which the school will be constructed to the entity (the “Ground Lease”). The School Board or the City will at all times retain title to the land. The entity will fund and oversee construction of the new school. Upon completion, the entity, as lessor, will lease the school facility to the School Board, as lessee, pursuant to a lease agreement (the “School Lease”).
The School Lease will be a 30-year, triple-net lease with annual payments due from the School Board totaling $1,254,500. The total anticipated payments under the School Lease will be equal to the debt service on the bonds plus any operating, maintenance, or bond costs not otherwise paid by the School Board. The School Board, however, will be obligated to make payments to the entity only if and to the extent the City makes annual appropriations to the School Board in each year of the School Lease that enable the School Board to make the lease payments. Neither the financing structure nor the School Lease will require any commitment by the City of Bristol to make appropriations. Simply put, payments under the School Lease will not be due to the entity unless and until the City of Bristol makes an annual appropriation that will enable the School Board to make those payments.

The entity will utilize the School Lease revenues to pay for the bond debt it incurs. The bonds will be secured by the revenues and assets of the project, including a pledge of the School Lease revenue and the school facility. Neither the real property nor the Ground Lease will be used in any way as security for the bond debt or the school facility. The Ground Lease also will not be subordinated to the bond debt. Once the bond debt is repaid, no further payments will be due under the School Lease, the Ground Lease will terminate, and the entity will convey the school facility to the School Board.

It is my further understanding that if the City of Bristol declines to make an annual appropriation or the anticipated School Lease payments are not remitted, the School Board will be considered to be in default of the School Lease. Upon such an occurrence, the School Board would be required to vacate the school and the entity could relet the school facility. Upon a nonpayment or nonappropriation, the underlying Ground Lease would continue. Nothing in the proposed transaction would require the City of Bristol or the School Board to surrender the real property on which the school is built upon a nonpayment or nonappropriation. The analysis and conclusions herein are based on these facts you have related.

**APPLICABLE LAW AND DISCUSSION**

As a preliminary matter, a public school board is a separate body corporate vested with all powers and charged with all duties imposed by law. Among their powers, school boards may contract and take, lease and convey school property, both

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1 A “triple-net” lease is one in which the lessee pays the ongoing expenses of the property, including maintenance, insurance, and applicable taxes, in addition to the agreed periodic rental payments.

real and personal.\textsuperscript{3} The duties of a school board include providing for the erecting and furnishing of necessary school buildings by purchase, lease, or other contracts.\textsuperscript{4} A school board is authorized to lease real and personal property, either as lessor or lessee, subject to applicable law.\textsuperscript{5}

You inquire whether the School Lease will have an impact on the debt limitation of the City set forth in Article VII, § 10 of the Constitution of Virginia. The Constitution of Virginia prohibits cities from issuing “any bonds or other interest-bearing obligations which, including existing indebtedness, shall at any time exceed ten per centum of the assessed valuation of the real estate in the city . . . .”\textsuperscript{6} A lease for a term of more than one year under which a locality is the lessee constitutes indebtedness, unless the lease falls within one of the exceptions to the limitation set forth in Article VII, § 10(a) of the Constitution of Virginia.\textsuperscript{7} In general, no debt is created for constitutional purposes if there is no legal obligation created on the part of the city.\textsuperscript{8}

In the described transaction, the City of Bristol is not legally obligated to make payments under the School Lease. Payments under the School Lease by the School Board are conditioned upon the City of Bristol making sufficient annual appropriations to the School Board to fund the School Lease; however, the City of Bristol will be not be unconditionally obligated to make any appropriations or commit revenues to the project or to pay the School Lease. Virginia law establishes that payments based upon discretionary appropriations do not pledge or commit the full faith and credit of the locality and, therefore, are not indebtedness for purposes of debt limitations.\textsuperscript{9} Because no revenues are directly committed by the City of Bristol, and no legal obligation binds the City to make sufficient annual appropriations to enable the School Board to make payments under the School Lease, the Lease does not constitute municipal debt under the Constitution of Virginia.\textsuperscript{10}

\textsuperscript{3} Id.
\textsuperscript{4} VA. CODE ANN. § 22.1-79(3) (2016).
\textsuperscript{5} VA. CODE ANN. § 22.1-129(B) (2016).
\textsuperscript{6} VA. CONST. art. VII, § 10(a).
\textsuperscript{10} Dykes, 242 Va. at 375.
Based upon the structure of the transaction described, the School Lease between the School Board and the entity would not constitute indebtedness of the City of Bristol.\textsuperscript{11} This determination would not apply, however, if the City’s failure to make an annual appropriation would result in the forfeiture of valuable real property in which the City of Bristol has an interest. A security arrangement whereby the City of Bristol would be required to surrender any ownership interest it may have in the Ground Lease property upon the School Board’s default in the School Lease payments would establish a debt that must satisfy the constitutional limitation on indebtedness.\textsuperscript{12}

**CONCLUSION**

It is my opinion that the School Lease proposed in the financing structure described above will not constitute a debt of the City of Bristol for purposes of the constitutional limitation on its indebtedness.


Criminal Procedure—Deferred Dispositions

A trial court may, with the concurrence of the Commonwealth’s Attorney, defer disposition and continue a criminal case for a period of time and then consider a dismissal if the defendant has complied with certain prescribed conditions.

THE HONORABLE SCOTT A. SUROVELL
MEMBER, SENATE OF VIRGINIA

NOVEMBER 9, 2018

Issue Presented

You ask whether a trial court may, with the concurrence of both the Commonwealth’s Attorney and the defendant, defer disposition and continue a criminal case for a period of time, and then at the end of that period consider a dismissal of the charge if the defendant has complied with certain prescribed conditions.

Applicable Law and Discussion

The Supreme Court of Virginia consistently has held that a trial court may defer disposition and continue a criminal case upon finding that the evidence is sufficient to convict the defendant, so long as it has not already rendered a judgment of conviction. This is so because “the act of rendering judgment is within the inherent power of the court and . . . the very essence of adjudication and entry of judgment by a judge involves discretionary power of the court.” In accordance with the Court’s decision in Hernandez v. Commonwealth, the authority to defer disposition in a criminal case also includes the authority to “consider dismissal of the case” at the end of the continuance period, provided the defendant has “complied with all the prescribed conditions.” Accordingly, it is my view that a trial court


2 Moreau, 276 Va. at 139, 661 S.E.2d at 847-48.

3 See Starrs, 278 Va. at 9, 752 S.E.2d at 817 (construing Hernandez, 281 Va. at 224, 707 S.E.2d at 274); cf. Starrs, 287 Va. at 13, 752 S.E.2d at 819 (noting that the trial court “upon accepting and entering Starrs’ guilty pleas in a written order, still retained the inherent authority to withhold a finding of guilt, to defer the disposition, and to consider an outcome other than a felony conviction”).
may, with the concurrence of both parties, defer disposition and continue a criminal case for a period of time, and then consider a dismissal of the charge at the end of that period if the defendant has complied with certain prescribed conditions.

I offer no view herein as to the advisability of a deferred disposition in any particular case, and I note also that the Court of Appeals has stated its opposition to the use of deferred disposition as an extension of judicial clemency.4

CONCLUSION

For the foregoing reasons, it is my opinion that a trial court may, with the concurrence of the Commonwealth’s Attorney and the defendant, defer disposition and continue a criminal case for a period of time, and then consider a dismissal of the charge at the end of that period if the defendant has complied with certain prescribed conditions.

---


Section 19.2-354(C), which permits offenders to discharge fines and costs by performing community service work in accordance with a court’s program, only applies to offenders performing community service work before or after their imprisonment. Therefore, courts do not have discretion to allow credit toward fines and costs for community service work performed by a person who is confined in a state prison, state detention center or diversion center, or local correctional facility.

The Honorable Joseph W. Milam Jr.
The Honorable James J. Reynolds
Circuit Court for the City of Danville

December 7, 2018

Issues Presented

You have asked whether the provisions of § 19.2-354(C) of the Code of Virginia regarding community service credit toward criminal fines and costs apply to inmates confined in state prisons, state detention centers and diversion centers, and local correctional facilities. Specifically, you question (1) whether a court may in its discretion allow credit toward fines and costs for community service work performed by inmates confined in such facilities; (2) whether the court must allow such credit; and (3) if the credits are permissible or mandatory, what is the extent of the credits that may be given under statute.

Applicable Law and Discussion

Section 19.2-354(C) of the Code provides in relevant part as follows:

[A] court shall establish a program and may provide an option to any person upon whom a fine and costs have been imposed to discharge all or part of the fine or costs by earning credits for the performance of community service work before or after imprisonment. The program shall specify the rate at which credits are earned and provide for the manner of applying earned credits against the fine or
costs. [. . .] The court shall have such other authority as is reasonably necessary for or incidental to carrying out this program.[1]

Your first question is whether a court may in its discretion allow credit toward fines and costs for community service work performed by inmates while confined in a state prison, state detention center or diversion center, and local correctional facilities. Section 19.2-354(C) limits its application to community service work performed “before or after imprisonment.” Community service work performed during incarceration would not fall within those parameters and, therefore, would not be subject to the statute. Because the statutory language is plain and unambiguous, it does not allow for statutory construction.2 “When the language of a statute is unambiguous, we are bound by the plain meaning of that language.”3

You relate that the specific focus of your request is confinement in state detention centers and diversion centers, which represent less traditional methods of confinement. You state that the Circuit Court for the City of Danville regularly receives requests from individuals in detention and diversion centers to receive credits for community service work. The Supreme Court of Virginia, in Charles v. Commonwealth, held that “participation in the Detention Center Incarceration Program is incarceration.”4 Because § 19.2-354(C) only applies to offenders before or after their incarceration and does not apply to incarcerated persons, offenders are not eligible to receive credit for community service performed while actively imprisoned or while participating in the detention center or diversion center programs. This would be true even if the detention center incarceration program was imposed as a condition of probation.5 Essentially the same rationale the Court used in Charles to find that the detention center incarceration program constituted incarceration would apply to the diversion center incarceration program, although it represents a less stringent form of confinement than a detention center.

Because courts do not have discretion to allow credit toward fines and costs for community service work performed during incarceration, your other questions—

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[1] VA. CODE ANN. § 19.2-354(C) (Supp. 2018) (emphasis added); see also VA. CODE ANN. § 19.2-354.1(B) (Supp. 2018) (providing that the court must give a defendant written notice of “the availability of earning credit toward [the] discharge of fines and costs through the performance of community service work”).


whether the statute mandates such credits and what extent of credit may be given—are rendered moot.

CONCLUSION

Accordingly, it is my opinion that § 19.2-354(C) only applies to offenders performing community service work before or after their imprisonment. Therefore, courts do not have discretion to allow credit toward fines and costs for community service work performed by a person who is confined in a state prison, state detention center or diversion center, or local correctional facility.
OP. NO. 18-040

ADMINISTRATION OF GOVERNMENT—DEPARTMENT OF HUMAN RESOURCE MANAGEMENT: HEALTH INSURANCE PROGRAM FOR LOCAL EMPLOYEES

Employees of a public service corporation organized under Title 13.1 and owned by local government entities, such as JAUNT, Inc., are not eligible for participation in the state health benefits program authorized by § 2.2-1204.

THE HONORABLE DAVID J. TOSCANO
MINORITY LEADER, HOUSE OF DELEGATES

DECEMBER 7, 2018

ISSUE PRESENTED

You have asked whether a public service corporation owned by local government entities is eligible to participate in the Commonwealth’s healthcare program as set forth in § 2.2-1204 of the Code of Virginia.

BACKGROUND

Your specific question relates to JAUNT, Inc. (JAUNT), a public service corporation organized under the general incorporation laws of the Commonwealth.1 JAUNT transports “the general public, agency clients, the elderly, and people with disabilities” throughout its Central Virginia service area.2 It is a stock corporation owned by the City of Charlottesville and the Counties of Albemarle, Nelson, Louisa and Fluvanna.3 JAUNT is governed by a Board of Directors appointed by the governing bodies of its five shareholder local governments.4 In 2017, over 84% of its operating funds were provided by state and local funds and federal assistance.5 JAUNT is responsible for the selection and hiring of its employees.6

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1 Articles of Incorporation of JAUNT, Inc., at 1 (Oct. 28, 1982) [hereinafter Articles of Incorporation] (on file with the Virginia State Corporation Commission).


3 Id.


maintains its own business office and provides workers’ compensation and general liability insurance for its operations. Eligible employees receive health and dental insurance from private insurance companies. JAUNT administers its own deferred compensation plan, available to all employees.

**APPLICABLE LAW AND DISCUSSION**

Section 2.2-1204 of the Code of Virginia establishes a health insurance program for employees of local governments, local officers, teachers, retirees, and their dependents. Subsection (D) of § 2.2-1204 defines “employees of local governments” to include

all officers and employees of the governing body of any county, city, or town, and the directing or governing body of any political entity, subdivision, branch, or unit of the Commonwealth or of any commission or public authority or body corporate created by or under an act of the General Assembly specifying the power or powers, privileges, or authority capable of exercise by the commission or public authority or body corporate, as distinguished from § 15.2-1300, 15.2-1303, or similar statutes, provided that the officers and employees of a social services department, welfare board, community services board or behavioral health authority, or library board of a county, city, or town shall be deemed to be employees of local government. For purposes of this section, private nonprofit organizations are not governmental agencies or instrumentalities.

JAUNT is a public service corporation as defined in § 56-1 of the Code of Virginia, which includes corporations “created . . . under the general incorporation laws of this Commonwealth” to conduct business as public service corporations,

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7 JAUNT 2015-2016 FINANCIAL REPORT, supra note 2, at 17.
8 Id.
9 Id. at 18.
10 VA. CODE ANN. § 2.2-1204 (2017). The predecessor statute to § 2.2-1204 was enacted in 1989, see 1989 Va. Acts ch. 475, and designated the Virginia Department of Personnel and Training (now the Department of Human Resource Management) to establish the plan or plans necessary to effect the goals of the legislation. See § 2.2-1204(A). It is popularly known among administrators and participants as “The Local Choice” or “TLC Program.” See COMMONWEALTH OF VIRGINIA, About the Local Choice, THE LOCAL CHOICE HEALTH BENEFITS PROGRAM, http://www.the localchoice.virginia.gov/about.html (last visited Nov. 7, 2018).
11 Section 2.2-1204(D).
including the “transport[ation] [of] passengers or property as a common carrier.”12 Applying the § 2.2-1204(D) definition of “employees of local governments” to the employees of such a public service corporation owned by local government entities, I am of the view that such employees are not employed by “the governing body of any county, city, or town,” or by “the directing or governing body of any political entity, subdivision, branch, or unit of the Commonwealth or of any commission or public authority or body corporate created by or under an act of the General Assembly specifying the power or powers, privileges, or authority capable of exercise by the commission or public authority or body corporate.”13

JAUNT’s employees are employed by a public service corporation formed under the general incorporation provisions of Title 13.1 of the Code of Virginia.14 The fact that its shareholders are political subdivisions of the Commonwealth does not render the public service corporation a political entity, public authority, commission, or body corporate created under an act of the General Assembly as described in § 2.2-1204(D),15 nor is it “a social services department, welfare board, community services board or behavioral health authority, or library board of a county, city, or town.”16 Accordingly, JAUNT’s employees are not eligible for participation in the state’s healthcare program.17

I do not find § 2.2-1204 or the related administrative code provision18 ambiguous. In Virginia, “[w]hen the language in a statute is clear and unambiguous, [a court is] bound by the plain meaning of that language.”19 Moreover, “[w]hen interpreting and applying a statute, [a court] ‘assume[s] that the General Assembly

12 VA. CODE ANN. § 56-1 (Supp. 2018); see Articles of Incorporation, supra note 1, at 1 (stating that the purpose of JAUNT is “to provide mass transportation service by motor vehicle as a public service corporation”).

13 VA. CODE ANN. § 2.2-1204(D).


15 See Appalachian Power Co. v. Greater Lynchburg Transit Co., 236 Va. 292, 296-97, 374 S.E.2d 10, 12-13 (1988) (holding that a public service corporation whose stock is owned by a municipality is not itself a governmental entity or instrumentality of the municipality).

16 Section 2.2-1204(D).

17 The Virginia Administrative Code carefully tracks the eligibility provisions of the statute; it provides a specific definition for “employer” as meaning “the entity with whom a person maintains a common law employee-employer relationship.” See 1 VA. ADMIN. CODE § 55-20-20.

18 Id. (1 VA. ADMIN. CODE § 55-20-20).

chose, with care, the words it used in enacting the statute, and [a court is] bound by those words.”

20 Had the General Assembly wished to include officers or employees of a public service corporation owned by local government entities, such as JAUNT, it could have done so expressly.

CONCLUSION

Accordingly, it is my opinion that the employees of a public service corporation organized under Title 13.1 and owned by local government entities, such as JAUNT, Inc., are not eligible for participation in the state health benefits program authorized by § 2.2-1204.


21 Section 2.2-1204(D) sets out specific boards, authorities, and departments whose officers and employees “shall be deemed to be employees of local government” who would otherwise be excluded (or potentially excluded) by the statute’s plain language. See supra, note 16 and accompanying text.
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