THE 2001 REPORT OF THE ATTORNEY GENERAL

WAS PREPARED BY

BARBARA H. SCOTT

WITH EDITORIAL ASSISTANCE BY

JANE A. PERKINS
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May 1, 2002

The Honorable Mark R. Warner  
Governor of Virginia

Dear Governor Warner:

I have the honor to present to you the 2001 Report of the Attorney.  

As you know, § 2.2-505 of the Code of Virginia authorizes the Governor, members of the General Assembly, and various state and local officials to request of the Attorney General official opinions on questions of law. Section 2.2-516 requires the Attorney General to present to the Governor, by May 1 of each year, a report that includes the official opinions issued during the preceding calendar year. The eighty-seven opinions contained herein, which were rendered by my predecessors, the Honorable Mark L. Earley and the Honorable Randolph A. Beales, address issues involving almost every facet of state government and its relation to the citizens of Virginia, to other states, and to the federal government. These opinions represent the considered judgment of the dedicated public servants who serve in this Office, and are based on the decisions of our courts and the principles on which this Commonwealth was founded. It is my hope that they will provide guidance and wisdom to state and local officials as Virginia approaches its 400th anniversary as a haven for freedom, liberty, and justice.

During the period covered by this report, the Office of the Attorney General represented the Commonwealth in thousands of legal disputes in the courts of the Commonwealth and the United States, including criminal appeals, habeas corpus actions, and civil suits involving virtually every area of state government. Only those matters appealed to the United States and Virginia Supreme Courts are listed in this report. In addition, deputy and assistant attorneys general have provided advice on thousands of legal questions posed by state agencies and institutions and by local officials.

This report lists the names of the attorneys, professional staff, and support personnel who served as full-time employees in this Office during 2001. I know you join with me in saluting the efforts of these individuals, many of whom have served the people of Virginia for over twenty years.

With kindest regards, I am

Very truly yours,

Jerry W. Kilgore  
Attorney General
**Personnel of the Office**

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<td>Mark L. Earley</td>
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1 This list includes all persons employed on a full-time basis in the Office of the Attorney General at any time during 2001, as provided by the Office's Division of Administration. The most recent title is used for employees whose position changed during the year.
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<td>Michele J. Bruno</td>
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<td>Linda B. Buell</td>
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<td>Alice H. Cannon</td>
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<td>Frederick A. Knapp III</td>
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<td>Christa A. Perez</td>
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<td>Marian W. Schutrumpf</td>
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<td>Barbara H. Scott</td>
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<td>Janice S. White</td>
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<td>Matthew J. White</td>
<td>Librarian</td>
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<td>Information Systems Manager</td>
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<tr>
<td>Abigail T. Yawn</td>
<td>Legal Secretary</td>
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</table>
ATTORNEYS GENERAL OF VIRGINIA FROM 1776 TO 2001

Edmund Randolph ........................................... 1776–1786
James Innes ......................................................... 1786–1796
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. ................................. 1918–1918
John R. Saunders .................................................. 1918–1934
Abram P. Staples .................................................... 1934–1947
Harvey B. Apperson .................................................. 1947–1948
J. Lindsay Almond Jr. ........................................... 1948–1957

1The 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.

2The 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.

3The 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.

4The 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.
Kenneth C. Patty\textsuperscript{5} ................................................................. 1957–1958
Frederick T. Gray\textsuperscript{6} ................................................................. 1961–1962
Andrew P. Miller .............................................................. 1970–1977
Anthony F. Troy\textsuperscript{7} ................................................................. 1977–1978
Gerald L. Baliles .............................................................. 1982–1985
William G. Broaddus\textsuperscript{8} ................................................................. 1985–1986
Mary Sue Terry .............................................................. 1986–1993
Stephen D. Rosenthal\textsuperscript{9} ................................................................. 1993–1994
Richard Cullen\textsuperscript{10} ................................................................. 1997–1998
Randolph A. Beales\textsuperscript{11} ................................................................. 2001–2002
Jerry W. Kilgore .............................................................. 2002–

\textsuperscript{5}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{6}The Honorable Frederick T. Gray was appointed Attorney General on May 1, 1961, to fill the unexpired term of the Honorable A.S. Harrison Jr. upon his resignation on April 30, 1961, and served until January 13, 1962.

\textsuperscript{7}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{8}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{9}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{10}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{11}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.
CASES

IN THE

SUPREME COURT OF VIRGINIA

AND

SUPREME COURT OF THE UNITED STATES
The complete listing of all cases handled by the Office of the Attorney General is not reprinted in this report. Selected cases pending in or decided by the Supreme Court of Virginia and the Supreme Court of the United States are included, as required by § 2.2-516 of the Code of Virginia.
CASES DECIDED IN THE SUPREME COURT OF VIRGINIA

Alliance to Save the Mattaponi v. State Water Control Bd. Reversing and remanding to circuit court decision of Court of Appeals of Virginia in these two consolidated cases denying citizens' group standing to appeal a permit issued to the City of Newport News for reservoir project in King William County.

Barnes v. Commonwealth. Affirming decision of Court of Appeals of Virginia, finding the evidence sufficient to support convictions for computer fraud and larceny by false pretenses.

Black v. Commonwealth. Three consolidated cases from Carroll County and Virginia Beach Circuit Courts. Reversing Court of Appeals of Virginia decisions, finding that § 18.2-423, which prohibits the burning of a cross with intent to intimidate any person or group of persons, impermissibly infringes on freedom of speech and is unconstitutional because it prohibits content-based speech, and the statute is overbroad.

Bloom v. Commonwealth. Affirming decision of Court of Appeals of Virginia, finding that Roanoke County Circuit Court did not err in admitting Bloom's earlier Internet chatroom conversations with a teenage girl as evidence in a trial in which he was convicted of criminal offenses based, in part, on his chatroom conversations with a police officer whom he believed to be the teenager.

Burns v. Commonwealth. Affirming capital murder conviction and death sentence.

Clark v. Commonwealth. Affirming Court of Appeals of Virginia en banc decision, finding that Clark had no constitutional right in sexual assault case to require victim to undergo independent medical examination by a defense expert.

Coleman v. Commonwealth. Affirming, on other grounds, judgment of Court of Appeals of Virginia, holding that Coleman was not subjected to double jeopardy when convicted of both malicious wounding and attempted murder.

Commonwealth v. Dotson. Reversing Court of Appeals of Virginia decision in these two companion cases finding that the evidence of felony child abuse and neglect was insufficient and remanding case for reconsideration under proper standard of review.

Commonwealth v. Huynh. Reversing judgment of trial court and holding that the authority granted by § 8.01-66.9 to reduce the Commonwealth's Medicaid lien on the proceeds of a medical malpractice case does not permit the lien to be reduced to "zero."

Commonwealth v. Shifflett. Reversing Court of Appeals of Virginia affirmance of trial court's convictions for assaulting a police officer and driving after having been declared an habitual offender. The basis for reversal was the failure of the trial court to strike for cause a prospective juror.
Concerned Taxpayers of Brunswick Co. v. Dep’t Envtl. Quality. Reversing decision of Court of Appeals and affirming Department’s grant of landfill permit.

Dabney v. Commonwealth. Affirming holding that evidence was sufficient to identify Dabney as the robber of a hotel employee.

Gardner v. Commonwealth. Reversing decision of Court of Appeals of Virginia, finding a fatal variance existed between the indictment’s allegation that the money was the property of Gardner’s grandfather and the evidence which showed that the money was the property of the bank from which it was obtained.

Green v. Commonwealth. Reversing capital murder conviction and death sentence.

Hanson v. Commonwealth. Reversing decision for a new sentencing proceeding pursuant to Fishback v. Commonwealth, 260 Va. 104, 532 S.E.2d 629 (2000), and rejecting argument that a new trial should be awarded.

Harris v. Commonwealth. Affirming decision of Court of Appeals of Virginia, holding that the trial court did not abuse its discretion in admitting as reliable a certificate of analysis.

Harris v. Commonwealth. Reversing decision of Court of Appeals of Virginia, holding that anonymous tip, by itself, did not give police sufficient reasonable suspicion to conduct a temporary detention and pat-down of Harris.

Howard v. Commonwealth. Reversing decision recommitting an insanity acquittee to the custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services, holding that, to support recommitment of an insanity acquittedee, the Commonwealth must prove that the acquittedee meets the commitment criteria by clear and convincing evidence, rather than by a preponderance of the evidence.

Johnson v. Commonwealth. Granting settlement of $925,000 to mother of one of two babies switched at birth at University of Virginia Hospital in July 1995.

Johnson v. Director. Vacating death sentence.

Lenz v. Commonwealth. Affirming capital murder conviction and death sentence.

Magco v. Barr. Affirming Court of Appeals of Virginia’s affirmance of trial court’s decision upholding occupational safety violation.

Mauri v. Commonwealth. Affirming decision of Court of Appeals of Virginia, holding that warrant sufficiently established requisite prior conviction to adjudicate Mauri an habitual offender.

McCain v. Commonwealth. Affirming decision of Court of Appeals of Virginia, rejecting Fourth Amendment challenge to search of McCain and his automobile.
Megel v. Commonwealth. Reversing Court of Appeals of Virginia, finding that Megel had a reasonable expectation of privacy in his home, although he was participating in a home electronic incarceration program.

Melanson v. Commonwealth. Affirming judgment, concluding that the Commonwealth's limited waiver of immunity for tort claims must be strictly construed in a case requesting compensation for injuries allegedly received as a result of a failing traffic sign owned and maintained by the Virginia Department of Transportation. The trial court had granted the Commonwealth's special plea that plaintiff had failed to file a timely notice of claim under the Act and dismissed the motion for judgment.

Mendez v. Commonwealth. Affirming decision of Court of Appeals of Virginia, holding that the evidence was sufficient to convict Mendez of grand larceny.

Murphy v. Commonwealth. Denying Murphy's Petition for Writ of Prohibition directing the trial court to vacate its order authorizing the involuntary administration of antipsychotic medications in order to restore Murphy's competency to stand trial for murder and malicious wounding and to ameliorate the danger he posed to others. The court found that the Virginia statute, which mandates a court to order treatment to restore the competency of an incompetent defendant, gave the trial court authority to order the forcible medication.


Orbe v. Director. Denying habeas petition challenging capital murder conviction and death sentence.

Patterson v. Commonwealth. Affirming capital murder conviction and death sentence.

Powell v. Commonwealth. Reversing capital murder conviction and death sentence and remanding for new trial.


Scates v. Commonwealth. Reversing decision of Court of Appeals of Virginia, finding that the trial court erred in admitting evidence of other crimes at trial.


Shackleford v. Commonwealth. Affirming decision of Court of Appeals of Virginia, finding that the evidence was sufficient to support the convictions, the
case was properly before the Lynchburg Circuit Court, and the motions to suppress were properly overruled.

*Smithfield Foods v. State Water Control Bd.* Affirming decision dismissing Board’s enforcement action against Smithfield Foods for alleged permit violations on a plea of *res judicata.*

*Southerly v. Commonwealth.* Reversing decision of Court of Appeals of Virginia, holding that the Court lacks jurisdiction to decide the question presented by the Commonwealth that notice to Southerly’s biological father concerning the transfer of Southerly’s trial from juvenile to circuit court was unnecessary.

*Va. Retirement Sys. v. Avery.* Affirming *en banc* decision of Court of Appeals of Virginia that, since service of process on an opposing party is not required to perfect an appeal of an administrative agency’s decision, the circuit court had jurisdiction over the matter, notwithstanding delivery of process on the administrative agency by commercial overnight delivery, and § 8.01 288 applies to administrative appeals under Part 2A of the Rules of Supreme Court of Virginia and cures the defective service.

*Vinson v. Warden.* Denying petition for writ of habeas corpus challenging capital murder conviction and death sentence.

*Walker v. Warden.* Denying petition for writ of habeas corpus challenging capital murder conviction and death sentence.

*Weathers v. Commonwealth.* Affirming decision of Court of Appeals of Virginia, finding that trial court did not err in admitting Weathers’ prior convictions during jury sentencing phase when the Commonwealth had not complied strictly with the terms of the statute.

*Yarbrough v. Commonwealth.* Affirming death sentence.

*Zirkle v. Commonwealth.* Affirming capital murder conviction and death sentence.

**Cases Pending in the Supreme Court of Virginia**

*Armstrong v. Commonwealth.* Appealing decision of Court of Appeals of Virginia on conviction for possession of a firearm after having been previously convicted of a felony.

*Bailey v. Director.* Challenging habeas corpus decision denying petition challenging capital murder conviction and death sentence.

*Bell v. Commonwealth.* Appealing capital murder conviction and death sentence.

*Commonwealth v. Hicks.* Appealing Court of Appeals of Virginia *en banc* ruling that the Richmond Redevelopment and Housing Authority’s enforcement of its trespass barment policy, on privatized RRHA property, violated Hicks’ First and Fourteenth Amendment rights.
Commonwealth v. Jerman. Appealing Court of Appeals of Virginia decision vacating abduction sentence and remanding for new sentencing proceeding on ground that Fairfax County Circuit Court should have instructed jury about Jerman’s parole ineligibility.

Commonwealth v. Pannell. Appealing decision of Court of Appeals of Virginia reversing and remanding trial court’s order revoking a juvenile’s probation, because the trial court admitted hearsay testimony from the probation officer and refused to apply a reasonable doubt standard at the revocation proceeding.

Commonwealth v. Sands. Pending on motion for rehearing of Supreme Court’s reversal of Court of Appeals of Virginia setting aside conviction for first-degree murder where trial court had denied defense request for self-defense instruction.

Commonwealth v. Smith. Appealing Court of Appeals of Virginia decision that trial court erred in allowing Smith to be tried jointly by a jury for four murder charges.

Commonwealth v. Washington. Appealing Court of Appeals of Virginia decision that Washington preserved an objection to trial court’s sua sponte declaration of mistrial, and that manifest necessity did not exist to support the mistrial.

Commonwealth v. Williams. Pending on motion for rehearing of Supreme Court’s reversal of Court of Appeals of Virginia setting aside conviction for robbery where trial court had refused Williams’ belated request for jury trial.

Dabney v. Director. Appealing decision granting habeas writ on ground of knowing use of perjured testimony.


Kirby v. Commonwealth. Appealing Court of Appeals of Virginia decision affirming Kirby’s conviction for possession of a firearm by a convicted felon.

Lenz v. Warden. Petition for writ of habeas corpus challenging capital murder conviction and death sentence.

Lovitt v. Director. Challenging capital murder conviction and death sentence.

Miles v. Commonwealth. Appealing Court of Appeals of Virginia decision that the prosecution had not intentionally goaded the defense into seeking a mistrial, and that the testimony of a sexual assault nurse examiner did not improperly address an ultimate issue in the case.

O’Brien v. Va. State Bar. Appealing decision in favor of the State Bar and challenging the Bar’s policy of prohibiting the practice of law through a nonprofessional limited liability company.
Pritchett v. Commonwealth. Appealing Court of Appeals of Virginia decision that expert testimony concerning the effects of Pritchett’s mental retardation on the voluntariness of his confession was properly excluded.

Sapp v. Commonwealth. Appealing Court of Appeals of Virginia decision affirming trial court’s admission of prior recorded testimony of two witnesses who were present but refused to testify.

State Health Comm’r v. Chippenham & Johnston-Willis Hosp. Appealing decision of Court of Appeals of Virginia reversing the State Health Commissioner’s decision to award a certificate of public need to Bon Secours-Richmond Health System, Inc., to construct a replacement St. Francis Hospital for Stuart Circle Hospital.

Stephens v. Commonwealth. Appealing Court of Appeals of Virginia affirmance of convictions for shooting at a motor vehicle and from a motor vehicle on double jeopardy grounds.

Thompson v. Commonwealth. Appealing ruling that found Thompson in contempt of court for failing to pay child support and sentencing him to an indeterminate jail sentence and appealing the trial court’s holding that the contempt sentence would begin after he finished serving time for a criminal conviction.

Velazquez v. Commonwealth. Appealing decision of Court of Appeals of Virginia affirming rape conviction. Velazquez argued that a sexual assault nurse examiner was improperly permitted to testify to medical causation; that the nurse gave testimony on the ultimate issue of fact, invading the province of the jury; and that the evidence failed to show penetration.

Cases in the Supreme Court of the United States

Anderson v. Commonwealth. Denying petition for certiorari from Supreme Court of Virginia’s affirmance of first-degree murder, robbery, two counts of abduction with intent to extort money, abduction, malicious wounding, and two counts of unlawful wounding.

Atkins v. Virginia. Granting petition for certiorari on issue of whether it is cruel and unusual punishment to execute the mentally retarded.


Burns v. Virginia. Denying petition for certiorari from direct appeal decision of Supreme Court of Virginia affirming capital murder conviction and death sentence.

Hamm v. Waste Mgmt. Holdings, Inc. Petition for certiorari pending to the decision of the United States Court of Appeals for the Fourth Circuit upholding district court decision that Virginia’s waste control statutes violate the Commerce Clause.
Lenz v. Virginia. Denying petition for certiorari from direct appeal decision of Supreme Court of Virginia affirming capital murder conviction and death sentence.

Lovitt v. Virginia. Denying petition for certiorari from direct appeal decision of Supreme Court of Virginia affirming capital murder conviction and death sentence.


Murphy v. Commonwealth. Denying appeal of Supreme Court of Virginia decision denying Murphy’s petition seeking to vacate the trial court’s order authorizing the involuntary administration of antipsychotic medication in order to restore Murphy’s competency to stand trial for murder and malicious wounding and to ameliorate the danger he posed to others.

Orbe v. Director. Pending petition for certiorari from habeas corpus decision of Supreme Court of Virginia denying petition challenging capital murder conviction and death sentence.

Parsons v. Warden. Denying appeal of Fourth Circuit’s denial of habeas relief from malicious wounding convictions and an assortment of firearms charges.


Virginia v. Maryland. Orig. juris. Pending suit before a special master against State of Maryland for injunctive and declaratory relief, asserting that Maryland has used its police power to interfere with the exercise by Virginia citizens of riparian rights guaranteed by compact.

Walker v. Warden. Denying appeal of Supreme Court of Virginia’s dismissal of habeas corpus petition challenging capital murder conviction and death sentence.

Webb v. Virginia. Denying appeal of Supreme Court of Virginia’s affirmance of convictions for first-degree murder, four counts of abduction, robbery, possession of a firearm after being convicted of a felony, and six counts of use of a firearm during a felony.
OFFICIAL OPINIONS
OF
ATTORNEYS GENERAL
MARK L. EARLEY AND RANDOLPH A. BEALES
JANUARY — DECEMBER 2001
Section 2.2-505 of the *Code of Virginia* authorizes the Attorney General to render official advisory opinions in writing only when requested in writing to do so by the Governor; members of the General Assembly; judges and clerks of courts of record, and judges of courts not of record; the State Corporation Commission; Commonwealth's, county, city or town attorneys; city or county sheriffs and treasurers; commissioners of the revenue; electoral board chairmen or secretaries; and state agency heads.

Each opinion in this report is preceded by a main headnote briefly describing the subject matter of the opinion. For purposes of citing an opinion, each opinion begins on the page on which the headnote preceding the opinion first appears. Cite an opinion in this report as follows: 2001 Op. Va. Att'y Gen. ___.

Opinions of the Attorney General may be accessed on the Internet, beginning with opinions issued in January 1996, at www.vaag.com; on LEXIS-NEXIS, beginning with opinions issued in July 1958; and on WESTLAW, beginning with opinions issued in 1976. The following CD-ROM products contain opinions of the Attorney General: Michie's Law on Disc for Virginia, including opinions from July 1980; CaseFinder, including opinions from July 1967; and Virginia Reporter & West's® Virginia Code, including opinions from July 1976.
OP. NO. 01-048

ADMINISTRATION OF GOVERNMENT: PLANNING AND BUDGET SYSTEM.

General Assembly may amend 2000 Appropriation Act by means of limited purpose bills rather than by comprehensive budget amendment bill that amends entire Act.

THE HONORABLE H. MORGAN GRIFFITH
MEMBER, HOUSE OF DELEGATES
MAY 2, 2001

You ask whether the General Assembly may amend the 2000 Appropriation Act by means of limited purpose bills rather than by a comprehensive budget amendment bill that amends the entire Act.

At the 2001 Session of the General Assembly, each house considered and passed its own budget amendment bills. The Session adjourned sine die, however, without both houses agreeing to a single budget amendment bill. You advise that, in spite of the General Assembly having amended the budget by means of limited purpose bills in 1994, there has been concern expressed that the 2000 Appropriation Act may not be amended with limited purpose bills.

"The powers of the General Assembly are broad and plenary." It may enact any law not prohibited by the United States Constitution or the Virginia Constitution. Moreover, an act of the General Assembly is presumed to be constitutional, and every reasonable doubt must be resolved in favor of the act's constitutionality.

The budgetary process for the Commonwealth is contained in Chapter 27 of Title 2.1, §§ 2.1-387 through 2.1-404 of the Code of Virginia. Section 2.1-399(B) specifically provides that, before the beginning of any regular session of the General Assembly held in an odd-numbered year, the Governor shall submit his proposed amendments "to capital appropriations acts adopted in the immediately preceding even-numbered year session." Section 2.1-400 requires that the standing committees of each house in charge of appropriation measures "shall begin consideration of the budget within five days after the budget has been submitted to the General Assembly by the Governor." Section 2.1-401 provides:

The General Assembly may increase or decrease items in the budget bill as it may deem to be in the interest of greater economy and efficiency in the public service, but neither house shall consider further or special appropriations, except in case of an emergency, which fact shall be clearly stated in the bill therefor, until the budget shall have been finally acted upon by both houses.

There are several rules of statutory construction that I must apply to this matter. Obviously, the primary goal of statutory construction is to ascertain and give effect to legislative intent. "[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction." "The manifest intention of the legislature, clearly disclosed by its
language, must be applied." The use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive. Finally, statutes are to be read as a whole rather than in isolated parts. The reading of a statute as a whole influences the proper construction of ambiguous individual provisions.

The plain language of the statutes governing the state budgetary system clearly requires both houses to have "finally acted upon" budget amendment bills before the General Assembly may consider any "further or special appropriations." After the budget amendment bills have been "finally acted upon" by each house, "further or special appropriations" may be considered by both houses. The phrase "finally acted upon by both houses," as used § 2.1-401, has not been defined by the General Assembly.

The 2001 Session of the General Assembly adjourned sine die with each house having considered and approved its own budget amendment bills. Each house considered the budget amendments approved by the other house; however, the General Assembly did not approve a single budget amendment bill. Adjournment sine die on February 24, 2001, had the effect of foreclosing any further action on, and then effectively defeating, all pending legislation which had not been passed by both houses of the General Assembly. It is, therefore, my opinion that each house of the 2001 Session of the General Assembly "finally acted upon" the budget amendment bills of each house, as required by § 2.1-401.

Accordingly, I am required to conclude that the General Assembly may amend the 2000 Appropriation Act by means of limited purpose bills rather than by a comprehensive budget amendment bill that amends the entire Act.

2Trucking Corporation, 207 Va. at 29, 147 S.E.2d at 751; Railway Express v. Commonwealth, 199 Va. 589, 593, 100 S.E.2d 785, 788 (1957), aff'd, 358 U.S. 434 (1959); Lipscomb v. Nuckols, 161 Va. 936, 944, 172 S.E. 886, 889 (1934); Supervisors Cumberland County v. Randolph, 89 Va. 614, 619, 16 S.E. 722, 723 (1893); see also Portsmouth v. Chesapeake, 205 Va. 259, 264, 136 S.E.2d 817, 822 (1964) (stating that, in absence of constitutional prohibition against annexation by city of portion of another city, General Assembly has power to deal with subject).
5Turner, 226 Va. at 459, 309 S.E.2d at 338.


"For purposes of this opinion, I assume that the limited purpose appropriation bills, which are the subject of your inquiry, are "further or special appropriations" as contemplated by § 2.1-401. Because I conclude that, in any event, the requirements of § 2.1-401 have been met, I express no opinion whether such limited purpose appropriation bills are, in fact, "further or special appropriations." Section 2.1-401.

"Section 2.1-401.


"Section 2.1-401.


"Section 2.1-401.


OP. NO. 01-101
ADMINISTRATION OF GOVERNMENT: VIRGINIA FREEDOM OF INFORMATION ACT.
HEALTH: HUMAN RESEARCH.
EDUCATIONAL INSTITUTIONS: GENERAL PROVISIONS.

Institutional Review Board is not 'public body' subject to the Act's disclosure requirements. Records generated by such board are not 'public records' prepared, owned or possessed by public body; are not required to be open for public inspection. Act's open meeting requirement does not apply to meetings of Institutional Review Boards and human research review committees.

THE HONORABLE THOMAS C. WRIGHT JR.
MEMBER, HOUSE OF DELEGATES
OCTOBER 22, 2001

You ask several questions concerning the application of The Virginia Freedom of Information Act to an Institutional Review Board1 ("IRB") of a public institution of higher learning2 in the Commonwealth engaged in human research projects.

You advise that the IRBs with which you are familiar are permanent boards within public institutions of higher learning that meet on a regularly scheduled basis. Such IRBs are composed of individuals from within the institutions and from the private sector. You state that the institution pays all expenses associated with IRBs, including staff support from the institution. You also relate that public institutions of higher learning within the Commonwealth engaged in research using human subjects are required by federal and state law to submit proposed human research projects to review by an IRB.3 You explain that approval by an IRB is required prior to performing federally regulated human research projects at such universities.

The primary purpose for review by an IRB of human research projects subject to federal regulation is to "assure the protection of the rights and welfare of the human subjects."4 Certain criteria must be satisfied before an IRB may approve such projects. First, risks to human subjects must be minimal and reasonable in relation to anticipated benefits.5 In addition, selection of subjects
must be equitable, and informed consent must be sought from each prospective subject and appropriately documented. Finally, the research plan must make adequate provision for monitoring and maintaining the confidentiality of data collected on human subjects and for protecting the privacy of such subjects.

Sections 32.1-162.16 through 32.1-162.20 comprise Virginia's laws applicable to human research that is not subject to federal regulation for the protection of human subjects. Section 32.1-162.19(A) provides that "[e]ach institution or agency which conducts or which proposes to conduct or authorize human research shall establish a human research review committee." (Emphasis added.) Section 32.1-162.16 defines the term ""institution' or 'agency'" as "any facility, program, or organization owned or operated by the Commonwealth." In addition, § 32.1-162.19(A) requires anyone conducting, or proposing to conduct, human research to affiliate with an institution or agency having a human research review committee. Furthermore, § 32.1-162.19(B) stipulates that the human research review committee must review and approve any proposed human research project. Finally, § 23-9.2:3.3 provides:

Each board of visitors or other governing body of any public or private institution of higher education in which human research, as defined in § 32.1-162.16, is conducted shall promulgate regulations pursuant to the Administrative Process Act (§ 9-6.14:1 et seq.) to effectuate the provisions of Chapter 5.1 (§ 32.1-162.16 et seq.) of Title 32.1 for human research. The regulations shall require the human research committee to submit to the Governor, the General Assembly, and the president of the institution or his designee at least annually a report on the human research projects reviewed and approved by the committee and shall require the committee to report any significant deviations from approved proposals.

The use of the word "shall" in a statute generally implies that the General Assembly intends its terms to be mandatory, rather than permissive or directive. Therefore, the human research review committee performs the same functions as an IRB and, in all respects, is similar to an IRB.

You first inquire whether an IRB is a "public body" as that term is defined in The Virginia Freedom of Information Act (the "Act").

Section 2.2-3701 of the Act defines the term "public body" as any authority, board, bureau, commission, district or agency of the Commonwealth ..., boards of visitors of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include any committee [or] subcommittee ... however designated, of the public body created to perform delegated functions of the public body or to advise the public body. It shall not exclude any such committee
[or] subcommittee ... because it has private sector or citizen members.

The only category under the definition of “public body” within which an IRB or a human research review committee could fall is that of “other organizations ... supported wholly or principally by public funds.” The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature. The purpose underlying a statute's enactment is particularly significant in construing it. Moreover, statutes should not be interpreted in ways that produce absurd or irrational consequences. Instead, they should be harmonized with other existing statutes where possible to produce a consistently logical result that gives effect to the legislative intent.

Section 2.2-3700(B) states that the primary purpose of the Act is to ensure[] the people of the Commonwealth ready access to records in the custody of public officials and free entry to meetings of public bodies wherein the business of the people is being conducted. [Emphasis added.] The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government....

The provisions of [the Act] shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.

Prior opinions of the Attorney General conclude that a variety of organizations that are not governmental agencies in the traditional sense, but which receive primary support for their activities from public funds, fall within the Act's definition of "public body." Both the IRB and the human research review committee are appointed by the public institution of higher learning pursuant to a statutory mandate for the purposes set forth in § 32.1-162.19 and applicable federal regulations. The necessary expenses incurred by the human research review committee and IRB in performing the required statutory functions are paid out of public funds from the budgets of public institutions of higher learning.

The Circuit Court of the City of Richmond construed the meaning of the term “organization” as used in the Act in a petition filed under the Act. Petitioners requested the circuit court to “order that meetings of the Animal Research Committee of the University of Virginia be treated as public meetings under the Act.” “The Animal Research Committee ... is an arm of the University assigned to the task of establishing standards concerning the care and use of animals at the University.” The court concluded that the term “organization,” as used in the phrase “other organizations, corporations or agencies in the Commonwealth, supported wholly or principally by public funds” means an organization having an independent status which is charged by law with the governance of, or responsibility for, some discrete public agency. It does not include subordinate, dependent
groupings of individuals who are charged with carrying out a part of the mission of a parent body.\textsuperscript{21}

The court reasoned that the term "organization" referred to an organization similar to those specifically enumerated in § 2.2-3701, such as legislative bodies, authorities, boards, bureaus, and commissions.\textsuperscript{22} Under the doctrine of \textit{noscitur a sociis},\textsuperscript{23} the court was required to construe the term "organization" "with reference to the words it is used with" in the Act.\textsuperscript{24}

Under the facts you provide, IRBs and human research review committees are supported wholly by public funds, but do not perform delegated functions of institutions of higher learning. I cannot conclude that an IRB or a human research review committee is an independent entity charged by law with the governance of, or responsibility for, some discrete public agency. It is clear that such boards and committees are subordinate, dependent groupings of individuals charged with effecting a mission of public institutions of higher learning. Therefore, I must conclude that an IRB is not a "public body" as that term is defined in the Act.

You next ask whether the records generated by an IRB are "public records" as that term is defined by the Act.

Section 2.2-3701 broadly defines the term "public records" to mean all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.

"Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation."\textsuperscript{25} All public records are open for inspection and copying during regular office hours, unless otherwise specifically provided by law.\textsuperscript{26} The definition of "public records" in the Act includes "all writings ... that consist of letters, words or numbers, or their equivalent, set down ... regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body."\textsuperscript{27} The IRB and the human research review committees are not public bodies,\textsuperscript{28} subject to the Act's disclosure requirements. The Act requires that "[a]ny exemption from public access to records ... shall be narrowly construed."\textsuperscript{29} Since I conclude that an IRB is not a "public body" as defined in the Act, I must also conclude that records generated by an IRB are not "public records" prepared or owned by, or in the possession of, a public body.

You next ask whether the open meeting requirements set forth in § 2.2-3707 of the Act apply to the meetings of IRBs.
"The provisions of [the Act] shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government." Since I am of the opinion that IRBs and human research review committees do not fall within the Act's definition of "public body," I must also conclude that they would not be subject to the Act's open meeting requirement. Accordingly, I am of the opinion that the Act does not require that the meetings of these boards and committees be open to the public.

Your final inquiry is whether IRB records are "public records" open to inspection under § 2.2-3704 of the Act.

Section 2.2-3704(A) provides that, "[e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of this Commonwealth during the regular office hours of the custodian of such records." Section 2.2-3705 contains 77 exceptions to the mandatory disclosure provisions of § 2.2-3704. Section 2.2-3705(A)(20) clearly excludes

[d]ata, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education ... in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such data, records or information has not been publicly released, published, copyrighted or patented.

IRBs and human research review committees are not, in my opinion, public bodies. As a result, these boards and committees are not subject to the provisions of the Act. The records of an IRB, therefore, are not subject to inspection and copying by any citizen. Consequently, I must conclude that the Act does not require that the records of an IRB be open for public inspection.

1An Institutional Review Board is "any board, committee, or other group formally designated by an institution to review, to approve the initiation of, and to conduct periodic review of, biomedical research [regulated by the Food and Drug Administration] involving human subjects." 21 C.F.R. § 56.102(g) (2001).

Public institutions of higher learning in the Commonwealth include "The College of William and Mary in Virginia, at Williamsburg; the rector and visitors of Christopher Newport University, at Newport News; Longwood College, at Farmville; the Mary Washington College, at Fredericksburg; George Mason University, at Fairfax; the James Madison University, at Harrisonburg; Old Dominion University, at Norfolk; the State Board for Community Colleges, at Richmond; the Virginia Commonwealth University, at Richmond; the Radford University, at Radford; the Roanoke Higher Education Authority and Center; the rector and visitors of the University of Virginia, at Charlottesville; the University of Virginia's College at Wise; the Virginia Military Institute, at Lexington; the Virginia Polytechnic Institute and State University, at Blacksburg; the Virginia Schools for the Deaf and the Blind; the Virginia State University, at Petersburg; Norfolk State University, at Norfolk; the Woodrow Wilson Rehabilitation Center, at Fishersville; the Medical College of Hampton Roads; and the Southwest Virginia Higher Education Center." Va. Code Ann. § 23-14 (Michie Supp. 2001).

"See 21 C.F.R. § 56.102(g).

"See 45 C.F.R. § 46.111(a)(1)-(2).

"See id. § 46.111(a)(3)-(5).

"See id. § 46.111(a)(6)-(7).

"See § 32.1-162.20.


"VA. CODE ANN. §§ 2.2-3700 to 2.2-3714 (Matthew Bender Repl. Vol. 2001).

"Section 2.2-3701.


"See, e.g., Op. Va. Att'y Gen.: 1984-1985 at 431 (Student Senate of Old Dominion University); 1983-1984 at 447, 448 (Governor's Advisory Board of Economists and Governor's Advisory Board on Revenue Estimates); 1982-1983 at 719 (Fairfax Hospital Association); id. at 726 (volunteer fire department); 1977-1978 at 482 (university honor committee); 1975-1976 at 406, 407; 1974-1975 at 584, 584 (General Professional Advisory Committee, composed of university presidents, established by State Council of Higher Education to serve Council in advisory capacity). But see Op. Va. Att'y Gen.: 1978-1979 at 316 (city mayor's citizen advisory committee is not subject to Act; is not created by public body, performs no delegated functions of public body, does not advise public body, and receives no public funding); 1974-1975, supra, at 584-85 (voluntary association of college presidents, with no official status as creature of State Council of Higher Education and receiving no public funds, is excluded from Act).

"See 45 C.F.R. § 46.111(a); 21 C.F.R. § 56.102(g).


"Id.

"Section 2.2-3701 (defining "public body").

"Students for Animals, 12 Va. Cir. at 249.

"Id.

"The meaning of a word ... takes color and expression from the purport of the entire phrase of which it is a part, and it must be construed so as to harmonize with the context as a whole." Kohlberg v. Va. Real Estate Comm., 212 Va. 237, 239, 183 S.E.2d 170, 172 (1971). "[T]he term of this statute is known by its statutes." BLACK'S LAW DICTIONARY 1084 (7th ed. 1999) (noting Latin derivation of noscitur a sociis).

"Students for Animals, 12 Va. Cir. at 249.


"Section 2.2-3704(A).

"Id.

"Section 2.2-3701 (defining "public body").
"Section 2.2-3700(B).

"Id.

OP. NO. 01-050
AGRICULTURE, HORTICULTURE AND FOOD: RIGHT TO FARM ACT.
COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.
Response to question whether Right to Farm Act supersedes local zoning ordinance
and permits use of aircraft in surveillance of crops, livestock and property and to
pick up repair parts and supplies is inconclusive.

THE HONORABLE R. STEVEN LANDES
MEMBER, HOUSE OF DELEGATES
JUNE 29, 2001

You ask whether the Right to Farm Act, §§ 3.1-22.28 and 3.1-22.29 of the Code
of Virginia, permits a constituent to use an airstrip on his farm for what he
labels "agricultural activities."

You advise that a constituent desires to operate on his farm property an airstrip,
which he considers to be a part of his farming operation. You are advised that
the agricultural activities for which the airstrip is operated are the takeoff
and landing of aircraft used in the surveillance of crops, livestock and property,
and in the pickup of repair parts and supplies. Furthermore, you relate that
the Federal Aviation Administration has approved the use of the airstrip, and
that none of the constituent's neighbors object to the operation of the private
airstrip on the farm. Because no further facts are provided, I assume that the
zoning ordinance of the locality within which the farm property is located does
not include operation of a private airstrip as a permitted use within an agricul-
turally zoned district. Consequently, it appears from your request that the
constituent requires a special use permit from the locality to operate his private
airstrip.

Section 3.1-22.28, as amended in 1994,¹ prohibits a county from adopting any
ordinance that requires a "special exception or special use permit" for agri-
culture production "in an area that is zoned as an agricultural district." Section
3.1-22.28 specifically defines "production agriculture" to mean "the bona fide
production or harvesting of agricultural ... products." At its 1994 Session, the
General Assembly also amended § 15.2-2288, pertaining to agricultural activi-
ties that may be regulated in a local zoning ordinance, by adding a paragraph
containing essentially the same limitation found in § 3.1-22.28.² Both
§§ 3.1-22.28 and 15.2-2288 permit a county to adopt "setback requirements,
minimum area requirements and other requirements" relating to land on which
the agricultural activity is occurring. Section 3.1-22.28 also provides that no
county shall enact zoning ordinances restricting or regulating farm structures
or farming practices in an agricultural district "unless such restrictions bear a
relationship to the health, safety and general welfare of its citizens." Sections
3.1-22.28 and 15.2-2288 clearly prohibit a locality from requiring a special
use permit or exception for agricultural production in agricultural zones or districts.

The stated purpose of § 3.1-22.28 is "to limit the circumstances under which agricultural operations may be deemed to be a nuisance." Section 3.1-22.29(A) provides that "[n]o agricultural operation ... shall be or become a nuisance, if such operations are conducted in accordance with existing best management practices and comply with existing laws and regulations of the Commonwealth." A county is empowered to cause any nuisance to be abated. Based upon the limited facts provided, it cannot be determined whether the use of an aircraft is a farming operation "conducted in accordance with existing best management practices" within the Commonwealth. In addition, the facts do not suggest that the county where the airstrip is located has concluded that operation of the airstrip constitutes a nuisance.

The primary goal of statutory construction "is to ascertain and give effect to legislative intent." The manifest intention of the legislature, clearly disclosed by its language, must be applied. The facts do not conclusively establish that the use of aircraft in the surveillance of crops, livestock and property, and in the pickup of repair parts and supplies so contributes to or is such a part of the bona fide production or harvesting of agricultural products that the Right to Farm Act should supersede the relevant local ordinance in this case. Consequently, I am unable to conclude that the General Assembly intends for the Right to Farm Act to permit the operation of an airstrip on farm property for the takeoff and landing of aircraft used in the surveillance of crops, livestock and property, and in the pickup of repair parts and supplies.


OP. NO. 01-032
AVIATION: AIRCRAFT, AIRMEN AND AIRPORTS GENERALLY.
ADMINISTRATION OF GOVERNMENT GENERALLY: TREASURY, STATE TREASURER AND COMPTROLLER.
TAXATION: RETAIL SALES AND USE TAX.

Virginia Aviation Board may enter into loan agreement to borrow money and issue note to finance infrastructure projects at airport facility owned by local government, upon approval of Treasury Board, provided Aviation Board receives appropriations
You inquire regarding the authority of the Virginia Aviation Board to create debt by using a loan to finance certain infrastructure projects at an airport facility owned by a local government.

You advise that the Virginia Aviation Board desires to grant the use of borrowed funds to the airport facility owned by the local government. You relate that the loan will be repaid within twenty-five years from grants and state-appropriated funds received by the Board.

The Virginia Aviation Board is "a public body corporate and politic." The General Assembly has granted the Board "all the powers necessary or convenient to carry out the purposes of" Chapter 1 of Title 5.1 of the Code of Virginia. One of the purposes expressed in Chapter 1 of Title 5.1 is "[t]o plan, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, and protect airports and air navigation facilities." Another express power is "[t]o execute such contracts and other instruments and take such other action as may be necessary or convenient to carry out the purposes of" Chapter 1 of Title 5.1. While the Board has the authority to issue revenue bonds, such ability is limited to airports owned by the Board on January 1, 1980. "The Board is authorized to accept, receive, receipt for, disburse, and expend federal and state moneys and other moneys, public or private, made available by grant or loan or both, to accomplish [its] purposes."

The General Assembly has not authorized the Virginia Aviation Board to issue revenue bonds to finance infrastructure projects at any airport facility owned by a local government. The General Assembly has, however, authorized the Board to "receive ... other moneys, public or private, made available by grant or loan" and "[t]o execute such ... other instruments and take such other action as may be necessary or convenient to carry out the purposes of" Chapter 1 of Title 15.1. One of the purposes contained in Chapter 1 includes the ability to construct, enlarge or improve airports and air navigation facilities. Consequently, should the infrastructure projects you describe fall within the context of constructing, enlarging or improving the airport facility, the Board may enter into, execute and deliver a loan agreement to borrow money and issue a note, subject, however, to the receipt of appropriations or grants. The practical effect of such is that the Board acknowledges an obligation to repay the debt.

You also inquire regarding the extent of limitations on the Board's ability to execute and deliver loans, notes and other forms of indebtedness. My review of the amount of annual appropriations the General Assembly has made available to the Board in the past requires me to conclude that it is unlikely that the Board may execute a demand note. Further, the appropriations available to the Board for grants to airports owned by local governments or private-public
use airports are categorized as air carrier, air carrier/reliever, and general aviation airports. Therefore, the Board’s ability to repay any indebtedness created by a loan for infrastructure improvements to an aviation facility owned by a local government is limited to airports categorized as air carrier or reliever airports or general aviation airports.

You finally inquire whether it is the responsibility of the Department of Treasury or the Treasury Board to approve such indebtedness, should borrowing be permitted. Among the powers and duties assigned to the Treasury Board is the duty to approve the terms and structure of bonds or other financing arrangements executed by or for the benefit of state agencies, boards and authorities where debt service payments on such bonds or other financing arrangements are expected by such agency, board or authority to be made, in whole or in part, directly or indirectly, from appropriations of the Commonwealth.

The Supreme Court of Virginia has noted that, “'while in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity.'" The Court has stated the related principle that “'the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction.'" Statutes should not be interpreted in ways that produce absurd or irrational consequences.

The Virginia Aviation Board is both “a public body corporate and politic,” and a state board. The Board must pay the debt owed on any loan from appropriations of the Commonwealth. Since you advise that the Aviation Board desires to create debt by using a loan to finance certain infrastructure projects, it is my opinion that such a loan constitutes a “financing arrangement” subject to approval by the Treasury Board. Consequently, it is also my opinion that it is the responsibility of the Treasury Board to approve any loan agreement entered into by the Virginia Aviation Board to finance the specific airport facility infrastructure projects.

3Section 5.1-2.2:1(3).
4Section 5.1-2.2:1(2).
5See §§ 5.1-2.7 to 5.1-2.13.
6Section 5.1-2.24; see also § 5.1-2.23 (explaining that Virginia Aviation Board is successor to Virginia Airports Authority).
7Section 5.1-2.16.
8Id.
9Section 5.1-2.2:1(2).
OP. NO. 01-079

BANKING AND FINANCE: MONEY AND INTEREST.

Every offer or extension of consumer credit within Commonwealth must be in compliance with Federal Truth-in-Lending Act and Regulation Z. State law claims are precluded where conduct forming basis of claim is regulated by federal law. Borrower who disputes lender's ability to establish cut-off or reasonable hour for posting payments to his account is limited substantively and procedurally to remedies and recovery allowed under federal law; is prohibited from recasting his claim under other state law theories.

THE HONORABLE WILLIAM C. MIMS
MEMBER, SENATE OF VIRGINIA
SEPTEMBER 12, 2001

You inquire regarding the application of certain provisions in Chapter 7.3 of Title 6.1 of the Code of Virginia governing money and interest. You first ask whether § 6.1-330.79 precludes other state law claims where the conduct forming the basis of a claim is regulated by federal law.

You present a hypothetical situation whereby a Virginia lender, subject to the Federal Truth-in-Lending Act and Regulation Z, establishes an open-end consumer credit account with a borrower. As authorized by Regulation Z, the lender sends periodic statements notifying the borrower that payments must be received by the lender at a time certain on the due date to be credited as of that date. The lender posts the borrower's payments to the account the day they are received, if they are received by a particular cut-off hour, in accordance with the notice on the periodic statement. Payments received after the cut-off hour are posted as of the following business day. The borrower claims that payments received after the cut-off hour must be posted as of the day received.
Section 6.1-330.79, entitled "[c]ompliance with federal law," provides:

Every person subject to the provisions of 15 U.S.C. § 1601et seq. and Regulation Z, Truth-in-Lending, promulgated by the Board of Governors of the Federal Reserve System shall comply with such statutes and regulations when offering or extending consumer credit as defined therein. A lender who fails to comply with this section shall not be subject to any liability or penalty beyond those imposed by such federal statutes and regulations.

Under recognized principles of statutory construction, the use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directory. The Truth-in-Lending Act and Regulation Z provide certain rules for the disclosure to consumers of terms, billing practices, and other aspects related to offers or extensions of consumer credit by creditors. Therefore, it is clear that § 6.1-330.79 requires every individual or entity within the Commonwealth who offers or extends consumer credit to comply with the federal law.

Additionally, "[w]hile not part of the code section, in the strictest sense, the caption may be considered in construing the statute, as it is 'valuable and indicative of legislative intent.'" The caption to § 6.1-330.79 clearly reflects that the General Assembly requires compliance by creditors with federal law—the Truth-in-Lending Act and Regulation Z. Finally, "[w]here a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation." Section 6.1-330.79 is clear and unambiguous. It is my opinion that § 6.1-330.79 clearly intends to preclude other state law claims where the conduct forming the basis of a claim is regulated by federal law. Such regulated conduct would include conduct that is required, specifically permitted, or prohibited by federal law.

You also ask whether a plaintiff who brings a claim under Virginia law regarding conduct regulated by § 6.1-330.79 is limited substantively and procedurally to the remedies and recovery allowed by the Federal Truth-in-Lending Act and Regulation Z.

Because I conclude that § 6.1-330.79 clearly and unambiguously precludes other state law claims where the conduct forming the basis of a claim is regulated by federal law, I must also conclude that a claim under Chapter 7.3 of Title 6.1 is limited substantively and procedurally to the remedies and recovery allowed by federal law. In the hypothetical situation you present, therefore, a borrower who disputes the lender's ability to establish a cut-off hour or the reasonableness of the hour for posting payments to his account is limited by § 6.1-330.79 to seeking redress under federal law. Section 6.1-330.79, in my view, prohibits such borrower from recasting his claim under other state law theories.

You ask whether § 6.1-330.63(A) of the Code of Virginia permits a bank to impose a returned check processing charge in such amount as may be agreed by the borrower, regardless of limitations on returned check processing charges in context of civil actions seeking recovery for such charges.

THE HONORABLE WALTER A. STOSCH
MEMBER, SENATE OF VIRGINIA
NOVEMBER 29, 2001

You ask whether § 6.1-330.63(A) of the Code of Virginia permits a bank to impose a returned check processing charge in such amount as may be agreed by the borrower, regardless of limitations on returned check processing charges contained in § 8.01-27.1.

For the purposes of this opinion, you ask that I assume that a borrower enters into a contract for revolving credit, such as a credit card agreement, with a bank or savings institution. The contract permits the borrower to make payments on the revolving credit account by personal check. The contract provides that, in the event the borrower’s depository refuses payment on the check because of a lack of funds in or credit with the depository, the bank may impose a returned check processing charge. The processing charge may be greater than $25.

Section 6.1-330.63, a portion of Chapter 7.3 of Title 6.1, governs the charges that a bank may impose under a contract for revolving credit. The first paragraph of § 6.1-330.63(A) provides:
Notwithstanding any other provision of this chapter, any bank or savings institution may impose finance charges and other charges and fees at such rates and in such amounts and manner as may be agreed by the borrower under a contract for revolving credit or any plan which permits an obligor to avail himself of the credit so established.

The above phrase, "[n]otwithstanding any other provision of this chapter," indicates a legislative intent to override any potential conflicts with other provisions of Chapter 7.3 of Title 6.1 relating to money and interest. The phrase is clearly and unambiguously limited only to any conflicts arising from other provisions of Chapter 7.3. Use of such phrase in this limited manner is in contrast to a statute containing the phrase, "notwithstanding any other provision of law." The latter phrase indicates a clear legislative intent to override any potential conflicts with all earlier legislation.

Section 8.01-27.1 addresses returned check processing charges involving checks in the context of civil actions seeking recovery for such charges:

A. In any civil claim or action made or brought against the drawer of a check, draft or order, payment of which has been refused by the drawee depository because of lack of funds in or credit with such drawee depository, the holder or his agent shall be entitled to claim, in addition to the face amount of the check (i) legal interest from the date of the check, (ii) the protest or bad check return fee, if any, charged to the holder by his bank or other depository, and (iii) a processing charge of twenty-five dollars.

B. Any holder of a check, draft or order, payment of which has been refused by the drawee for insufficient funds or credit, who charges the drawer amounts in excess of those authorized in subsection A on account of payment being so refused shall, upon demand, be liable to the drawer for the lesser of (i) twenty-five dollars plus the excess of the authorized amount or (ii) twice the amount charged in excess of the authorized amount.

In analyzing § 6.1-330.63, which permits a Virginia bank to impose charges and fees in such amounts as may be agreed by the borrower under a contract for revolving credit, with § 8.01-27.1, several rules of statutory construction apply. First, a statute should not be construed to frustrate its purpose. Secondly, statutes related to the same subject should be considered in pari materia. Finally, statutes dealing with the same subject matter should be construed to achieve a harmonious result.

The mere fact that statutes relate to the same subject or are part of the same general plan, however, does not mean that they cannot also be in conflict. Indeed, the reason for considering statutes in pari materia is that this permits "any apparent inconsistencies [to] be ironed out whenever that is possible."
Thus, the Supreme Court of Virginia has recognized that the requirement that statutes relating to the same subject be considered as *in pari materia* is only one among many rules of statutory construction:

> In the construction of statutes, the courts have but one object, to which all rules of construction are subservient, and that is to ascertain the will of the legislature, the true intent and meaning of the statute, which are to be gathered by giving to all the words used their plain meaning, and construing all statutes *in pari materia* in such manner as to reconcile, if possible, any discordant feature which may exist, and make the body of the laws harmonious and just in their operation.  

Sections 8.01-27.1(A) and 6.1-330.63(A), in my view, deal with the same general subject matter. Section 8.01-27.1(A), however, begins with the introductory phrase, “in any civil claim or action made or brought against the drawer of a check.” This phrase indicates a clear legislative intent for § 8.01-27.1(A) to apply in the case of civil actions for the recovery of fees arising from checks on which a drawee depository has refused to make payment. “While not part of the code section, in the strictest sense, the caption may be considered in construing the statute, as it is ‘valuable and indicative of legislative intent.’” “A title may be read in an attempt to ascertain an act’s purpose, though it is no part of the act itself.” The caption of § 8.01-27.1(A) is “[a]dditional recovery in certain civil actions concerning checks.”

Section 6.1-330.63(A), however, specifically permits banks to impose “other charges and fees ... as may be agreed by the borrower,” “[n]otwithstanding any other provision of this chapter.” The caption of § 6.1-330.63 is “[c]harges by banks or savings institutions; revolving credit.” Section 6.1-330.63(A), therefore, specifically permits banks to impose finance charges and other charges and fees as agreed by the borrower. An accepted principle of statutory construction is that, when it is not clear which of two statutes applies, the more specific statute prevails over the more general.” Also, when statutes provide different procedures on the same subject matter, “the general must give way to the specific.”

In this instance, it is clear that both §§ 8.01-27.1(A) and 6.1-330.63(A) apply to the instant factual situation. It is, in my view, apparent that § 6.1-330.63(A) is the more specific statute pertaining to “other charges and fees” that may be imposed by banks per agreement with their borrower. In addition, the basic provisions of § 8.01-27.1(A) originally were enacted by the 1981 Session of the General Assembly, while those of § 6.1-330.63 originally were enacted by the 1987 Session of the General Assembly. The General Assembly is presumed to know what statutes previously have been enacted. A cardinal rule of statutory construction is that conflicts between laws are to be avoided whenever possible, with general and special laws viewed in harmony so as to give effect to all acts of the legislature.

I must, therefore, conclude that the General Assembly intends to permit banks and savings institutions to treat revolving credit contracts in a manner distinct
and different from general civil actions brought against the drawer of a check, draft or order. Consequently, based on the above, I conclude that § 6.1-330.63(A) permits a bank or savings institution to impose a returned check processing charge in such amount as is agreed by the borrower, regardless of limitations on returned check processing charges contained in § 8.01-27.1.¹


⁴See Prillaman v. Commonwealth, 199 Va. 401, 405-06, 100 S.E.2d 4, 7 (1957); 1996 Op. Va. Att'y Gen. 134, 135. Statutes in pari materia are those "[o]n the same subject; relating to the same matter." BLACK'S LAW DICTIONARY 794 (7th ed. 1999). Such statutes "may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." ⁵Id.


¹⁶See Op. Va. Att'y Gen.: 1993 at 135, 137 (stating principle that statutes dealing with same subject must be read together to give effect to all provisions if possible applies when one of state statutes being construed is local charter); 1986-1987 at 40, 41 (stating principle that general statute and charter provisions should be construed to avoid apparent conflicts) (citing 1983-1984 at 140, 142 (stating principle that general act and special act on same subject and applying in same locality at same time should be construed, if reasonably possible, to give force and effect to each)).

¹⁷My conclusion is consistent with a 1995 opinion of the Attorney General that considers the question whether § 8.01-27.1 permits retail merchants to post in a conspicuous place in their business establishment a notice of a returned check processing charge, creating an express contract for such charge above the amount contained in § 8.01-27.1. See 1995 Op. Va. Att'y Gen. 21. The opinion does not address the interplay between §§ 8.01-27.1 and 6.1-330.63, and is confined to the activities of retail merchants.
Sheriff may hold public sale of personal property seized under fieri facias or distress warrant on private property of debtor. Authority and duty to establish place of sale falls within sheriff's discretion. Expenses incurred for movement or storage of property or other costs of sale are deductible from sale proceeds.

THE HONORABLE JOHN R. NEWHART
SHERIFF FOR THE CITY OF CHESAPEAKE
MAY 11, 2001

You ask whether a sheriff's sale of personal property held pursuant to § 8.01-492 of the Code of Virginia may be held on the debtor's property, even though it is private property. You also inquire whether the sale must be held elsewhere when the debtor objects to the sale on his property. Finally, you inquire regarding the payment of costs for any movement or storage of the sale property.

Section 8.01-492 provides:

In any case of goods and chattels which an officer shall distrain or levy on, otherwise than under an attachment, or which he may be directed to sell by an order of a court, unless such order prescribe a different course, the officer shall fix upon a time and place for the sale thereof....

With regard to whether a sheriff has the authority to hold the sale on private property, it is settled that language of a statute that is plain should be given its clear and unambiguous meaning. Section 8.01-492 plainly provides that the appropriate officer shall fix the "time and place for the sale." Thus, the determination of the time and place of the sale is to be made by the officer holding such sale. The Supreme Court of Virginia notes that "§ 8.01-492 requires a public sale conducted in a manner which will attract multiple bidders to achieve the best price possible for the goods sold." Accordingly, so long as the sale falls within these parameters, it is my opinion that the mere fact that it is held on the private property of the debtor does not invalidate such sale.

With respect to whether the sheriff must hold the sale elsewhere upon the objection of the debtor, § 8.01-492 mandates that "the officer shall fix ... a ... place for the sale." The use of the word "shall" in a statute ordinarily implies that its provisions are mandatory. This provision plainly and unambiguously grants to the sheriff the authority, and the duty, to establish the place of the sale. Accordingly, the final decision falls within the sheriff's discretion.

Lastly, as to expenses and costs incurred as a result of executing the sale, § 8.01-483 authorizes the officer recovering money from the execution of a writ of fieri facias to deduct "his fees and other charges." In addition, § 8.01-499 provides that the officer may deduct his "commission ... and his necessary expenses and costs." The Attorney General previously has concluded that these statutes are sufficient authority for the sheriff to deduct from the proceeds of the sale the expenses and costs associated with such sale. Similarly, it is my opinion that expenses incurred for movement or storage of the property or other costs of the sale are deductible from the proceeds derived from the public sale.
You inquire regarding the authority of the Chesapeake Bay Local Assistance Board to institute legal action to enforce the Chesapeake Bay Preservation Act and regulations promulgated by the Board in a jurisdiction located in Tidewater Virginia.

The following statements paraphrase the facts described in your request. In 1991, the Chesapeake Bay Local Assistance Board approved the ordinance of a locality in Tidewater Virginia. The Chesapeake Bay Local Assistance Department questions the locality's interpretation of a portion of the ordinance that is contrary to the 50-foot buffer allowance in the Chesapeake Bay Preservation Area Designation and Management Regulations ("Board Regulation(s)"). As a result, the locality implements its program under the Chesapeake Bay Preservation Act in a manner that is inconsistent with the directions of the Department. To justify its position, the locality relies on the Department's Code and Model Ordinance, the Department's prior approval of the ordinance, and the
nine-year duration of the local program. The locality has ignored the Department's interpretation of the ordinance pertaining to the 50-foot buffer area permitted by the Board Regulations.\(^7\) In 1992, the Board published an advisory stating that 50-foot buffers permitted by the applicable Board Regulation were exceptions to the Department's requirements, and were allowable only when necessary on lots that existed prior to enactment of the Act.\(^4\)

You state that the Chesapeake Bay Local Assistance Department has verified a complaint that the Tidewater locality is not correctly implementing the Chesapeake Bay Preservation Act by allowing automatic 50-foot buffers, removing all vegetation within the buffer and replanting with grass, and not requiring water quality impact assessments. The locality subsequently has assured the Department that it will complete water quality impact assessments and retain or plant properly vegetated buffers, but will continue to allow 50-foot buffers in accord with its interpretation of the ordinance.

You ask several questions regarding the authority of the Chesapeake Bay Local Assistance Board to intervene in local zoning cases to ensure a locality's compliance with the Chesapeake Bay Preservation Act and Board Regulations. Specifically, you ask whether the Board may (1) bring legal action to discontinue a development based solely on an approved site plan that clearly shows a violation of the Act and Board Regulations; (2) file an injunction against site developers where they are violating the Act and Board Regulations; and (3) seek a court order prohibiting the issuance of permits by a locality until it is compliant with the Act and Board Regulations. Based on the clear and unambiguous language of the Chesapeake Bay Preservation Act and the reasoning provided below, I answer the above questions in the affirmative.

Section 10.1-2103 of the Code of Virginia, a portion of the Chesapeake Bay Preservation Act, empowers the Board to "[p]romulgate regulations,"\(^5\) "[d]evelop, promulgate and keep current the criteria required by § 10.1-2107,"\(^6\) and ensure that local comprehensive plans and zoning and subdivision ordinances comply with the Act.\(^7\) Section 10.1-2105 of the Act creates the Chesapeake Bay Local Assistance Department to provide staff assistance to the Board and to perform all duties necessary to carry out the purposes of the Act.

A 1991 opinion of the Attorney General provides:

Local governments in Tidewater Virginia are required to designate the Chesapeake Bay Preservation Areas\(^9\) within their respective jurisdictions and must apply the [Board] Regulations to protect the quality of state waters within these designated preservation areas, through their comprehensive plans, zoning ordinances and subdivision ordinances.\(^8\)

The opinion observes that "[l]ocal governments outside Tidewater Virginia also may employ the criteria in the [Board] Regulations and "may incorporate protection of the quality of state waters into their comprehensive plans, zoning ordinances and subdivision ordinances."\(^10\) Finally, the opinion concludes:
Section 10.1-2110 specifically authorizes localities not subject to the mandatory provisions of the Bay Act and [Board] Regulations nevertheless to incorporate those criteria into their comprehensive plans and subdivision and zoning ordinances for "protection of the quality of state waters." Section 10.1-2108 recognizes such provisions to be a valid exercise of local police powers.\textsuperscript{11}

Section 10.1-2109 of the Act mandates that, "after adoption of criteria by the Board,"\textsuperscript{12} local governments in Tidewater Virginia "shall" designate Chesapeake Bay Preservation Areas within their jurisdictions and incorporate measures to protect the quality of state waters into their comprehensive plans and zoning and subdivision ordinances.\textsuperscript{13} It is clear that the jurisdictions comprising Tidewater Virginia\textsuperscript{14} are required to designate Chesapeake Bay Preservation Areas within their jurisdictions.\textsuperscript{15}

In the event a Tidewater Virginia jurisdiction does not designate the Chesapeake Bay Preservation Areas within its jurisdiction and/or does not incorporate the measures set forth in the Board Regulations to protect the quality of state waters within designated preservation areas in its local plan and ordinance, § 10.1-2104 of the Act provides "exclusive authority" for the Board to "institute or intervene in legal and administrative actions to ensure compliance by local governing bodies with [the Act] and with any criteria or regulations adopted hereunder."\textsuperscript{18}

In addition, § 10.1-2103(10) authorizes the Board to "[t]ake administrative and legal actions to ensure compliance by counties, cities and towns with the provisions of [the Act]." As the Supreme Court of Virginia has stated, "[i]f the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it."\textsuperscript{17} It is unnecessary to resort to any rules of statutory construction when the language of a statute is unambiguous.\textsuperscript{18} In those situations, the statute's plain meaning and intent govern.

Sections 10.1-2103(10) and 10.1-2104 clearly and unambiguously authorize the Board to intervene in or institute both administrative and legal actions to ensure compliance by local governing bodies with the Act. Under well-accepted principles of statutory construction, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.\textsuperscript{19} In addition, the mention of one thing in a statute implies the exclusion of another.\textsuperscript{20} The Chesapeake Bay Preservation Act authorizes the Board to "intervene" on its own or on behalf of a person who views a local governing body to be disregarding its zoning ordinances or misinterpreting certain criteria designed to protect the quality of state waters. The Act also specifically authorizes the Board to "institute" or "take" administrative and legal actions against local governing bodies in Tidewater Virginia to ensure their compliance with the Act and Board Regulations.\textsuperscript{21}

Sections 10.1-2109 and 10.1-2111 of the Act plainly and unambiguously require compliance by local governments in Tidewater Virginia. Section 10.1-2109 provides, in part:
A. Counties, cities and towns in Tidewater Virginia shall use the criteria developed by the Board to determine the extent of the Chesapeake Bay Preservation Area within their jurisdictions. Designation of Chesapeake Bay Preservation Areas shall be accomplished by every county, city and town in Tidewater Virginia not later than twelve months after adoption of criteria by the Board.

B. Counties, cities, and towns in Tidewater Virginia shall incorporate protection of the quality of state waters into each locality's comprehensive plan consistent with the provisions of [the Act].

C. All counties, cities and towns in Tidewater Virginia shall have zoning ordinances which incorporate measures to protect the quality of state waters in the Chesapeake Bay Preservation Areas consistent with the provisions of [the Act]. Zoning in Chesapeake Bay Preservation Areas shall comply with all criteria set forth in or established pursuant to § 10.1-2107. 23

D. Counties, cities and towns in Tidewater Virginia shall incorporate protection of the quality of state waters in Chesapeake Bay Preservation Areas into their subdivision ordinances consistent with the provisions of [the Act]. Counties, cities and towns in Tidewater Virginia shall ensure that all subdivisions developed pursuant to their subdivision ordinances comply with all criteria developed by the Board.

Section 10.1-2111 provides that “[l]ocal governments shall employ the criteria promulgated by the Board to ensure that the use and development of land in Chesapeake Bay Preservation Areas shall be accomplished in a manner that protects the quality of state waters consistent with the provisions of [the Act].”

The use of the word “shall” in a statute ordinarily implies that its provisions are mandatory. 22 The Act contains no definition of the term “employ” as that term is used in § 10.1-2111. In the absence of any such definition, the term must be given its common, ordinary meaning. “Employ,” as used in § 10.1-2111, means “to make use of ...; use; apply.” 24 Local governments in Tidewater Virginia, therefore, must comply with the Board Regulations to ensure that land use and development in the designated areas is accomplished in a manner that protects the quality of state waters, as required by the Act. Should a local government fail to do so, the Board is authorized to intervene in, institute, or take administrative and legal actions to ensure compliance with the Act.

Therefore, based on the clear and unambiguous language of the Act, I must conclude that the Chesapeake Bay Local Assistance Board has authority to “intervene” on its own or on behalf of a person who believes a local governing body in Tidewater Virginia is disregarding its zoning ordinances or misinterpreting certain criteria designed to protect the quality of state waters. I am
also of the opinion that the Board is authorized to institute or take administrative and legal actions to ensure compliance with the Act.

Finally, you ask whether the Executive Director of the Chesapeake Bay Local Assistance Department and the Chesapeake Bay Local Assistance Board have the authority to impose a cease and desist order on a locality that is violating the Act, and to request the Attorney General to file an injunction against any locality that violates a cease and desist order.

The powers and duties of the Board are stated clearly and unambiguously in § 10.1-2103. In addition, § 10.1-2106(C) of the Act vests the Director "with all the authority of the Board, including the authority granted by § 10.1-2104, when it is not in session, subject to such regulations as may be prescribed by the Board." As noted above, § 10.1-2104 authorizes the Board to institute legal actions. I am unable, however, to find authorization in the Act for the Board or the Director to impose a cease and desist order on a locality that is violating the Act. When a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute. As the Virginia Supreme Court has often stated, "[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied." Consequently, I am of the opinion that the Chesapeake Bay Preservation Act does not authorize the Executive Director of the Chesapeake Bay Local Assistance Department or the Chesapeake Bay Local Assistance Board to issue a cease and desist order to a locality that is violating the Act, and to request the Attorney General to seek an injunction against a locality that violates a cease and desist order.


"To minimize the adverse effects of human activities on the other components of the Resource Protection Area, state waters, and aquatic life, a 100-foot buffer area of vegetation that is effective in retarding run-off, preventing erosion, and filtering non-point source pollution from run-off shall be retained if present and established where it does not exist. The 100-foot buffer area shall be deemed to achieve a 75% reduction of sediments and a 40% reduction of nutrients. Except as noted in this subsection, a combination of a buffer area not less than 50 feet in width and appropriate best management practices located landward of the buffer area which collectively achieve water quality protection, pollutant removal, and water resource conservation at least the equivalent of the 100-foot buffer area may be employed in lieu of the 100-foot buffer." 9 Va. Admin. Code 10-20-130(B).

"The Chesapeake Bay Preservation Act became effective July 1, 1988. See 1988 Va. Acts ch. 608, at 784, 792-96 (adding sections in Title 10 relating to Act); see also id ch. 891, at 1874 (repealing Title 10 and adding Title 10.1).

1 Section 10.1-2103(4).
2 Section 10.1-2103(5).
3 Section 10.1-2103(8).

"Chesapeake Bay Preservation Area" means an area delineated by a local government in accordance with criteria established pursuant to § 10.1-2107." Section 10.1-2101.


"Id. at 32 (quoting § 10.1-2110).

"Id. at 35.
The Act requires that the Board ensure that local governments comply with the Act and
See §§ of state waters in Chesapeake Bay Preservation Areas, and (ii) assures that all subdivisions in
"See § 10.1-2101 (defining jurisdictions comprising “Tidewater Virginia”).
"The word “shall” is primarily mandatory in its effect and the word “may” is primarily permissive. See Pettus v. Hendricks, 113 Va. 326, 330, 74 S.E. 191, 193 (1912).
"The Board Regulations require local governments to develop local programs necessary to comply with the Act and Chapter 20 of the Regulations (see supra note 2). See 9 Va. ADMIN. CODE 10-20-50. “Local governments’ means counties, cities and towns [and] applies to local governments in Tidewater Virginia, as defined in § 10.1-2101 of the Act, but the provisions of [Chapter 20] may be used by other local governments.” 9 Va. ADMIN. CODE 10-20-40. “Local program’ means the measures by which a local government complies with the Act and regulations.” Id. The Board Regulations require that local programs contain the following elements:
“A. A map delineating Chesapeake Bay Preservation Areas.
B. Performance criteria applying in Chesapeake Bay Preservation Areas that employ the requirements in Part IV [of Chapter 20 of the Board Regulations].
C. A comprehensive plan or revision that incorporates the protection of Chesapeake Bay Preservation Areas and of the quality of state waters.
D. A zoning ordinance or revision that (i) incorporates measures to protect the quality of state waters in Chesapeake Bay Preservation Areas, and (ii) requires compliance with all criteria set forth in Part IV.
E. A subdivision ordinance or revision that (i) incorporates measures to protect the quality of state waters in Chesapeake Bay Preservation Areas, and (ii) assures that all subdivisions in Chesapeake Bay Preservation Areas comply with the criteria set forth in Part IV.
F. An erosion and sediment control ordinance or revision that requires compliance with the criteria in Part IV.
G. A plan of development process prior to the issuance of a building permit to assure that use and development of land in Chesapeake Bay Preservation Areas is accomplished in a manner that protects the quality of state waters.”
9 Va. ADMIN. CODE 10-20-60.
Part IV establishes the performance criteria for land use and development (see 9 Va. ADMIN. CODE 10-20-110 to 10-20-160 (Law. Coop. 1996)). Part VI pertains to the statutory enforcement responsibilities of the Board (see 9 Va. ADMIN. CODE 10-20-240 to 10-20-280 (Law. Coop. 1996)).
‘‘The Act requires that the [B]oard ensure that local governments comply with the Act and [Board Regulations] and that their comprehensive plans, zoning ordinances and subdivision ordinances are in accordance with the Act. To satisfy these requirements, the [B]oard has adopted [Chapter 20] and will monitor each local government’s compliance with the Act and [Chapter 20].’’ 9 Va. ADMIN. CODE 10-20-240. Pursuant to § 10.1-2103(8) and (10) of the Act, the Board shall take administrative and legal action to ensure compliance by local governments. See 9 Va. ADMIN. CODE 10-20-250, 10-20-260.
"Section 10.1-2107(A) provides: ‘In order to implement the provisions of [the Act] and to assist counties, cities and towns in regulating the use and development of land and in protecting the quality of state waters, the Board shall promulgate regulations which establish criteria for use by local governments to determine the ecological and geographic extent of Chesapeake Bay Preservation Areas. The Board shall also promulgate regulations which establish criteria for use by local
governments in granting, denying, or modifying requests to rezone, subdivide, or to use and develop land in these areas."

"See Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) (noting that "shall" is word of command, used in connection with mandate); see also Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that "shall" generally indicates procedures are intended to be mandatory, imperative or limited); Op. Va. Att’y Gen.: 1997 at 16, 17; 1996 at 20, 21; 1991 at 126, 126, and opinions cited therein; id. at 127, 129, and opinions cited therein.


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OP. NO. 01-102

CONSTITUTION OF VIRGINIA: FRANCHISE AND OFFICERS (QUALIFICATIONS OF VOTERS). ELECTIONS: VOTER REGISTRATION — GENERAL PROVISIONS AND ADMINISTRATION.

MENTAL HEALTH GENERALLY: COMMITTEES AND TRUSTEES.

Election laws referring to 'incapacitated' and constitutional provision referring to 'mentally incompetent' as standards for disqualifying person from voting are not in conflict. Court has option to determine whether 'incapacitated' adjudication rises to standard of mental incompetence necessary to deprive person of his voting franchise. General Assembly has power to eliminate court's option.

THE HONORABLE BILL BOLLING
MEMBER, SENATE OF VIRGINIA
DECEMBER 10, 2001

You ask whether Article II, § 1 of the Constitution of Virginia, which refers to persons "adjudicated to be mentally incompetent," conflicts with §§ 24.2-101, 24.2-404(A)(4)(iv), 24.2-410, 24.2-418 and 37.1-134.6 of the Code of Virginia, which refer to persons "adjudicated incapacitated." Additionally, you ask whether a court order that finds a person to be "incapacitated," but allows such person to continue to vote, conflicts with Article II, § 1. If not, you also ask whether the General Assembly may amend § 37.1-134.6 to eliminate a court's option to enter such an order.

Article II, § 1 states the prerequisites for voting in popular elections and provides that "[a]s prescribed by law, no person adjudicated to be mentally incompetent shall be qualified to vote until his competency has been reestablished." (Emphasis added.) This voting disqualification is long-standing, but it has been couched in different terms through the years. For example, the Constitution of 1830 barred from voting "any person of unsound mind." Later, the Constitution was amended to exclude from voting "idiots and lunatics." The language was again changed in 1902 to exclude 'idiots' and 'insane persons' from registering and voting. The present Constitution "substituted the term 'mentally incompetent' for 'of unsound mind,' since it was thought to be more readily understood by the public."
Title 24.2 provides for the administration of elections in the Commonwealth and implements the qualifications and disqualifications enunciated in the Constitution. The statutory provisions to which you refer address in some manner the disqualification at issue. Notably, prior to 1998, §§ 24.2-101, 24.2-404, 24.2-410, and 24.2-418 used the phrase “mentally incompetent.”

Effective January 1 and April 15, 1998, the General Assembly deleted the phrase in §§ 24.2-101, 24.2-404 and 24.2-418, and added the term “incapacitated,” and added the latter term in § 24.2-410, while retaining the phrase “mentally incompetent.”

The constitutional history of the disqualification from voting for what now is phrased “mentally incompetent” reflects the current evolution of this phrase from the original phrase “unsound mind.” The history demonstrates attempts by the framers of the Virginia Constitution to use varying terms of art to denote the requisite standard for the state of mind necessary for disqualification in accordance with the contemporary views of that standard. Although different terms have been used, all such terms are consistent with the overriding purpose of the constitutional provision, which is to ensure that the voting franchise is exercised only by persons capable of making a mature and responsible decision among candidates and issues.

Similarly, the implementing statutes seek to identify the standard for disqualification in conformance with the constitutional provision. It is my opinion that the latest amendments to these statutes on this issue are an attempt by the General Assembly to clarify and modernize the constitutional standard but not to change the standard itself. Thus, the statutory amendments do not create a new or alternate standard; rather, such are examples of an exercise in semantics. In this regard, the use of the phrase “mentally incompetent” is interchangeable with the use of the word “incapacitated.” Therefore, I am of the opinion that the statutes in Title 24.2 at issue and Article II, § 1 are not in conflict.

Regarding your second and third inquiries, Title 37.1 relates to mental health generally and specifically defines the phrase “incapacitated person” in § 37.1-134.6 for purposes of adjudicating a person “‘mentally incompetent.’” Notably, the General Assembly enacted this definition at the same time it amended §§ 24.2-101, 24.2-404 and 24.2-418 to incorporate the term. Section 37.1-134.6 states that “[a] finding that a person is incapacitated shall be construed as a finding that the person is ‘mentally incompetent’ as that term is used in Article II, Section 1 of the Constitution of Virginia and Title 24.2 unless the court order entered pursuant to this chapter specifically provides otherwise.”

The Constitution makes clear that the decision whether an individual is “mentally incompetent” is “determined not by the [voting] registrar but through procedures established by, and based on standards of competency prescribed by, the General Assembly.” Thus, it directs the General Assembly to establish such procedures “[a]s prescribed by law.”
Section 37.1-134.6 is among the statutes prescribed to implement this constitutional directive. Although this section contains seemingly mandatory language in that it provides that "[a] finding that a person is incapacitated shall[18] be construed as a finding that the person is 'mentally incompetent'" under the Constitution and Title 24.2 (thus triggering the attendant prohibition from voting), this statute also permits a court to specifically order otherwise. The General Assembly does not require in clear and unambiguous language that a finding of "incapacitated" result in the prohibition from voting due to mental incompetence. When the General Assembly intends to enact a mandatory requirement, it, of course, knows how to express its intention.17 Under this definitional statute, a court possesses the discretion to determine on a case-by-case basis whether a finding of "incapacitated" is tantamount to a finding that the individual is "mentally incompetent." Thus, the General Assembly presently leaves it within the court's discretion to find that a person adjudged "incapacitated" under § 37.1-134.6 rises to the standard of mental incompetence necessary to deprive the person of his voting franchise. It is likewise certainly within the General Assembly's prerogative to amend this statute to eliminate the court's option to do so.

1Section 37.1-134.6 states that the term "incapacitated person" "shall be construed as a finding that the person is 'mentally incompetent,'" unless the court order finding the individual an incapacitated person provides otherwise.


1Id.

1Id.

1Id. at 348.


1See 1997 Va. Acts ch. 801, supra, at 1997-99; see id. at 2036 (enacting effective date of act in clause 2).

6See 1998 Va. Acts ch. 582, supra, at 1373; see id. at 1376 (enacting effective date of act in clause 2).


1Compare 1975-1976 Op. Va. Att'y Gen. 323, 324 (noting that amendments substituting "city sheriffs" for "city sergeants" are semantic only and do not change power, duties or responsibilities previously imposed on city sergeants).

1Compare 1993 Op. Va. Att'y Gen. 33, 44 n.1 (noting that, although Virginia Constitution refers only to voter's "precinct," terms "polling place" and "precinct" are interchangeable under state statutes).

6See 1997 Va. Acts ch. 921, at 2503, 2521 (adding § 37.1-134.6 defining "incapacitated person"); see id. at 2556 (enacting in clause 2, effective date of act as January 1, 1998).


1 Howard, supra note 2, at 348.

You ask whether a classified state employee, serving at the deputy director level at a state facility within an agency of the executive branch, may lawfully serve in the General Assembly.

The qualifications to hold state office are set out in Article II, § 5 of the Constitution of Virginia, which provides:

The only qualification to hold any office of the Commonwealth or of its governmental units, elective by the people, shall be that a person must have been a resident of the Commonwealth for one year next preceding his election and be qualified to vote for that office, except as otherwise provided in this Constitution, and except that:

(c) nothing in this Constitution shall limit the power of the General Assembly to prevent conflict of interests, dual office-holding, or other incompatible activities by elective or appointive officials of the Commonwealth or of any political subdivision.

I am not aware of any statute that specifically prohibits a classified state employee from serving as a member of the General Assembly. Article IV, § 4 contains the required qualifications for General Assembly members, and prohibits "[a]ny person holding a salaried office under the government of the Commonwealth" from serving as a member of the General Assembly. The Commission on Constitutional Revision recognized that the language of this provision is "vague and illogical" and that "judicial interpretation [of this section] in the Virginia courts is almost non-existent." Therefore, "common sense suggests that it not be applied harshly or given sweeping and unrealistic interpretations."
Prior opinions of the Attorney General indirectly respond to your inquiry. A 1971 opinion concludes that "an employee of a college is an employee of a governmental agency and does not hold a salaried office under the government of the Commonwealth. Accordingly, the constitutional restrictions would not prohibit a community college professor from serving in the General Assembly." Two prior opinions conclude that an individual may serve in the General Assembly while holding a full-time position in a state college, and that there are no constitutional prohibitions disallowing the individual from receiving salary as a professor at a state college while serving as a member of the General Assembly. I concur with the conclusions of these prior opinions. The General Assembly has enacted no statute that alters the conclusions of these opinions. The Supreme Court of Virginia has stated that "[t]he legislature is presumed to have had knowledge of the Attorney General’s interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General’s view."

The Hatch Political Activity Act provides that, under certain limited conditions, a state or local officer or employee may not be a candidate for elective office, and by implication, may not serve in an elective office. In general, the Act applies to officers or employees of a state or local agency "whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency." The Hatch Political Activity Act, by its own terms, does not apply to an individual who exercises no functions in connection with a federally financed activity. Thus, the Act’s prohibitions would apply only if the classified state employee, serving at the deputy director level at a state facility within an agency of the executive branch, exercises functions in connection with a federally financed activity.

Assuming the connection with a federally financed activity under the Hatch Political Activity Act is not present, it is my opinion that a classified state employee, serving at the deputy director level at a state facility within an agency of the executive branch, may be a candidate for and, if elected, serve in the General Assembly.

\(^1\)Section 2.1-639.35(B), a portion of the General Assembly Conflict of Interest Act, permits members of the General Assembly to have “contract[s] of regular employment” “with any governmental agency of the executive or judicial branches of state government” as a specific exception to the general contract prohibition of the Act.

\(^2\)See 1993 Op. Va. Att’y Gen. 27, 30 (explaining that public position is considered “office” if (1) position is created by Constitution or by statute and is for fixed term; (2) position is filled by election or appointment; and (3) position has designation or title, and law imposes public duties on person holding position); see also 1981-1982 Op. Va. Att’y Gen. 305.


You ask whether the General Assembly may convene a special session after adjournment sine die of the 2001 Regular Session to conduct the constitutionally required decennial reapportionment, recess from the special session to convene a reconvened session, and resume the special session upon adjournment sine die of the reconvened session.

You advise that the 1991 General Assembly convened in special session on April 1, 1991, for the purpose of conducting decennial reapportionment. You advise further that the General Assembly adjourned the special session on April 2, 1991, to meet on April 3, 1991, following adjournment sine die of a reconvened session.

Article IV, § 6 of the Constitution of Virginia governs sessions of the General Assembly. Article IV, § 6 requires the General Assembly to “reconvene on the sixth Wednesday after adjournment” sine die of its regular session for the purpose of considering legislation returned by the Governor with recommendations for amendment. The General Assembly may also consider at such reconvened session legislation and items of the appropriation bill that have been vetoed by the Governor. No other legislative business may be considered at a reconvened session. A special session of the General Assembly may be convened in one of only two ways: (1) the Governor may convene a special session “when, in his opinion, the interest of the Commonwealth may require”; or (2) the Governor shall convene a special session “upon the application of two-thirds of the members elected to each house.”


Section 1501(4) defines “state or local officer or employee” to mean “an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, but does not include—

“(A) an individual who exercises no functions in connection with that activity; or

“(B) an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a State or political subdivision thereof, or by a recognized religious, philanthropic, or cultural organization.”


OP. NO. 01-024

Constitution of Virginia: Legislature (Legislative Sessions) — Franchise and Officers (Apportionment).

Constitution does not prohibit General Assembly from convening special session following adjournment sine die of 2001 Regular Session to conduct decennial reapportionment, recessing special session to convene reconvened session, and resuming special session upon adjournment sine die of reconvened session.

THE HONORABLE H. MORGAN GRIFFITH
MEMBER, HOUSE OF DELEGATES
FEBRUARY 23, 2001

You ask whether the General Assembly may convene a special session after adjournment sine die of the 2001 Regular Session to conduct the constitutionally required decennial reapportionment, recess from the special session to convene a reconvened session, and resume the special session upon adjournment sine die of the reconvened session.

You advise that the 1991 General Assembly convened in special session on April 1, 1991, for the purpose of conducting decennial reapportionment. You advise further that the General Assembly adjourned the special session on April 2, 1991, to meet on April 3, 1991, following adjournment sine die of a reconvened session.

Article IV, § 6 of the Constitution of Virginia governs sessions of the General Assembly. Article IV, § 6 requires the General Assembly to “reconvene on the sixth Wednesday after adjournment” sine die of its regular session for the purpose of considering legislation returned by the Governor with recommendations for amendment. The General Assembly may also consider at such reconvened session legislation and items of the appropriation bill that have been vetoed by the Governor. No other legislative business may be considered at a reconvened session. A special session of the General Assembly may be convened in one of only two ways: (1) the Governor may convene a special session “when, in his opinion, the interest of the Commonwealth may require”; or (2) the Governor shall convene a special session “upon the application of two-thirds of the members elected to each house.”
The powers of the General Assembly generally are plenary, and the Constitution acts to limit those powers. Nothing in the Constitution prohibits the General Assembly from convening a special session following adjournment *sine die* of the 2001 Regular Session to conduct the decennial reapportionment, recessing the special session to convene a reconvened session, and resuming the special session upon adjournment *sine die* of the reconvened session. Consequently, I must conclude that such a course of action is permitted.

1"The General Assembly shall reapportion the Commonwealth into electoral districts ... in the year 1971 and every ten years thereafter." VA. CONST. art. II, § 6.
3VA. CONST. art. IV, § 6.
4Sec id.
5Id.

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OP. NO. 01-059

CONSTITUTION OF VIRGINIA: LEGISLATURE (QUALIFICATIONS OF SENATORS AND DELEGATES — FRANCHISE AND OFFICERS (APPORTIONMENT) (QUALIFICATIONS TO HOLD ELECTIVE OFFICE.

ELECTIONS: ELECTION DISTRICTS, PRECINCTS, AND POLLING PLACES - EFFECTIVE DATE OF REDISTRICTING MEASURES.

State senator may move his residence from City of Harrisonburg to Shenandoah County, which is included in reapportioned 26th Senatorial District precleared by U.S. Department of Justice, and complete his term of office through year 2003.

THE HONORABLE KEVIN G. MILLER
MEMBER, SENATE OF VIRGINIA
JULY 17, 2001

You ask whether you may move your residence within the newly apportioned 26th Senatorial District from the City of Harrisonburg to Shenandoah County and complete your term of office in the Senate of Virginia in the year 2003.

You note that you have represented the 26th Senatorial District in the General Assembly of Virginia since 1984. You note further that the redistricting plan for the Senate of Virginia, signed by the Governor on April 21, 2001, now includes Shenandoah County.

Section 5 of the Voting Rights Act of 1965, as amended, which is applicable to the Commonwealth, requires that any change in state or local election laws or voting practices or procedures be submitted to the United States Department of Justice for review and evaluation of its potential impact on minority voters, before such change may be implemented. This review is commonly referred to as "§ 5 preclearance." Under accepted rules of statutory construction, interpretations by the agency charged with administering a statute are entitled to great weight. A statute requiring § 5 preclearance cannot be implemented
until preclearance is obtained. The redistricting plan for the senatorial districts of the General Assembly was precleared under § 5 by the United States Department of Justice on July 9, 2001.

Article IV, § 4 of the Constitution of Virginia sets forth the qualifications for election to the Senate of Virginia:

Any person may be elected to the Senate who, at the time of the election, is twenty-one years of age, is a resident of the senatorial district which he is seeking to represent, and is qualified to vote for members of the General Assembly.... A senator or delegate who moves his residence from the district for which he is elected shall thereby vacate his office.

A prior opinion of the Attorney General concludes that Article IV, § 4 must be read in conjunction with Article II, § 5, which sets forth the qualifications to hold elective office:

The only qualification to hold any office of the Commonwealth or of its governmental units, elective by the people, shall be that a person must have been a resident of the Commonwealth for one year next preceding his election and be qualified to vote for that office, except as otherwise provided in this Constitution ....

Consequently, only those persons entitled to vote for an office elective by the people are entitled to hold that office. In addition, members of the Senate of Virginia must maintain their residence in the district for which they are elected.

The plain language of Article IV, § 4 specifies only that each senator or delegate must maintain his residence in the district “for which he is elected.” The district for which you are elected is, of course, the 26th Senatorial District. Since the decennial redistricting legislation setting forth Virginia’s senatorial districts was precleared by the Department of Justice on July 9, 2001, the 26th Senatorial District now includes Shenandoah County.

Therefore, I am of the opinion that, since the Department of Justice has now precleared the redistricting plan for the Virginia Senate, which includes Shenandoah County within the 26th Senatorial District, you may move your residence from the City of Harrisonburg to Shenandoah County and still complete your term of office through the year 2003.

1"The General Assembly shall reapportion the Commonwealth into electoral districts ... in the year 1971 and every ten years thereafter." VA. CONST. art. II, § 6. Legislation enacted by the General Assembly to accomplish decennial redistricting "shall take effect immediately," and legislators "in office on the effective date of the decennial redistricting legislation shall complete their terms of office." VA. CODE ANN. § 24.2-311(A) (Michie Repl. Vol. 2000).
You inquire regarding the law-enforcement authority of the sheriff of King William County on the Mattaponi and Pamunkey Indian reservations. You specifically inquire regarding the authority of the sheriff's office to serve legal process, arrest warrants, and subpoenas, and to investigate misdemeanors and felonies on the reservations.

You advise that the sheriff's office routinely responds to calls for law-enforcement assistance on both reservations when requested by members of the Mattaponi and Pamunkey tribes. In addition, you report that the sheriff's office serves legal process on both reservations. Finally, you advise that it has been the historical practice of the sheriff's office to advise the chief or council members of both tribes that such activities are occurring on the reservations.

A sheriff is an independent constitutional officer whose duties "shall be prescribed by general law or special act." ¹ A 1980 opinion of the Attorney General notes that, in the absence of a statute providing otherwise, the authority of a sheriff is coextensive with his county.² The Supreme Court of Virginia has commented that, as a general rule, the duties of a sheriff and his deputies are regulated and defined by statute.³ The Court has also stated:

The sheriff is an officer of the court subject to its orders and directions. He is also a conservator of the peace and charged with the enforcement of all criminal laws within his jurisdiction. It is his duty, as well as the duty of the other police officers of the county and city, to investigate all violations of law and to serve criminal warrants.
Prior opinions of the Attorney General conclude that, in the absence of a constitutional or statutory provision to the contrary, a sheriff has exclusive control over the day-to-day operations of his office and the assignment of his personnel. Furthermore, a 1985 opinion of the Attorney General notes that, although a sheriff’s powers and duties are limited to those prescribed by statute, he is free to discharge those powers and duties in a manner he deems appropriate. The opinion further notes that a sheriff has discretionary authority with respect to personnel policies, cooperative agreements with federal agencies, and policies governing the use of vehicles by the sheriff’s personnel.

At this time, the Pamunkey and Mattaponi tribes are not federally recognized Indian tribes. Consequently, state law, not federal law, governs this matter. As early as 1658, the Governor, the Council and commissioners of Virginia “confirmed” the Pamunkey and Mattaponi Indian reservations to those tribes during the Grand Assembly of Virginia held at James City County. In 1661, the Council sought to resolve confrontations occurring between the English settlers and members of the tribes. The Council confirmed that members of the tribes must be afforded security in their persons and goods, and further, “whoever shall defraud or take from them their goods and doe hurt and injury to their persons” must receive the same punishment as the laws imposed upon “an Englishman.”

The Indian Treaty of 1677 between the King of England, acting through the Lieutenant Governor of Virginia, and several Indian tribes, including the Pamunkey and the Mattaponi, is the most important existing document describing Virginia’s relationship toward Indian lands and the rights of the tribes on such lands. The Commonwealth now stands as the successor to the Crown. The treaty confirms the Pamunkey and Mattaponi tribes’ aboriginal title to lands described in a patent issued by the British Crown, which no longer is on record in Virginia. The Indian Treaty of 1677 provides:

[T]he said Indian Kings & Queens and their Subjects shall hold their lands, and have the same confirmed to them and their posterity by Patent under the Seale of this his Majesties Colony, without any fee gratuity or Reward for ye same, in such sort, and in as free and firme manner as others His Majesties Liege Subjects, have and enjoye their Lands, and possessions, paying onely yearly for, and in Liew of a Quitrent or acknowledgement for the same three Indian Arrowes.

The Supreme Court of the United States explained the effect of British law on Indian land rights in the case of Mitchel v. United States. "[F]riendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation." Subject to this right of possession, the fee simple remained in the Crown or its grantees. Cases and opinions subsequent to Mitchel agree that aboriginal Indian title consists of an exclusive right of occupancy, not a fee simple. The cases dealing with Indian lands in the territory of the original colonies, such as Virginia, locate the ultimate fee in the state in which the lands are located.
Although the Commonwealth has a fee simple interest in the Pamunkey and Mattaponi reservations, it should be emphasized that this interest is subject to the exclusive use and occupancy of the two tribes possessing Indian title to the land. The superior title that exists in the Commonwealth does not abrogate Indian rights, but only prevents transfer of Indian lands to non-Indians without the consent of both the government and the Indians.

The members of the Pamunkey and Mattaponi tribes occupy a status in the Commonwealth somewhat different from other citizens. A 1917 opinion recognizes a guardian-ward relationship between the Commonwealth and members of the Mattaponi and Pamunkey tribes. The Indian Treaty of 1677 imposes some duty on the state to provide certain privileges or benefits to the Indians that may not be extended to others. While this special relationship may not be defined fully, it has been recognized consistently. Article V of the treaty specifically addresses the protection that is afforded members of the tribes against criminal behavior as follows:

That the said Indians be well Secured & defended in their persons goods and properties against all hurts and injuries of the English, and that upon any breach or violation hereof, that the aggrieved Indians doe in the first place repair and address themselves to the Govern'r Acquainting him therewith without rashly and sudainly betaking themselves to any hostile course for Satisfaction who will inflict such punishment on the wilfull infringers hereof, as the Lawes of England or this Country permitt, and as if such hurt or injury had bin done to any Englishman, which is but just and Reasonable they owneing themselves to be under the allegiance of his most Sacred Majestie.

Furthermore, Article VI of the treaty prohibits any member of either tribe from being imprisoned "without a warrant from a Justice of peace, upon Sufficient cause of Commitment."

Following the Indian Treaty of 1677, the 1705 Council affirmed the obligation of the Commonwealth to the members of the tribes as follows:

[T]he Indians tributary to this government, shall be well secured and defended in their persons, goods, and properties; and that whosoever shall defraud, or take from them, their goods, or do hurt or injury to their persons, shall make satisfaction, and be punished for the same, according to law, as if the Indian sufferer had been an Englishman.

I can find nothing in the Indian Treaty of 1677 that limits the authority of the King William County sheriff's office with regard to the Mattaponi and Pamunkey Indian reservations. To the contrary, the treaty and subsequent actions of the General Assembly extend the same protections of the law of the Commonwealth to members of the tribes as are extended to nonmembers. The agreement
between the King William County sheriff’s office and the Pamunkey and Mattaponi tribes in the county reflects the policies that exist in a number of other states with Indian reservations. Other American Indian tribes are recognized by the United States government and, therefore, have a relationship with the federal government. This relationship, with regard to criminal jurisdiction, is codified in the Indian Country Crimes Act\(^1\) and the Indian Major Crimes Act.\(^2\) Under these federal acts, local and state law-enforcement entities have limited jurisdiction over federally designated reservations. Virginia tribes are not subject to either federal act, because they are not recognized by the federal government and do not have federal reservations. Indian tribes in Virginia have an established relationship only with the Commonwealth, and, therefore, the laws of the Commonwealth must apply. Accordingly, I am of the opinion that the King William County sheriff’s office may exercise the same law-enforcement authority on the Pamunkey and Mattaponi Indian reservations as elsewhere in the county. Specifically, the sheriff’s office has authority to serve legal process, arrest warrants, and subpoenas, and to investigate misdemeanors and felonies on the reservations as elsewhere in the county.


\(^{7}\)See id. See, e.g., Op. Va. Att’y Gen.: 1983-1984 at 323 (authority to appoint and remove deputies); 1982-1983 at 462, 463-64 (authority over personnel policies); 1978-1979 at 238 (authority to enter into agreement with federal agency for provision of law enforcement services on land of concurrent jurisdiction); 1976-1977 at 250 (authority to assign duties to deputies; official use of department vehicle and claim for mileage expense); 1973-1974 at 39, 40 (authority over vehicles assigned to sheriff’s office); id. at 322 (authority to request reimbursement for personal car used in performance of official business).

\(^{8}\)I am not aware of any treaty between the Pamunkey and Mattaponi Indian tribes and the United States government.

\(^{9}\)1 Hen. Stat. act 72, at 467-68 (1657-1658) (titled “Confirmation of Indians’ Land”).


\(^{11}\)Id. at 139.


"34 U.S. (9 Pet.) 711 (1835).

"Id. at 745.

"See id.


"Id.


"Id. at 292.


"18 U.S.C.A. § 1152 (West 2000) (providing that federal criminal laws extend to "Indian country," except those "offenses committed by one Indian against the person or property of another Indian, [or] to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively").

"18 U.S.C.A. §§ 1153, 3242 (West 2000) (establishing list of "major" crimes that, if committed by Indian, "shall be subject to the same law and penalties as all other persons committing any of the ... offenses, within the exclusive jurisdiction of the United States." Section 1153(a). Indians committing such offenses "shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States." Section 3242.).

OP. NO. 01-073

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY OFFICERS).

COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, ETC.

Duty of county sheriff to enforce local ordinance requiring vehicle owners to display current county decals.

THE HONORABLE GAIL S. BERRY
TREASURER FOR GREENE COUNTY
SEPTEMBER 27, 2001

You inquire regarding the duty of the Greene County sheriff to enforce an ordinance requiring owners of vehicles to display current county decals.
You advise that payment for vehicle decals in Greene County is due annually on February 15 and represents a major source of income for the county. County residents must display the current county vehicle decal after February 15 of each year. You advise that the sheriff will no longer enforce the decal ordinance. You express concern that, without this enforcement mechanism, your office may not collect sufficient revenues for the county.

The powers and duties of a treasurer are set out generally in Article 2, Chapters 31 and 39 of Title 58.1 of the Code of Virginia. The treasurer is responsible for collecting taxes and other revenues payable into the treasury of the locality served by the treasurer. Prior opinions of the Attorney General conclude that it is the duty of a county treasurer to issue local automobile licenses and collect the fees authorized by local ordinance.

A sheriff is an independent constitutional officer whose duties "shall be prescribed by general law or special act." A sheriff may appoint one or more deputy sheriffs to discharge the duties of his office. A 1980 opinion of the Attorney General notes that, in the absence of a statute providing otherwise, the authority of a sheriff is coextensive with his county. The Supreme Court of Virginia has commented that, as a general rule, the duties of a sheriff and his deputies are regulated and defined by statute. The Court has also stated:

The sheriff is an officer of the court subject to its orders and directions. He is also a conservator of the peace and charged with the enforcement of all criminal laws within his jurisdiction. It is his duty, as well as the duty of the other police officers of the county and city, to investigate all violations of law and to serve criminal warrants.

Also among the general duties of county sheriffs within the county he serves are: (a) enforcement of local ordinances and state laws; (b) service of process for the courts within his county; (c) maintenance of order in the courtroom and assistance of the court generally; and (d) operation of the jail.

I must, therefore, conclude that it is the duty of the office of the Greene County sheriff to enforce the county ordinance requiring vehicle owners to display current county decals.

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You ask whether the nature and severity of a felony have any weight or significance with regard to whether a Commonwealth’s attorney should prosecute.

Commonwealth’s attorneys are independently elected constitutional officers responsible directly to the voters of their localities. They may be removed from office only by the procedures detailed in §§ 24.2-230 through 24.2-238 of the Code of Virginia for removal of elected officers. The Supreme Court of Virginia has been clear that Commonwealth’s attorneys prosecuting violations of the law enjoy discretion in the selection of cases for prosecution. As the Court has noted a prosecutor’s “duty to administer the criminal law impartially, in the interest of justice, is essentially a judicial one.” A prosecutor has the responsibility of a minister of justice, and not simply that of an advocate.” Such responsibility obligates him to see that the party charged with an offense “is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”

The prosecuting attorney, therefore, has the authority and the responsibility not only to ensure that the criminal process is not abused, but also to ensure that criminal prosecutions are pursued only to seek justice. Consequently, the Commonwealth’s attorney should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute.


VA. SUP. CT. pt. 6, § II, R. 3.8 cmt. [1].

Id.; see also VA. Sup. CT. pt. 6, § II, R. 3.8.


See Glidewell, 124 Va. at 575, 98 S.E. at 669 (stating that concealing crimes or stifling prosecutions to defeat ends of justice is not permitted).

OP. NO. 00-110

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY OFFICERS).

TAXATION: LOCAL OFFICERS – COMMISSIONERS OF THE REVENUE.

COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS – COMMISSIONER OF THE REVENUE.

Commissioner of revenue has no authority to contract with private statistical company to prepare, during normal working hours, report regarding data on new construction and buildings.

THE HONORABLE RANDY N. WILLIAMS
COMMISSIONER OF THE REVENUE FOR RUSSELL COUNTY
MAY 16, 2001

You ask whether a commissioner of the revenue may prepare, for a set fee, a report regarding data on new construction and buildings for a private statistical company that collects such data. You relate that the information collected for such report is obtained from county building permits. You also relate that such report is prepared on official county time. 1

The commissioner of the revenue is a constitutional officer whose duties “shall be prescribed by general law or special act”2 of the General Assembly. The duties of commissioners of the revenue are set out specifically in Article 1, Chapter 31 of Title 58.1, §§ 58.1-3100 through 58.1-3122.2 of the Code of Virginia, as well as generally in Titles 15.2 and 58.1.3

Article VII, § 4 of the Constitution of Virginia directs the General Assembly to assign duties by general or special law to constitutional officers, including the commissioner of the revenue.4 With respect to county building permits, the commissioner of the revenue may review such permits and obtain information from such permits as may be helpful to him for local tax assessment purposes.5

I am, however, unaware of any statutory provision authorizing a commissioner of the revenue to prepare reports such as you describe for a private company for a set fee.6

Accordingly, I must conclude that a commissioner of the revenue has no authority to contract with a private company to prepare such a report for a private statistical company during the normal workday hours.
You ask whether the question approved in 1998 by the voters of Arlington County is broad enough to authorize the expenditure of bond funds for the construction of a new library on school-owned property or whether such proposed construction constitutes a substantial change from the question posed to the voters, and if so, whether the question is invalidated.

You state that the ballot question approved in 1998 asked the voters of Arlington County whether the county should contract debt and issue general obligation bonds in the maximum amount of $8 million to finance, with other available funds, the expansion and renovation of, or the building of a new, Westover and Shirlington branch library. You advise that a preliminary proposal recommends the building of a new Westover Library, with an underground parking area, in conjunction with the replacement of an older part of an elementary school. You relate that, under current standards, the sixty-year-old section of the elementary school building is inappropriate for use as a school or other public building. The Westover Library is located on a small portion of county-owned land and is surrounded on two sides by school-owned property. You report that there are several problems, particularly parking problems, associated with expanding and renovating the library on its present site. You also note that many area residents oppose connecting a library and parking facility with the school. The school is used for preschool and community programs. You advise that, due to the growing population of young children, the school could be reopened as a neighborhood or special focus school.
A county may contract debt only as authorized by general law pursuant to Article VII, § 10(b) of the Constitution of Virginia. Subject to certain exceptions in § 10(b), the general law authorizing the debt must provide that the question of contracting the debt be submitted by referendum to the qualified voters of the county. Prior opinions of the Attorney General subscribe to the rule that funds derived from a district levy made for a specific purpose, e.g., the repayment of a loan from the Literary Fund or the retirement of a particular school bond issue, may not be diverted to another purpose, albeit temporarily, even if the funds exceed the amount required for annual debt service, until such indebtedness is repaid in full. The purpose of a particular levy, or the allowable use of bond proceeds, must be derived from the record of the action of the board of supervisors or from the instrument authorizing creation of the debt obligation.

You have provided with your request the explanation of the ballot question, which was prepared and distributed as authorized by § 24.2-687 of the Code of Virginia; a memorandum from the county manager dated July 1, 1998, detailing the proposed uses of the bond proceeds; and a copy of a newspaper article which appeared shortly before the November 1998 referendum was held. Each of those documents clearly indicates the possibility that the bond proceeds would be used to build a new Westover Library on a different nearby site, rather than on the existing site.

The documents you provide establish a record supporting a conclusion that the construction of a new Westover Library on a different site would be within the allowable uses of the bond proceeds. Assuming the information provided constitutes the full and accurate record of relevant actions of the board of supervisors and statements of purpose applicable to the bonds, it is my opinion that the construction of a new Westover Library on a different site than its present location is permitted by the bond referendum approved by the Arlington County voters in 1998. Therefore, it is also my opinion that the proposed construction does not constitute a substantial change from the question posed to the voters.

3See, e.g., Op. Va. Att’y Gen.: 1970-1971 at 39, 40 (citing 1956-1957 Op. Va. Att’y Gen. 225) (citing rulings of Attorneys General that bond proceeds may be used only for projects listed on referendum ballots); 1967-1968 at 233, 233-34 (concluding that bond issue proceeds are not to be used for any purpose not specified in question submitted in referendum; purpose of special district levies is to be determined from analysis of records of board of supervisors); 1960-1961 at 260, 262-63 (stating that use of bond proceeds is limited to specific purpose recited in school board resolution which was basis for bond issuance; question submitted to voters may have been, but was not, couched in general language); 1950-1951 at 31 (concluding that board of supervisors has no authority to divert bond proceeds to purpose not stated in resolution authorizing issuance of bonds). See also Va. Code Ann. § 15.2-2610 (Michie Repl. Vol. 1997) (requiring that certified copy of resolution or ordinance requesting referendum be filed with circuit court).
COUNTIES, CITIES AND TOWNS: FRANCHISES, PUBLIC PROPERTY, UTILITIES.

Supermajority vote requirement does not apply to sale of right-of-way in Virginia Beach that does not constitute 'public place.'

THE HONORABLE KENNETH W. STOLLE
MEMBER, SENATE OF VIRGINIA
FEBRUARY 2, 2001

You ask whether § 15.2-2100 of the Code of Virginia, which requires a three-fourths vote of all members elected to the governing body to sell the rights to certain public property, applies to the sale of a portion of the right-of-way for the extension of Ferrell Parkway, from El Camino Real Drive to Sandbridge Beach, in the City of Virginia Beach.

You advise that, in 1990, the City of Virginia Beach acquired by condemnation the right-of-way for the extension of Ferrell Parkway, from El Camino Real Drive to Sandbridge Beach ("Ferrell Parkway Phase VII"). You relate that the city is considering selling portions of Ferrell Parkway Phase VII to a third party. You note that § 15.2-2100 provides that no city shall convey an interest in and to its streets, avenues or other public places except as authorized by a vote of at least three-fourths of all members elected to city council, notwithstanding any other provision of law.

You relate further that you are advised that the city is considering not adhering to the three-fourths affirmative vote requirement, because the right-of-way has never been used as a street. You provide with your request (1) a copy of an ordinance adopted by the city council on February 26, 1990, authorizing the city attorney to negotiate the acquisition of property for the right-of-way; (2) copies of Plaintiff's Response to Defendant's Motion to Dismiss in the case of City of Virginia Beach v. Sandbridge Development Company, Law No. CL90-3160, in the Circuit Court of the City of Virginia Beach; (3) a copy of the 1968 plat showing the easement dedication to the city; and (4) a copy of the June 22, 1999, resolution adopting the Ferrell Parkway Phase VI and VII alignments from General Booth Boulevard to Sandbridge. Finally, you advise that Ferrell Parkway Phases VI and VII have been on the city's master street and highway plan, and the city plans to continue maintaining the public utilities along this portion of the right-of-way for Phase VII.

Sections 15.2-2100 and 15.2-2107 implement the provisions of Article VII, § 9 of the Constitution of Virginia. Article VII, § 9 requires an affirmative vote of three-fourths of the members elected to the city governing body before a city may sell any rights "in and to its ... streets, avenues, ... or other public places, or its gas, water, or electric works." Furthermore, § 9 places restrictions on the rights of a city to create franchises, leases, or other rights to use public property, including a limit on the term of such franchise and a procedural requirement of advertising and public bidding prior to the granting thereof to the municipal council. Article VII, § 9 and § 15.2-2100 impose two distinct restrictions on cities. First, property of certain enumerated classes, such as streets, avenues and other public property, that has been dedicated to public use "may not be
sold without a three-fourths vote of all members elected to the municipal council.  

Second, "the grant of any franchise, lease or right to use any of the enumerated classes of public property or easement of any description in any manner not permitted to the general public" is limited to forty years in duration.  

Prior opinions of the Attorney General repeatedly have noted that Article VII, § 9 seeks "to prevent 'the permanent dedication of publicly owned property to private use.'" Section 9 is virtually unchanged from § 125 of the 1902 Constitution of Virginia. According to Professor A.E. Dick Howard, Executive Director of the Virginia Commission on Constitutional Revision, the concern which gave rise to this section was the "fear of legislative willingness to knuckle under to special interests, [and] a belief that municipal councils could not be counted on faithfully to safeguard the public interest when dealing with corporations and utilities." Professor Howard notes that, because of the concern that unscrupulous city councils might dispose of valuable public property at a fraction of its worth to such parties, the section attempts to ensure that private business interests are not favored over the public interests in a city or town's public property. Thus, this section requires "the recorded vote of an extraordinary majority" of council members when selling public property. In the case of franchising public property, § 9 places a limit on the time a franchise may tie down city or town property and provides for an advertising and bidding process so that notice is clearly provided to the public prior to the award of the franchise.  

The clear intent of the constitutional provision is to safeguard public property and ensure that it not be appropriated by private self-interests for an extended term to the detriment of the public without due consideration by council members. Accordingly, a 1990 opinion concludes that a city cannot grant an easement in perpetuity to a gas company so that the company could install a natural gas pipeline across city property. The grant of such an easement permits the use of city property "'in a manner not permitted to the general public.'" Thus, the easement may not be granted in perpetuity but must be limited to the forty-year term prescribed in Article VII, § 9, and be subject to the advertising and bid provisions therein.  

The terms "street" and "avenue" are not defined in either the constitutional or the statutory provision. Consequently, the terms must be given their common, ordinary meanings used at the time of their adoption in the 1971 Constitution. At the time of adoption, the term "street" was defined as  

[a]n urban way or thoroughfare; a road or public way in a city, town, or village, generally paved, and lined or intended to be lined by houses on each side. It includes all urban ways which can be and are generally used for travel, and normally does not include service entrances or driveways leading off from the street onto adjoining premises.  

The term "avenue" was defined to mean "[a]ny broad passageway, bordered on each side by trees."
You note that § 15.2-2100 authorizes a city to convey an interest in and to its streets, avenues or other public places subsequent to the three-fourths affirmative vote of all members elected to council, notwithstanding any other provision of law, and suggest that the Ferrell Parkway Phase VII right-of-way is a street, avenue or other public place. You provide no facts, however, to support a conclusion that the described right-of-way falls within the common, ordinary meaning of the terms "street" and "avenue." Consequently, I am unable to conclude that the Phase VII right-of-way is either a street or an avenue. You do relate, however, that the right-of-way has never been used as a street.

From the facts and documents provided for review, it is also not clear whether the Ferrell Parkway Phase VII right-of-way is a "public place." A 1983 opinion of the Attorney General considers whether the predecessor statute to § 15.2-2100 applies to properties purchased and sold by a city in administering its housing program. The opinion notes that the term "public places" is not defined by the General Assembly in considering the applicability of the three-fourths vote requirement. Therefore, the following definition of "public place" has been adopted:

"A place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public (e.g., a park or public beach). Also, a place in which the public has an interest as affecting the safety, health, morals, and welfare of the community. A place exposed to the public, and where the public gather together or pass to and fro."

A 1988 opinion responds to an inquiry whether, after two of four members present at a council meeting have disqualified themselves, the remaining two members constitute a legal quorum to conduct the business of transferring town real property to the fire department. The opinion notes that the "super-majority requirement" [of § 15.2-2100] does not apply to all property owned by a city or town. Rather, the requirements of [§ 15.2-2100] apply only to the sale of property dedicated to public use. Finally, a 1989 opinion notes that municipal property that has been dedicated to public use may not be sold without a three-fourths vote of all members elected to a municipal council. The opinion relies on the 1983 opinion in noting that the requirement applies only to public places devoted to use by the public at large or by the municipality itself in carrying out its governmental functions.

The General Assembly has not amended § 15.2-2100 in any manner to indicate that it disagrees with the definition of the term "public place" adopted by the Attorney General. The General Assembly is presumed to have knowledge of the Attorney General's published interpretations of a statute, and its failure to make corrective amendments evinces legislative acquiescence in the interpretation. I must conclude that the prior opinions correctly state the definition to be used in determining whether municipal property is a "public place" for the purposes of § 15.2-2100.
The ultimate determination, however, regarding whether the Ferrell Parkway Phase VII right-of-way is a "street, avenue or public place" subject to the three-fourths affirmative vote requirement in Article VII, § 9 and § 15.2-2100(A) depends on a complete and detailed set of facts. Review of the documents provided with your request leads me to conclude that the property comprising the subject right-of-way has never been devoted to use by the public at large or by the city in carrying out its governmental functions. Furthermore, such property does not meet the definition of "public place."

Therefore, it is my opinion that the documents provided for review do not support a conclusion that the subject property comprising the right-of-way constitutes a public place requiring the three-fourths vote of all members of the city council to be sold. I am, therefore, required to conclude that § 15.2-2100 does not apply to the sale of a portion of the Ferrell Parkway Phase VII right-of-way.

1For the purposes of this opinion, after reviewing all documents forwarded with your request, I must assume that such right-of-way is either vacant or bare real property that the city has not improved. The documents provided for review contain no indication that the City of Virginia Beach has improved the subject right-of-way property.

2Section 15.2-2107 provides that persons occupying or using streets, avenues, or any other public places, contrary to law, "shall be guilty of a Class 4 misdemeanor."


5Id. (emphasis in italics added) (citing Art. VII, § 9 and § 15.1-307, predecessor statute to § 15.2-2100); see also Stendig Development Corp. v. Danville, 214 Va. 548, 202 S.E.2d 871 (1974) (holding that Article VII, § 9 vote requirement is not limited to property dedicated to public use and does not proscribe city ordinance requiring three-fourths vote to sell any city property).


9Id.

10Id. at 853.

11Id. at 854.


13Id. (quoting Va. Const. art. VII, § 9).

14Id.


17Id. at 171.


19See id.

20Id. at 32 n.6 (quoting Black's Law Dictionary 1107 (5th ed. 1979)).

50 2001 REPORT OF THE ATTORNEY GENERAL

You ask whether § 15.2-2100(A) of the Code of Virginia, which requires a three-fourths vote of all members elected to council to sell the rights to certain public property, applies to the sale of two buildings owned and previously used as school buildings by the City of Hopewell.

A relatively recent opinion of the Attorney General issued to Mr. Edwin N. Wilmot, City Attorney for the City of Hopewell, dated December 19, 2000 ("Wilmot opinion"), concludes that Article VII, § 9 of the Constitution of Virginia and § 15.2-2100(A) apply to the sale of the two city-owned buildings about which you inquire. You provide the following information in addition to that provided in the Wilmot opinion request and inquire whether this information alters the conclusion of the Wilmot opinion regarding the two buildings.

Pursuant to § 22.1-129, the school board conveyed to the city one of the buildings as surplus property. The building is vacant and boarded up and has not been used for ten years. The only purpose to which the building has been devoted since its conveyance to the city has been for storage and vehicular parking.

The other building is used as an elementary school but will become vacant upon completion of a newly constructed elementary school. The building is also used as a polling place and a meeting place for religious services and for other public functions. When both buildings no longer are used as schools and are vacant, the school board will relinquish both buildings to the city.

The city plans to develop and sell these two buildings. A majority of the city council seeks to develop the vacant building into a regional public library, as headquarters for the Appomattox Regional Library System. In order to obtain partial funding for the project through federal and state tax credits, you note that the building must be conveyed to a private limited partnership. Further,
the arrangement may be structured so that the property reverts to the city at
the end of a specific time period.

The other building, currently used as an elementary school, soon will be closed
to the public. The city plans to redevelop the building for productive use, which
may entail selling the building to a private entity for development as residential
apartments. You are advised that other localities have made similar convey­
ances of former school property in order to take advantage of tax credits and to
facilitate development of the property.

The constitutional provision declaring that the Attorney General “shall perform
such duties ... as may be prescribed by law” is implemented by the statutes
that define the various duties of the office. Section 2.1-118 articulates the
authority of the Attorney General to render official legal opinions. For many
years, Attorneys General have concluded that § 2.1-118, the authorizing statute
for official opinions of the Attorney General, does not contemplate that such
opinions be rendered on matters requiring largely factual determinations,
rather than matters interpreting questions of law. Your question clearly
requires that certain factual determinations be made and applied to the appli­
cable provisions of the Virginia Constitution and enabling statutory provisions.
In addition, § 2.1-118 also prevents the Attorney General from rendering an
official opinion on questions involving the interpretation of matters that are
of a purely local nature. Let me, however, share with you several observations
on overriding principles that control your inquiry that are neither largely factual
determinations nor matters of a purely local nature.

Sections 15.2-2100 and 15.2-2107 implement the provisions of Article VII,
§ 9. Article VII, § 9 requires an “affirmative vote of three fourths of all members
elected to the governing body” before a city may sell any rights “in and to its ...
street, avenues, ... or other public places, or its gas, water, or electric works.”
The clear intent of the constitutional provision is to safeguard public property
and to ensure that it not be appropriated by private self-interests for an
extended term to the detriment of the public without due consideration by
council members.

From the additional facts provided, it is clear that the two buildings are “public
places.” The Wilmot opinion adopts the following definition of “public place”:

“A place to which the general public has a right to resort; not
necessarily a place devoted solely to the uses of the public,
but a place which is in point of fact public rather than private,
a place visited by many persons and usually accessible to the
neighboring public (e.g., a park or public beach). Also, a place
in which the public has an interest as affecting the safety,
health, morals, and welfare of the community. A place exposed
to the public, and where the public gather together or pass to
and fro.”

The additional facts do not alter the conclusion of the Wilmot opinion. In my
view, the two buildings are public, rather than private, places. The public has
a clear interest in such buildings that affects ""the safety, health, morals, and welfare of the community.""§ The final determination, however, regarding whether these two buildings are subject to the three-fourths affirmative vote requirement in Article VII, § 9 and § 15.2-2100(A) depends on a complete and detailed set of facts. Based upon the additional information provided, however, it remains my opinion that the two buildings in the City of Hopewell clearly are ""public places,"" as that term is used in Article VII, § 9 and § 15.2-2100(A).

Consequently, it remains my opinion that Article VII, § 9 and § 15.2-2100(A) apply to the sale of the two described buildings owned by the City of Hopewell.

1See 2000 Op. Va. Att'y Gen. 62 (concluding that buildings owned and used as schools by City of Hopewell are ""public places"" that may not be sold without recorded three-fourths affirmative vote of all members elected to city council).

2VA. CONST. art. V, § 15.


4See, e.g., Op. Va. Att'y Gen.: 1991 at 122, 123-24 (determining whether element of consideration exists sufficient to render duck race form of illegal gambling is factual matter); 1986-1987 at 1, 5-6 (determining accuracy of conflicting newspaper accounts describing existence of alleged prior agreement involving contact visits for death row inmates is factual matter); see also 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 668 (1974) (stating that giving advice and opinions on matters of law is major responsibility of Attorney General).


6Section 15.2-2107 provides that persons occupying or using streets, avenues, or any other public places, contrary to law, ""shall be guilty of a Class 4 misdemeanor."


9Id.

OP. NO. 00-105
CONTRACTS: VIRGINIA PUBLIC PROCUREMENT ACT.
COUNTIES, CITIES AND TOWNS: AUTHORITIES FOR DEVELOPMENT OF FORMER FEDERAL AREAS.

Vint Hill Farms Economic Development Authority is exempt from competitive procurement procedures of Act with respect to acquisition of property; is not exempt with regard to procurement of contract for services.

THE HONORABLE JAY K. KATZEN
MEMBER, HOUSE OF DELEGATES
MARCH 30, 2001

You inquire whether § 15.2-6308 of the Code of Virginia exempts the Vint Hill Farms Economic Development Authority (the ""Authority"") from the requirements of the Virginia Public Procurement Act.
You advise that the Authority was established on March 29, 1996, by proclamation of the Governor pursuant to former §§ 15.1-1320 through 15.1-1341, amended and recodified as §§ 15.2-6300 through 15.2-6321. You relate that the Authority has acquired a military base in Fauquier County from the federal government consisting of approximately 700 acres; obtained rezoning and preliminary subdivision approvals from the board of supervisors consistent with the Authority's master plan; leased over 20 existing commercial buildings to small business; attracted over 225 new jobs; renovated and leased 15 residential units; sold 33 acres to the Federal Aviation Administration for construction of a $95 million facility; and obtained a tax-exempt loan for infrastructure improvements. The Authority is actively redeveloping the military base to create jobs and add to the tax base of the state and the county.

You also relate that the Authority is in the final phase of a grant received from the Department of Defense toward the redevelopment of Vint Hill Farms. You advise that, after this fiscal year, all income necessary for the Authority to redevelop the former military base to a mixed-use, planned residential, commercial, and industrial community must be self-generated from building rentals, sales proceeds, utility fees, and loans. You advise further that the Authority receives no income from either the state or the county.

You relate further that redevelopment of the site is projected to occur over a ten-to-fifteen year period. The Authority anticipates that it will purchase goods and services in connection with the demolition, renovation and maintenance of existing structures and with regard to the construction of new improvements, such as roads, utilities, landscaping and recreation infrastructure.

You advise that the Authority is performing the same real estate landlord and development functions as a private sector development company. You relate that, in such capacity, the amount of time spent during the public procurement process of contracting, advertising and selecting renovation services reduces the Authority's ability to respond effectively when new purchasing or rental opportunities arise. You believe that the public procurement process also reduces the Authority's ability to obtain the services of some proven quality contractors, who can obtain all the work they can do from the private sector without being subjected to the formalized public bid process. Finally, you also believe that the ability to employ contractors of proven quality and responsiveness may save the Authority considerable money over a ten-to-fifteen year project.

Section 15.2-6308 lists the public and corporate powers granted to development authorities to acquire military installations and return them to “nonmilitary uses and to the tax rolls.” The last paragraph of § 15.2-6308 provides:

No provision of law with respect to the acquisition, operation or disposition of property by other political subdivisions or public bodies shall be applicable to an authority unless specifically stated therein. In any locality where planning, zoning or development regulations may apply, the authority shall comply with and is subject to those regulations to the same extent as a private commercial or industrial enterprise.
The Virginia Public Procurement Act requires that "[a]ll public contracts with nongovernmental contractors" be awarded pursuant to competitive procedures, "unless otherwise authorized by law." The requirements of the Act are applicable to "public bodies." The term "public body," as used in the Act, "means any legislative, executive or judicial body, agency, office, department, authority, ... or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in [the Act]." The Authority is both an "authority" and a "political subdivision of the Commonwealth." Prior opinions of the Attorney General consistently conclude that political subdivisions are public bodies within the meaning of § 11-37 and are required to comply with the Act. It is my opinion that the Authority is a "public body" for purposes of the Act and, therefore, is required to conform to the provisions of the Act. Section 11-37 of the Act sets forth the following additional definitions: "[s]ervices' means any work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies"; "[n]onprofessional services' means any services not specifically identified as professional services"; "[p]ublic contract' means an agreement between a public body and a nongovernmental source that is enforceable in a court of law." Section 11-37, however, does not define the term "property.

Since § 11-41(A) of the Act requires that "[a]ll public contracts with nongovernmental contractors" be procured competitively, "unless otherwise authorized by law," the threshold question is whether the contract is one entered into by, and binding upon, a "public body." If that question is answered affirmatively, then such contract must be competitively procured, "unless otherwise authorized by law." The specific provision in the last paragraph of § 15.2-6308, stating that no law pertaining to the "acquisition, operation or disposition of property by other political subdivisions or public bodies shall be applicable to an authority unless specifically stated therein," does not define the term "property." In the absence of any such definition, the term must be given its common, ordinary meaning. "Property," as used in § 15.2-6308, means "[t]he right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel); the right of ownership ... [a]ny external thing over which the rights of possession, use, and enjoyment are exercised." Although the General Assembly commands that the statutory provisions pertaining to development authorities be "liberally construed," the plain meaning of § 15.2-6308 must prevail. As the Supreme Court of Virginia has stated, "the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction."

I am, therefore, of the opinion that, pursuant to § 15.2-6308, the Authority is exempt from the competitive procurement procedures of the Virginia Public Procurement Act with respect to the acquisition of property, but is not exempt with regard to the procurement of any contract for services.


Section 11-41(A) (Michie Supp. 2000).

Section 11-37 (Michie Supp. 2000).


“Professional services” encompass “the practice of accounting, actuarial services, architecture, land surveying, landscape, architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering.” Section 11-37.

Section 11-41(A).


BLACK’S LAW DICTIONARY 1232 (7th ed. 1999).


“If the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it.” Temple v. City of Petersburg, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944); see also 1993 Op. Va. Att’y Gen. 256, 257.


OP. NO. 00-107
COUNTIES, CITIES AND TOWNS: ALLEGHANY HIGHLANDS ECONOMIC DEVELOPMENT AUTHORITY.

Allegany County may not offset funding provided to Alleghany-Highlands Economic Development Authority for failed industrial project against minimum amount county is required to remit annually as member of Authority.

MR. MICHAEL M. COLLINS
COUNTY ATTORNEY FOR ALLEGHANY COUNTY
DECEMBER 21, 2001

You ask whether a county may offset, pursuant to § 15.2-6209 of the Code of Virginia, an amount of money paid by the county to the Alleghany-Highlands Economic Development Authority against the amount it currently owes to the Authority.

You relate that Alleghany County is a member locality of the Alleghany-Highlands Economic Development Authority. You also relate that the county contributes annually to the Authority a certain amount of funding in compliance with the requirements of § 15.2-6209. You further relate that the county recently provided additional funding to the Authority for an industrial project that failed to materialize. You inquire regarding whether this amount of additional funding provided to the Authority may be used to offset the upcoming annual contribution otherwise owed by the county pursuant to § 15.2-6209.
Chapter 62 of Title 15.2, §§ 15.2-6200 through 15.2-6214, establishes and governs the Alleghany-Highlands Economic Development Authority. Specifically, § 15.2-6209 provides for the capitalization of the Authority by "each county and city which is a member of the Authority," and further provides that every year each such member

may remit to the Authority an amount it deems appropriate for Authority purposes. However, in no event shall the [member's] contribution be an amount less than the greater of five percent of the machinery and tools tax collected in the previous year or a sum equal to its highest previous annual allocation to the Alleghany-Highlands Economic Development Commission. [Emphasis added.]

It is axiomatic that the primary goal of statutory interpretation is to interpret statutes in accordance with the legislature's intent. Therefore, statutes must be construed in a manner that ascertains and gives effect to legislative intent. Such intent "must be gathered from the words used, unless a literal construction would involve a manifest absurdity." Finally, the entire statutory provision must be reviewed to ascertain legislative intent.

With respect to capitalizing the Alleghany-Highlands Economic Development Authority, § 15.2-6209, by providing that each member "may remit ... an amount it deems appropriate," contemplates that each of the Authority's members exercises its own discretion in deciding the amount of its contribution. Section 15.2-6209 also mandates, however, that such discretion is subject to a minimum amount of contribution. Therefore, in reviewing § 15.2-6209 in its entirety, it is clear that the statute requires that each member's annual contribution meet a minimum amount as determined by the statutory formula. Because this minimum amount is statutorily required to be remitted every year by each Authority member, the fact that a greater amount may have been remitted by a member in a prior year does not alter that member's obligation under the statute.

Accordingly, I must conclude that the amount Alleghany County originally provided to the Alleghany-Highlands Economic Development Authority as additional funding for an industrial project that failed to materialize may not be used to offset the county's obligation under § 15.2-6209 to remit annually to the Authority the minimum amount required by that statute.

3See Commonwealth v. Jones, 194 Va. 727, 731, 74 S.E.2d 817, 820 (1953) (noting that, to derive true purpose of act, statute should be construed to give effect to its component parts).
4The use of the word "shall" in a statute ordinarily implies that its provisions are mandatory. See Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) (noting that "shall" is word of command, used in connection with mandate); see also Schmidt v. City of Richmond, 206 Va. 211,
You ask whether the requirements in §§ 15.2-2126 and 15.2-2127 of the Code of Virginia, relating to giving of notice and submission of application to counties for approval of sewage systems, are applicable to a town seeking to expand its existing sewage system into a designated service area of the county in which the town is located.

You relate that a county has two independent towns located within its boundaries, one of which is the town in issue. You also relate that the county participates in a sewer authority with the other town. You further relate that the county proposes to build a sewage system on a portion of the county remote from either town. You note that the county expects to begin construction of the system within twelve months, with service beginning approximately twelve to eighteen months thereafter. Additionally, you note that the county has adopted a master sewer plan to include construction of a sewage system adjacent to the town limits of the town in issue. You conclude that the participation of the county in a sewer authority, along with the anticipated construction of a sewage system in the area remote from the town in issue, and the county's adoption of a master sewer plan negate the provision in § 15.2-2126, which allows a town to expand its sewage system into a county without notice to the county if the county itself does not operate a sewage system or provide sewage services. For the reasons that follow, I respectfully disagree with your conclusion.

The authority for a municipality to establish and operate water and sewer systems is set forth in § 15.2-2109(A). Specifically, this statute grants to any locality the power to "establish, maintain, operate, extend and enlarge ... sewerage ... systems ... within or outside the limits of the locality." Accordingly, the authority for the town in issue to extend its existing sewer system outside its limits is clear and unambiguous. Whether it may do so without notice to and subsequent approval or disapproval by the adjacent county in which such service is extended is determined by § 15.2-2126.

Section 15.2-2126 provides:

Any person, including municipal corporations, that proposes ... an extension of any existing [sewage] system ... shall ...
notify in writing the governing body of the county in which such sewage system is to be located and shall appear at a regular meeting thereof and notify such governing body in person. However, a town proposing to expand a sewage system shall not be required to provide notice in writing or in person to a county if the county itself does not operate a sewage system or provide sewerage services.

The plain language of § 15.2-2126 requires the town in issue to notify in writing and in person the county wherein the town's sewage service would be extended, unless the county does not operate a sewage system or provide sewerage services. Under the facts presented, the county does not presently operate a sewage system nor does it provide sewerage services. With respect to its participation in a sewer authority, the Attorney General has concluded previously that a locality's power to provide utility services under state statutes is independent of a locality's power to create a water and sewer authority. Thus, the county's participation in a sewer authority consisting of the county and another town is not tantamount to the county itself operating a sewage system or providing sewerage services.

Accordingly, it is my opinion that the town in issue falls within the purview of the exception to the general notice requirement provided in § 15.2-2126. Consequently, the requirements in §§ 15.2-2126 and 15.2-2127, relating to giving of notice and submission of application to counties for approval of sewage systems, are not applicable to such town.

1See VA. CODE ANN. § 15.2-5102 (Michie Supp. 2001) (authorizing governing bodies of two or more localities to create sewer authority by ordinance).

2See VA. CODE ANN. § 15.2-2128 (Michie Repl. Vol. 1997) (authorizing governing body of county or town which has adopted master plan for sewage system to deny application for sewage system if such denial appears to it to be in best interest of inhabitants of county or town).

3Section 2.1-118 requires that a request by a county attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."


6See VA. CODE ANN. § 15.2-2127 (Michie Repl. Vol. 1997) (providing that governing body of county notified of proposed extension of sewage system in county pursuant to § 15.2-2126 is authorized to disapprove same).

7Compare 1973-1974 Op. Va. Att'y Gen. 108, 110 (concluding that town which sought to extend its sewer system into adjacent county did not have to follow notice provisions of § 15.1-326, predecessor statute to § 15.2-2126, because statute did not include municipal corporations thereunder). Section 15.1-326 subsequently was amended to include municipal corporations. See 1974 Va. Acts ch. 246, at 357, 357.

8Utility services include those services related to "waterworks, sewerage, gas works (natural or manufactured), electric plants, public mass transportation systems, [and] stormwater management systems." Section 15.2-2109(A).

You ask whether the participation by a consumer affairs investigator as a mediator in a dispute being reviewed by a local consumer affairs office violates the mediation or confidentiality provisions of Chapter 21.2 of Title 8.01, §§ 8.01-581.21 through 8.01-581.23 of the Code of Virginia.

You relate that a local consumer affairs investigator sometimes assists and facilitates agreements between the parties to a consumer complaint investigation. You also relate that many complaint investigations result in informal negotiations and agreements that satisfy the parties in dispute, while others result in the determination that a criminal offense has been committed or that a statewide investigation is necessary. In addition, you advise that an investigator often receives requests from other governmental agencies or when called to testify in a judicial proceeding to disclose information and records in his files. You conclude that the role of an investigator as a mediator does not fall within the purview of § 8.01-581.21 or § 8.01-581.22.

Section 15.2-963 authorizes any county or city to “establish a local office of consumer affairs.” The provision was enacted in 1974, and authorizes a local office of consumer affairs to serve as a central coordinating agency and clearinghouse for receiving and investigating complaints about illegal, fraudulent, deceptive or dangerous consumer practices.

Section 15.2-963(1) specifically authorizes local offices of consumer affairs to receive and investigate consumer complaints. Section 15.2-963(2) authorizes such offices “to resolve complaints ... by means of voluntary mediation or arbitration which may involve the creation of written agreements to resolve individual complaints between complainants and respondents to complaints.” Section 15.2-963(4) authorizes the offices “[t]o maintain records of consumer complaints” and provides that such records remain “confidential except to the extent that disclosures of such matters may be necessary for the enforcement of laws.” Clearly, local offices of consumer affairs established pursuant to § 15.2-963 possess adequate statutory authority to receive, investigate, mediate, and arbitrate consumer complaints and to disclose information connected with such complaints as may be required for the enforcement of laws.

Chapter 21.2 of Title 8.01, §§ 8.01-581.21 through 8.01-581.23, provides for the resolution of controversies through mediation. As used in Chapter 21.2, “mediation” means the process by which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution.
of the controversy," and "mediator" means an impartial third party selected by agreement of the parties to a controversy to assist them in mediation." Additionally, § 8.01-581.22 sets forth confidentiality provisions regarding "memoranda, work products and other materials contained in the case files of a mediator."

An accepted principle of statutory construction provides that a specific statute is controlling over a more general statute. In this case, § 15.2-963 provides for and governs the role of local offices of consumer affairs. Importantly, this statute specifically confers upon these offices the power to mediate consumer complaints and authorizes them to create written agreements to resolve such complaints. Accordingly, in light of the specific statutory language regarding mediation of consumer complaints contained in § 15.2-963, I am of the view that this statute is controlling over the more general mediation provisions of §§ 8.01-581.21 through 8.01-581.23.

Additionally, § 15.2-963 was enacted prior to the enactment of Chapter 21.2 of Title 8.01. The General Assembly is, of course, presumed to know what statutes previously have been enacted. Therefore, had the General Assembly intended for §§ 8.01-581.21 through 8.01-581.23 to be applied to mediation conducted by local consumer affairs offices, it could have so provided.

Accordingly, it is my opinion that §§ 8.01-581.21 through 8.01-581.23 are not applicable to the investigation and mediation activities connected with the resolution of consumer complaints pursuant to § 15.2-963.

1Section 2.1-118 requires that a request by a Commonwealth's attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."


5Section 15.2-963(4).


7Id.


11Compare Va. Code Ann. § 10.1-1186.3 (Michie Repl. Vol. 1998) (stating that "[t]he State Air Pollution Control Board, the State Water Control Board and the Virginia Waste Management Board, in their discretion, may employ mediation as defined in § 8.01-581.21").
Mayor of City of Petersburg may remove commissioners of Petersburg Hospital Authority for inefficiency, neglect of duty or misconduct, only after commissioners have been given copy of charges against them at least 10 days prior to hearing at which they have opportunity to be heard.

MR. MICHAEL R. PACKER
CITY ATTORNEY FOR THE CITY OF PETERSBURG
MAY 10, 2001

You ask whether the mayor of the City of Petersburg has the authority to remove from office the commissioners of the Petersburg Hospital Authority.

You advise that the Petersburg Hospital Authority is established in accordance with the laws governing hospital authorities. You advise further that the mayor appoints the commissioners of the Authority and fills any vacancies by appointment of commissioners nominated by the remaining commissioners. You relate that the mayor has been asked to remove the Authority’s commissioners, because they have voted to purchase land for the purpose of relocating the main hospital facilities within the City of Petersburg.

Chapter 53 of Title 15.2, §§ 15.2-5300 through 15.2-5367 of the Code of Virginia comprises the statutory scheme governing hospital authorities and provides for the establishment of such authorities as the Petersburg Hospital Authority. Section 15.2-5302 provides:

In each city there shall be a political subdivision of the Commonwealth, with such public and corporate powers as are set forth in this chapter, to be known as the "hospital authority" of the city.

Subsequent provisions of Chapter 53 provide the framework for determining the need for such an authority, its subsequent powers, its bonding authority, and the method for its dissolution. Specifically, § 15.2-5303 provides that the city council must declare a need for such an authority; § 15.2-5307 provides that the city mayor must appoint the authority's commissioners; § 15.2-5319 provides that the governing body of any city in which the authority is located may make appropriations to aid the authority; and § 15.2-5349 provides that any bonds and other obligations of the authority shall not be a debt of the Commonwealth. Finally, § 15.2-5321 provides:

Insofar as the provisions of this chapter are inconsistent with the provisions of any other law, the provisions of this chapter shall be controlling. Nothing in this chapter shall prevent any city from establishing, equipping, and operating a hospital or hospitals or improving or extending existing hospitals and hospital facilities under the provisions of its charter or any general law other than this chapter.

The use of the word “shall” in a statute ordinarily implies that its provisions are mandatory. It, therefore, is the express intent of the General Assembly that the provisions of Chapter 53 override any potential conflicts with other statutory provisions.
Pursuant to § 15.2-5307, the mayor appoints the commissioners to the hospital authority. Section 15.2-5311 specifically qualifies the authority of a mayor to remove commissioners so appointed:

The mayor may remove a commissioner for inefficiency or neglect of duty or misconduct in office, but only after the commissioner has been given a copy of the charges against him, which may be made by the mayor, at least ten days prior to the hearing thereon and has had an opportunity to be heard in person or by counsel.

The use of the word "may" in § 15.2-5311 clearly indicates the grant of permissive and discretionary authority.³

The Supreme Court of Virginia has stated that, "[i]f the language used in a statute] is plain and unambiguous, and its meaning clear and definite, effect must be given to it regardless of what courts think of its wisdom or policy."⁴ In such cases, courts must find the meaning within the statute itself. The General Assembly clearly and unambiguously permits the mayor to remove commissioners of a hospital authority. When a statute creates a specific grant of authority, however, such authority exists only to the extent specifically granted in the statute.⁵ The Supreme Court has also stated that: "'[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied.'"⁷

Consequently, it is my opinion that § 15.2-5311 empowers the mayor of the City of Petersburg to remove the commissioners of the Petersburg Hospital Authority for neglect of duty or inefficiency or misconduct in office, but "only after" the commissioners have been given a copy of the charges made against them at least ten days prior to a hearing, and they have had an opportunity to be heard.

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1See Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) (noting that "shall" is word of command, used in connection with mandate); see also Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that "shall" generally indicates procedures are intended to be mandatory, imperative or limited); Op. Va. Att'y Gen.: 1997 at 16, 17; 1996 at 20, 21; 1991 at 126, 126, and opinions cited therein; id. at 127, 128, and opinions cited therein.


4Fairbanks, etc., Co. v. Cape Charles, 144 Va. 56, 63, 131 S.E. 437, 439 (1926); see also Town of South Hill v. Allen, 177 Va. 154, 165, 12 S.E.2d 770, 774 (1941); Hammer v. Commonwealth, 169 Va. 355, 364-65, 193 S.E. 496, 499-500 (1937); Woodward v. Staunton, 161 Va. 671, 674, 171 S.E. 590, 591 (1933).


You ask whether § 15.2-1302 of the Code of Virginia operates to protect school funding provided by the state with regard to certain localities.

You relate that a county and a city are operating a joint school system pursuant to a written agreement. You also relate that members from each locality comprise the resulting joint school board. You note that the amount of state school funding for the system derives from computations separately calculated with reference to the county and city, respectively. You state that the authorized state funds for such joint system, as well as state directives regarding schools within the system, have been separately sent to the county and city accordingly. You further state that either locality may choose to opt out of the joint school system and return to operating separate county and city school systems. Lastly, you advise that the city seeks to change to town status. You inquire whether § 15.2-1302 will allow the current state school funding distribution to remain in place upon such transition subject to the time limitations set forth in the statute.

A county and city may operate a joint school system pursuant to the authority and terms set forth in §§ 22.1-26 and 15.2-1300. Section 22.1-26 generally provides for two or more school boards to establish joint schools. Section 15.2-1300(A) generally provides for two or more political subdivisions to jointly exercise any power, privilege or authority otherwise capable of being exercised by each such political subdivision. Section 15.2-1300(B) specifically authorizes political subdivisions to enter into agreements with one another for joint action.

Section 15.2-1302 provides two instances for which distribution of funds by the state to a locality remain in effect for certain limited time periods, subsequent to the occurrence of certain events specified in the statute. First, § 15.2-1302 provides that “any state funds that were distributed to a locality, including a local school board, in support of a governmental program or function prior to a consolidation of such program or function ... shall continue to be distributed to the entity or entities carrying out the program or function after consolidation” in accordance with the schedule articulated in the statute. Secondly, § 15.2-1302 provides that “state funds ... distributed to a locality, including a
local school board, in support of a governmental program or function prior to a consolidation of such program or function" shall continue to be so distributed after a "governmental consolidation of the entities providing such programs or functions" subject to the schedule set forth in the statute.\(^2\)

Importantly, § 15.2-1302 is premised on the fact that state funds have been distributed to each locality prior to any "consolidation" of a governmental program or function. Therefore, if the school system in question resulted from a "consolidation," § 15.2-1302 would not be applicable since this statute, by its plain language,\(^3\) operates only when the funds have been distributed to a locality prior to a consolidation. Conversely, if this joint school system was not effected by a consolidation, then the entities involved are entitled to the treatment of funds afforded in § 15.2-1302 should they later become consolidated.

In the instant case, each locality has entered into an agreement with the other to operate a joint school system. The Attorney General previously has recognized that the phrase "joint school system" is subject to interpretation based on a factual determination.\(^4\) Whether such system is tantamount to a consolidation likewise is dependent on the facts.

The county and city and two school boards about which you inquire are linked by a written agreement which provides that each locality may opt out of the arrangement and revert to individual school systems. Additionally, the stream of state funds flows to each locality based on separate calculations for each locality. Indeed, the state has treated each locality separately in that the state funds for the system's schools are computed and distributed separately. Therefore, the state has not recognized a consolidation of the two school systems. Accordingly, it is my opinion that a consolidation of the two school systems has not yet taken place.\(^5\)

Because I conclude that the joint school system in issue did not result from a consolidation of two separate systems, it is necessary to determine whether the transition of the city to town status will effectuate a consolidation as contemplated by § 15.2-1302.

Section 15.2-1302 specifically provides that the state funds distributed to a locality in support of a governmental program or function prior to the "governmental consolidation of the entities providing such programs or functions, shall continue to be distributed to the entity or entities carrying out the program or function after consolidation" subject to the schedule set forth in the statute. The use of the word "shall" in a statute ordinarily implies that its provisions are mandatory.\(^6\) Generally, consolidations of localities are governed by Chapter 35 of Title 15.2, §§ 15.2-3500 through 15.2-3550. Chapter 41 of Title 15.2, §§ 15.2-4100 through 15.2-4120, specifically addresses the transition of a city to town status. Significantly, § 15.2-1302 provides that, for its purposes, "consolidation" includes the transition of a city to town status." A statute that is not ambiguous needs no interpretation.\(^7\) In view of the unambiguous language of § 15.2-1302, it is clear that the transition of a city to town status activates the operative provisions of the statute.
Accordingly, it is my opinion that § 15.2-1302 applies to the localities about which you inquire upon the transition of the city to town status.8

2See id.
5Compare Op. Va. Att'y Gen.: 1987-1988 at 323, 324; 1985-1986 at 4, 6 (noting that construction of statute by public officials charged with its administration is entitled to great weight and in doubtful cases will be regarded as decisive).
6See Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) (noting that "shall" is word of command, used in connection with mandate); see also Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that "shall" generally indicates procedures are intended to be mandatory, imperative or limited); Op. Va. Att'y Gen.: 1997 at 16, 17; 1996 at 20, 21; 1991 at 126, 126, and opinions cited therein; id. at 127, 129, and opinions cited therein.
7See Temple v. City of Petersburg, 182 Va. 418, 29 S.E.2d 357 (1944) (noting that, when language of statute is plain and unambiguous and its meaning clear and definite, it must be given effect).
8Compare 2000 Op. Va. Att'y Gen. 149, 150, 151 n.6 (concluding that, pursuant to §§ 15.2-1302 and 15.2-4116, city continues to receive separate state funding to operate independent library upon city's transition to town status).

OP. NO. 01-052
COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.
CONSERVATION: HISTORIC RESOURCES – DEPARTMENT OF HISTORIC RESOURCES.
CONSTITUTION OF VIRGINIA: BILL OF RIGHTS.

Attorney General declines to render opinion: (1) whether ordinance delegating authority to architectural review board to determine historical significance of vacant parochial school building for purposes of demolition by church is invalid on its face; such function is properly left to local authority responsible for adoption and enforcement of ordinance; (2) whether decision of architectural review board places substantial burden on religious exercise of church; such decision requires analysis of facts and circumstances rather than interpretation of law; (3) whether review board's denial of church's permit application constitutes unconstitutional 'taking.' Department of Historic Resources is appropriate agency to determine whether building located in historic district and labeled 'ruin' may be removed.

THE HONORABLE JOHNNY S. JOANNOU
MEMBER, HOUSE OF DELEGATES
JUNE 29, 2001

You ask several questions regarding the scope of authority of an architectural review board pursuant to § 15.2-2306 of the Code of Virginia.1 You first ask whether the absence of published objective standards for use by an architectural review board in determining historical significance constitutes an invalid delegation of authority by the Portsmouth City Council.

You relate that a church in Portsmouth has purchased for demolition a parochial school building that has been vacant since 1991, for the purpose of constructing
a prayer garden plaza and expanding the church parking lot. You understand that the Portsmouth church was founded in 1772, and is the third oldest church of its denomination in the United States. The architectural review board has determined that the school building contained an 1891 structure regarded as historic. In the 1950s, the school building was built over with a brick wrap-around structure, leaving one of the four original walls visible. You advise that the Department of Historic Resources regards the building as a “ruin,” because the original integrity of the building had been greatly altered. The church desires to increase its presence and visibility on the street corridor now occupied by the former parochial school building.

The Portsmouth city code enclosed with your correspondence requires the church to apply for a certificate of appropriateness to demolish any building in the locality’s historic district. Application is made to the secretary of the architectural review board. The board either issues or denies a certificate of appropriateness based on the general purposes for creating historic districts, including “[t]he preservation and protection of historic buildings, structures, places and areas of historic interest.” For purposes of demolition, the architectural review board must consider “[t]he historical or architectural value and significance of the building or structure and its relationship to or congruity with the historic value of the land, place and area in the historic district upon which it is [erected],” and with other buildings or structures in the vicinity. Any person aggrieved by a decision of the board may appeal such decision to the local governing body for review. The basis for such appeal must be “limited to an alleged error by the [board] in finding that the proposed erection, alteration, reconstruction or restoration ... would not be architecturally compatible with the historic landmarks, buildings or structures within the historic district.” Decisions of the governing body may be reviewed and revised in circuit court.

This Office historically has followed a policy of responding to official opinion requests only when such requests concern an interpretation of federal or state law, rule or regulation. In instances when a request requires an interpretation of a local ordinance, the Attorney General has declined to respond in order to avoid becoming involved in matters solely of local concern and over which the local governing body has control. Any ambiguity that exists in a local ordinance is a problem to be rectified by the local governing body rather than by an interpretation by this Office. In addition, a 1987 opinion of the Attorney General concludes that the Attorney General has declined to render official opinions when the request involves, among others, a matter of purely local concern or procedure. Accordingly, I have limited my comments to the scope of authority of an architectural review board created by a locality pursuant to § 15.2-2306.

Section 15.2-2306 contains the only reference to architectural review boards found in the Virginia Code. Section 15.2-2306 declares that the governing body of a locality may provide for an architectural review board to administer any ordinance adopted by the locality setting forth the historic landmarks within the locality. Architectural review boards have only two specifically designated functions: (1) to review and certify that a proposed building or structure, including signs, is “architecturally compatible with the historic landmarks,
buildings or structures" in the district subject to the board’s control; and (2) to review and approve or disapprove the razing, demolition or moving of a historic landmark, building or structure within a historic district.

Statutes that relate to the same subject "are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogenous system, or a single and complete statutory arrangement." When construing statutes on the same subject, each section must be considered in conjunction with every other section to produce a harmonious result.

Chapter 22 of Title 15.2, §§ 15.2-2200 through 15.2-2327, presents such a "connected system" for local government planning, subdivision of land and zoning. Various statutes within Chapter 22 detail the creation, powers and responsibilities of the several bodies and officers charged with carrying out the local land use regulation process, including the local governing body, the planning commission, the zoning administrator, the board of zoning appeals and the architectural review board.

When a local governing body delegates a portion of its legislative power, it must establish standards for the exercise of the authority delegated. "There must be provided uniform rules of action, operating generally and impartially, for enforcement cannot be left to the will or unregulated discretion of subordinate officers or boards." This statement "is subject to a qualification, ‘where it is difficult or impracticable to lay down a definite rule,’" and a delegation to an administrative board of the power to exercise a discretion based upon a finding of facts is not an invalid delegation. This exception is premised on the understanding that legislation cannot address every variable that will arise in the application or administration of the delegated authority. In addition, it is presumed that public officials will discharge their duties in accordance with law, and if an appeal may be had from the arbitrary acts of an official, due process requirements are met.

I note that, pursuant to the Portsmouth city code, any person aggrieved by a decision of the architectural review board may appeal the decision to the local governing body for review. Furthermore, decisions of the governing body may be reviewed and revised in circuit court. In addition, the review board is composed of members from civic coalitions, associations and leagues from the historic area, and "members ... chosen to provide professional expertise, such as architects, attorneys, real estate agents or historians." Under the circumstances, I cannot conclude that the delegation of authority here is invalid on its face.

You next inquire whether a building that is located in a historic district and is labeled a "ruin" may be removed.

You relate that, according to guidelines issued by the Department of Historic Resources, a building is considered a "ruin" when the original integrity has been greatly altered. Section 10.1-2202 states that the powers and duties of the Director of the Department are designed
to encourage, stimulate, and support the identification, evaluation, protection, preservation, and rehabilitation of the Commonwealth's significant historic, architectural, archaeological, and cultural resources; in order to establish and maintain a permanent record of those resources; and in order to foster a greater appreciation of these resources among the citizens of the Commonwealth.

Among the powers and duties set forth in § 10.1-2202, the Director is required to aid and to encourage counties, cities and towns to establish historic zoning districts for designated landmarks and to adopt regulations for the preservation of historical, architectural, or archaeological values; [and]

[to provide technical advice and assistance to individuals, groups and governments conducting historic preservation programs and regularly to seek advice from the same on the effectiveness of Department programs.]31

For many years, Attorneys General have concluded that § 2.1-118, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law.32 In addition, two 1987 opinions of the Attorney General conclude that, in rendering official opinions pursuant to § 2.1-118, the Attorney General has declined to render such opinions when the request (1) does not involve a question of law, (2) requires the interpretation of a matter reserved to another entity, (3) involves a matter currently in litigation, or (4) involves a matter of purely local concern or procedure.33 Prior opinions also conclude that a request for an official opinion made pursuant to § 2.1-118 concerning the propriety of the actions of another entity interpreting matters reserved solely to it is not subject to review by the Attorney General and must be treated as the binding determination with regard to the matter.34 The General Assembly clearly has authorized the Department of Historic Resources, through its Director, to promulgate guidelines pertaining to structures contained in historic districts. Consequently, I must respectfully decline to render an opinion regarding whether a building located in a historic district and fitting the Department's definition of a "ruin" may be removed. I am of the view that the Department of Historic Resources is the appropriate agency to make such a determination.35

You also ask whether the Religious Land Use and Institutionalized Persons Act of 200036 ("Religious Land Use Act") permits the removal of a building that is viewed as a substantial threat to the existence of another church building.

A recent federal district court case explains that the concept of a religious freedom restoration act began as the congressional response to the decision of the Supreme Court of the United States in Employment Division, Department of Human Resources v. Smith,37 which construed the Free Exercise Clause of the First Amendment to the Constitution of the United States to hold that neutral,
generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.\textsuperscript{38} With the enactment of the Religious Freedom Restoration Act of 1993,\textsuperscript{39} Congress sought to rescind \textit{Smith} and restore what is referred to as the pre-\textit{Smith} standard: the “compelling interest/least restrictive means” test found in the cases of \textit{Sherbert v. Verner} and \textit{Wisconsin v. Yoder}.\textsuperscript{40} Through the 1993 Act, Congress reinstated the compelling interest test eschewed by \textit{Smith} by requiring that a generally applicable law placing a “substantial burden” on the free exercise of religion must be justified by a “compelling governmental interest” and must employ the “least restrictive means” of furthering that interest.\textsuperscript{41} In 1997, the Supreme Court struck down the Act in the case of \textit{City of Boerne v. Flores}.\textsuperscript{42} “The Court held Congress lacked the power under the Enforcement Clause of the Fourteenth Amendment to change the meaning of the First Amendment.”\textsuperscript{43} In 2000, Congress responded with the Religious Land Use Act, a law similar to the Religious Freedom Restoration Act.\textsuperscript{44}

The Religious Land Use Act forbids the imposition or implementation of land use regulations “in a manner that imposes a substantial burden on the religious exercise of a person, ... unless the government demonstrates that imposition of the burden”\textsuperscript{45} furthers a compelling governmental interest and is the least restrictive means available.\textsuperscript{46} The Act applies whenever the substantial burden is imposed in the implementation of a land use regulation under which a government makes, or is permitted to make, “individualized assessments of the proposed uses for the property involved.”\textsuperscript{47}

In analyzing a claim under the Religious Land Use Act, the government must determine (1) whether a substantial burden has been imposed on the exercise of sincerely held religious beliefs, and (2) whether the state can justify the imposition of that burden. Therefore, if the church in question is unable to show that the board’s decision is a substantial burden on religious exercise, the board is not required to come forth with proof of its interest. Such a determination requires an in-depth analysis of the facts and circumstances of the particular case. For many years, Attorneys General have concluded that § 2.1-118 does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law.\textsuperscript{48} Consequently, I am unable to provide a determination whether the decision of the architectural review board places a substantial burden on the religious exercise of the members of the church.

Finally, you ask whether the architectural review board’s denial of the church’s application for a permit constitutes a “taking” under eminent domain.

The Supreme Court of Virginia has defined “eminent domain” as “the right on the part of the state to take or control the use of private property for the public benefit when public necessity demands it, is inherent in every sovereignty, and is inseparable from sovereignty, unless denied to it by its fundamental law.”\textsuperscript{49} The Court also has stated that “[t]he only constitutional limitations imposed upon the power of eminent domain are contained in the just compensation clause” of the Constitution of Virginia.\textsuperscript{50} “[T]here is no constitutional right to a
hearing on the issue of necessity [for such a taking]. The necessity or expediency of the condemnor's project is a legislative question and is not reviewable by the courts.

The Court has also commented that, "[a]s sovereign, the State has the right of jurisdiction and dominion for governmental purposes over all the lands ... within its territorial limits," which is "sometimes termed the jus publicum." The jus publicum and all rights of the people, which are by their nature inherent or inseparable incidents thereof, are incidents of the sovereignty of the State. The Virginia Constitution "impliedly denies to the legislature the power to relinquish, surrender or destroy, or substantially impair the jus publicum.

The General Assembly may delegate its power of eminent domain to political subdivisions and governmental bodies. The delegated right of eminent domain, however, "must be exercised upon such terms and in such manner and for such public uses as the legislature may direct." You provide no facts supporting a delegation by the General Assembly or the local governing body of the right of eminent domain to the architectural review board.

The Taking Clause of the Fifth Amendment to the United States Constitution applies not only to a physical deprivation of property, but also to regulations of property. The Taking Clause is violated when land use regulations do not "substantially advance legitimate state interests," or they "den[y] an owner economically viable use of his land." A land use regulation which does not in its terms arbitrarily discriminate, however, will not be declared unconstitutional, except where its effect upon an individual parcel of land is so great as to amount to a taking of the property without just compensation.

Resolution of any inquiry regarding whether the denial of the permit application by the architectural review board constitutes a "taking" under either the Fifth Amendment to the United States Constitution or the Just Compensation Clause of the Virginia Constitution depends on the particular facts and circumstances of the matter. You provide no such facts upon which to base such a conclusion. Accordingly, I must respectfully decline to render an opinion on whether the board's denial of such a permit application would constitute a "taking."

Section 15.2-2306(A.1) provides:

"Any locality may adopt an ordinance setting forth the historic landmarks within the locality as established by the Virginia Board of Historic Resources, and any other buildings or structures within the locality having an important historic, architectural, archaeological or cultural interest, any historic areas within the locality as defined by § 15.2-2201, and areas of unique architectural value located within designated conservation, rehabilitation or redevelopment districts, amending the existing zoning ordinance and delineating one or more historic districts, adjacent to such landmarks, buildings and structures, or encompassing such areas, or encompassing parcels of land contiguous to arterial streets or highways (as designated pursuant to Title 33.1, including § 33.1-41.1 of that title) found by the governing body to be significant routes of tourist access to the locality or to designated historic landmarks, buildings, structures or districts therein or in a contiguous locality. An amendment of the zoning ordinance and the establishment of a district or districts shall be in accordance with the provisions of Article 7 (§ 15.2-2280 et seq.) of [Chapter 22 of Title 15.2]. The governing body may provide for a review board to administer the ordinance and
may provide compensation to the board. The ordinance may include a provision that no building or structure, including signs, shall be erected, reconstructed, altered or restored within any such district unless approved by the review board or, on appeal, by the governing body of the locality as being architecturally compatible with the historic landmarks, buildings or structures therein."

Section 15.2-2306(A)(2) authorizes the governing body to provide "that no historic landmark, building or structure within any [historic] district shall be razed, demolished or moved until the razing, demolition or moving thereof is approved by the review board, or, on appeal, by the governing body after consultation with the review board."


2Id. The Portsmouth city code uses the phrase "commission of architectural review" for the phrase "architectural review board" as used in this opinion.

3Id. § 40-51(a).

4Id. § 40-54(a).

5Id. § 40-54(b).

6Id. § 40-53.6(a).

7Id.

8Id. § 40-53.6(c).


14Section 15.2-2306(A)(2).


19Section 15.2-2286(4) (Michie Supp. 2000) (zoning administrator is vested with enforcement authority on behalf of local governing body).


21Section 15.2-2306(A.1)-(A)(2).


See Maritime Union, 202 Va. at 681, 119 S.E.2d at 313; Ours Properties, 198 Va. at 852, 96 S.E.2d at 758.

Ours Properties, 198 Va. at 851, 853, 96 S.E.2d at 757, 758.

PORTSMOUTH, VA., CODE § 40-53.6(a), supra note 2.

Id. § 40-53.6(c).

Id. § 40-178(a).


The Supreme Court of Virginia has noted that it is a basic rule of statutory interpretation that "the practical construction given to a statute by public officials charged with its enforcement is entitled to great weight ... and in doubtful cases will be regarded as decisive." Bed Company v. Corporation Commission, 205 Va. 272, 275, 136 S.E.2d 900, 902 (1964).


Id. at *41-42.


Id. § 2(a)(1)(A)-(B) (to be codified at 42 U.S.C. § 2000cc(a)(1)(A)-(B)).

Id. § 2(a)(2)(C) (to be codified at 42 U.S.C. § 2000cc(a)(2)(C)).

See opinions cited supra note 32.


Hamer v. School Bd. of the City of Chesapeake, 240 Va. 66, 70, 393 S.E.2d 623, 626 (1990). The Just Compensation Clause provides that "the General Assembly shall not pass any law ... whereby private property shall be taken or damaged for public uses, without just compensation." Va. Const. art. I, § 11.

Hamer, 240 Va. at 70, 393 S.E.2d at 626; see also Railway Company v. Llewellyn, 156 Va. 258, 278-79, 157 S.E. 809, 815, amended on other ground, 156 Va. 288, 162 S.E. 601 (1931).


Id. at 546, 164 S.E. at 696-97.

Id. at 546, 164 S.E. at 697.

"Blondell v. Guntner, 118 Va. 11, 12, 86 S.E. 897, 897 (1915).

"The Taking Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.


OP. NO. 01-047
COUNTIES, CITIES AND TOWNS: POLICE AND PUBLIC ORDER.
ADMINISTRATION OF GOVERNMENT: ATTORNEY GENERAL AND DEPARTMENT OF LAW (OFFICIAL OPINIONS OF ATTORNEY GENERAL) — TREASURY, STATE TREASURER AND COMPTROLLER — DIVISION OF RISK MANAGEMENT.
CONSTITUTION OF VIRGINIA: EXECUTIVE (ATTORNEY GENERAL).
WORKERS' COMPENSATION: DEFINITIONS AND GENERAL PROVISIONS.
Question regarding whether law-enforcement officers employed in off-duty capacity are considered to be performing "law enforcement activities" for purposes of workers' compensation and personal and property damage liability coverage under local government risk management insurance program requires factual determination rather than interpretation of federal or state law, rule or regulation. Authority of Attorney General to issue official advisory opinions is limited to questions of law.

THE HONORABLE WILLIAM C. MIMS
MEMBER, SENATE OF VIRGINIA
DECEMBER 27, 2001

You ask whether law-enforcement officers engaged in off-duty employment under § 15.2-1712 of the Code of Virginia are considered to be performing "law-enforcement activities" for purposes of workers' compensation and personal and property damage liability coverage under a local government risk management insurance program.

You advise that multifamily rental apartment and commercial office landlords ("private leasing entity(-ies)") contract for the off-duty employment of law-enforcement officers to provide building and grounds security and other crime prevention services. You advise that local government law-enforcement agencies approve and assign officers to perform off-duty employment, as well as arm and equip such officers for most law-enforcement contingencies, whether performed on or off the property of the private leasing entity. Such officers are compensated by the private leasing entity. Further, the officers operate directly under policies, procedures and guidelines established by their local departments. The private leasing entity provides general guidance to, but exercises no control over, the off-duty officers, and grants advance authorization to such officers to act on its behalf. You also advise that officers assigned to off-duty employment are authorized to act in a law-enforcement capacity on the site of the private leasing entity; however, such officers are subject to recall by their local departments without prior notice to the private leasing entity. Consequently, you observe that law-enforcement officers employed under contract in
an off-duty capacity to private leasing entities to provide security and crime prevention services are involved in law-enforcement activities throughout their assigned shifts of work.

You further relate that the locality may assume responsibility for workers' compensation and personal and property damage liability insurance coverage for law-enforcement officers working under contract in an off-duty capacity with private leasing entities only when such officers are engaged in law-enforcement activities; however, the private leasing entities must provide insurance coverage for any nonlaw-enforcement activities performed in an off-duty capacity by law-enforcement officers. You state that it does not appear that the activities of a law-enforcement officer employed in an off-duty capacity to provide building and grounds security and crime prevention services on the property of a private leasing entity can be categorized as either law-enforcement or nonlaw-enforcement activities, because the services performed are so interrelated as to be incapable of clear definition as law-enforcement or nonlaw-enforcement activity.

You indicate that your primary interest is to determine whether law-enforcement officers employed under § 15.2-1712 are engaged in law-enforcement activities for purposes of workers' compensation and personal and property damage liability coverage under a local government risk management insurance program. You also seek clarification regarding what constitutes nonlaw-enforcement activities not covered under such risk management insurance program. We are not aware of the terms of either the contract for off-duty employment between the law-enforcement officers and the private leasing entities or the local government's risk management insurance program.

The constitutional provision declaring that the Attorney General shall perform such duties as may be prescribed by law is implemented by the statutes that define the various duties of the Office. Section 2.2-505 articulates the authority of the Attorney General of Virginia to render official legal opinions. For many years, Attorneys General have concluded that § 2.2-505, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law. Your question requires that certain factual determinations be made and applied to the provisions of a policy or contract of insurance provided under a local government's risk management insurance program. Section 2.2-505 also prevents me from rendering an official opinion on questions involving the interpretation of the terms of such a policy or contract of insurance that are clearly of a purely private and local nature, and has limited responses to requests for official opinions to matters that concern an interpretation of federal or state law, rule or regulation.

Additionally, should the local government entity risk management insurance program to which you refer be a policy with the Department of the Treasury, Division of Risk Management, the General Assembly clearly requires that the Division implement and interpret the provisions of such a program. Prior opinions conclude that a request for an official opinion made pursuant to
§ 2.2-505 concerning the propriety of the actions of another entity interpreting matters reserved solely to it is not subject to review by the Attorney General and must be treated as the binding determination with regard to the matter.\(^8\)

I will, however, share with you several observations on the controlling principles in the question you have raised.

Prior opinions of the Attorney General consider off-duty employment by law-enforcement officers. A 1999 opinion notes that § 15.2-1712 "specifies that [law-enforcement officers] may engage in off-duty employment requiring the use of their police powers as authorized by local ordinance and regulations."\(^9\)

The opinion concludes that law-enforcement officers may not engage in off-duty employment unless the locality has adopted an ordinance permitting such employment.\(^10\) A 1997 opinion concludes that, when a locality has adopted the required ordinance and has promulgated rules and regulations applicable to off-duty employment, "the chief of police may establish a uniform fee schedule as a guide for compensating police officers required by subpoena to appear in civil matters during their off-duty hours."\(^11\) Finally, a 1986 opinion notes that the Law Enforcement Liability Self-Insurance Plan as administered by the Division of Risk Management excludes from coverage the off-duty, "part-time" employment of law-enforcement officers, unless (1) an ordinance has been enacted by the locality pursuant to § 15.2-1712 permitting such off-duty employment, and (2) the employing entity is an "organization" meeting the definition contained in § 18.2-340.16.\(^12\)

The Virginia Local Government Risk Management Plan, "VaRISK 2," is the current policy offered to local governments by the Division of Risk Management. VaRISK 2 excludes from coverage

\[
\text{[a]ny claim resulting from off-duty employment, unless (a) such employment is performed for an employer that is approved by [a] Covered Party authorized to make such decisions, and (b) is performed in a recognized law enforcement context, and (c) if required by the PLAN, a separate contribution has been paid to the PLAN for this activity. VaRISK 2 shall have the final decision in determining what is a recognized law enforcement context under the PLAN.}\]

I am advised that coverage for law-enforcement officers engaged in off-duty employment may be available as an exception to this exclusion; however, there are several conditions that must be met before coverage applies. In addition, VaRISK 2 is available only to plan members, and not all localities have joined the VaRISK 2 plan. The law-enforcement liability policy of insurance offered by the Division of Risk Management also must have been purchased by the member locality. Finally, VaRISK 2 is excess over any other available policy of insurance.

Under the Virginia Workers' Compensation Act, a compensable "injury" means an "injury by accident arising out of and in the course of the employment."\(^14\) Section 65.2-102(A) of the Act specifically addresses workers' compensation coverage of law-enforcement officers in an off-duty capacity:
Notwithstanding any other provision of law, a claim for workers' compensation benefits shall be deemed to be in the course of employment of any ... law-enforcement officer who, in an off-duty capacity ..., undertakes any law-enforcement or rescue activity.

The phrase "[n]otwithstanding any other provision of law," in § 65.2-102(A) indicates a legislative intent to override any potential conflicts with earlier legislation.15

The Court of Appeals of Virginia notes that the terms of employment of a law-enforcement officer are different from a typical employer-employee relationship. "A law enforcement officer is charged with the public duty of exercising his authority in different places, ... and at various times, including evening hours."16 In the case of Graybeal v. Board of Supervisors of Montgomery County, the Supreme Court of Virginia recognized the "atypical circumstances" of a public officer involved in law enforcement.17 Furthermore, the Court held, in the context of the atypical circumstances of a public officer's employment, that the "in the course of" requirement in the Workers' Compensation Act "must be satisfied by a showing of an unbroken course beginning with work and ending with injury under such circumstances that the beginning and the end are connected parts of a single work-related incident."18

As noted, however, your question regarding whether law-enforcement officers employed pursuant to § 15.2-1712 are considered to be performing "law enforcement activities" for purposes of workers' compensation and personal and property damage liability coverage under a local government risk management insurance program, instead, requires an attempt to resolve a dispute involving specific facts. Thus, the question is one requiring a factual determination rather than interpretation of federal or state law, rule or regulation. As noted, the authority of this Office to issue official advisory opinions under § 2.2-505 is limited to questions of law.19

1Section 15.2-1712 provides that "any locality may adopt an ordinance which permits law-enforcement officers and deputy sheriffs to engage in off-duty employment which may occasionally require the use of their police powers in the performance of such employment." The ordinance "may include reasonable rules to apply to such off-duty employment" or may delegate the promulgation of such rules to the local chief of police or local sheriff. VA. CODE ANN. § 15.2-1712 (Michie Repl. Vol. 1997).
2VA. CONST. art. V, § 15.
3See VA. CODE ANN. §§ 2.2-500 to 2.2-518 (Michie Repl. Vol. 2001).
7See §§ 2.2-1839, 2.2-1843.
You inquire whether the law-enforcement authority of your office to go beyond Campbell County is limited to matters directly associated with the circumstances set forth in § 15.2-1724 of the Code of Virginia. You also ask whether the authority of your office under the circumstances set forth in § 15.2-1724 is limited to assisting law-enforcement officers of the other locality or whether the sheriff’s office has authority to act independently beyond the county.

A sheriff is an independent constitutional officer whose duties “shall be prescribed by general law or special act.” A 1980 opinion of the Attorney General notes that, in the absence of a statute providing otherwise, the authority of a sheriff is coextensive with his county. The Supreme Court of Virginia has commented that, as a general rule, the duties of a sheriff and his deputies are regulated and defined by statute. The Court has also stated:

The sheriff is an officer of the court subject to its orders and directions. He is also a conservator of the peace and charged
with the enforcement of all criminal laws within his jurisdic-
tion. It is his duty, as well as the duty of the other police offi-
cers of the county and city, to investigate all violations of law
and to serve criminal warrants.\[5\]

Prior opinions of the Attorney General conclude that, in the absence of a con­stitu­
tional or statutory provision to the contrary, a sheriff has exclusive control
over the day-to-day operations of his office and the assignment of his personnel.\[3\]
Furthermore, a 1985 opinion of the Attorney General notes that, although a
sheriff’s powers and duties are limited to those prescribed by statute, he is
free to discharge those powers and duties in a manner he deems appropriate.\[7\]
The opinion further notes that a sheriff has discretionary authority with respect
to personnel policies, cooperative agreements with federal agencies, and policies
governing the use of vehicles by the sheriff’s personnel.\[8\]

Generally, in the absence of a statute providing otherwise, the authority of a
sheriff is coextensive with his county.\[9\] In a 1978 opinion, the Attorney General
concludes that, “as a general rule a county law-enforcement officer has no
authority to make an arrest outside his jurisdiction, except in his status as a
private citizen to arrest for a felony, affray or breach of the peace.”\[10\] A 1974
opinion also concludes that a county deputy sheriff has no statutory authority
to arrest for a misdemeanor committed in his presence within the boundaries
of an independent city located outside the county of his sheriff.\[11\] The General
Assembly has enacted no statute altering the conclusions of these opinions.
With the exception of certain specific situations, therefore, the status of a
county sheriff outside his locality is that of a private citizen.\[12\] Another 1978
opinion concludes that, as a general proposition, a private citizen may only
effect an arrest for felonies, affrays or breaches of the peace committed in his
presence.\[13\]

Section 15.2-1724 authorizes law-enforcement officers to go beyond their terri-
torial limits “[w]henever the necessity arises ... for the enforcement of [the
drug] laws” or “during any emergency resulting from the existence of a state of
war, internal disorder, or fire, flood, epidemic or other public disaster.”\[14\] The
language in § 15.2-1724 limits its application to exceptional situations of
great and immediate necessity. The 1978 opinion considers whether the author­
ity granted to a sheriff in § 8.01-295 to execute civil process “throughout the
political subdivision in which he serves and in any contiguous county or city”
also permits the sheriff to arrest, without a warrant, a person who unlawfully
interferes with such service.\[15\] The opinion concludes that § 8.01-295 implies
that a sheriff remains clothed with those powers of his office incidental to per­
fected service of process outside his usual jurisdiction, including the authority
to arrest, without a warrant, a person who unlawfully interferes with or
obstructs the sheriff’s performance of that duty.\[16\] The General Assembly has
taken no action to alter the conclusion of the 1978 opinion. The Supreme Court
of Virginia has stated that “[t]he legislature is presumed to have had knowledge
of the Attorney General’s interpretation of the statutes, and its failure to
make corrective amendments evinces legislative acquiescence in the Attorney
General’s view.”\[17\]
Sections 8.01-295 and 15.2-1724 both contemplate a sheriff performing limited official duties beyond the boundaries of his locality. Moreover, § 15.2-1724 strongly implies that a sheriff remains clothed with those powers of his office incidental to the enforcement of drug laws outside his jurisdiction or an emergency arising outside his jurisdiction due to an act of war, internal disorder, fire, flood, epidemic or other such public disaster. "[T]he primary objective of statutory construction is to ascertain and give effect to legislative intent." Analysis of legislative intent includes appraisal of the subject matter and purpose of the statute, in addition to its express terms. The purpose underlying a statute's enactment is particularly significant in construing it. Moreover, statutes should not be interpreted in ways that produce absurd or irrational consequences.

I must, therefore, conclude that § 15.2-1724 limits the interjurisdictional law-enforcement authority of the sheriff's office beyond Campbell County to matters directly and incidentally related to the circumstances set forth in that statute. It is also my opinion that an officer properly engaged in one of the activities enumerated in § 15.2-1724 beyond the territorial limits of his locality is authorized to act in the same manner and is subject to the same limitations as would apply to a law-enforcement officer of the extraterritorial locality.

"Whenever the necessity arises (i) for the enforcement of laws designed to control or prohibit the use or sale of controlled drugs as defined in § 54.1-3401 or laws contained in Article 8 of Title 18.2, (ii) in response to any law-enforcement emergency involving any immediate threat to life or public safety, (iii) during the execution of the provisions of § 37.1-67.01 or § 37.1-67.1 relating to orders for temporary detention or emergency custody for mental health evaluation or (iv) during any emergency resulting from the existence of a state of war, internal disorder, or fire, flood, epidemic or other public disaster, the police officers and other officers, agents and employees of any locality may, together with all necessary equipment, lawfully go or be sent beyond the territorial limits of such locality to any point within or without the Commonwealth to assist in meeting such emergency or need, or while enroute to a part of the jurisdiction which is only accessible by roads outside the jurisdiction."

"In such event the acts performed for such purpose by such police officers or other officers, agents or employees and the expenditures made for such purpose by such locality shall be deemed conclusively to be for a public and governmental purpose, and all of the immunities from liability enjoyed by a locality when acting through its police officers or other officers, agents or employees for a public or governmental purpose within its territorial limits shall be enjoyed by it to the same extent when such locality within the Commonwealth is so acting, under this section or under other lawful authority, beyond its territorial limits."

"The police officers and other officers, agents and employees of any locality when acting hereunder or under other lawful authority beyond the territorial limits of such locality shall have all of the immunities from liability and exemptions from laws, ordinances and regulations and shall have all of the pension, relief, disability, workers' compensation and other benefits enjoyed by them while performing their respective duties within the territorial limits of such locality."

1"Whenever the necessity arises (i) for the enforcement of laws designed to control or prohibit the use or sale of controlled drugs as defined in § 54.1-3401 or laws contained in Article 8 of Title 18.2, (ii) in response to any law-enforcement emergency involving any immediate threat to life or public safety, (iii) during the execution of the provisions of § 37.1-67.01 or § 37.1-67.1 relating to orders for temporary detention or emergency custody for mental health evaluation or (iv) during any emergency resulting from the existence of a state of war, internal disorder, or fire, flood, epidemic or other public disaster, the police officers and other officers, agents and employees of any locality may, together with all necessary equipment, lawfully go or be sent beyond the territorial limits of such locality to any point within or without the Commonwealth to assist in meeting such emergency or need, or while enroute to a part of the jurisdiction which is only accessible by roads outside the jurisdiction."

"In such event the acts performed for such purpose by such police officers or other officers, agents or employees and the expenditures made for such purpose by such locality shall be deemed conclusively to be for a public and governmental purpose, and all of the immunities from liability enjoyed by a locality when acting through its police officers or other officers, agents or employees for a public or governmental purpose within its territorial limits shall be enjoyed by it to the same extent when such locality within the Commonwealth is so acting, under this section or under other lawful authority, beyond its territorial limits."

"The police officers and other officers, agents and employees of any locality when acting hereunder or under other lawful authority beyond the territorial limits of such locality shall have all of the immunities from liability and exemptions from laws, ordinances and regulations and shall have all of the pension, relief, disability, workers' compensation and other benefits enjoyed by them while performing their respective duties within the territorial limits of such locality."


See id. See, e.g., Op. Va. Att'y Gen.: 1983-1984 at 323 (authority to appoint and remove deputies); 1982-1983 at 462, 463-64 (authority over personnel policies); 1978-1979 at 238 (authority to enter into agreement with federal agency for provision of law-enforcement services on land of concurrent jurisdiction); 1976-1977 at 250 (authority to assign duties to deputies; official use of department vehicle and claim for mileage expense); 1973-1974 at 39, 40 (authority over vehicles assigned to sheriff's office); id. at 322 (authority to request reimbursement for personal car used in performance of official business).


See, e.g., Op. Va. Att'y Gen.: 1996 at 113 (concluding that, when court issues capias on indictment, county deputy sheriff may enter city to execute capias, without requiring assistance of law-enforcement officer from city); 1978-1979, supra note 10, at 15 (stating that § 8.01-295 implies that sheriff remains clothed with powers of his office incidental to perfecting service of process outside his usual jurisdiction).


Section 15.2-1724(i), (iv).


Id.


OP. NO. 01-046

COURTS NOT OF RECORD: DISTRICT COURTS.

General district court clerk is not required, nor authorized, to determine whether deferred judgment order is statutorily authorized prior to assessing applicable costs.

THE HONORABLE JOEL C. CUNNINGHAM
JUDGE, GENERAL DISTRICT COURT OF HALIFAX COUNTY
DECEMBER 21, 2001

You ask whether the clerk of the general district court is required to determine that a deferred judgment order is statutorily authorized prior to assessing all applicable costs. 1
The powers and duties of district court clerks are set forth in Title 16.1 of the Code of Virginia, including the power and duty to collect applicable costs. With respect to circuit court clerks, the Attorney General has repeatedly concluded that it is not the duty of the clerk to assess the legal sufficiency of documents for which he has some duty with regard thereto. Accordingly, it has been noted that the legal consequences of a writing can be determined only by the court.

I concur in these conclusions and find them equally applicable to clerks of district courts. In the instant case, therefore, the determination of whether a deferred judgment order is statutorily authorized is not a matter falling within the purview of the duties of a clerk. Consequently, it is my opinion that the clerk of the general district court is not required, nor is he authorized, to determine whether a deferred judgment order is statutorily authorized prior to assessing applicable costs.


3See Op. Va. Att'y Gen.: 1999 at 220, 220-21 (concluding that it is not duty of clerk to assess legal sufficiency of document proffered for recordation); 1984-1985 at 166, 166 (concluding that it is not within power of clerk to inquire further to determine whether instrument presented for filing is sufficient to meet requirements of any particular provision of law).


5Compare Commonwealth v. Jackson, 255 Va. 552, 555 n.1, 499 S.E.2d 276, 278 n.1 (1998) (noting that whether action of district court is proper is matter to be brought before court).

OP. NO. 00-106
COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.

Juvenile court has no authority to appoint guardian ad litem for juvenile defendant, in addition to appointment of legal counsel, to represent child in criminal or delinquency proceeding.

THE HONORABLE W. EDWARD MEEKS III
COMMONWEALTH'S ATTORNEY FOR AMHERST COUNTY
DECEMBER 14, 2001

You ask whether § 16.1-266 of the Code of Virginia authorizes a juvenile and domestic relations district court ("juvenile court") to appoint a guardian ad litem for a juvenile defendant, in addition to the appointment of legal counsel, to represent the child.

You advise that a juvenile court seeks to appoint a guardian ad litem, in addition to appointing legal counsel, to represent a child. You state that the guardian ad litem will be compensated from public funds.
The jurisdiction, practice, and procedure of the juvenile courts in the Commonwealth are entirely statutory, and are set forth in Chapter 11 of Title 16.1, §§ 16.1-226 through 16.1-361. Section 16.1-266 governs the appointment of counsel for children under the jurisdiction of the juvenile court. Section 16.1-266(B) provides that, in detention review hearings or adjudicatory or transfer hearing cases, a "child and his or her parent, guardian, legal custodian or other person standing in loco parentis shall be informed ... of the child's right to counsel." The juvenile court must also provide an opportunity for the child to obtain and employ counsel, or if the child is indigent, appoint counsel to represent him, or obtain a waiver of the child's right to representation by counsel. The first sentence of § 16.1-266(D) provides that, "in all other cases which in the discretion of the court require counsel or a guardian ad litem to represent the interests of the child ..., a discreet and competent attorney-at-law may be appointed by the court." (Emphasis added).

It is axiomatic that "'[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied." Moreover, a statute stating the manner in which something is to be done or the entity which is to do it evinces a legislative intent that it not be done in another manner or by another entity. Statutes are to be read as a whole rather than in isolated parts. It is clear that juveniles enjoy only the right to counsel in a criminal or delinquency proceeding, not the right to guardians ad litem.

Based on the plain language of § 16.1-266(B) and (D), I am of the opinion that a juvenile court has no authority to appoint a guardian ad litem for a juvenile defendant, in addition to the appointment of legal counsel, to represent the child in a criminal or delinquency proceeding.

3Section 16.1-266(B)(2).
4Section 16.1-266(B)(3).
8See Wilson v. Com., 23 Va. App. 318, 477 S.E.2d 7 (1996) (holding that General Assembly did not intend to require circuit court to appoint guardian ad litem whenever court issues subpoena to compel juvenile's testimony or initiates criminal contempt proceedings against juvenile who is represented by counsel).

OP. NO. 01-013
COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.
CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY — DRUGS.
CRIMINAL PROCEDURE: ARREST.
Fingerprints of juveniles may be taken only when juvenile is taken into custody. Juvenile who has been issued summons by law-enforcement officer for possession of marijuana and is not taken into custody may not be fingerprinted.

THE HONORABLE EDWARD DEJ. BERRY
JUDGE, JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT
JUNE 19, 2001

You ask whether a juvenile who is issued a summons for possession of marijuana may be fingerprinted when the charge is disposed of under § 16.1-278.8(A)(5) of the Code of Virginia.

You present a hypothetical situation in which a juvenile is issued a summons for a delinquent act that would constitute a violation of § 18.2-250.1 for an adult. The juvenile then requests disposition under § 16.1-278.8(A)(5), which is similar to the deferred disposition of sentence for adults set forth in § 18.2-251. Section 18.2-251 provides that an adult may be placed on probation only after the court is satisfied that a finding of guilt is justified. When an adult on probation under § 18.2-251 violates a condition of probation, the court may make an immediate adjudication of guilt and proceed to sentence the offender. When a juvenile is found to be delinquent, the juvenile and domestic relations district court (“juvenile court”) or the circuit court has several available options with regard to making “orders of disposition for [the juvenile’s] supervision, care and rehabilitation.” One of those options is to defer disposition of the matter for a period of time and place the juvenile on probation pursuant to § 16.1-278.8(A)(5).

The juvenile courts have exclusive original jurisdiction over juveniles charged with criminal offenses. In juvenile court proceedings, the welfare of the child is a paramount concern of the State. The Attorney General has long concluded that proceedings in a juvenile court are civil in nature. Consequently, a juvenile is not charged with a criminal act and the finding of delinquency is not a “conviction” of a crime in a juvenile court. Finally, “[t]he jurisdiction, practice, and procedure of the juvenile ... courts are entirely statutory,” and are set forth in the Juvenile and Domestic Relations District Court Law, §§ 16.1-226 through 16.1-361.

Section 16.1-299(A) is the only statute that applies to the fingerprinting of juveniles. Section 16.1-299(A) provides that “any juvenile who is taken into custody” may be fingerprinted. The hypothetical situation you present involves a juvenile who has been issued a summons for possession of marijuana. Section 19.2-76 details the procedure for the execution of an arrest warrant and summons, and provides that “[a] warrant ... shall be executed by the arrest of the accused, and a summons shall be executed by delivering a copy to the accused personally.” Therefore, when a law-enforcement officer issues a summons, the accused has not been taken into custody.

The Supreme Court has stated that “[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied.” Section 16.1-246 clearly specifies the circumstances in which a juvenile may be taken into custody.
Section 16.1-299(A) permits the fingerprints of juveniles to be taken only when the juvenile "is taken into custody."\(^1\) When a juvenile is issued a summons by a law-enforcement officer, the juvenile clearly is not "taken into custody."

The law under which the juvenile courts operate is entirely statutory, and the relevant statutes make no provision for a juvenile who has received a summons to be fingerprinted, yet § 16.1-299(A) provides such authority for fingerprinting when the juvenile has actually been taken into custody. Accordingly, I must conclude that a juvenile who has been issued a summons and is not taken into custody may not be fingerprinted.\(^1\)

\(^1\)Although the stated inquiry involves a juvenile who is charged with possession of marijuana under § 18.2-250.1 and is seeking disposition of such charge under § 18.2-251, I must assume that any charge will be for a delinquent act that would have been a crime under § 18.2-250.1 had the juvenile been an adult.


\(^3\)Section 16.1-241 conveys on each juvenile court "exclusive original jurisdiction ... over all cases, matters and proceedings involving:

A. The custody, visitation, support, control or disposition of a child:

1. Who is alleged to be abused, neglected, in need of services, in need of supervision, a status offender, or delinquent, except where the jurisdiction of the juvenile court has been terminated or divested ...."\(^\text{See Va. Code Ann.}§ 16.1-227\) (Michie Repl. Vol. 1999); Peyton v. French, 207 Va. 73, 79, 147 S.E.2d 739, 743 (1966); Lewis v. Commonwealth, 214 Va. 150, 153, 198 S.E.2d 629, 632 (1973) (noting that juvenile proceedings are for protection of child and society).

\(^4\)Op. Va. Att'y Gen.: 1978-1979 at 83, 84; 1975-1976 at 198, 199; id. at 199, 199; see also Lewis v. Commonwealth, 214 Va. at 153, 198 S.E.2d at 632; Op. Va. Att'y Gen.: 1976-1977 at 322, 1975-1976 at 187; id. at 194 (proceedings in juvenile court are not criminal in nature); id. at 195; id. at 198 (juvenile court does not deal with charges involving juveniles as either felonies or misdemeanors).

\(^5\)See \text{Va. Code Ann.}§ 16.1-308\) (Michie Repl. Vol. 1999); Op. Va. Att'y Gen.: 1978-1979 at 83 (juvenile court finding of "not innocent" on marijuana charge does not bar person from probation as first-time offender for later adult offense); 1977-1978 at 203 (delinquency adjudication is not "conviction" of crime for purposes of § 19.2-305.1(A)); 1976-1977 at 138, 139 ("not innocent" finding does not subject juvenile to additional court costs under § 19.2-368.18); 1975-1976 at 194, 195 (juvenile is not subject to civil disabilities attached to felony conviction); id. at 195, 196 (juvenile sentenced to jail is not convicted of felony or misdemeanor); 1974-1975 at 227, 228 (juvenile court dispositions do not have attendant civil disabilities associated with adult convictions); 1972-1973 at 241; 1960-1961 at 175, 176 (adjudication by juvenile court is not considered conviction for crime).


\(^8\)Section 16.1-246 provides:

No child may be taken into immediate custody except:

A. When a child is alleged to be in need of services or supervision and (i) there is a clear and substantial danger to the child's life or health or (ii) the assumption of custody is necessary to ensure the child's appearance before the court ...."


\(^10\)You ask a second question regarding whether fingerprint cards must be submitted to the Central Criminal Records Exchange for storage. Since I conclude that a juvenile who has been issued a summons for a delinquent act may not be fingerprinted, I do not need to reach this question.
You seek guidance regarding the implementation of a program administered by your office related to the Crime Victim and Witness Rights Act.

You advise that your office is working on a computerized system by which registered crime victims will be updated with information regarding future court dates, transfers, and releases of active inmates incarcerated in the city jail. You inquire whether this program may be used to provide information to victims in cases where the inmate was a juvenile when the crime was committed.

Chapter 1.1 of Title 19.2, §§ 19.2-11.01 through 19.2-11.4 of the Code of Virginia comprises the Crime Victim and Witness Rights Act. Section 19.2-11.01(A) sets out the purposes of the Act. Included within the purposes are ensuring that crime victims and witnesses be informed of their rights, receive appropriate authorized services, and, to the extent permitted by law, have the opportunity to be heard by law-enforcement agencies, Commonwealth's attorneys, correctional agencies and the judiciary at all critical stages of the criminal justice process.

Chapter 11 of Title 16.1, §§ 16.1-226 through 16.1-361, deals specifically with juvenile law and contains certain statutes regarding the rights of victims in juvenile law matters. For example, § 16.1-302.1 addresses whether such victims may be present in the courtroom. Section 16.1-309.1(D) provides that, "[u]pon the request of a victim of a delinquent act which would be a felony if committed by an adult, the court may order that such victim be informed of the ... charges brought, the findings of the court, and the disposition of the case." Section 16.1-285.2 addresses the release and review hearing required for a serious offender who has received a determinate juvenile commitment and states that the respective Commonwealth's attorney "shall provide notice of the time and place of the hearing ... to the last known address of any victim ... if such victim has submitted a written request for notification."

It is a well-established rule of statutory construction that "[t]he jurisdiction, practice, and procedure of the juvenile and domestic relations district courts are entirely statutory." This rule arises from the Commonwealth's concern with the welfare of children, and is consistent with the premise that proceedings in a juvenile court are civil in nature, as well as the premise that a juvenile is not charged with a criminal act and a finding of delinquency is not a conviction of a crime. Accordingly, with respect to resolving an issue related to
juvenile law, the statutory provisions that specifically address the issue are paramount.

Another fundamental rule of statutory construction to be applied to this matter is that specific statutes supersede general statutes insofar as there is conflict between them. Thus, the statutes relating to rights of victims involved in juvenile matters contained in Chapter 11 of Title 16.1 control over the general statutes relating to rights of victims as set forth in the Crime Victim and Witness Rights Act.

In light of these principles of statutory construction, it is clear that the rights of victims who are involved in a juvenile proceeding are those rights that are statutorily provided for in Chapter 11 of Title 16.1. The system of victim notification that you propose, therefore, would not generally be applicable to cases involving juvenile offenders absent statutory authority enabling it to be so applicable.


\[7\] See, e.g., 1990 Op. Va. Att’y Gen. 119, 120 (noting that use of tape recorder by party or his counsel in juvenile court proceeding is matter of statutory right).

Note 1984-1985 Op. Va. Att’y Gen. 157, 158 (concluding that, once case is properly before circuit court, confidentiality statutes in Chapter 11 of Title 16.1 relating to juvenile records apply when child is treated as juvenile but not necessarily if child is treated as adult).

OP. NO. 01-021

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.
MOTOR VEHICLES: REGULATION OF TRAFFIC – RECKLESS DRIVING AND IMPROPER DRIVING.

Juvenile court has jurisdiction to try case involving adult charged with driving in reckless manner which places person of juvenile in danger.

THE HONORABLE MICHAEL J. VALENTINE
JUDGE, JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT
SEPTEMBER 28, 2001

You inquire regarding the jurisdiction of a juvenile and domestic relations district court ("juvenile court") or a general district court to try a case involving an adult charged with driving in a reckless manner which places the person of a juvenile in danger.
You present a hypothetical situation where an adult drives in such a reckless manner that the person of a juvenile is placed in danger. The general district court is of the opinion that the matter involves a juvenile victim and should be heard by the juvenile court. The juvenile court is of the opinion that the matter should be heard by the general district court, since it alleges a course of conduct that is prohibited by the motor vehicle laws of the Commonwealth, Title 46.2 of the Code of Virginia, and does not involve a crime specifically against a juvenile.

Virginia's reckless driving laws are contained in Article 7, Chapter 8 of Title 46.2, §§ 46.2-852 through 46.2-869, and violation of these laws is a criminal offense, unlike most other driving violations, which are classified as traffic infractions. As a general rule, § 46.2-852 provides that the offense of reckless driving occurs when "any person ... drives a vehicle on any highway recklessly or at a speed or in a manner so as to endanger the life, limb, or property of any person." The word "recklessly," as used in § 46.2-852,

imparts a disregard by the driver of a motor vehicle for the consequences of his act and an indifference to the safety of life, limb or property....

The essence of the offense of reckless driving lies not in the act of operating a vehicle, but in the manner and circumstances of its operation.

"The jurisdiction, practice, and procedure of the juvenile ... courts are entirely statutory," and are contained in the Juvenile and Domestic Relations District Court Law, §§ 16.1-226 through 16.1-361. Section 16.1-241(I) declares that the jurisdiction of the juvenile court extends to an adult charged with "any other offense [other than those listed] against the person of a child." A 1974 opinion of the Attorney General construes this particular statutory provision and concludes that it is intended to provide for exclusive original jurisdiction in the juvenile court for any crimes committed by any individual against the person of a juvenile. The General Assembly has taken no action to alter the conclusion of the 1974 opinion. In Deal v. Commonwealth, the Supreme Court of Virginia has stated that "[t]he legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view."

The Supreme Court has also stated that "'[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied.'" Section 16.1-241(I) clearly specifies the jurisdiction of the juvenile court when any person is charged with "any ... offense against the person of a child." In the hypothetical situation you present, an adult drives in such a reckless manner that the person of a juvenile is placed in danger.

Accordingly, I must conclude that the juvenile court, and not the general district court, has jurisdiction to try a case involving an adult charged with driving in a reckless manner which places the person of a juvenile in danger.
Section 46.2-868 makes "[e]very person convicted of reckless driving ... guilty of a Class 1 misdemeanor." Punishment for conviction of a Class 1 misdemeanor is "confinement in jail for not more than six months and a fine of not more than $1000, either or both." Va. Code Ann. § 18.2-11(a) (Michie Supp. 2001).

Unless otherwise stated, ... violations [of Title 46.2] shall constitute traffic infractions punishable by a fine of not more than $200." Va. Code Ann. § 46.2-113 (Michie Repl. Vol. 1998). A court may assess "a further monetary penalty not exceeding $500" for commission of "a serious traffic violation" in a commercial motor vehicle. Id.


OP. NO. 01-009

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS – FACILITIES FOR DETENTION AND OTHER RESIDENTIAL CARE.

City of Covington must abide by charter provisions governing apportionment of costs and expenses of sheriff elected jointly with Alleghany County, with regard to funding regional juvenile detention center that is part of sheriff's budget; may not authorize its share of operational costs of detention center to be determined separately from county under separate lease agreement.

THE HONORABLE MALFOURD W. TRUMBO
MEMBER, SENATE OF VIRGINIA
FEBRUARY 22, 2001

You ask for guidance regarding contributions made by the City of Covington to fund a regional juvenile detention center.

You relate that the Shenandoah Valley Juvenile Detention Center operates a juvenile detention center for the housing of juvenile offenders. You also relate that Alleghany County is a member of, and has entered into a lease agreement with, the commission that governs the center. Additionally, you provide that the City of Covington is a city of the second class and shares with Alleghany County a circuit court, clerk, Commonwealth's attorney, and sheriff. You provide further that, pursuant to the Covington city charter, the apportionment of costs for the services provided to Alleghany County and the City of Covington for their joint court system and sheriff are apportioned between the county and city in proportion to their respective populations. Finally, you provide that funds for Alleghany County's share of the costs for the detention center are derived from the sheriff's budget. You inquire whether the City of Covington may authorize its share of the operational costs of the center to be determined separately from Alleghany County pursuant to a separate lease agreement.

Article 13, Chapter 11 of Title 16.1 §§ 16.1-315 through 16.1-322 of the Code of Virginia, governs joint or regional juvenile detention homes, group homes or
other juvenile residential care facilities. Specifically, § 16.1-315 authorizes the governing bodies of three or more localities, by concurrent ordinances or resolutions, to establish a joint or regional juvenile detention center commission. In the instant case, Alleghany County is a member of the commission governing the Shenandoah Valley Detention Center.

The Attorney General has long recognized that, unlike cities of the first class whose residents elect a sheriff, cities of the second class are included within the jurisdiction of the sheriff of the appropriate county. Accordingly, the Covington city charter provides that the costs and expenses of the sheriff, "elected conjointly with Alleghany County, shall be borne by the city and Alleghany County in the proportion that the population of each bears to the aggregate population of the city and county." Similarly, the charter provides for such apportionment of expenses of the court system.

Virginia adheres to the Dillon Rule, which provides that "any powers exercised by the Commonwealth's localities must be expressly conferred upon them either by general law or, as is more common with cities ..., by their charters, granted them by special act." Conversely, "any doubt as to whether a power has been conferred is, according to Dillon's Rule, to be construed against the locality."

The facts presented maintain that the expenses of the regional juvenile detention center in issue are part of the sheriff's budget. The charter for the City of Covington articulates the apportionment requirements for the expenses of both the sheriff and court system. I do not know of any other charter provision which results in a different method of apportionment nor am I aware of a statute suggesting otherwise. Accordingly, it is my opinion that the city must abide by the charter's apportionment of costs and expenses of the office of the sheriff who serves the city.

See id.
Id.
Compare 1982-1983 Op. Va. Att'y Gen. 160 (concluding that county sheriff may not refuse to accept prisoners from his respective portion of second class city and that county is responsible for expenses of housing prisoners arrested in portion of city lying in county).

OP. NO. 01-071
COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS - FEES.

Requirement that circuit court clerk charge, according to number of pages or sheets, (1) for recording document without plat, incrementally prescribed fee plus $1 fee for admitting writing to record; and (2) for recording document in conjunction with plat, incrementally prescribed fee for document, and same fee for plat plus $1 fee for admitting writing to record. Clerk must charge single fee prescribed for recording certificate of satisfaction releasing original deed of trust and any modifications to original deed, plus $1 fee required for admitting writing to record.
You inquire regarding amendments enacted by the 2001 Session of the General Assembly to § 17.1-275(A)(2) of the Code of Virginia, relating to fees collected by circuit court clerks for deed recordation, and the fee required by § 17.1-275(A)(1) for recording a certificate of satisfaction.

The 2001 Session of the General Assembly amended the portion of § 17.1-275(A)(2) about which you inquire to require circuit court clerks to charge the following fees:

For recording and indexing in the proper book any writing and all matters therewith, or for recording and indexing anything not otherwise provided for, thirteen fifteen dollars for an instrument or document consisting of ten or fewer pages or sheets; thirty dollars for an instrument or document consisting of 11 through 30 pages or sheets; and fifty dollars for an instrument or document consisting of 31 or more pages or sheets, including the fee of one dollar set forth in subdivision A 1 for up to four pages and one dollar for each page over four pages, and for recording plats too large to be recorded in the deed books, and for each sheet thereof, thirteen dollars. This fee shall be in addition to the fee for recording a deed or other instrument recorded in conjunction with such plat sheet or sheets including the fee of one dollar set forth in subdivision A 1.\[1\]

You first ask whether the deletion of the reference in § 17.1-275(A)(2) to "plats too large to be recorded in the deed books" requires a clerk to charge a separate fee for the plat and for the document recorded in conjunction with the plat. Secondly, you inquire whether the clerk's fee for recording a document without a plat must be the amount provided in amended § 17.1-275(A)(2), plus the one-dollar fee required by § 17.1-275(A)(1) for admitting a writing to record, while the fee for recording and indexing a document with a plat would be only the fee specified for such document.

I am advised that plats are treated differently by the various offices of circuit court clerks within the Commonwealth. Some offices have separate plat books and charge $13 for each plat recorded in the plat books. Other offices have the legal-sized plats microfilmed or digitally scanned, resulting in an equivalent of four or five written pages. Of these particular offices, some charge the plats as extra pages, with the result being a two-page deed plus one plat sheet equivalent to four pages, which, for recording purposes, would be a six-page document. Therefore, the recording fee is $13 for the first four pages, plus one dollar for each additional page—a total of $15. Other offices charge a clerk's fee for the deed and a separate $13 fee for each plat sheet recorded.
The 2001 amendment to § 17.1-275(A)(2) raises the clerk’s fee incrementally, and adds the term “sheets” to the amendment. The amendment deletes both the language “including the fee of one dollar set forth in subdivision A 1” and the reference to “plats too large to be recorded in the deed books.” Following these deletions, § 17.1-275(A)(2) provides that “[i]ts fee shall be in addition to the fee for recording a deed or other instrument recorded in conjunction with such plat sheet or sheets including the fee of one dollar set forth in subdivision A 1.”

When new provisions are added to existing legislation by amendment, a presumption arises that, in making such amendment, the General Assembly “acted with full knowledge of, and in reference to, the existing law upon the same subject and the construction placed upon it by the courts.” It is further presumed that the General Assembly acted purposefully with the intent to change existing law. “The manifest intention of the [General Assembly], clearly disclosed by its language, must be applied.”

Section 17.1-275(A)(2) speaks of “recording and indexing ... any writing and all matters therewith.” As used in this statute, “writing” is singular, and means the particular document or instrument to be entered in the record book, while the phrase “matters therewith” pertains to additional papers that are supportive or probative of the primary document that the clerk is required to admit to record. The amendment to § 17.1-275(A)(2) requires that circuit court clerks collect fees “[f]or recording and indexing ... any writing and all matters therewith” in the amounts of $15, $30 and $50 for “an instrument or document” consisting of a defined range of “pages or sheets.” Such fee “shall be in addition to the fee for recording a deed or other instrument recorded in conjunction with such plat sheet or sheets including the fee of one dollar” required by § 17.1-275(A)(1). The use of the word “shall” in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directory.

The additional language in § 17.1-275(A)(2) requires a clerk to charge for recording a document without a plat the amended fee, plus the one-dollar fee required by § 17.1-275(A)(1) for admitting a writing to record. If a document, however, is recorded with a plat, the clerk would charge for recording the plat the amended fee plus the one-dollar fee in § 17.1-275(A)(1), and would charge for the document “recorded in conjunction with such plat” only the amended clerk’s fee. Section 17.1-275(A)(2), therefore, requires a clerk, e.g., recording a ten-page document, to charge a fee of $16 for a document recorded without a plat, but to charge a $15 fee for a document with an attached plat and a separate $16 fee for the plat.

Accordingly, it is my opinion that § 17.1-275(A)(2) requires a clerk to charge the amended fee for recording a document without a plat, plus the one-dollar fee required by § 17.1-275(A)(1) for admitting a writing to record. For recording a document “in conjunction with such plat,” the clerk would charge the amended fee for the document and the amended fee plus the one-dollar fee required by § 17.1-275(A)(1) for the plat. The document recorded with an attached plat is exempt from the § 17.1-275(A)(1) fee.
Your final inquiry is whether the clerk should assess the one-dollar fee required by § 17.1-275(A)(1) for recording a certificate of satisfaction.

You relate that some circuit court clerks interpret the third sentence of § 17.1-275(A)(2) to mean that the one-dollar fee required by § 17.1-275(A)(1) may not be assessed for recording a certificate of satisfaction, because the language of that sentence mandates that "[o]nly a single fee" shall be charged for recording such certificate. Other clerks interpret the provision to mean that a clerk may not charge a recording fee for releasing the original deed of trust and a separate fee for releasing each correction or modification to that deed of trust, in which case the one-dollar fee in § 17.1-275(A)(1) would apply.

You explain that, when an original deed of trust is recorded, the circuit court clerk collects a fee and the required state and local taxes. Furthermore, when a correction or modification to the original recorded deed of trust subsequently is recorded, a new clerk's fee is collected. State and local recordation taxes are collected in the latter instance only when the modification of the deed of trust "increase[s] the amount of the principal obligation secured thereby." The one-dollar fee permitted by § 17.1-275(A)(1) is the fee a clerk is to receive "generally," whenever Virginia law does not specify a fee. Section 17.1-275(A)(2) further provides that "[o]nly a single fee as authorized by this subdivision shall be charged for recording a certificate of satisfaction that releases the original deed of trust and any corrected or revised deeds of trust."

The Supreme Court of Virginia has stated that, "where a [statute] is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." As you note, a clerk may perform subsequent recordings of an original deed of trust to correct errors and to modify the terms of the loan. In such circumstances, the "single fee" authorized in § 17.1-275(A)(2) clearly refers to the satisfaction of the original deed of trust. The clerk is not authorized to charge a separate fee for satisfaction of the original deed of trust and for subsequent recordings of the original deed to correct errors or modify the terms of the loan.

Therefore, I am of the opinion that § 17.1-275(A)(2) requires a clerk to charge the amended fee for recording a certificate of satisfaction, plus the one-dollar fee required by § 17.1-275(A)(1) for admitting a writing to record. A circuit court clerk, therefore, must assess the one-dollar fee specified in § 17.1-275(A)(1) for recording a certificate of satisfaction.

2 Id. at 525.
3 Id.
4 Id.
You ask whether the City of Richmond may use funds derived from the fee assessed pursuant to § 17.1-281 of the Code of Virginia to pay the cost of heating, cooling, electricity, and routine maintenance of courthouses located within the city.

Section 15.2-1638 provides that "[t]he governing body of every county and city shall provide courthouses with suitable space and facilities." Additionally, § 15.2-1638 requires that the costs of such courthouses, "and of keeping the same in good order, shall be chargeable to the county or city." Accordingly, prior opinions of the Attorney General conclude that a locality has a "duty to provide
adequate courthouse facilities,"¹ and that a local governing body "must provide for a courthouse and funds for maintenance and upkeep."² Thus, the provision and funding of a courthouse and the maintenance for such courthouse is a responsibility of the locality in which the courthouse is situated.

Section 17.1-281 provides that "[a]ny county or city, through its governing body, may assess a sum not in excess of two dollars as part of the costs" in certain court actions or cases. Section 17.1-281 further provides that such assessment "shall be collected by the clerk ... and held by [the] treasurer subject to disbursements by the governing body ... to defray increases in the cost of heating, cooling, electricity, and ordinary maintenance" of a courthouse.

This Office has previously concluded that the legislative purpose of § 17.1-281 is to generate funds for the functions enumerated in the statute.³ With respect to utilities and ordinary maintenance of the courthouse, § 17.1-281 specifically provides that the funds derived from the civil actions or court cases described in the statute may be disbursed by the governing body "to defray increases in the cost of heating, cooling, electricity, and ordinary maintenance" of the courthouse.

The Supreme Court of Virginia has stated that the language of a statute that is plain needs no interpretation.⁴ Additionally, where a statute specifies certain things, the intention to exclude that which is not specified may be inferred.⁵ Furthermore, statutes dealing with the same subject matter must be read together to give effect to legislative intent.⁶ The specific language of § 17.1-281 directs that disbursements from the funds generated pursuant to the statute may be used "to defray increases in the cost" of the specified utilities and ordinary maintenance of the courthouse. The statute does not authorize that the funds be used to offset the entire cost of such items.

Accordingly, it is my opinion that the City of Richmond may use funds derived from the fees assessed pursuant to § 17.1-281 to defray increases in the cost of heating, cooling, electricity, and ordinary maintenance of courthouses located within the city's boundaries, but may not use such funds to pay the entire cost of utilities and routine courthouse maintenance.

Duty of teacher or other school administrator who suspects (1) that 18-year-old student is having sexual relationship with 13- or 14-year-old student, or (2) that two students, who are minors and whose age difference falls within purview of § 18.2-63, are engaging in sexual conduct, to report knowledge of such activity to local department of social services for investigation.

THE HONORABLE RAYMOND C. ROBERTSON
COMMONWEALTH'S ATTORNEY FOR THE CITY OF STAUNTON
DECEMBER 27, 2001

You ask whether a teacher or school administrator, who has knowledge (1) that an eighteen-year-old student is having a sexual relationship with a thirteen- or fourteen-year-old student in violation of § 18.2-63 of the Code of Virginia, or (2) that two minor students whose ages fall within the purview of § 18.2-63 are engaged in sexual conduct in violation of that statute, is required to report such activity as child abuse and neglect pursuant to §§ 63.1-248.2 and 63.1-248.3.

Section 18.2-63 provides, in part:

If any person carnally knows, without the use of force, a child thirteen years of age or older but under fifteen years of age, such person shall be guilty of a Class 4 felony.

However, if such child is thirteen years of age or older but under fifteen years of age and consents to sexual intercourse and the accused is a minor and such consenting child is three years or more the accused's junior, the accused shall be guilty of a Class 6 felony. If such consenting child is less than three years the accused's junior, the accused shall be guilty of a Class 4 misdemeanor.

Section 63.1-248.6 requires a local department of social services to investigate allegations of abuse or neglect of a child. Section 63.1-248.2 defines the terms applicable to such investigation. Specifically, § 63.1-248.2 defines an "abused or neglected child" as

any child less than eighteen years of age:

4. Whose parents or other person responsible for his care commits or allows to be committed any act of sexual exploitation or any sexual act upon a child in violation of the law...

Section 63.1-248.3 designates the persons who, in their professional or official capacity, have reason to suspect that a child is abused or neglected pursuant to § 63.1-248.2, and who are required to report incidents of suspected abuse or neglect. Specifically included in this statute are "teacher[s] or other person[s] employed in a public or private school."

A 1989 opinion of the Attorney General concludes that the responsibility of the local department of social services in child abuse and neglect matters is limited to the investigation of allegations of acts committed by a parent or other
person responsible for the care of a child. The 1990 Session of the General Assembly enacted an amendment to § 63.1-248.2, which provides:

Nothing in this section shall relieve any person specified in § 63.1-248.3 from making reports required in that section, regardless of the identity of the person suspected to have caused such abuse or neglect. The General Assembly is presumed to have had knowledge of the Attorney General's interpretations of statutes, and its failure to amend a statute that this Office has interpreted in an official opinion indicates legislative acquiescence in the Attorney General's view. In this instance, however, the General Assembly did not acquiesce in the Attorney General's conclusion, but amended § 63.1-248.2 in direct response to the result reached in the 1989 opinion.

Additionally, when new provisions are added to existing legislation by an amendatory act, a presumption arises that a change in the law was intended. In this instance, the General Assembly's amendment indicates a legislative intent that the definition of "abused or neglected child" set forth in § 63.1-248.2 not be limited to acts committed by a parent or other person responsible for his care; rather, the amendment makes clear that the identity of the person suspected of committing the act is irrelevant with respect to the obligation of a person falling within the purview of § 63.1-248.3 to make a report of such abuse or neglect. It is my opinion, therefore, that the 1990 amendment to § 63.1-248.2 effectively overrules the 1989 opinion.

Thus, it is also my opinion that, in the instant case, a teacher or school administrator who suspects that an eighteen-year-old student is having a sexual relationship with a thirteen- or fourteen-year-old student in violation of § 18.2-63 has a duty to report the matter to the local department of social services in accordance with §§ 63.1-248.2 and 63.1-248.3. Similarly, it is my opinion that a teacher or school administrator who suspects that two students, who are minors and whose age difference falls within the purview of § 18.2-63, are engaging in sexual conduct, and thus are in violation of § 18.2-63, has a duty to report his or her knowledge of such activity in accordance with §§ 63.1-248.2 and 63.1-248.3.

1 See also Va. Code Ann. § 63.1-248.6:01 (Michie Supp. 2001) (explaining procedures for investigations by local departments of social services).
You ask whether a licensee must comply strictly with the regulatory procedure for validating a breath test device prior to conducting a test to determine the alcohol or drug content of a person's blood. If not, you ask whether such procedure complies with the requirements of § 18.2-268.9 of the Code of Virginia.

Your inquiries pertain specifically to the numbering in the Virginia Administrative Code of the Regulations for Breath Alcohol Testing, which has been changed to reflect the transfer by the 1996 Session of the General Assembly of the Division of Forensic Science from the Department of General Services to the Department of Criminal Justice Services. As a result and pursuant to its authority, the Department of Criminal Justice Services amended the regulations to reflect the change. The amended regulations became effective November 23, 2000.

The regulation pertaining to the methods and procedures of conducting breath tests have been changed as follows:

The licensee shall verify that the breath test device is properly calibrated and in proper working order by conducting a room air blank analysis prior to analysis of the breath of the person and by conducting a validation test with a control sample immediately following the analysis of the breath of the person as part of the test protocol.

This regulation is "procedural in nature." "Substantial compliance therewith shall be deemed sufficient."

Section 18.2-268.9 provides for the validity of a breath test so that test results may be used as evidence in prosecutions by the Commonwealth. For a chemical analysis of a person's breath to be valid as evidence in a prosecution for driving under the influence, it must "be performed by an individual possessing a valid license to conduct such tests, with a type of equipment and in accordance with methods approved by the Department of Criminal Justice Services, Division of Forensic Science." In addition, the individual conducting a breath test "shall issue a certificate which will indicate that the test was conducted in accordance with the Division's specifications." Section 18.2-268.9 is enacted as part of Article 2, Chapter 7 of Title 18.2, relating to driving a motor vehicle while intoxicated. Statutes relating to the same subject "are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogeneous system, or a single and complete statutory arrangement."
Section 18.2-268.11 provides that "[s]ubstantial compliance" with "[t]he steps set forth in §§ 18.2-268.2 through 18.2-268.9 relating to taking, handling, identifying, and disposing of blood or breath samples are procedural and not substantive," and "shall be sufficient." 12

"The principle of substantial compliance, which is predicated upon a failure of strict compliance with applicable requirements, operates to replace the protective safeguards of specificity with a less exacting standard of elasticity, in order to achieve a beneficial and pragmatic result." 13 A ""prejudicial irregularity in test procedures"" does not defeat ""admissibility of the certificate but only affect[s] its weight as evidence of the alcoholic content of [the defendant's] blood."" 14 "Simply put, the statute does not require proof of the accuracy of an individual test as a prerequisite to admissibility of the resulting certificate." 15

Accordingly, it is my opinion that a licensee need only comply substantially with the regulatory procedure for validating a breath test device prior to conducting a test to determine the alcohol or drug content of a person's blood. In addition, I am of the opinion that the regulatory procedure complies with the requirements of § 18.2-268.9.

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1See 17:3 Va. Regs. Reg. 395-98 (Oct. 23, 2000); see also 1996 Va. Acts chs. 154, 952, at 265, 2329, respectively (transferring responsibilities of Division of Forensic Science from Department of General Services to Department of Criminal Justice Services).


4Id. at 395.

5"Licensee" means a person holding a valid license from the [Division of Forensic Science] to perform a breath test of the type set forth within these regulations under the provisions of § 18.2-268.9 of the Code of Virginia, or a parallel local ordinance. Id. (quoting 6 Va. Admin. Code 30-190-10 (amending 1 Va. Admin. Code 30-50-10 (Law. Coop. 1996))).


8Id.


10Id.


12The use of the word "shall" in a statute ordinarily implies that its provisions are mandatory. See Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) (noting that "shall" is word of command, used in connection with mandate); see also Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that "shall" generally indicates procedures are intended to be mandatory, imperative or limited); Op. Va. Att'y Gen.: 1997 at 16, 17; 1996 at 20, 21; 1991 at 126, 126, and opinions cited therein; id. at 127, 129, and opinions cited therein.

You ask whether a general district court has the statutory authority to issue a restricted operator's permit to an individual whose conviction pursuant to § 18.2-271.1 of the Code of Virginia occurred two and one-half years earlier.

You relate that, in October 1998, the general district court convicted an individual of a second offense of driving while intoxicated and, in accordance with the requirements of § 18.2-271(B), the individual lost his driving privileges for a period of three years. You further relate that, at the time of his conviction, the individual did not seek a restricted permit, nor was he placed in an alcohol safety action program pursuant to § 18.2-271.1. You also advise that the individual later appealed his conviction to the circuit court. You further advise that the individual now seeks to obtain a restricted permit and inquire as to the district court's statutory authority to issue such permit two and one-half years after the conviction.

Section 18.2-266 pertains to driving under the influence of drugs or alcohol, and § 18.2-270(A) provides that a violation of § 18.2-266 is a Class 1 misdemeanor. Under § 18.2-271.1, as enacted at the time of the conviction, a court had the discretionary authority to order a person convicted of a second offense under § 18.2-266 to enter into an alcohol safety action program and to also provide that such person receive a restricted permit to operate a motor vehicle. Reading § 18.2-271.1 in conjunction with § 18.2-271, the General Assembly intends that courts have discretion in determining how long an individual convicted of driving while intoxicated should be deprived of his operator's license and under what circumstances, provided that individual enters and successfully completes an alcohol safety action program. Importantly, under these statutes, a defendant is not convicted of any offense until he or she completes such program. In the instant case, however, you advise that the individual did not enter such a program.
A prior opinion of the Attorney General concludes that a district court is without jurisdiction to enter any further orders beyond twenty-one days after final disposition of a case unless such time limit is extended by a specific statute. The opinion notes that § 16.1-133.1, which allows a district court that has convicted a person of a nonfelonious criminal charge to reopen his case on motion of the convicted person for good cause shown, extends such time period to a total of sixty days. The opinion is in accord with a decision of the Supreme Court of Virginia, holding that a district court retains jurisdiction over its final judgment within the period specified by statute. In the instant case, where the individual seeks to obtain from the district court an order for the issuance of a restricted permit beyond any statutory limitations applicable to the court's final judgment in his case, the district court is clearly without jurisdiction to issue such an order.

Accordingly, based on the facts presented, it is my opinion that the district court's final judgment in this matter was rendered in October 1998, and therefore, the court has no jurisdiction over the matter.

2See 1998 Va. Acts ch. 703, at 1625, 1625-26 (reenacting § 18.2-271.1(A), (C), (E)).
51992 Op. Va. Att'y Gen. 155, 156, 157 (noting that provision in Virginia Supreme Court Rule 1:1, which permits final order or judgment to be modified, suspended or vacated for no longer than twenty-one days after entry, generally applies to district courts).
6Id. at 157.
Section 18.2-271(B) provides:

Any adult convicted, or any juvenile found guilty, of violating § 18.2-266 or subsection A of § 46.2-341.24, or any substantially similar local ordinance, or law of any other jurisdiction, two or more times in any combination within ten years shall, upon the second conviction, have his driver's license revoked as provided in subsection A of § 46.2-391. This suspension period shall be in addition to the suspension period provided under § 46.2-391.2. Any period of license suspension or revocation imposed pursuant to this section, in any case, shall run consecutively with any period of suspension for failure to permit a blood or breath sample to be taken as required by §§ 18.2-268.1 through 18.2-268.12 or §§ 46.2-341.26:1 through 46.2-341.26:11.

Pursuant to this provision, therefore, when an adult is convicted, or a juvenile is found guilty, of violating § 18.2-266 or § 46.2-341.24(A), or both sections, “two or more times ... within ten years,” such person “shall” lose his driver's license “upon the second conviction.”

A principle of statutory construction requires that statutes be read in accordance with their plain meaning and intent. Another dictates that statutes may be construed only where there is ambiguity. Otherwise, the clear and unambiguous words of a statute must be accorded their plain meaning.

The clear and unambiguous language in § 18.2-271(B) provides that the ten-year period for license revocation is to be calculated between convictions for an adult, or between two findings of guilt for a juvenile, with the individual's license being revoked upon the second conviction or finding of guilt within that ten-year period. Therefore, it is my opinion that the ten-year period specified in § 18.2-271(B) for revocation of a driver's license upon a second conviction of driving under the influence of alcohol or drugs is calculated from the first to the second conviction, in the case of an adult, or between two findings of guilt, in the case of a juvenile.

1VA. CODE ANN. § 18.2-271(B) (Michie Supp. 2000) (emphasis added). The use of the word “shall” in a statute ordinarily implies that its provisions are mandatory. See Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) (noting that “shall” is word of command, used in connection with mandate); see also Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that “shall” generally indicates procedures are intended to be mandatory, imperative or limited); Op. Va. Att'y Gen.: 1997 at 16, 17; 1996 at 20, 21; 1991 at 126, 126, and opinions cited therein; id. at 127, 129, and opinions cited therein.


3See id. at 386-87, 297 S.E.2d at 663.

You ask whether the firearms regulation contained in the Virginia State Parks Regulations duly adopted by the Department of Conservation and Recreation conflicts with § 18.2-308 of the Code of Virginia.

You advise that a hunter education instructor for the Department of Game and Inland Fisheries believes that a conflict exists between § 18.2-308 and the regulation. The instructor advises that the firearms regulation prohibits individuals with a valid concealed weapon permit from bringing firearms on the lands controlled by the Department of Conservation and Recreation.

Section 18.2-308 sets forth the prerequisites for carrying concealed weapons. Specifically, § 18.2-308(O) provides that the granting of a concealed weapons permit does not authorize the possession of such weapons "on property or in places where such possession is otherwise prohibited by law." Consequently, the Attorney General concludes in a 1995 opinion that a concealed handgun permit allows the holder to carry a handgun in an area not otherwise prohibited, because the granting of a concealed handgun permit merely exempts an individual from the general prohibition. Similarly, a 2000 opinion notes that, where the carrying of a concealed weapon is otherwise prohibited by law, the authority under § 18.2-308 to carry a concealed weapon is negated.

The firearms regulation adopted by the Department of Conservation and Recreation provides:

No person except employees, police officers, or officers of the department [of Conservation and Recreation] shall carry or possess firearms of any description, or airguns, within [a state] park. This regulation shall not apply in areas designated for hunting by the Department of Conservation and Recreation.

Additionally, the territorial scope of the Virginia State Parks Regulations shall be effective within and upon all state parks, historical and natural areas, roads, sites and other recreational areas in the Commonwealth which may be under the jurisdiction of the Department of Conservation and Recreation and shall regulate the use thereof by all persons.
The Department of Conservation and Recreation is the state agency responsible for the management of all state parks. Section 10.1-104(A)(4) authorizes the Department "[t]o prescribe rules and regulations necessary or incidental to the performance of duties or execution of powers conferred by law." Therefore, the Department clearly and unambiguously is charged with both the responsibility and the authority to regulate the property at issue.

Thus, in accordance with the prior opinions of the Attorney General on this subject and in light of the properly promulgated regulations of the Department of Conservation and Recreation, I am required to conclude that a person with a concealed weapons permit is prohibited from carrying a concealed weapon onto property falling within the purview of these regulations.

14 VA. ADMIN. CODE 5-30-10 to 5-30-400 (Law. Coop. 1996).


4 VA. ADMIN. CODE 5-30-200.

4 VA. ADMIN. CODE 5-30-30.


OP. NO. 01-076
CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY – CHARITABLE GAMING.

Qualified organization authorized to remove proceeds from pull tabs sales from its gross receipts is exempt from permit requirement, provided annual gross receipts resulting from charitable gaming do not exceed $25,000. Charitable Gaming Commission must enforce audit, inspection and enforcement requirements of charitable gaming statutes that are not predicated on organization's gross receipts. Charitable gaming statutes do not restrict organization's use of proceeds from pull tabs games.

THE HONORABLE DONALD L. MOSELEY
SECRETARY OF ADMINISTRATION
AUGUST 30, 2001

You inquire regarding the enactment of § 18.2-340.26:1 of the Code of Virginia by the 2001 Session of the General Assembly, a portion of the statutes in Article 1.1:1, Chapter 8 of Title 18.2, relating to charitable gaming. You first ask whether qualified gaming organizations that sell pull tabs in private social quarters are required to maintain a valid permit issued by the Charitable Gaming Commission as a prerequisite to selling pull tabs.

Section 18.2-340.26:1 provides:

A. Pull tabs ... used as part of a raffle as defined in § 18.2-340.16 may be sold only upon the premises owned or
exclusively leased by the organization and at such times as the portion of the premises in which the pull tabs ... are sold is open only to members and their guests.

B. The proceeds from pull tabs ... used as a part of a raffle shall not be included in determining the gross receipts for a qualified organization provided the gaming (i) is limited exclusively to members of the organization and their guests, (ii) is not open to the general public, and (iii) there is no public solicitation or advertisement made regarding such gaming.

Except as provided in § 18.2-340.23, organizations are required to obtain a permit from the Charitable Gaming Commission before conducting any charitable game. "Charitable games" are "those raffles and games of chance explicitly authorized by [Article 1.1:1]." Pull tabs sold pursuant to § 18.2-340.26:1 are forms of "raffles." Consequently, unless exempted by § 18.2-340.23, organizations that conduct pull tab games pursuant to § 18.2-340.26:1 must obtain a permit from the Commission before conducting such games.

Section 18.2-340.23(A) provides that "[n]o organization that reasonably expects ... to realize gross receipts of $25,000 or less in any twelve-month period shall ... notify the Commission of its intention to conduct charitable gaming ... or ... comply with Commission regulations." "Gross receipts," as used in Article 1.1:1, means "the total amount of money received by an organization from charitable gaming before the deduction of expenses, including prizes." I am advised that the majority, if not all, of the games offered by organizations that sell pull tabs gross more than $25,000 per year.

I can find no basis upon which to conclude that § 18.2-340.26:1 permits the proceeds of these games to be included in the organization's gross receipts for some purposes, but not for other purposes. Accordingly, I must conclude that, by removing the proceeds from pull tabs in determining the gross receipts from charitable gaming conducted under the conditions specified in § 18.2-340.26:1, an organization is exempt from the permit requirement of § 18.2-340.25, provided the gross receipts' annual results still do not exceed $25,000.

You next ask whether qualified gaming organizations that sell pull tabs in private social quarters are required to meet the recordkeeping requirements of the Charitable Gaming Commission and are subject to audit, inspection and enforcement by the Commission.

An organization that conducts charitable games under the conditions specified in § 18.2-340.26:1(B) will not be exempt from all the charitable gaming statutes, even though the organization is exempt from the permit requirements of § 18.2-340.25. Section 18.2-340.23(A) provides that any organization that reasonably expects to realize gross receipts' annual results of $25,000 or less is not required to "(i) notify the Commission of its intention to conduct charitable gaming, (ii) file a resolution of its board of directors as required by subsection B, or (iii) comply with Commission regulations." Section 18.2-340.23(C) provides that nothing in the statute prevents the Commission from conducting
any investigation or audit it deems appropriate to ensure an organization’s compliance with Article 1.1:1 and any applicable Commission regulations.

Although, in this instance, the Commission’s regulations will not be applicable, those portions of Article 1.1:1 with which compliance is not predicated on the organization’s gross receipts will apply, and the Commission is not divested of its authority to enforce those provisions. Section 18.2-340.30(A) requires each qualified organization to keep a record of its receipts from charitable gaming and its disbursements related to such operation. The organization must file annual reports with the Commission and may be required, by regulation of the Commission, to file more frequent reports. Section 18.2-340.23(B) exempts volunteer fire departments and rescue squads and their auxiliaries from the required financial reporting requirements and from the payment of audit fees; however, it requires them to obtain an “exempt status” certification from the Commission prior to conducting charitable gaming and to file a resolution of their board of directors, at such time as may be required by the Commission, stating that the organization has complied with Article 1.1:1. Organizations exempt under § 18.2-340.23(A) are not required to file the resolution and are exempt from the Commission’s regulations. Should any such organization’s actual gross receipts’ annual results exceed $25,000, however, the Commission may require it to file the report specified in § 18.2-340.30. As the Supreme Court of Virginia has noted, a basic rule of statutory construction is that, in considering the object and purpose of a statute, a reasonable construction should be given to promote the end for which it was enacted. That which is necessarily implied in a statute must be included to effect the purpose of that statute.

Furthermore, except as provided in § 18.2-340.23, all reports filed pursuant to § 18.2-340.30 are subject to audit by the Commission, and the Commission may prescribe an annual audit fee based on a percentage of the organization’s gross receipts from charitable gaming. Because the proceeds from pull tabs are not included in determining the organization’s gross receipts from charitable gaming, they would not be included in calculating the audit fee due from those organizations. If the organizations conducted no other charitable games, no audit fee could be prescribed, though the Commission would retain the authority to conduct an audit. There is no corresponding exemption from the requirements regarding the records that must be kept.

Although the organizations conducting the gaming limited by § 18.2-340.26:1 would be exempt from Commission regulations, the powers and duties of the Commission specified in § 18.2-340.18 continue to apply to such organizations. “The Commission is vested with jurisdiction and supervision over all charitable gaming authorized under [Article 1.1:1].” Its powers include “free access to the offices, facilities or any other place of business of any organization, including any premises devoted in whole or in part to the conduct of charitable gaming,” and they “may enter such places or premises for the purpose of carrying out any duty imposed by [Article 1.1:1], securing records required to be maintained by an organization, investigating complaints, or conducting audits.” Furthermore, “[t]he Commission may compel the production of any books, documents,
records, or memoranda of any organizations or supplier for the purpose of satisfying itself that [Article 1.1:1] and its regulations are strictly complied with."\(^\text{14}\)

The Commission continues to possess the authority to "issue subpoenas for the attendance of witnesses before it, administer oaths, and compel production of records or other documents and testimony of such witnesses whenever, in the judgment of the Commission, it is necessary to do so for the effectual discharge of its duties,"\(^\text{15}\) although it may compel only a person "holding a permit to file with the Commission such documents, information or data as shall appear to the Commission to be necessary for the performance of its duties."\(^\text{18}\)

In addition, "[t]he Commission may enter into arrangements with any governmental agency of this or any other state or any locality in the Commonwealth for the purposes of exchanging information or performing any other act to better ensure the proper conduct of charitable gaming."\(^\text{17}\) There appears to be no limitation on the power of the Commission to conduct such audits, in addition to those required by § 18.2-340.31, as it deems necessary and desirable, and the Commission may, of course, continue to report any alleged criminal violation of Article 1.1:1 for appropriate action by the local Commonwealth's attorney.

Your final inquiry is whether qualified gaming organizations are permitted to use the proceeds from the sale of pull tabs in private social quarters for purposes other than those permitted in Article 1.1:1.

Section 18.2-340.26:1(B) expressly provides that the proceeds from the games that satisfy its conditions "shall not be included in determining the gross receipts for a qualified organization." Gross receipts from charitable gaming may be used only as prescribed by statute.\(^\text{19}\) In addition, a portion of the organization’s gross receipts must be used for certain purposes.\(^\text{19}\)

Because the proceeds of the games described in § 18.2-340.26:1 are not used in determining the organization’s charitable gaming gross receipts, such are not intended to be governed by § 18.2-340.19(1) or § 18.2-340.33(1) and (15).\(^\text{20}\)

Moreover, if the organization is exempt from the permit requirement pursuant to § 18.2-340.23(A), it need not comply with the Commission’s regulations, including those prescribed pursuant to § 18.2-340.19(1).\(^\text{21}\) For all of these reasons, I am of the opinion that the charitable gaming statutes impose no restriction on the uses to which the proceeds of the games described in § 18.2-340.26:1 may be put, or any requirement that such proceeds be used for any particular purpose, including charitable purposes.


\(^2\)Section 18.2-340.17 establishes the Charitable Gaming Commission. The Commission "is vested with control of all charitable gaming in the Commonwealth, with plenary power to prescribe regulations," and is authorized to issue, deny, suspend or revoke the permits of organizations that are not in compliance with the charitable gaming laws. VA. CODE ANN. § 18.2-340.15 (Michie Repl. Vol. 1996); § 18.2-340.20 (Michie Supp. 2001); see also §§ 18.2-340.18, 18.2-340.19 (Michie Supp. 2001) (enumerating powers and duties of Commission and authorizing Commission to adopt regulations).

\(^3\)See VA. CODE ANN. § 18.2-340.25 (Michie Supp. 2001); see also § 18.2-340.16 (Michie Supp. 2001) (defining "qualified organization").
Section 18.2-340.16 (emphasis added).

Id.

Section 18.2-340.23(B) grants permit exemptions for any volunteer fire department or rescue squad or an auxiliary of such fire department or squad “if, prior to conducting charitable gaming, it notifies the Commission ... that it will conduct charitable gaming.” I am not aware of any volunteer fire department or rescue squad that conducts any form of charitable gaming that (i) is limited exclusively to members of the organization and their guests, (ii) is not open to the general public, and (iii) has not publicly solicited or advertised such gaming. Accordingly, § 18.2-340.23(B) is probably not relevant to your inquiry.


See Norfolk So. Ry. Co. v. Lassiter, 193 Va. 360, 364, 68 S.E.2d 641, 643 (1952) (“policy [in statute] that is clearly implied is as effective as that which is expressed”); Aetna Co. v. Earle-Landsell Co., 142 Va. 435, 450, 129 S.E. 263, 267 (1925) (noting that authority to contract necessarily implies power to specify or negotiate terms and conditions of contract that will best promote speedy construction, otherwise there would be no measure of obligation).


See § 18.2-340.30.

Section 18.2-340.18(2).

Section 18.2-340.18(3).

Section 18.2-340.18(5).

Section 18.2-340.18(6).

Section 18.2-340.18(7).

No part of the gross receipts derived by a qualified organization may be used for any purpose other than (i) reasonable and proper gaming expenses, (ii) reasonable and proper business expenses, (iii) those lawful religious, charitable, community or educational purposes for which the organization is specifically chartered or organized, and (iv) expenses relating to the acquisition, construction, maintenance, or repair of any interest in the real property involved in the operation of the organization and used for lawful religious, charitable, community or educational purposes. See supra notes 18, 19.

Section 18.2-340.19(1) requires the Commission to adopt regulations which “[r]equire, as a condition of receiving a permit, that the applicant use a predetermined percentage of its gross receipts for (i) those lawful religious, charitable, community or educational purposes for which the organization is specifically chartered or organized or (ii) those expenses relating to the acquisition, construction, maintenance or repair of any interest in real property involved in the operation of the organization and used for lawful religious, charitable, community or educational purposes. The regulation may provide for a graduated scale of percentages of gross receipts to be used in the foregoing manner based upon factors the Commission finds appropriate to and consistent with the purpose of charitable gaming.” See supra note 19.

OP. NO. 01-001
CRIMINAL PROCEDURE: ARREST.
Victims' Services Section of Department of Criminal Justice Services, rather than Attorney General, is appropriate agency to determine what constitutes special circumstances dictating course of action other than arrest in matters involving family violence.

THE HONORABLE MATTHEW J. BRITTON
COMMONWEALTH'S ATTORNEY FOR KING GEORGE COUNTY
JUNE 27, 2001

You ask what constitutes "special circumstances which would dictate a course of action other than an arrest" under § 19.2-81.3(B) of the Code of Virginia.

Section 19.2-81.3(B) provides:

A law-enforcement officer having probable cause to believe that a violation of § 18.2-57.2 or § 16.1-253.2 has occurred shall arrest and take into custody the person he has probable cause to believe, based on the totality of the circumstances, was the primary physical aggressor unless there are special circumstances which would dictate a course of action other than an arrest.

The 1994 Session of the General Assembly established the Commission on Family Violence Prevention to study domestic violence in the Commonwealth, to identify existing services and resources available to address family violence, to investigate ways to coordinate delivery of those services and resources and increase public awareness of their existence, and to determine services, resources and legislation which may be needed to further address, prevent and treat family violence.

In 1996, the Commission issued its report to the Governor and General Assembly, and recommended that the Virginia Code be amended to "require mandatory arrest of the primary physical aggressor upon a finding of probable cause that assault and battery of a family or household member has occurred." The 1996 Session of the General Assembly subsequently enacted § 19.2-81.3(B), and directed the Commission to continue its study of family violence prevention and to submit its findings and recommendations to the Governor and the General Assembly. In 1997, the Commission submitted its report, which contained a recommendation "that the Department of Criminal Justice Services' Model Policy and training standards provide guidance related to the terms 'primary physical aggressor' and 'special circumstances.'"

I am advised that the Department of Criminal Justice Services has developed a model policy for law-enforcement agencies to adopt in responding to calls for assistance involving complaints of domestic violence. Furthermore, I am advised that the Department's Victims' Services Section has developed a domestic violence curriculum for law-enforcement personnel, and further, that such curriculum specifically addresses instances that constitute "special circumstances" under § 19.2-81.3(B). Unless the Department's interpretation is
clearly wrong in such a situation, I must defer to the interpretation of § 19.2-81.3(B) by the Department regarding what constitutes “special circumstances,” since the Department is specifically required by the General Assembly to make such determinations.\(^7\) As the Supreme Court of Virginia has noted, the General Assembly is presumed to be cognizant of the administrative construction of this particular statute and, when such construction continues without legislative alteration, will be presumed to have acquiesced in it.\(^7\)

A 1987 opinion of the Attorney General concludes that, in rendering official opinions pursuant to § 2.1-118, the Attorney General has declined to render such opinions when the request (1) does not involve a question of law, (2) requires the interpretation of a matter reserved to another entity, (3) involves a matter currently in litigation, or (4) involves a matter of purely local concern or procedure.\(^7\) Prior opinions also conclude that a request for an official opinion made pursuant to § 2.1-118 concerning the propriety of the actions of another entity interpreting matters reserved solely to it is not subject to review by the Attorney General and must be treated as the binding determination with regard to the matter.\(^8\) Consequently, I must respectfully decline to render an opinion on what constitutes “special circumstances which would dictate a course of action other than an arrest” under § 19.2-81.3(B). I am of the opinion that the Victims’ Services Section of the Department of Criminal Justice Services is the appropriate agency to make such determinations.

\(^3\)1996 Va. Acts ch. 866, at 1593, 1608; see id. cl. 2, at 1610 (providing for act to become effective July 1, 1997).
\(^6\)See 1999 Op. Va. Att’y Gen. 3, 5, and opinions cited at 6 n.25; cf. Board of Zoning Appeals v. 852 L.L.C., 257 Va. 485, 486, 514 S.E.2d 767, 770 (1999) (“if the administrative interpretation of a portion of an ordinance is so at odds with the plain language used in the ordinance as a whole, such interpretation is plainly wrong, and must be reversed” (quoting Cook v. City of Falls Church, 244 Va. 107, 111, 418 S.E.2d 879, 881 (1992))).
conducted by school safety officer as school official must be reasonably based on individualized suspicion of wrongdoing; searches conducted by school safety officer as conservator of peace must be assessed in terms of probable cause.

THE HONORABLE KENNETH W. STOLLE
MEMBER, SENATE OF VIRGINIA
NOVEMBER 30, 2001

You inquire regarding the legal standard to be applied to searches conducted by school safety officers who have been appointed conservators of the peace with special police powers. You specifically ask whether such school officials may conduct limited searches on school premises under the reasonableness standard articulated by the Supreme Court of the United States in the case of New Jersey v. T.L.O. If not, you ask whether such school officials must have probable cause to conduct searches or make arrests.

You advise that the 2001 Session of the General Assembly enacted House Joint Resolution 542, directing the Virginia State Crime Commission to conduct a study of school safety specialists and security officers. You state that the Commission has been advised that the circuit courts in local school divisions are appointing school safety officers as conservators of the peace with special police powers. You note that the school safety officers appointed as conservators of the peace remain employees of the local school division.

You relate that the Crime Commission has been advised that the T.L.O. case holds that, while school officials cannot disregard the requirements of the Fourth Amendment to the United States Constitution, they may conduct limited searches using only a reasonableness standard. Furthermore, the Commission has been advised that this case did not address the appropriate standard to be used for searches when the school official is also a law-enforcement officer. You relate that it is not clear to the Commission whether school safety officers appointed as conservators of the peace must meet the warrant requirements of the Fourth Amendment before conducting searches.

Section 15.2-1737(A) of the Code of Virginia authorizes the circuit court for any locality to appoint special police officers for a locality within the court's jurisdiction. Special police officers so appointed "have the general power, authority and duties of other peace officers." Section 19.2-13(A) also authorizes the circuit court to appoint one or more special conservators of the peace to serve a term designated by the court not to exceed four years under any one appointment. Conservators of the peace have general powers of arrest.

The Fourth Amendment to the Constitution of the United States provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." "Searches and seizures carried out by school officials are governed by the same Fourth Amendment principles that apply in other contexts." "To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." The Supreme Court of the United States usually requires that a search be undertaken only pursuant to a warrant and supported by probable cause. The inappropriateness of the probable cause standard for
reviewing anything other than the criminal investigatory function, however, has been made clear by the Court in a number of contexts. When the purpose of a Fourth Amendment search is not to discover evidence of crime, but is intended to serve some "special needs, beyond the normal need for law enforcement," a reasonable, articulable suspicion may be all that is necessary to pass constitutional muster. The supervision and operation of schools present "special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."

The Supreme Court of the United States established in the T.L.O. case a "reasonableness" standard for searches conducted in the school context. The standard is less restrictive than the general "probable cause" standard applied in most other search and seizure contexts. The Court envisioned a balancing process in which the need to search is weighed against the invasion which the search entails. "On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order." The Court recognized that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and ... preserve[es] the informality of the student-teacher relationship." Consequently, an "accommodation of the privacy interests of school children with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause."

School officials, therefore, must have reasonable suspicion that a student is engaged in some illegal activity before they can search the student's personal belongings. The standard is met where the officials reasonably suspect a student has violated "either the law or the rules of the school" and the subsequent search is "reasonably related to the objectives of the search and not excessively intrusive." The "reasonableness" standard is designed, as the United States Supreme Court has stated, to "spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense."

In the context of investigating the violation of a school regulation by a teacher or school official and not the perpetration of a crime, the invasion of a suspected student's Fourth Amendment rights is assessed only in terms of general reasonableness, not probable cause. The T.L.O. case, however, considered "only searches carried out by school authorities acting alone and on their own authority." The case did not present the "question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies." Consequently, the Court expressed "no opinion on that question."

Clearly, teachers and school officials have an interest in the provision of an education and the maintenance of school discipline. In conducting a search at school in furtherance of these interests, such officials should be concerned
with locating and confiscating anything that may be disruptive to the provision of education and the maintenance of discipline. In the course of such a search, evidence may be acquired that ultimately may be considered to have been reasonably obtained and therefore usable in a criminal prosecution or in an adjudication of delinquency.

In conducting searches, law-enforcement officers seek to find evidence of crime. Given the responsibility of the police to find evidence of crime, the standard of probable cause of an actual arrest must be met to justify any search under the Fourth Amendment. In the case of Brinegar v. United States, the Supreme Court of the United States explained:

These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community’s protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers’ whim or caprice.

Consequently, when a school safety officer conducts a search as a conservator of the peace with special police powers, he is clearly acting in his law-enforcement capacity. Should such officer conduct a search seeking evidence of crime, it is my view that the standard of probable cause of an actual arrest must be met to justify the search. A court has not, however, considered the matter. Ultimately, therefore, the determination whether the situation you present is governed by a reasonable standard or a standard requiring probable cause depends on a complete and detailed set of facts. Indeed, the reasonableness of any Fourth Amendment search conducted in a school necessarily depends on the facts of each particular case.

Accordingly, while I am unable to render a definitive opinion due to a lack of knowledge of all the pertinent and particular facts in a particular case, it is my general opinion that all school searches conducted by a school safety officer as a school official must be assessed in terms of general reasonableness. When such searches are conducted by a school safety officer as a conservator of the peace with special police powers seeking evidence of crime, it must be assessed in terms of probable cause.

Section 15.2-1737(A) provides that special police officers appointed by a local circuit court "shall be conservators of the peace under the supervision of the person or agency making application for the appointment."


T.L.O., 469 U.S. at 351 (Blackmun, J., concurring).

"While 'reasonable suspicion' is a less demanding standard than probable cause ..., the Fourth Amendment requires at least a minimal level of objective justification." Illinois v. Wardlow, 528 U.S. 119, 123 (2000).

Griffin, 483 U.S. at 873-74 (upholding warrantless search of probationer's home by probation officer where founded upon "reasonable grounds" to believe that contraband was present).

469 U.S. at 337.

Id.

Id. at 340.

Id. at 341.

See, e.g., United States v. Place, 462 U.S. 696, 703 (1983) (agreeing that, where authorities possess specific and articulable facts warranting reasonable belief that traveler's luggage contains narcotics, governmental interest in seizing luggage briefly to pursue further investigation is substantial).

469 U.S. at 342; accord Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995) (upholding school district's decision to implement random urinalysis drug testing of student athletes); DesRoches, 156 F.3d at 571 (holding that school official's proposed search of student's backpack for missing tennis shoes belonging to another student was reasonable under Fourth Amendment).

469 U.S. at 343.

Id. at 341 n.7.

Id.

Id.

"Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Draper v. United States, 358 U.S. 307, 313 (1959) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).


OP. NO. 00-097
CRIMINAL PROCEDURE: SENTENCE; JUDGMENT; EXECUTION OF SENTENCE.

Circuit court may order payment of restitution prior to payment of court costs. Judge may issue standing order that clerk credit payments made by defendant, as condition of probation, toward restitution before collecting court costs.
THE HONORABLE DOLLIE M. COMPTON
CLERK, CIRCUIT COURT OF RUSSELL COUNTY
DECEMBER 27, 2001

You ask whether a circuit court judge hearing a criminal case may enter a standing order requiring that the clerk credit all payments toward restitution before collecting court costs.

You relate that a defendant in a criminal case has been ordered by the judge, as a condition of probation, to make payment of restitution and court costs. You further relate that the judge has ordered that all payments made by the defendant be first credited toward the restitution. You inquire whether the judge may order that restitution be paid prior to court costs.

Section 19.2-305(B) of the Code of Virginia provides that "[a] defendant placed on probation following conviction may be required to make ... restitution ... for damages or loss caused by [his] offense." Section 19.2-305.1 stipulates that "at least partial restitution" is a mandatory condition of probation for most crimes which result in damage or loss to property. Section 19.2-305(A) provides for the payment of court costs as a condition of probation.

A primary goal of statutory interpretation is to ascertain the intent of the General Assembly. Although the statutes in question do provide for the payment of restitution and costs, they do not provide guidance as to whether restitution or costs are to receive priority over the other. Thus, there is no statutorily ascribed order of priority between these two categories. Accordingly, I am unable to discern a legislative intent to accord preferential treatment to either category.

Generally, a circuit court "has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of the court's jurisdiction." In the instant case, the court is afforded wide latitude in determining the terms and conditions of the payment of restitution or costs. Inasmuch as there are no statutory qualifications to the contrary, it is my opinion that a circuit court has the authority to order that payment of restitution be made prior to payment of court costs. Accordingly, a circuit court judge may order that the clerk first credit the payments at issue toward restitution before collecting court costs.


Compare § 19.2-354(B) (Michie Supp. 2001) (authorizing court to order defendant on work release to make payments on installment and providing for distribution of such funds in following order of priority: (1) to support order; (2) to fines, restitution or costs; (3) to work release expenses; and (4) to defray offender's keep), with VA. CODE ANN. §§ 53.1-45.1(E) (Michie Repl. Vol. 1998) and
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53.1-131.2(H) (Michie Supp. 2001) (reflecting same order of priority concerning wages earned by prisoners in work programs and criminal offenders participating in work release).


OP. NO. 01-093

CRIMINAL PROCEDURE: SENTENCE; JUDGMENT; EXECUTION OF SENTENCE.

COURTS OF RECORD: CLERKS, CLERKS’ OFFICES AND RECORDS — CIRCUIT COURTS.

Circuit court, and not clerk, must make specific finding that indigent defendant has demonstrated particularized need for free copy of his trial transcript. Funds expended for preparation of transcript for indigent defendant may be reimbursed pursuant to circuit court order specifically providing for such payment. Indigent defendant previously provided with copy of arrest warrant. Indictments and conviction orders is not entitled to additional copies. Circuit court clerk may not waive fees for copying document previously furnished to indigent defendant at no charge.

THE HONORABLE JUDY L. WORTHINGTON
CLERK, CIRCUIT COURT OF CHESTERFIELD COUNTY
OCTOBER 30, 2001

You inquire regarding the fees associated with preparing and furnishing copies of transcripts and other court documents requested by an indigent defendant.

You relate that an incarcerated defendant, acting prose, has filed a motion in forma pauperis and a sketch order to obtain, without charge, copies of his trial records. You advise that the defendant needs these documents to prepare an appeal of his criminal conviction, a writ of habeas corpus, and a motion to vacate his conviction. You advise that the defendant specifically requested the clerk to arrange for the transcription of his criminal trial and each hearing regarding this matter, and to provide copies of his arrest warrants, indictments, orders of conviction, sentencing orders, the table of contents of his trial record, and the aforementioned transcripts.

You advise further that, although the defendant was convicted in 1997, he has yet to file a motion to vacate, notice of appeal, or petition for writ of habeas corpus. In addition, you advise that the defendant, prior to conviction, was provided, free of charge, copies of his arrest warrant, indictment and conviction order. You also relate that the defendant entered a guilty plea and was represented by counsel at trial. Finally, you state that you are not aware of any statute that requires the Commonwealth to pay for the transcription of proceedings furnished, at no charge, to a defendant who has not filed a notice of appeal or a petition for writ of habeas corpus. You also note that neither the Compensation Board nor the county has allocated an appropriation for such a transcription to be paid out of the clerk’s budget.

You first ask whether a circuit court clerk may waive fees associated with preparing or furnishing a transcript requested by an indigent defendant who has not filed a notice of appeal or petition for writ of habeas corpus.
An indigent defendant is entitled to a free copy of his trial transcript to perfect an appeal. An indigent defendant, however, is not entitled to a copy of a trial transcript at public expense, even though the transcript is already in existence, for the purpose of combing the record in the hope of discovering some error. An indigent defendant must demonstrate a particularized need for the free copy of the transcript in order to receive it. In the case of McCoy v. Lankford, the Supreme Court of Virginia adopted the particularized need standard and held that the indigent defendant petitioning for a writ of habeas corpus should be furnished, without cost, certified copies of the arrest warrants, indictment and conviction order from the criminal file in the circuit court. The Court, however, ruled that such indigent defendant who fails to demonstrate a particularized need for a trial transcript may not have a transcript prepared for his use at public expense. Therefore, the circuit court, and not the clerk, must make a specific finding that the indigent defendant has demonstrated a particularized need for a free copy of his trial transcript.

You next inquire whether a circuit court clerk may bill the Commonwealth for fees associated with preparing and furnishing a copy of the trial and hearing transcript requested by an indigent defendant who has not filed a notice of appeal or petition for writ of habeas corpus.

Section 1-10, Item 30(A)(3) of the 2000 Appropriation Act allocates to the circuit courts in the Commonwealth funds to be expended "incident to the prosecution of a petition for a writ of habeas corpus by an indigent petitioner." Item 30(A)(3) requires that expenses related to such prosecution "shall be paid upon receipt of an appropriate [circuit court] order." Consequently, any funds expended for the preparation of a transcript for an indigent defendant may be reimbursed only pursuant to a valid order of the circuit court specifically providing for such payment.

Your final question is whether a circuit court clerk may waive the fees for copying a document previously furnished, free of charge, to an indigent defendant.

In the Commonwealth, an indigent defendant is entitled to file one habeas corpus petition challenging the validity of his conviction. Any subsequent petition is barred by § 8.01-654(B)(2) of the Code of Virginia. Consequently, once the indigent defendant has been provided with a copy of the arrest warrant, indictments and conviction orders, he is not entitled to additional copies. I am of the opinion, therefore, that the circuit court clerk may not waive fees for copying a document previously furnished, free of charge, to an indigent defendant.

¹"One who represents oneself in a court proceeding without the assistance of a lawyer." Black's Law Dictionary 1237 (7th ed. 1999).
²"In the manner of an indigent who is permitted to disregard filing fees and court costs." Black's Law Dictionary, supra, at 783.
⁴Jones v. Superintendent, Virginia State Farm, 460 F.2d 150, 152 (4th Cir. 1972).
You ask whether a risk assessment instrument developed by the Virginia Criminal Sentencing Commission for integration into the state's sentencing guidelines for sex offenses violates either the Constitution of the United States or the Constitution of Virginia.

You advise that risk assessments occur both formally and informally throughout the various stages of the criminal justice system. Judges, for instance, make sentencing decisions based on the perceived risk an offender poses to public safety in terms of new offense behavior. You advise further that the 1999 session of the General Assembly requested "the Virginia Criminal Sentencing Commission to develop a risk assessment instrument for utilization in the sentencing guidelines for sex offenses." You explain that such a risk assessment instrument is designed to identify those offenders who, as a group, represent the greatest risk for repeat offenses once released back into the community.

You relate further that the Sentencing Commission responded to the legislative mandate by designing and executing a research methodology to study a sample of felony sex offenders convicted in the Commonwealth. The objective of the Commission was to develop a reliable and valid predictive instrument, specific to the population of sex offenders in the Commonwealth, that would be helpful to the judiciary when sentencing sex offenders.
You explain that criminal risk assessment is a means of developing profiles or composites of offenders likely to repeat criminal behavior, based on overall group results. Typically, risk assessment is practiced informally throughout the criminal justice system (e.g., prosecutors in bringing charges, judges in sentencing offenders, and probation officers in developing supervision plans). Groups have several factors in common that are statistically relevant to predicting the likelihood of repeat offenses. Those groups exhibiting a high degree of repeat offenses are labeled high risk. Empirically based risk assessment, however, is a formal process of gaining knowledge by observing the actual behavior of individual offenders within groups.

The Virginia Criminal Sentencing Commission has devised a risk assessment instrument for sex offenders to enhance the underlying structure of the sentencing guidelines. The Commission studied the recidivist rate for sex offenders, and found that forty percent committed repeat offenses while others committed felony offenses. The Commission, therefore, developed a risk assessment instrument for use in determining which offenders are at risk of recidivism. The instrument contains a checklist of the following factors, with points assigned to each factor to indicate its importance in predicting recidivism:

1. The offender’s age at the time the offense was committed;
2. Whether the offender has less than a ninth grade education;
3. Whether the offender was regularly unemployed;
4. The offender’s relationship to the victim;
5. Whether the primary offense is an aggravated sexual battery;
6. The location of the offense;
7. Whether the offender had prior felony/misdemeanor arrests for crimes against the person;
8. Whether the offender had prior incarcerations/commitments; and
9. Whether the offender received prior treatment.

Decisions of the Supreme Court of the United States indicate that, from a legal point of view, there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions,² and the Court has specifically rejected the contention “that it is impossible to predict future behavior and that the question is so vague as to be meaningless.”³ A prediction of future criminal conduct formed the basis for an enhanced sentence under the now-repealed “dangerous special offender” statute.⁴ The federal statute defined a defendant as dangerous “if a period of confinement longer than that provided for [the instant] felony is required for the protection of the public from further criminal conduct by the defendant.”⁵ The statute was challenged numerous times on the grounds that the standard of proving dangerousness was unconstitutionally vague. Courts have upheld the statute as not unconstitutionally vague on the basis that dangerousness is a concept familiar to judges involved in sentencing decisions.⁶ It, therefore, appears to be well-established that there is no impediment under the United States Constitution to using predictions of dangerousness in legal proceedings, up to and including those that may result in loss of liberty or death.⁷
The Supreme Court of Virginia has also had opportunity to consider the constitutionality of predictions of future dangerousness under § 19.2-264.4 of the Code of Virginia in the context of death penalty cases. The Court rejected the assertion that § 19.2-264.4(C) violates a defendant's rights under the Eighth and Fourteenth Amendments to the United States Constitution, because a jury may find future dangerousness based upon unadjudicated crimes. The Virginia Supreme Court has determined that a death sentence in the Commonwealth may be based on the assessment by a jury of such matters as lay testimony and the circumstances of the capital crime. Accordingly, I must conclude that sentencing guidelines that are voluntary and may be dispensed with by a trial judge may take into account a defendant's prior history of sexual offenses in determining the likelihood of his recidivism.

It is, therefore, my opinion that a risk assessment instrument developed for integration into the state's sentencing guidelines for sex offenses does not violate either the United States or the Virginia Constitution.


Jurek, 428 U.S. at 274 (op. of Stewart, Powell, Stevens, JJ.); id. at 279 (White, J., concurring).


United States v. Williamson, 567 F.2d 610, 613 n.6 (4th Cir. 1977) (quoting now-repealed § 3575(f)).

See United States v. Schell, 692 F.2d 672, 675-76 (10th Cir. 1982); Williamson, 567 F.2d at 613; United States v. Bowdach, 561 F.2d 1160, 1175 (5th Cir. 1977); United States v. Neary, 552 F.2d 1184, 1194 (7th Cir. 1977); United States v. Stewart, 531 F.2d 326, 396-37 (6th Cir. 1976).

See Schall v. Martin, 467 U.S. 253, 268, 269 n.18 (1984) (citing Rummel v. Estelle, 445 U.S. 263, 275 (1980) (stating that presence or absence of violence does not always affect strength of society's interest in deterring particular crime)); Barefoot v. Estelle, 463 U.S. 880, 897 (1983) (noting that, though difficult, predictions of dangerousness are essential part of judicial process); Jurek, 428 U.S. at 272-74 (holding that medical testimony on future dangerousness is admissible at penalty phase of capital prosecution); State v. Prior, 799 P.2d 244, 249 (Wash. 1990) (holding that exceptional sentences are warranted when offender has significant criminal history and is not amenable to treatment); In re Harris, 98 Wash. 2d 276, 287, 654 P.2d 109, 114 (1982) (requiring judicial finding of probable dangerousness to self before issuing summons for 72-hour evaluation and treatment).

You inquire whether the Town of Purcellville Police Department may patrol and enforce the laws of the Commonwealth one mile beyond the corporate limits of the town.

You advise that the density of population in Loudoun County within one mile of the town is less than 300 inhabitants per square mile, although the county density, particularly in the east end, exceeds 300 inhabitants per square mile. You, therefore, seek clarification of § 19.2-250(A) of the Code of Virginia.

Section 19.2-250(A) provides:

Notwithstanding any other provision of [Article 2, Chapter 15 of Title 19.2] ..., the jurisdiction of the corporate authorities of each town ..., in criminal cases involving offenses against the Commonwealth, shall extend within the Commonwealth one mile beyond the corporate limits of such town ...; except that such jurisdiction of the corporate authorities of towns situated in counties having a density of population in excess of 300 inhabitants per square mile ..., shall extend for 300 yards beyond the corporate limits of such town[.]

The Supreme Court of Virginia has stated that the primary goal of statutory construction "is to ascertain and give effect to legislative intent." The Court notes that "[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied." The use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive. Finally, statutes are to be read as a whole rather than in isolated parts. The reading of a statute as a whole influences the proper construction of ambiguous individual provisions.

The plain language of § 19.2-250(A) specifies only that the density of population is to be measured as "inhabitants per square mile." There is no indication that the General Assembly intended the statute to be applicable only to portions of counties. Had the General Assembly intended to restrict the measurement of population density to the portions of counties that actually surround a town, it could have chosen language to reflect such an intent. The United States Census Bureau calculates the entire density of population in Loudoun County to be 326.2 persons per square mile.

Therefore, I conclude that the Town of Purcellville Police Department may not patrol and enforce the laws of the Commonwealth one mile beyond the corporate limits of the town. Section 19.2-250(A) restricts such jurisdiction for "towns situated in counties having a density of population in excess of 300 inhabitants per square mile" to "300 yards beyond the corporate limits of such town."


You inquire regarding whether individuals issued “Credentials of Ministry” by a church in California may qualify as “ministers” pursuant to § 20-23 of the Code of Virginia.

You advise that two individuals have presented to you “Credentials of Ministry,” issued by the Universal Life Church of Modesto, California, and have requested authority to perform marriages. You report that the Credentials appear valid and provide written authority to perform sacerdotal rites, including marriage.

You first ask whether the clerk of the circuit court is required to investigate proof of a facially valid ordination or certificate to determine the authenticity of a given religious society or denomination, for the purposes of authorization pursuant to § 20-23.

Section 20-23 provides, in part:
When a minister of any religious denomination shall produce before the circuit court of any county or city in this Commonwealth, ... or before the clerk of such court at any time, proof of his ordination and of his being in regular communion with the religious society of which he is a reputed member, ... and is serving as a regularly appointed pastor in his denomination, such court, ... or the clerk of such court at any time, may make an order authorizing such minister to celebrate the rites of matrimony in this Commonwealth.

In the case of Cramer v. Commonwealth, the Supreme Court of Virginia notes that § 20-23 applies to "ministers" who make proof of "ordination" and of being in "regular communion" with a religious society. The Court also holds that the term "minister" applies to those for whom ministry is less than a full-time vocation, and that the terms "ordination" and "communion" are not used in the ecclesiastical sense, because the state is "not concerned with the religious aspect of the marriage ceremony." The Court further notes that the word "ordain" is subject to such definitions as "appoint, arrange, order, manage" or 'to establish by appointment." The Court also notes that the word "communion" is subject to such definitions as "mutual participation, ... joint or common action' or 'a function performed jointly." The Court defines the term "minister," as used in § 20-23, to mean one who "is the head of a religious congregation, society or order. He is set apart as the leader. He is the person elected or selected in accordance with the ritual, bylaws or discipline of the order."

Article VII, § 4 of the Constitution of Virginia creates the office of clerk of the circuit court, and provides that a clerk's duties "shall be prescribed by general law or special act." As a rule, clerks of court have no inherent powers, and the scope of their authority must be determined by reference to applicable statutes. When a statute creates a specific grant of authority, however, such authority exists only to the extent specifically granted in the statute.

Section 20-23 grants the only authority to circuit court clerks to "make an order authorizing [a] minister to celebrate the rites of matrimony." The primary goal of statutory construction "is to ascertain and give effect to legislative intent." "The manifest intention of the legislature, clearly disclosed by its language, must be applied." Section 20-23 does not require a circuit court clerk to investigate proof of a facially valid ordination or certificate to determine the authenticity of a given religious society or denomination. Had the General Assembly intended to require clerks to do so, it would have chosen appropriate language reflecting such an intent. Consequently, I must conclude that a clerk of the circuit court is not required to investigate proof of a facially valid ordination or certificate to determine the authenticity of a given religious society or denomination.

You also ask whether the individuals who have presented "Credentials of Ministry" issued by the Universal Life Church may be authorized to perform marriages in the Commonwealth.
Section 20-23 specifically provides that the clerk of the circuit court “may make an order authorizing ... minister[s] to celebrate the rites of matrimony.” The use of the term “may” indicates that the issuance of such an order by the clerk is permissive and discretionary, rather than mandatory. Consequently, it is my opinion that it is within the discretion of the clerk of the circuit court to “make an order authorizing such minister to celebrate the rites of matrimony.”


Id. at 564, 202 S.E.2d at 913.

Id. at 565, 202 S.E.2d at 914.

Id. (citation omitted).

Id. (citation omitted).

Id. at 567, 202 S.E.2d at 915.


When the General Assembly intends words in a statute to have a specific meaning, it clearly and unambiguously expresses its intention. See Potomac Hospital Corp. v. Dillon, 229 Va. 355, 355, 329 S.E.2d 41, 44 (1985) (noting that General Assembly specifically expressed its intention to allow application of § 8.01-35.1, regardless of date causes of action affected thereby accrued).


OP. NO. 01-025
EDUCATION: PUPILS - DISCIPLINE.
Discretionary authority of local law-enforcement authorities to share with public schools officials information concerning any offense committed by student(s) off school property on school bus, school property, or at school-sponsored activity that would be criminal offense if committed by adult.

THE HONORABLE H. RUSSELL POTTS JR.
MEMBER, SENATE OF VIRGINIA
JUNE 25, 2001
You ask whether § 22.1-280.1(B) of the Code of Virginia permits local law-enforcement authorities to share with public school officials information concerning any offense committed off school property that would be a felony if committed by an adult or would be an adult misdemeanor involving any of the incidents described in § 22.1-280.1(A).

The Attorney General has recently concluded in an opinion to you dated July 21, 2000, that § 22.1-280.1(B) authorizes local law-enforcement authorities to report to the school principal or the designee of such principal any offense that would be a felony if committed by an adult or would be an adult misdemeanor involving any of the incidents described in § 22.1-280.1(A). You have inquired whether the phrase “wherever committed” in § 22.1-280.1(B) provides to local law-enforcement authorities the discretion to report any such incidents, regardless of whether committed on a school bus, on school property, at a school-sponsored activity, or at some other location off school property.

Section 22.1-280.1 addresses the reporting of certain criminal incidents occurring on school buses, school property, or at school-sponsored activities. Section 22.1-280.1(B) provides:

Notwithstanding the provisions of Article 12 (§ 16.1-299 et seq.) of Chapter 11 of Title 16.1, local law-enforcement authorities may report, and the principal or his designee may receive such reports, on offenses, wherever committed, by students enrolled at the school if the offense would be a felony if committed by an adult ... or would be an adult misdemeanor involving any incidents described in clauses (i) through (v) of subsection A. [Emphasis added.]

The General Assembly does not define the term “wherever” as it is used in the phrase “wherever committed” in § 22.1-280.1(B). Therefore, the term must be given its common, ordinary meaning. The term “wherever” is used as an adverb modifying the verb “committed” in this phrase. The term “wherever,” when used as an adverb, is generally synonymous with the term “where,” which conveys the meaning of “place”; “removed all restrictions on his movements and permitted him to go [wherever] he wished.”

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature. Analysis of legislative intent includes appraisal of the subject matter and purpose of the statute, in addition to its express terms. The purpose underlying a statute’s enactment is particularly significant in construing it.

In the July 21, 2000, opinion to you, the Attorney General concluded that the clear purpose of § 22.1-280.1(B) is to permit the sharing of reports by local law-enforcement authorities with the principal of local public schools or his designee. Furthermore, the Attorney General noted that the sharing of such reports of the described offenses by students, wherever they have occurred, by local law-enforcement authorities is clearly discretionary and not mandatory.
Therefore, based on that opinion and the relevant statutes, it is my opinion that § 22.1-280.1(B) permits local law-enforcement authorities to share with public school officials information concerning any offense committed off school property that would be a felony if committed by an adult or would be an adult misdemeanor involving any of the incidents described in § 22.1-280.1(A).

'The incidents described in § 22.1-280.1(A) are "(i) the assault, assault and battery, sexual assault, death, shooting, stabbing, cutting, or wounding of any person on a school bus, on school property, or at a school-sponsored activity; (ii) any conduct involving alcohol, marijuana, a controlled substance, imitation controlled substance, or an anabolic steroid on a school bus, on school property, or at a school-sponsored activity; (iii) any threats against school personnel while on a school bus, on school property or at a school-sponsored activity; (iv) the illegal carrying of a firearm onto school property; [or] (v) any illegal conduct involving firebombs, explosive materials or devices, or hoax explosive devices, as defined in § 18.2-85, or explosive or incendiary devices, as defined in § 18.2-433.1, or chemical bombs, as described in § 18.1-87.1, on a school bus, on school property, or at a school-sponsored activity."'


OP. NO. 01-081

ELECTIONS: CAMPAIGN FINANCE DISCLOSURE ACT.

Decision by State Board of Elections that candidate's campaign committee may pay for expenses of campaign only with check drawn on campaign depository and paid directly to vendor providing service is entitled to great weight. No authority for staff member of candidate's campaign committee to pay for office supplies with personal credit card and to be reimbursed by check drawn on campaign depository for amount of purchase.

THE HONORABLE S. CHRIS JONES
MEMBER, HOUSE OF DELEGATES
NOVEMBER 28, 2001

You request interpretation of § 24.2-905 of the Code of Virginia, a portion of the Campaign Finance Disclosure Act, relating to the payment of campaign expenses.

As chairman of the Joint Legislative Study on Campaign Finance Reform, you state that you are seeking a clear, impartial interpretation of a portion of § 24.2-905, which provides:
No candidate, campaign treasurer, or other individual shall pay any expense on behalf of a candidate, directly or indirectly, except by a check drawn on such designated depository identifying the name of the campaign committee and candidate.

You state that the State Board of Elections has interpreted this provision to mean that a candidate's campaign committee may pay for expenses of the campaign only with a check drawn on the campaign depository and paid directly to the vendor providing a service. You suggest that this interpretation prohibits the practice by a candidate's campaign committee of reimbursing staff directly for out-of-pocket expenses. You provide an example whereby a campaign staff member uses a personal credit card to pay for office supplies to be used by the campaign committee and then is reimbursed by the campaign committee with a check drawn on the campaign depository in the exact amount of the purchase. You advise that a review of campaign finance reports reflects that nearly all candidates use such common reimbursement practices.

You state that the members of the Joint Legislative Study of Campaign Finance Reform believe this interpretation of the statutory provision to be contrary to the intent of the General Assembly. You relate that you believe that the actual intent is to ensure that all monies spent by a campaign committee flow in and out of the official campaign depository account. You believe that expense reimbursements written on a depository account and duly reported on campaign finance reports clearly come within the allowable intent of the provision.

Therefore, you ask whether the terms “directly or indirectly,” as used in § 24.2-905, may be interpreted to permit a candidate's campaign committee to reimburse a candidate, campaign treasurer or other individual campaign committee staff member for campaign-related expenses.

It is my opinion that the language in § 24.2-905 does not mandate a conclusion permitting a staff member of a candidate's campaign committee to pay for office supplies with a personal credit card, without regard to the purchase amount, and to be reimbursed by check drawn on the campaign depository in the amount of the purchase. The State Board of Elections may view such a conclusion as inconsistent with the directions also contained in § 24.2-905 for establishing “a petty cash fund to be utilized for the purpose of ... reimbursing verified credit card expenditures of less than one hundred dollars if complete records of such expenditures are maintained as required by [the Campaign Finance Disclosure Act].”

The Campaign Finance Disclosure Act constitutes “the exclusive and entire campaign finance disclosure law of the Commonwealth.” Section 24.2-905, a portion of the Act, must be read as a whole rather than in isolated parts. The reading of a statute as a whole influences the proper construction of ambiguous individual provisions. When read as a whole, I am of the view that the provisions of § 24.2-905 cannot reasonably be read to support a conclusion that the General Assembly intended to permit such reimbursements of verified credit card expenditures in excess of $100. The Supreme Court of Virginia mandates that “the manifest intention of the legislature, clearly disclosed by its language, must
be applied."

In addition, a statute specifying the method by which something shall be done evinces a legislative intent that it not be done otherwise. Had the General Assembly intended to permit reimbursement of credit card purchases in excess of $100, it would not have clearly specified permission in § 24.2-905 for a treasurer to "establish a petty cash fund to be utilized for the purpose of ... reimbursing verified credit card expenditures of less than one hundred dollars."

The language of § 24.2-903, also a portion of the Campaign Finance Disclosure Act, reaffirms the general statutory duty of the State Board of Elections to "provide ... instructions for persons filing reports pursuant to [the Act] to assist them in completing the reports," so as "to obtain uniformity ... and legality and purity in all elections." In making its decision, the State Board, of course, had access to all of the relevant information regarding the reimbursement practices of candidates' campaign committees, as related in your opinion request, and considered the detailed procedure in Article 4 of the Act for reporting campaign contributions and expenditures. As in other instances, the decision of the State Board in performing its statutory duty in this instance is entitled to great weight. I conclude that the decision in this instance is not inconsistent with the express language of § 24.2-905, and represents a proper exercise of the authority the General Assembly places in the State Board.


9See Forst v. Rockingham, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981); Dept. Taxation v. Prog. Com. Club, 215 Va. 732, 739, 213 S.E.2d 759, 762 (1975); 1993 Op. Va. Att'y Gen. 226, 227. This rule of statutory construction is particularly persuasive in construing individual statutes that constitute parts of a complex statutory scheme, such as the voting system established in Title 24.2. In such an instance, deference to a decision of the agency charged by the General Assembly with the statewide administration of such a system is appropriate unless the decision clearly is wrong. 1996 Op. Va. Att'y Gen. 124, 127 n.7. I, therefore, issue no opinion on whether the language of § 24.2-905 could support a different conclusion by the State Board.

OP. NO. 01-040
ELECTIONS: CAMPAIGN FINANCE DISCLOSURE ACT.

Formation of tax exempt corporation for purpose of educating public on political position relating to matter of governmental policy constitutes 'political purpose.'
You ask whether it is permissible under Virginia law for a group of elected officials to form an educational corporation exempt from income taxation under § 501(c)(4) of the Internal Revenue Code for the purpose of influencing public policy. You advise that a statement of organization and regular reports of contributions are not filed with the State Board of Elections.

You relate that the corporation seems to be a political action committee, and that its purpose is to educate the public on the political position of the group of elected officials. You advise that thirty-four state senators have contributed funds to the corporation from their campaign accounts.

The Campaign Finance Disclosure Act constitutes "the exclusive and entire campaign finance disclosure law of the Commonwealth." For the purposes of the Act, the term "political action committee" is defined as "any organization, other than a campaign committee or political party committee, established or maintained in whole or in part to receive and expend contributions for political purposes." Section 24.2-909 of the Act provides that certain entities "may establish and administer for political purposes, and solicit and expend contributions for, a political action committee." 8

The Campaign Finance Disclosure Act does not define the term "political purposes" as it is used in the definition of "political action committee" and in § 24.2-909. The term must, therefore, be given its common, ordinary meaning. 7 The term "political" generally means "of or relating to government, a government, or the conduct of governmental affairs"; "of or relating to matters of government as distinguished from matters of law"; "of, relating to, or concerned with the making as distinguished from the administration of governmental policy"; "of, relating to, or concerned with politics"; "of relating to, or involved in party politics." 8 The term "purpose" generally is defined to mean "something that one sets before himself as an object to be attained"; "an end or aim to be kept in view, in any plan, measure, exertion, or operation"; "an object, effect, or result aimed at, intended, or attained"; "a subject under discussion or an action in course of execution." 9

The Supreme Court of Virginia has noted that, "[w]hile in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity." 10 "[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction." 11 Statutes should not be interpreted in ways that produce absurd or irrational consequences. 12

Section 24.2-909 permits certain entities to establish and administer political action committees "for political purposes" and to solicit and expend contribu-
tions on behalf of such committees. The commonly accepted definition of "political purposes" includes an objective relating to the conduct of governmental affairs and the making of governmental policy. Consequently, I must conclude that the formation of a tax exempt corporation for the purpose of educating the public on a political position relating to a matter of governmental policy clearly constitutes a "political purpose," and is thus permissible under the Campaign Finance Disclosure Act. I, therefore, also conclude that it is permissible under Virginia law for a group of elected officials to form a corporation, or political action committee, under § 501(c)(4)(A) of the Internal Revenue Code for the purpose of influencing public policy.

1See I.R.C. § 501(c)(4)(A) (West Supp. 2000) (exempting from federal income tax "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare").


3Section 24.2-900.

4Section 24.2-901.

5The use of the term "may" in § 24.2-909 indicates that the formation of a political action committee is permissive and discretionary. See 21 M.J. Words and Phrases 353-54 (2000); 1997 Op. Va. Att'y Gen. 10, 12, and opinions cited at 13 n.11.

6Section 24.2-909 provides: "Any stock or nonstock corporation, labor organization, membership organization, cooperative, or other group of persons may establish and administer for political purposes, and solicit and expend contributions for, a political action committee, provided that:

1. No political action committee shall make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisal, threat of force, or as a condition of employment.

2. Any person soliciting a contribution to a political action committee shall, at the time of solicitation, inform the person being solicited of (i) his right to refuse to contribute without any reprisal and (ii) the political purposes of the committee."


9Id. at 1847.


13You have advised that the entity created is educational in nature and formed for the purpose of influencing public policy. Accordingly, for the purpose of this opinion, I assume that the entity intends to engage only in issue advocacy and will not expressly advocate the election or defeat of a clearly identified candidate for public office. I note, however, that, should the entity exceed the bounds of issue advocacy and advocate or endorse the election or defeat of any particular candidate(s) for public office, the entity would be subject to the reporting requirements of §§ 24.2-908 and 24.2-910. See Virginia Soc. for Human Life, Inc. v. Caldwell, 152 F.3d 268 (4th Cir. 1998) (affirming 906 F. Supp. 1071 (W.D. Va. 1995), after certifying question of law to Virginia Supreme Court (see Va. Society for Human Life v. Caldwell, 256 Va. 151, 500 S.E.2d 814 (1998) (holding that Campaign Finance Disclosure Act does not reach groups that engage purely in issue advocacy))).
ELECTIONS: CAMPAIGN FUNDRAISING; LEGISLATIVE SESSIONS.

Legislator's receipt of campaign contribution in check form on January 9, 2001, amounts to acceptance of contribution prior to commencement of 2001 Session of General Assembly and is lawful.

THE HONORABLE H. MORGAN GRIFFITH
MEMBER, HOUSE OF DELEGATES
FEBRUARY 8, 2001

You ask whether § 24.2-940 of the Code of Virginia prohibits the deposit of a campaign contribution during a regular session of the General Assembly when such contribution is received by a member of the General Assembly prior to commencement of the session.

You advise that you received a campaign contribution in the form of a check on January 9, 2001, prior to commencement of the 2001 regular session of the General Assembly.1 You further advise that you were unable to access your account at a bank in Salem, Virginia, to deposit the check. You ask for guidance as to the legality of depositing the check, during or after the 2001 session, or whether you should return the check.

Section 24.2-940(A) provides:

No member of the General Assembly ... and no campaign committee of a member of the General Assembly ... shall solicit or accept a contribution for the campaign committee of any member of the General Assembly ..., from any person or political committee on and after the first day of a regular session of the General Assembly through adjournment sine die of that session.

The use of the word "shall" in a statute ordinarily implies that the provisions are mandatory.2 Section 24.2-940(D) defines "solicit," as used in the statute, to mean a "request [for] a contribution, orally or in writing, but shall not include a request for support of a candidate or his position on an issue." Section 24.2-901 of the Campaign Finance Disclosure Act defines "contribution" as "money ... of any amount, ... given ... or in any other way provided to a candidate." There is no definition in the elections laws, however, for the term "accept" as used in § 24.2-940(A). Consequently, unless a contrary legislative intent is manifest, words used in a statute should be given their common, ordinary and accepted meanings in use at the time of the statute.3 The term "accept" means "to receive with consent (something given or offered); accept to the receipt of."4

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature.5 Analysis of legislative intent includes appraisal of the subject matter and purpose of the statute, in addition to its express terms.6 The purpose underlying a statute's enactment is particularly significant in construing it.7 Moreover, statutes should not be interpreted in ways that produce absurd or irrational consequences.8
A "check" is "[a] draft signed by the maker or drawer, drawn on a bank, payable on demand, and unlimited in negotiability." A "draft" is "[a]n unconditional written order signed by one person ... directing another person ... to pay a certain sum of money on demand." You state that you received the campaign contribution in the form of a check before the first day of the 2001 Session of the General Assembly. It is my opinion that you accepted the campaign contribution in the form of a check at the time you received the check. The check merely represents the unconditional written order of the campaign contributor directing his bank to pay a certain sum of money to you on demand. Consequently, I am also of the opinion that § 24.2-940(A) does not apply to the campaign contribution at issue, and that you may deposit the check during or after the legislative session, or you may return the check.

1The first day of the 2001 Session of the General Assembly was January 10, 2001, the second Wednesday in January. See VA. CONST. art. IV, § 6 (mandating that General Assembly meet once a year on second Wednesday in January).

2See Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) (noting that "shall" is word of command, used in connection with mandate); see also Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that "shall" generally indicates procedures are intended to be mandatory, imperative or limited); Op. Va. Att’y Gen.: 1997 at 16, 17; 1996 at 20, 21; 1991 at 126, 126, and opinions cited therein; id. at 127, 129, and opinions cited therein.


9BLACK’S LAW DICTIONARY 230 (7th ed. 1999).

"Id." at 508.
You inquire regarding the impact of the decennial redistricting of election districts on the York County special election to be held on November 6, 2001, pursuant to § 24.2-226 of the Code of Virginia.

You relate that the purpose of the special election is to fill a vacancy occurring on the York County Board of Supervisors due to a supervisor's election to the House of Delegates. You advise that the supervisor resigned from the York County Board of Supervisors effective January 3, 2001. Thereafter, the York County Board of Supervisors petitioned the circuit court to issue a writ of election for a special election to fill the board vacancy in the supervisor's election district for the remainder of the unexpired term. The writ of election was issued on January 10, 2001. You relate that the applicable statutory provisions do not directly answer your question regarding whether the election must be conducted based on the election district as it existed on January 4, 2001, the date on which the vacancy occurred. You note that York County must act quickly to complete the decennial reapportionment in the election district prior to the special election.

Section 24.2-226(A) provides that any vacancy on a board of supervisors must be filled by special election. The special election is to be held at "the next ensuing general election ... in November." The individual elected at the special election completes the remaining portion of the term of the board member that left office. In addition, "[w]hen a vacancy occurs in a local governing body ..., the remaining members ..., within forty-five days of the office becoming vacant, shall appoint a qualified voter of the election district in which the vacancy occurred to fill the vacancy." If the governing body fails to make the appointment within forty-five days, the circuit court must make the appointment. Consequently, there is virtually no interruption in the representation on the board of supervisors for the citizens of the affected election district.

Article VII, § 5 of the Constitution of Virginia provides that, if the members of the governing body of a county are elected by district, the governing body of the county shall periodically "reapportion the representation in the governing body among the districts." Ordinances adopted by county governing bodies to accomplish the decennial redistricting of districts must take effect immediately upon passage. When a decennial redistricting occurs, § 24.2-311(B) requires the members of the governing body in office on the effective date of the redistricting to complete their terms of office. The election of members to the governing body to succeed members in office on the effective date of the redistricting must be held "at the general election next preceding the expiration of the terms of office of the incumbent members." The general election must be conducted on the basis of the districts as comprised following the decennial redistricting.

In 1991, the General Assembly requested the Virginia Code Commission to study and revise Title 24.1 and to report its findings to the Governor and the 1993 Session of the General Assembly in the form of a recodified title. The drafting note in the Code Commission's report, following § 24.2-311, provides:
The rationale for using new districts to fill vacancies is based on the practical workings of the election system. The decennial redistricting involves changes in congressional, state legislative, and local governing body districts in the year following the census, 1991, 2001, etc. Precinct lines are redrawn simultaneously to accommodate the new election district lines and to revise the precincts to meet the state law minimum and maximum size requirements. These changes are entered into the state system so that registered voters are properly assigned to their new precincts and districts and so that the registered voter lists used to run elections will be ready for the first election following redistricting. When this information on new precincts and districts is entered into the state system, the old information on the precincts and districts is automatically deleted. Voters are advised of their new districts and precincts.

The primary goal of statutory construction "is to ascertain and give effect to legislative intent." In addition, statutes should not be construed to frustrate their purpose. The principles of statutory construction require that statutes be harmonized with other existing statutes, if possible, to produce a consistently logical result that gives effect to the legislative intent.

It is, therefore, my opinion that the special election to be held on November 6, 2001, to fill the vacated position on the board of supervisors must be conducted based on the election districts existing at the time of the election. If the decennial redistricting has occurred and is precleared by the United States Department of Justice in accordance with § 5 of the Voting Rights Act, I am of the opinion that the election must be conducted based on the new district that most closely approximates the old district from which the supervisor originally was elected to the board of supervisors.

2See id.
4Section 24.2-228(A).
6Id.
7See id.
8Section 24.2-228(A).
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'S. Doc. No. 25, supra, at 50.

OP. NO. 00-101
ELECTIONS: FEDERAL, COMMONWEALTH AND LOCAL OFFICERS — VACANCIES IN Elected CONSTITUTIONAL AND LOCAL OFFICES - CONSTITUTIONAL AND LOCAL OFFICERS — THE ELECTION — SPECIAL ELECTIONS.
CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY OFFICERS).

Circuit court clerk vacancy is to be filled promptly on Tuesday date that falls within purview of statutory limitations for holding special elections. November general election day is among dates court may consider for holding such election.

MR. PATRICK J. MORGAN
COUNTY ATTORNEY FOR LOUISA COUNTY
JANUARY 29, 2001

You ask whether a circuit court has the authority to order a special election only in November to fill a vacancy caused by the retirement of the circuit court clerk.

You relate that a clerk of a county circuit court was elected to office in November 1999. You also relate that a vacancy in the clerk's office has arisen due to the retirement of the clerk effective January 1, 2001. You further relate that the circuit court judge has set a special election in November 2001 to fill the vacancy. You inquire whether such action falls within the applicable elections statutes.

A clerk of the circuit court is a constitutional officer, the election of whom is governed by the elections statutes applicable to constitutional officers. Specifically, vacancies in elected constitutional offices are governed by Article 6, Chapter 2 of Title 24.2, §§ 24.2-225 through 24.2-229 of the Code of Virginia, and by reference therein, Article 5, Chapter 2 of Title 24.2, §§ 24.2-217 through 24.2-224.

Section 24.2-228.1(A) provides that "[a] vacancy in any elected constitutional office ... shall be filled by special election." Section 24.2-228.1(A) also provides that, upon petition to the circuit court by the governing body or upon the court's own motion, "the court shall promptly issue the writ ordering the election for a date determined pursuant to § 24.2-682." Section 24.2-682 establishes the times for holding special elections and dictates that "[a] special election to fill a vacancy in any constitutional office shall be held promptly and in accordance with the requirements of subsection (A) [of this statute]." Section 24.2-682(A) provides that such special election "shall be held on a Tuesday," that it "shall [not] be held within the sixty days prior to a general or primary election" or "on
the same day as a primary election," and that it "may be held on the same day as a general election."

The Supreme Court of Virginia has stated that, "[w]hile in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity."5

The Court has also stated that, "the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction."6 Statutes should not be construed to frustrate their purpose.7 With respect to the statutory provision in issue, § 24.2-228.1(A) mandates that vacancies in elected constitutional offices "shall be filled by special election" and that the date for such election be determined pursuant to § 24.2-682. Section 24.2-682 mandates that such election "be held promptly"8 and in accordance with the requirements set forth in subsection (A) of the statute. Section 24.2-682(A) clearly and unambiguously mandates that the special election "be held on a Tuesday" but not "on the same day as a primary election" or within "sixty days prior to a general or primary election." Finally, § 24.2-682(A) permits, but does not require, the special election to be "held on the same day as a general election."9

In the instant case, therefore, it is my opinion that the circuit court clerk vacancy is to be filled pursuant to a special election held on a date falling within the purview of § 24.2-682(A). I am of the opinion that, although the statute does not require the special election date to coincide with the November general election day, such day is among those that the court may consider.

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1See VA. CODE ANN. § 24.2-217 (Michie Repl. Vol. 2000) (requiring voters of counties to elect clerk of county circuit court at "general election in November 1999, and every eight years thereafter").


3Article 6, Chapter 2 of Title 24.2 governs vacancies in elected constitutional offices.

4Article 5, Chapter 2 of Title 24.2 governs the election and terms of constitutional officers.


8See 1989 Op. Va. Att'y Gen. 250, 251-52 (noting that use of word "shall" in statute indicates its procedures are intended to be mandatory).

9Whether or not the election is held "promptly" is a factual matter dependent on the relevant facts and circumstances, none of which is presented here.

10Use of the word "may" in § 24.2-682(A) indicates the grant of permissive, not mandatory, authority. See 1998 Op. Va. Att'y Gen. 38, 40.

OP. NO. 01-010

ELECTIONS: THE ELECTION – SPECIAL ELECTIONS.

No authority for Colonial Heights City Council to call for advisory referendum regarding establishment of recreation center in city.
THE HONORABLE M. KIRKLAND COX  
MEMBER, HOUSE OF DELEGATES  
JANUARY 26, 2001  

You ask whether the City Council of the City of Colonial Heights may call for an advisory referendum concerning the establishment of a recreation center in Colonial Heights.

Section 24.2-684 of the Code of Virginia provides, in part:

Notwithstanding any other provision of any law or charter to the contrary, the provisions of this section shall govern all referenda.

No referendum shall be placed on the ballot unless specifically authorized by statute or by charter. [Emphasis added.]

When a statute begins with the phrase “notwithstanding any other provision of law,” it is presumed that the General Assembly intended to override any potential conflicts with earlier legislation. In addition, the use of the word “shall” in a statute ordinarily implies that its provisions are mandatory.

Prior opinions of the Attorney General interpreting § 24.2-684 consistently conclude that, absent specific statutory authority, a referendum may not be held to take the sense of the people on a local issue. Section 4.12 of the Colonial Heights Charter of 1960 provides the only authority for the submission of propositions to the city’s qualified voters:

The council shall have authority, by resolution, to submit to the qualified voters of the city for an advisory referendum thereon, any proposed ordinance or amendment to the city charter ....

Under well-accepted principles of statutory construction, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute. In addition, the mention of one thing in a statute implies the exclusion of another. Finally, the Supreme Court of Virginia has stated that “the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction.”

The city charter authorizes the council to call for an advisory referendum only for proposed ordinances and amendments to the charter. I must, therefore, conclude that the City Council of the City of Colonial Heights does not have the authority to call for an advisory referendum regarding the establishment of a recreation center in Colonial Heights.

2See Andrews v. Shepherd, 201 Va. 412, 414-15, 111 S.E.2d 279, 282 (1959) (noting that “shall” imposes imperative duty); see also Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that “shall” generally indicates procedures are intended to be mandatory, imperative or limited); Op. Va. Att’y Gen.: 1997 at 16, 17; 1996 at 20, 21; 1991 at 126, 126, and opinions cited therein; id. at 127, 129, and opinions cited therein.
You ask several questions regarding the Virginia Statewide Fire Prevention Code Act, §§ 27-94 through 27-101 of the Code of Virginia (the “Act”). You first ask whether the Act requires a citizen to obtain a permit for the storage of sparklers, snap and pops, and fountains. You next ask whether the Act regulates the storage of sparklers, snap and pops, and fountains.

You relate that, for the past seven years, certain residents of Albemarle County have sold fireworks at three separate locations in the county. County fire investigators routinely inspected the fireworks stands and issued permits to sell fireworks to the residents. You advise further that a county fire investigator executed a warrant to search the residents’ home pursuant to an affidavit alleging that they were storing fireworks without a permit, in violation of the Albemarle County Code. You advise that, while searching the residence, the county fire investigator seized fireworks consisting primarily of sparklers, snap and pops, and fountains. Finally, you advise that the residents were charged with storing unapproved fireworks, failing to obtain a permit for the storage of fireworks, and storing fireworks in an unapproved structure.

Section 27-97 empowers the Board of Housing and Community Development to adopt a Statewide Fire Prevention Code (“Fire Prevention Code” or “Code”). The Board has adopted such a set of regulations designed to provide statewide standards to protect life and property from conditions arising from the unsafe storage, handling and use of fireworks that may tend to cause fire or explosion. The Act also authorizes counties to provide for the enforcement of the Fire Prevention Code and to adopt fire prevention regulations more restrictive than the Code. Section F-101.5 of the Fire Prevention Code specifically permits local governing bodies to “adopt fire prevention regulations that are more restrictive or more extensive in scope than the [Code].” Section F-108.2 of the Code authorizes local code officials to require permits for the storage of fire-
works. Section 59.1-147 and Fire Prevention Code § F-3102.1 specifically exclude from the definition of “fireworks” items such as sparklers, fountains and similar types of displays when stored on private property with the consent of the owner. Consequently, it is my opinion that the storage of items such as sparklers, fountains and similar types of displays on private property is not prohibited by the Act or the Fire Prevention Code, unless a locality adopts more restrictive provisions, as authorized by §§ 27-97 and 59.1-148.

Article III of Chapter 6 of the Albemarle County Code provides the “administrative procedures for the regulation of the use and sale of fireworks” in Albemarle County. The County Code makes it unlawful to store any substance or thing containing any explosive or inflammable compound or substance that is intended as fireworks. The Attorney General has long followed a policy of responding to official opinion requests only when such requests concern an interpretation of federal or state law, rule or regulation. In instances when a request requires an interpretation of a local ordinance, the Attorney General has declined to respond in order to avoid becoming involved in matters solely of local concern and over which the local governing body has control. Any ambiguity that may exist in a local ordinance is a problem that can and should be rectified by the local governing body rather than by an interpretation by the Attorney General.

Accordingly, I am required to limit my comments to application of the Act and the Fire Prevention Code. I have not attempted to resolve any ambiguity that may exist in the specific language of the Albemarle County Code governing this matter.


3SFPC, supra, at 1.

4See id. at 6.

5See id. at 6-301.


7Id. § 6-301.


You inquire regarding the valuation of outdoor advertising signs in eminent domain proceedings.

You advise that § 33.1-95.1(2) of the Code of Virginia permits the owner of any building, structure, or improvement subject to a taking under the power of eminent domain to present evidence of the "fair market value" of such building, structure, or improvement. You relate that a right-of-way operations manual published by the Department of Transportation recognizes that outdoor advertising signs are to be treated as tenant-owned improvements and considered as part of the real estate. The manual sets forth criteria for appraisers to consider in determining the value of signs. You have been informed that the Department of Transportation uses only the "cost approach" for valuation of outdoor advertising signs.

In the case of Lamar Corporation v. City of Richmond, the Supreme Court of Virginia considers the question "whether a lessee, who erects a billboard on the property he leases, has an interest in either the billboard or the underlying property which entitles him to a separate condemnation proceeding to ascertain just compensation when the underlying leasehold property is condemned." The Court concludes:

[W]e have adopted the general rule that, as between the condemnor and lessee, structures attached to the condemned real estate but owned by the lessee are realty.

The value of the structures is included in the total award made for the freehold, even though the lessee has, by the terms of his lease, expressly reserved the right to remove them during or at the end of his term. Title to the structures passes to the condemnor as an incident of the entire taking.

Section 33.1-95.1 begins with the phrase "[n]otwithstanding anything to the contrary contained in [Chapter 1 of Title 33.1] or in Chapter 1.1 ([§ 25-46.1 et seq.]) of Title 25." This phrase indicates a legislative intent to override any potential conflicts with earlier legislation. Furthermore, § 33.1-95.1 sets forth certain requirements to be followed in the exercise of the power of eminent domain. The Commonwealth Transportation Commissioner is required to notify the owner of any "building, structure, or other improvement" of his intent to exercise the power resulting in the taking of such property. The owner, then, "may present evidence of the fair market value" of such property. Section 33.1-95.1(4) defines the term "fair market value" as used in the statute to mean the price that the real property would bring if it were offered for sale by one who wanted to sell, but was under no necessity, and was bought by one who wanted to buy, but was under no necessity.
There are several rules of statutory construction that I must apply to this matter. Obviously, the primary goal of statutory construction "is to ascertain and give effect to legislative intent." The manifest intention of the legislature, clearly disclosed by its language, must be applied. The use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive. Statutes are to be read as a whole rather than in isolated parts. The reading of a statute as a whole influences the proper construction of ambiguous individual provisions. Finally, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.

The language of these statutory provisions pertaining to the Commissioner's exercise of the power of eminent domain resulting in the taking of a structure or other improvement is plain and obvious. The Commissioner must notify the owner of his intent to take such property. The owner of such property may present evidence of the fair market value of such property. Fair market value is basically that which a ready and willing seller is prepared to accept from a ready and willing buyer. In the case where the owner of such property "is different from the owner of the underlying land," he "shall not be allowed to proffer any evidence of value which the owner of the underlying land would not be permitted to proffer" if such property belonged to the land owner. Accordingly, I must conclude that § 33.1-95.1 requires the Commonwealth Transportation Commissioner to value outdoor advertising signs in eminent domain cases using the fair market valuation set forth in the statute.

2 Id. at 351-52, 402 S.E.2d at 34.
6 Section 33.1-95.1(2).
11 See Rountree Corp. v. City of Richmond, 188 Va. 701, 711-12, 51 S.E.2d 260-61 (1949).
You ask whether the third paragraph of § 36-98 of the Code of Virginia, as amended by the 2001 Session of the General Assembly, supersedes all residential architectural design feature requirements of an ordinance adopted by the City of Suffolk.

You relate that, in September 1999, the City of Suffolk adopted a comprehensive ordinance, entitled the Unified Development Ordinance, in an attempt to regulate development in the city. You advise that the ordinance contains certain residential architectural design features which are required for single family homes constructed in a planned development zone. Furthermore, you advise that the ordinance contains a listing of residential architectural design features which the City is attempting to enforce on all single family residential projects built in the city. The portion of the subject ordinance about which you specifically inquire requires that “[e]xterior materials and finishes such as brick, stone, wood, clapboard, cedar shake, stucco, drivet or similar material shall be provided on all exterior elevations on not less than fifty (50%) percent of all buildings”. For the purposes of this opinion, you ask that I assume that you are referring to projects involving single family residential construction.

Section 36-98, a portion of the Uniform Statewide Building Code (“Building Code”), directs and empowers the Board of Housing and Community Development “to adopt and promulgate a Uniform Statewide Building Code,” and expressly provides that “[s]uch building code shall supersede the building codes and regulations of the counties, municipalities and other political subdivisions and state agencies.” Prior opinions of the Attorney General conclude that the Building Code supersedes all building and maintenance codes and regulations of counties, municipalities, political subdivisions and state agencies that have been or may be enacted or adopted. The dominant purpose of the Building Code is “to protect the health, safety and welfare of the residents of this Commonwealth.” Another important purpose of the Building Code is to provide for “the safety of ultimate construction.”

The third paragraph of § 36-98 pertains to the effect of the Building Code on local ordinances, and provides:

Such Building Code also shall supersede the provisions of local ordinances applicable to single family residential construction that (a) regulate dwelling foundations or crawl...
spaces, (b) require the use of specific building materials or finishes in construction, or (c) require minimum surface area or numbers of windows; however, such Code shall not supersede proffered conditions accepted as a part of a rezoning application, conditions imposed upon the grant of special exceptions, special or conditional use permits or variances, or land use requirements in airport or highway overlay districts, or historic districts created pursuant to § 15.2-2306, or local flood plain regulations adopted as a condition of participation in the National Flood Insurance Program.

A rule of statutory construction requires the presumption that, when new provisions are added to existing legislation by an amendatory act, a presumption normally arises that a change in the law was intended. In addition, two bodies of law which pertain to the same subject matter are said to be in pari materia. Where possible, the two should be harmonized in order to give effect to both.

"If both the statute and the ordinance can stand together and be given effect, it is the duty of the courts to harmonize them and not nullify the ordinance." Of course, consistent with Dillon's Rule, the local ordinance must be supported by adequate enabling legislation.

When the state in the exercise of its police power enacts certain laws, however, a political subdivision may in the exercise of its delegated police powers legislate on the same subject. The exercise of this power by a locality cannot, however, be inconsistent with state law. An ordinance is inconsistent with state law if state law preempts local regulation in the area, either by expressly prohibiting local regulation or by enacting state regulations so comprehensive that the state may be considered to occupy the entire field. Section 1-13.17 precludes a local governing body from enacting ordinances "inconsistent with" state law. It is beyond doubt that § 1-13.17 can have the effect of invalidating local ordinances under appropriate circumstances.

The design element contained in the Suffolk city ordinance, requiring that "[e]xterior materials and finishes such as brick, stone, wood, clapboard, cedar shake, stucco, drivet, or similar materials shall be provided on all exterior elevations on not less than fifty (50%) percent of all buildings," clearly mandates the use of specific building materials or finishes in construction. The third paragraph of § 36-98 unambiguously "supersede[s] the provisions of local ordinances applicable to single family residential construction ... requir[ing] the use of specific building materials or finishes in construction." The third paragraph of § 36-98 is clearly "so comprehensive that the state may be considered to occupy the entire field." Consequently, I must conclude that design elements of the Suffolk city ordinance quoted above are preempted by the provisions of the third paragraph of § 36-98.

2 Suffolk, Va., Unified Development Ordinance (Jan. 26, 2000) [hereinafter Suffolk Ordinance].
3 See id. art. 4, § 31-410.
§ 36-99(A) (Michie Supp. 2001). “The Building Code shall prescribe building regulations to be complied with in the construction of buildings and structures, and the equipment therein as defined in § 36-97, and shall prescribe regulations to insure that such regulations are properly maintained, and shall also prescribe procedures for the administration and enforcement of such regulations. The provisions thereof shall be such as to protect the health, safety and welfare of the residents of this Commonwealth, provided that buildings and structures should be permitted to be constructed at the least possible cost consistent with recognized standards of health, safety, energy conservation and water conservation and barrier-free provisions for the physically handicapped and aged.” Id.


City of Virginia Beach v. Hay, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999) (holding that, under Dillon’s Rule, local governing bodies have only those powers expressly granted by legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable. Where legislature grants power to local government but does not specify method of implementing power, local government’s choice as to how to implement conferred power will be upheld, provided method chosen is reasonable).

Ticonderoga Farms v. County of Loudoun, 242 Va. 170, 175, 409 S.E.2d 446, 449 (1991); King, 195 Va. at 1088, 81 S.E.2d at 590.

“When the council ... of any city ... [is] authorized to make ordinances, ... it shall be understood that the same must not be inconsistent with the Constitution and laws of ... this Commonwealth.” Va. Code Ann. § 1-13.17 (Matthew Bender Repl. Vol. 2001); see 1995 Op Va. Att’y Gen. 85, 86.


Id.; Wayside Restaurant, Inc. v. City of Virginia Beach, 215 Va. 231, 208 S.E.2d 51 (1974); Kisey, 212 Va. at 693, 187 S.E.2d at 168; King, 195 Va. at 1087, 81 S.E.2d at 590.

Suffolk Ordinance, supra note 2, art. 4, § 31-410, table 410-2, at 4-55.

01-103

INSURANCE: ACCIDENT AND SICKNESS INSURANCE – MANDATED BENEFITS.

Federal Women’s Health and Cancer Rights Act and state law require coverage for reconstructive breast surgery in course of treatment of cancer where all or part of breast is surgically removed and coverage for surgery to reestablish symmetry between breasts. Any benefit covered under Act that is not mandated by state law is required by Act. Issue of preemption does not arise where state law requires at least same coverage for reconstructive breast surgery as Act requires.
You inquire regarding § 38.2-3418.4 of the Code of Virginia, which requires health insurance coverage for reconstructive breast surgery.¹

You relate that on October 21, 1998, Congress enacted the Federal Women's Health and Cancer Rights Act of 1998 ("Cancer Rights Act").² The Cancer Rights Act provides that "medical and surgical benefits with respect to a mastectomy shall [be] provide[d], in a case of a participant or beneficiary who is receiving benefits in connection with a mastectomy and who elects breast reconstruction in connection with such mastectomy."³ You state that you do not believe that the Cancer Rights Act preempts state law that provided at least the same coverage for reconstructive breast surgery on the effective date of the Act. Finally, you relate that the Cancer Rights Act applies to most, if not all, health insurance, including managed care programs, self-insured programs, and programs subject to state-mandated benefits.

You first ask whether § 38.2-3418.4 provides "at least the coverage of reconstructive breast surgery otherwise required under [the Cancer Rights Act],"⁴ and if not, you inquire regarding amendments to § 38.2-3418.4 that may be necessary to conform state law with the coverage required under the Act.

The Supremacy Clause of the Constitution of the United States provides that federal laws and treaties "shall be the supreme law of the land."⁵ As you note in your request, by virtue of this clause, federal law supersedes any conflicting state law.⁶ The preemption of state law by federal law may occur by express statutory language or other clear indication that Congress intended to legislate exclusively in the area.⁷ Even if Congress does not intend the enactment of a federal statutory scheme completely to preempt state law in the area, congressional enactments in the same field override state laws with which they conflict.⁸

The Cancer Rights Act requires that "medical and surgical benefits with respect to a mastectomy shall provide, in a case of a participant or beneficiary who is receiving benefits in connection with a mastectomy ..., coverage for ... reconstruction of the breast."⁹ Section 38.2-3418.4(A) provides that "accident and sickness insurance policies ... shall provide coverage for reconstructive breast surgery under such policy." The use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive.¹⁰ Both laws consistently require coverage for reconstructive breast surgery in the course of treatment of cancer where all or part of a breast is surgically removed. Both expressly require coverage for surgery to reestablish symmetry between the two breasts.¹¹

The Cancer Rights Act specifically requires coverage for "prostheses and physical complications of mastectomy, including lymphedemas."¹² Section 38.2-3418.4 does not contain such explicit references to either prostheses or physical complications.
The Cancer Rights Act clearly requires coverage for such procedures unless the same coverage is required by state law. Therefore, any benefit covered under the Cancer Rights Act that is not mandated by state law is required by the Act. Thus, amending § 38.2-3418.4 so as to have it mirror the Cancer Rights Act would not actually change the amount of coverage insurance providers must now provide in Virginia.

Accordingly, it is my opinion that § 38.2-3418.4 requires "at least the coverage of reconstructive breast surgery otherwise required under [the Cancer Rights Act]," and thus, the issue of preemption does not arise.

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13. A. Notwithstanding the provisions of § 38.2-3419, each insurer proposing to issue individual or group accident and sickness insurance policies providing hospital, medical and surgical, or major medical coverage on an expense-incurred basis; each corporation providing individual or group accident and sickness subscription contracts; and each health maintenance organization providing a health care plan for health care services shall provide coverage for reconstructive breast surgery under such policy, contract or plan delivered, issued for delivery or renewed in this Commonwealth on or after July 1, 1998.


"Id.

OP. NO. 01-063
MENTAL HEALTH GENERALLY: ADMISSIONS AND DISPOSITIONS IN GENERAL—COMMUNITY MENTAL HEALTH SERVICES.

Emergency Medical Treatment Act does not preempt or conflict with statutes governing Commonwealth's involuntary commitment process for mentally ill adults in need of hospitalization. Act complements process by providing court with authority to place individual at any hospital with emergency room departments that execute Medicare provider agreements. Organizations affected by Emergency Medical Treatment Act and Virginia laws governing involuntary commitment process must comply with requirements of both laws; should develop annual written agreements with community services boards to reach satisfactory arrangements for provision of qualified examiners to perform evaluation services.

THE HONORABLE KENNETH W. STOLLE
MEMBER, SENATE OF VIRGINIA
JUNE 28, 2001


Congress enacted the Emergency Medical Treatment Act in response to a growing concern about the provision of adequate medical services to individuals, particularly the indigent and the uninsured, who seek care from hospital emergency rooms. Congress was concerned that hospitals were dumping patients who were unable to pay for care, either by refusing to provide emergency treatment to these patients, or by transferring the patients to other hospitals before the patients' conditions stabilized. The core purpose of the Emergency Medical Treatment Act is to get patients into the system who might otherwise go untreated and be left without a remedy, because traditional medical malpractice law affords no claim for failure to treat. Numerous cases and the legislative history of the Emergency Medical Treatment Act confirm that the sole purpose in enacting the Act was to deal with the problem of patients being turned away from emergency rooms for nonmedical reasons. The Emergency Medical Treatment Act thereby imposes a "limited duty on hospitals with emergency rooms to provide emergency care to all individuals who come there." Once the Emergency Medical Treatment Act has met that purpose of ensuring that a hospital undertakes stabilizing treatment for a patient who arrives with an emergency condition, the patient's care becomes the legal responsibility of the hospital and the treating physicians. The hospitals covered by the Emergency Medical Treatment Act are hospitals with emergency room departments that execute Medicare provider agreements with the Secretary of Health and Human Services.
The Emergency Medical Treatment Act seeks to achieve the limited purpose of its enactment by requiring that the hospital provide limited stabilizing treatment to, or an appropriate transfer of, any patient that arrives with an emergency medical condition. The Act defines the term "to stabilize" as "to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a [hospital] facility." The stabilization requirement is thus defined entirely in connection with a possible transfer and without any reference to the patient’s long-term care within the system. The stabilization requirement was intended to regulate the hospital's care of the patient only in the immediate aftermath of the act of admitting the patient for emergency treatment and while it considered whether it would undertake longer-term full treatment or, instead, transfer the patient to a hospital that could and would undertake that treatment.

The Emergency Medical Treatment Act also requires that every hospital provide an appropriate screening for every individual who comes to its emergency department and determine whether the individual, in fact, has an emergency medical condition. In the absence of a statutory definition for the term "appropriate medical screening," it has been concluded that it should be defined as requiring participating hospitals to apply uniform screening procedures to all individuals coming to the emergency room of the hospital and requesting treatment. The examination must determine "whether or not an emergency medical condition ... exists." Under the Act, an "emergency medical condition" means

a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—

(i) placing the health of the individual ... in serious jeopardy,
(ii) serious impairment to bodily functions, or
(iii) serious dysfunction of any bodily organ or part[.]

If the hospital detects that an emergency medical condition exists, the Emergency Medical Treatment Act declares that

the hospital must provide either—

(A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or
(B) for the transfer of the individual to another medical facility

A hospital may not transfer an individual who has an emergency medical condition that has not been stabilized without a certification signed by a physician that, "based upon the information available at the time of transfer, the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual." The Act, thus, clearly provides that "the hospital's duty to stabilize the
patient does not arise until the hospital first detects an emergency medical condition." Similarly, the transfer restrictions "apply only when an individual 'comes to the emergency room,' and after 'an appropriate medical screening examination,' 'the hospital determines that the individual has an emergency medical condition.'

Sections 37.1-67.01 through 37.1-90 control the involuntary commitment process in Virginia for adults who are mentally ill and in need of hospitalization. Section 37.1-67.1 authorizes any magistrate, "upon the sworn petition of any responsible person or upon his own motion," to issue a temporary detention order ("TDO") "if it appears ... that the person is mentally ill and in need of hospitalization ... and the person is incapable of volunteering or unwilling to volunteer for treatment." Subject to several exceptions, the order may be issued "only after an in-person evaluation by an employee of the local community services board or its designee." The detention period under a TDO is forty-eight hours, after which a commitment hearing must be held or the person must be released. If it is determined at the commitment hearing that the person meets the commitment criteria specified in § 37.1-67.3, the judge issues an order of involuntary commitment.

Sections 37.1-67.01, 37.1-67.1 and 37.1-67.3 require community services board personnel to perform certain functions for the court related to the temporary detention and civil commitment process. Under § 37.1-67.01, a magistrate may, based on probable cause that a person is mentally ill and in need of hospitalization, and presents an imminent danger to himself or others or is substantially unable to care for himself, issue an emergency custody order requiring that the person be taken into custody and transported to a convenient location, which may include a hospital emergency room, to be evaluated by community services board staff to assess the person's need for hospitalization. Custody of the person shall not exceed four hours.

The purpose for issuing an emergency custody order under § 37.1-67.01 is to obtain an assessment of the person's mental condition in order to advise the magistrate whether a TDO should be issued under § 37.1-67.1. An employee of the community services board or its designee must perform this in-person evaluation. After receiving such evaluation, a magistrate may issue an order to temporarily detain the person pending the full commitment hearing under § 37.1-67.3. The community services board personnel or designee determines the facility of temporary detention. Under § 37.1-67.4, this institution may "provide emergency medical and psychiatric services within its capabilities when the institution [and not the community services board personnel] determines such services are in the best interests of the person within its care."

Prior to the commitment hearing, a psychiatrist or licensed psychologist, or if neither is available, a qualified mental health professional, who may be an employee of the community services board, but who must have no interest in the admission or treatment of the patient, must examine the person in private. The examiner certifies to the court whether the person (i) is so seriously mentally ill as to be unable to care for himself, or (ii) presents an imminent
danger to himself or others due to mental illness, and (iii) requires involuntary hospitalization or treatment. 29

The judge requires from the community services board a prescreening report stating whether the person is deemed so seriously mentally ill that he is substantially unable to care for himself, is an imminent danger to himself or others due to mental illness and in need of involuntary hospitalization or treatment, whether there is no less restrictive alternative to institutional confinement, and what the recommendations are for the person’s care and treatment. 30 Should the judge determine that the person meets the commitment criteria, the community services board which serves the political subdivision in which the person was examined must designate the hospital or other facility in which to place the person. 31 Prior to admission, however, the director of the hospital must examine the admission papers under § 37.1-68 to determine if they conform substantially with the law. Section 37.1-70 requires a physician on staff at the hospital to examine the person to determine if there is sufficient cause to believe that the person is mentally ill. If such examination reveals insufficient cause, the person must be returned to the locality in which the person resides or where the petition for commitment was initiated. 32 Moreover, a court may not order examination of the person by a physician who has not voluntarily contracted to perform such services. 33 Although the community services board staff must designate the facility in which the person will be confined, the court may not require the hospital to admit the person over its objection; rather, admission to the hospital is accomplished in accordance with hospital policies and procedures. 34

Should the judge find that less restrictive alternatives to institutional confinement are available and that treatment can be monitored by the community services board or designated providers, the court may order outpatient commitment. 35 The community services board then recommends a specific course of treatment and programs for the provision of such treatment and monitors the person’s compliance with such treatment as may be ordered by the court under § 37.1-67.3.

Although community services board employees must make recommendations for the person’s placement, care and treatment, and examination and evaluation of a person may be performed on the premises of a hospital, such actions are considered recommendations to the court. The hospital director and admitting physician determine whether to admit a patient, and the treating professionals within the hospital, rather than the community services board employee or designee, prescribe treatment while the person is hospitalized. The community services board employee or designee monitors the prescribed treatment and reports to the court, as appropriate.

You first ask whether the Emergency Medical Treatment Act preempts or conflicts with §§ 37.1-67.01 and 37.1-67.1.

The Supremacy Clause of the Constitution of the United States provides that federal laws and treaties “shall be the supreme law of the land.” 36 As you note
in your opinion request, by virtue of this clause, any conflicting provision provided by such law or treaty would supersede state law. The preemption of state law by federal law may occur by express statutory language or other clear indication that Congress intended to legislate exclusively in the area. Even if Congress does not intend the enactment of a federal statutory scheme completely to preempt state law in the area, congressional enactments in the same field override state laws with which they conflict.

In adopting the Emergency Medical Treatment Act, Congress clearly has stated its intent not to preempt any state law, except where such law "directly conflicts with a requirement of [the Act]." The Emergency Medical Treatment Act requires hospitals to provide individuals who come to the emergency department with "an appropriate medical screening examination." If the individual is diagnosed with an "emergency medical condition," the hospital must either stabilize the patient's condition or transfer the patient after fulfilling several statutory requirements. Federal regulations implementing the Emergency Medical Treatment Act define the term "emergency medical condition" to mean "[a] medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain, psychiatric disturbances and/or ... substance abuse)."

As noted, the purpose for issuing an emergency custody order under § 37.1-67.01 is to obtain an assessment of the person's mental condition in order to advise the magistrate whether a TDO should be issued under § 37.1-67.1.

The Emergency Medical Treatment Act and §§ 37.1-67.01 and 37.1-67.1, however, are not in conflict. Although the community services board staff must designate the facility in which the person will be confined, the court may not require a hospital to admit the person over its objection; rather, admission to a hospital is accomplished in accordance with hospital policies and procedures. Section 37.1-194 requires community services boards to provide "emergency services" within their respective jurisdictions; § 37.1-197(A)(12) requires that they develop annual written agreements with the courts specifying "what services will be provided to consumers." Such a contractual agreement may require the provision of emergency examinations upon request. Under certain circumstances, such a duty might give the court sufficient grounds to mandate performance by a community services board. The court may address these issues with the local community services boards, as well as with area psychiatrists and psychologists, to determine satisfactory arrangements for the provision of qualified examiners to perform these services. The Emergency Medical Treatment Act will require hospitals with emergency room departments that execute Medicare provider agreements to conduct the examination of the person ordered by the court, regardless of whether the hospital has voluntarily agreed to perform such service. Consequently, I am of the opinion that the Emergency Medical Treatment Act does not preempt §§ 37.1-67.01 and 37.1-67.1.

Lastly, you ask whether §§ 37.1-67.01 and 37.1-67.1 may be amended to provide clarification to entities and organizations affected by those statutes and the Emergency Medical Treatment Act.

It is my opinion that the Emergency Medical Treatment Act complements §§ 37.1-67.01 and 37.1-67.1 by providing a court with the authority to place an
individual at any hospital with emergency room departments that execute Medicare provider agreements. Consequently, I must also conclude that organizations affected by the Emergency Medical Treatment Act and §§ 37.1-67.01 and 37.1-67.1 must comply with the requirements of the federal and state statutes. It is, therefore, incumbent on such entities and organizations to develop annual written agreements with community services boards to reach satisfactory arrangements for the provision of qualified examiners to perform evaluation services.

1See H.R. Rep. No. 99-241, pt. 1, at 27 (1986), reprinted in 1986 U.S.C.C.A.N. 579, 605 ("The Committee is greatly concerned about the increasing number of reports that hospital emergency rooms are refusing to accept or treat patients with emergency conditions if the patient does not have medical insurance"); Brooks v. Maryland General Hosp., Inc., 996 F.2d 708, 710 (4th Cir. 1993).

2Brooks, 996 F.2d at 710 (recognizing that, "[u]nder traditional state tort law, hospitals are under no legal duty to provide [emergency] care [to all]," and holding that purpose of Emergency Medical Treatment Act is simply to impose on hospitals legal duty to provide such emergency care); Gatewood v. Washington Healthcare Corp., 933 F.2d 1037, 1041 (D.C. Cir. 1991) (holding that purpose of Emergency Medical Treatment Act is "to create a new cause of action, generally unavailable under state tort law, for what amounts to failure to treat").

3See, e.g., Correa v. Hospital San Francisco, 69 F.3d 1184, 1189 (1st Cir. 1995) (stating that Congress enacted Emergency Medical Treatment Act because it was "concerned about the increasing number of reports that hospital emergency rooms are refusing to accept or treat patients with emergency conditions if the patient does not have medical insurance" (quoting H.R. Rep. No. 99-241, pt. 1, at 27, reprinted in 1986 U.S.C.C.A.N., supra note 2, at 605)); Eberhardt v. City of Los Angeles, 62 F.3d 1253, 1255 (9th Cir. 1995) (stating that Congress enacted Emergency Medical Treatment Act "in response to a growing concern about 'the provision of adequate emergency room medical services to individuals who seek care'" (quoting H.R. Rep. No. 99-241, pt. 3, at 5 (1986), reprinted in 1986 U.S.C.C.A.N., supra, at 726)); Cleland v. Bronson Health Care Group, Inc., 917 F.2d 266, 268 (6th Cir. 1990) ("It is undisputed that the impetus to [the Emergency Medical Act] came from highly publicized incidents where hospital emergency rooms allegedly ... failed to provide a medical screening that would have been provided a paying patient, or transferred or discharged a patient without taking steps that would have been taken for a paying patient.").

4Brooks, 996 F.2d at 715.


9Id. § 1395dd(a) (1994).
10Id. § 1395dd(a).
11Id. § 1395dd(e)(1)(A) (1994).
12Id. § 1395dd(b)(1).
13Id. § 1395dd(c)(1)(A)(ii) (1994).
14Eberhardt v. City of Los Angeles, 62 F.3d at 1259.
15James v. Sunrise Hosp., 86 F.3d 885, 889 (9th Cir. 1996).
The magistrate is to issue the TDO if the evidence indicates "that the person presents an imminent danger to self or others as a result of mental illness, or is so seriously mentally ill as to be substantially unable to care for self." VA. CODE ANN. § 37.1-67.1 (Michie Supp. 2000).

Section 37.1-67.1.

Id. The person may be detained for a maximum of ninety-six hours if the detention period ends on a Saturday, Sunday, or legal holiday. VA. CODE ANN. § 37.1-67.3 (Michie Supp. 2000).

Section 37.1-67.3.

Id.

A law-enforcement officer also may take a person into custody based on probable cause that the person meets the criteria for emergency custody without prior authorization to obtain an assessment. VA. CODE ANN. § 37.1-67.01 (Michie Supp. 2000).

Section 37.1-67.01.

Section 37.1-67.1.

A magistrate may issue a TDO without a prior in-person evaluation only if (i) the person has been personally examined by an employee of the community services board or designee within the previous 72 hours or (ii) there is significant risk to the person or to others conducting the evaluation. Section 37.1-67.1.

This facility must have been approved to provide temporary detention services pursuant to regulations of the Board of Mental Health, Mental Retardation and Substance Abuse Services. Section 37.1-67.1.

Section 37.1-67.3 provides: "The examiner shall not be related by blood or marriage to the person, shall not be responsible for treating the person, shall have no financial interest in the admission or treatment of the person, shall have no investment interest in the hospital detaining or admitting the person ..., and, except for employees of state hospitals and of the U.S. Department of Veterans Affairs, shall not be employed by such hospital. For purposes of this section, investment interest means the ownership or holding of an equity or debt security, including, but not limited to, shares of stock in a corporation, interests or units of a partnership, bonds, debentures, notes, or other equity or debt instruments."

Section 37.1-67.3.

Id.

Id.

Id.


Section 37.1-67.3.

"U.S. CONST. art. VI, cl. 2.


"Id. § 1395dd(e).

"Id. § 1395dd(b)(1).

MOTOR VEHICLES: LICENSURE OF DRIVERS.

Person under 18 who has been convicted of committing offense for which demerit points have been assessed or are assessable, or violates safety belt or child restraint laws must attend driver improvement clinic but is prohibited from earning safe driving points. Statute providing that safe driving points shall not be awarded for court-assigned clinic attendance repeals statute authorizing court to determine whether person shall receive safe driving points upon satisfactory completion of driver improvement clinic.

THE HONORABLE CLIFFORD R. WECKSTEIN
JUDGE, TWENTY-THIRD JUDICIAL CIRCUIT
DECEMBER 28, 2001

You inquire concerning the safe driving points awarded persons under eighteen years of age.

You relate that you are the circuit court judge member of the local alcohol safety action program policy board. You advise that the Roanoke county and city police departments and the court community corrections program have created a traffic safety program for newly licensed juveniles in an effort to reduce the disproportionately high percentage of traffic crashes involving juveniles. You relate that local law-enforcement officials promote the program as a way for new drivers to learn valuable traffic safety skills and earn five safe driving points upon successful completion of the program. Finally, you advise that the Department of Motor Vehicles perceives § 46.2-334.01(A)(1) of the Code of Virginia to prohibit the Commissioner of the Department from awarding safe driving points to any juveniles under any circumstances.

You first inquire whether § 46.2-334.01(A)(1) prohibits the eligibility of licensed drivers under the age of eighteen to earn safe driving points upon completion of a driver improvement clinic as authorized by § 46.2-498(D).

Section 46.2-334.01(A)(1) provides that, "[n]otwithstanding the provisions of § 46.2-498," the Commissioner of the Department of Motor Vehicles "shall direct" any person under the age of eighteen who has been issued a learner's permit or driver's license "to attend a driver improvement clinic"

whenever the driving record of a person less than nineteen years old shows that he has been convicted of committing, when he was less than eighteen years old, (i) an offense for which demerit points have been assessed or are assessable under [§§ 46.2-489 through 46.2-506][1] or (ii) a violation of any provision of [§§ 46.2-1091 through 46.2-1094][2] or [§§ 46.2-1095 through 46.2-1100][3] .... No safe driving points shall be awarded for such clinic attendance, nor shall any safe driving points be awarded for voluntary or court-assigned clinic attendance. Such person's parent, guardian, legal custodian, or other person standing in loco parentis may attend such clinic and receive a reduction in demerit points and/or an award of safe driving points pursuant to § 46.2-498.
Section 46.2-498(D) permits "[a]ny resident or nonresident person holding a valid license to drive a motor vehicle in Virginia" to apply "for permission to attend a driver improvement clinic." (Emphasis added.) Furthermore, § 46.2-498(D) provides that "[p]ersons who voluntarily attend and satisfactorily complete a driver improvement clinic shall be eligible (i) to have five demerit points subtracted from their total accumulation of demerit points" or to be awarded safe driving points, "except in those instances where a person has not accumulated five demerit points." In lieu of having five demerit points subtracted, § 46.2-498(D)(ii) permits such person "to receive a reduction in premium charges as set forth under § 38.2-2217."^4

The use of the word "shall" in § 46.2-334.01(A)(1) generally implies that its terms are intended to be mandatory, rather than permissive or directive.° In addition, § 46.2-334.01(A)(1) begins with the phrase "[n]otwithstanding the provisions of § 46.2-498." This phrase indicates a clear legislative intent to override any potential conflicts that may exist between §§ 46.2-334.01(A)(1) and 46.2-498.° Consequently, even if § 46.2-334.01(A)(1) were read to be conflicting with § 46.2-498, it is axiomatic that, when there is a conflict, § 46.2-498(D) must yield to § 46.2-334.01(A)(1).° When a statute is expressed in plain and unambiguous terms, whether general or limited, the legislature is assumed to mean what it plainly has expressed, and no room is left for construction.° Therefore, when a person under the age of eighteen has been convicted of committing an offense for which demerit points have either been assessed or are assessable, or violates the safety belt or child restraint laws of the Commonwealth, § 46.2-334.01(A)(1) requires that such person attend a driver improvement clinic. Furthermore, § 46.2-334.01(A)(1) does not allow such person to receive any safe driving points for attending a driver improvement clinic, even if such attendance is voluntary. Consequently, I am of the opinion that a person under the age of eighteen is prohibited from earning the safe driving points authorized by § 46.2-498(D).

You next ask whether § 46.2-334.01(A)(1) repeals § 46.2-505 by implication.

Section 46.2-505 provides:

Any circuit or general district court or juvenile court of the Commonwealth, or any federal court, charged with the duty of hearing traffic cases for offenses committed in violation of any law of the Commonwealth, or any valid local ordinance, or any federal law regulating the movement or operation of a motor vehicle, may require any person found guilty, or in the case of a juvenile found not innocent, of a violation of any state law, local ordinance, or federal law, to attend a driver improvement clinic. The attendance requirement may be in lieu of or in addition to the penalties prescribed by § 46.2-113, the ordinance, or federal law. The court shall determine if a person is to receive safe driving points upon satisfactory completion of a driver improvement clinic conducted by the Department [of Motor Vehicles] or by any business, organization, governmental entity or individual certified by the Department
to provide driver improvement clinic instruction. In the absence of such notification, no safe driving points shall be awarded by the Department.

Persons required by the court to attend a driver improvement clinic shall notify the court if the driver improvement clinic has or has not been attended and satisfactorily completed, in compliance with the court order. Failure of the person to attend and satisfactorily complete a driver improvement clinic, in compliance with the court order, may be punished as contempt of such court.

Statutes related to the same subject must be considered in pari materia. Section 46.2-334.01(A)(1) provides that "[n]o safe driving points shall be awarded ... for ... court-assigned clinic attendance." Section 46.2-505 provides that "[t]he court shall determine if a person is to receive safe driving points upon satisfactory completion of a driver improvement clinic." These two provisions clearly are in conflict. A cardinal rule of statutory construction is that conflicts between laws are to be avoided whenever possible, with general and special laws viewed in harmony so as to give effect to all acts of the legislature. It is not possible to give effect to these two statutes since each conflicts directly with the other.

Another rule of statutory construction requires the presumption that, in enacting statutes, the General Assembly has full knowledge of existing law and interpretations thereof. The 1995 amendment of § 46.2-505 is in direct conflict with the 1998 enactment of § 46.2-334.01(A)(1). Although the repeal of statutes by implication is not favored, if two statutes are in pari materia, then to the extent that their provisions are irreconcilably inconsistent and repugnant, the later enactment repeals or amends the earlier enacted statute.

Accordingly, I must conclude that the prohibition against awarding safe driving points in § 46.2-334.01(A)(1) is in direct conflict with the authority provided in § 46.2-505 for a court to determine whether a person shall receive safe driving points upon satisfactory completion of a driver improvement clinic. The authority for the court provided in § 46.2-505, being the older of the two conflicting provisions, is, therefore, repealed by implication by § 46.2-334.01(A)(1).

2Id. tit. 46.2, ch. 10, art. 12 ("Safety Belts") (Michie Repl. Vol. 1998).
4Section 38.2-2217 allows a rate reduction in motor vehicle insurance premiums for certain persons who attend driver improvement clinics.
You ask whether an individual who fails to pay for fuel dispensed by pressing a "pay inside" button at a self-service gasoline pump is, in addition to violating § 46.2-819.2 of the Code of Virginia, subject to prosecution for a criminal offense.

You relate that the method of pumping fuel into a motor vehicle through the use of self-service gasoline pumps at a retail service station permits an individual to select one of two payment modes: (1) the "pay outside" button on the pump by which the individual inserts a credit card with subsequent activation of the pump to dispense fuel and payment for such fuel recorded on the credit card; or (2) the "pay inside" button on the pump which activates the pump to dispense fuel with subsequent payment made to a cashier. You also relate that, with regard to the latter mode, an individual who presses the "pay inside" button to activate the pump to dispense fuel into the individual's motor vehicle and subsequently drives away without paying for the fuel is in violation of § 46.2-819.2.
Title 18.2 contains the crimes and offenses for which criminal prosecution is authorized in the Commonwealth. Specifically, § 18.2-96 defines the crime of "petit larceny," and provides generally that any person who "[c]ommits simple larceny not from the person of another of goods and chattels of the value of less than $200 ... shall be deemed guilty of petit larceny, which shall be punishable as a Class 1 misdemeanor." Additionally, § 18.2-103 provides:

> Whoever, without authority, with the intention of converting goods or merchandise to his own or another's use without having paid the full purchase price thereof, or of defrauding the owner of the value of the goods or merchandise ... of any store or other mercantile establishment, ... when the value of the goods or merchandise involved in the offense is less than $200, shall be guilty of petit larceny ....

"[L]arceny is the taking and carrying away of the goods and chattels of another with intent to deprive the owner of the possession thereof permanently." Pursuant to §§ 18.2-96 and 18.2-103, such actions amount to petit larceny when the value of the goods is less than $200. In a case decided by the Court of Appeals of Virginia, an individual used a gas credit card issued to him by his employer for purchases of gasoline when using the employer's motor vehicle for employment purposes. The individual used the card, however, for his personal vehicle on several occasions and was prosecuted and convicted under § 18.2-192 for credit card theft. The Court of Appeals reversed the trial court's decision and held that the facts show that he stole gasoline rather than a credit card, and that "theft of gasoline ... is petit larceny."

Although the facts you present are different from the case decided by the Virginia Court of Appeals, the holding that the theft of gasoline is petit larceny is relevant. Under the facts presented, the actions of an individual who presses the "pay inside" button at a self-service gasoline pump to activate the pump to dispense fuel into his motor vehicle and drives away without paying for such fuel are tantamount to theft of the gasoline. Accordingly, I must conclude that such individual is subject to criminal prosecution under Virginia's petit larceny laws.

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1Section 46.2-819.2 provides:

> "A. No person shall drive a motor vehicle off the premises of an establishment at which motor fuel offered for retail sale was dispensed into the fuel tank of such motor vehicle unless payment for such fuel has been made.
>  
> "B. Any person who violates this section shall be liable for a civil penalty not to exceed $100.
>  
> "C. The driver's license of any person found to have violated this section (i) may be suspended, for the first offense, for a period of up to 30 days and (ii) shall be suspended for a period of 30 days for the second and subsequent offenses."

2See, e.g., Va. Code Ann. § 18.2-7 (Michie Repl. Vol. 1996) (providing that "[t]he commission of a crime shall not stay or merge any civil remedy"); § 18.2-8 (Michie Repl. Vol. 1996) (classifying offenses as either felonies or misdemeanors and stating that "[t]raffic infractions are violations of public order as defined in § 46.2-100 and not deemed to be criminal in nature").


You request interpretation of § 46.2-644 of the Code of Virginia, a portion of Article 2, Chapter 6 of Title 46.2, relating to notification to the Department of Motor Vehicles (the “Department”) of the levy and seizure of a vehicle, pursuant to a writ of fieri facias.

You advise that you understand § 46.2-644 to require the sheriff to notify the Department both when the sheriff physically seizes a vehicle and when the sheriff releases a seized vehicle. You advise further that your office notifies the Department when you levy on a vehicle. In this situation, possession of the vehicle remains with the debtor. You relate that the Department has advised that notification is necessary only when the sheriff has physical possession of the vehicle. Therefore, you first ask whether the sheriff is required to notify the Department when the vehicle has not been physically seized.

Section 46.2-644 provides:

A levy made by virtue of an execution, fieri facias, or other court order, on a motor vehicle, trailer, or semitrailer for which a certificate of title has been issued by the Department, shall constitute a lien, subsequent to security interests previously recorded by the Department and subsequent to security interests in inventory held for sale and perfected as otherwise permitted by law, when the officer making the levy reports to the Department on forms provided by the Department, that the levy has been made and that the motor vehicle, trailer, or semitrailer levied on has been seized by him. If the lien is thereafter satisfied or should the motor vehicle, trailer, or semitrailer thus levied on and seized thereafter be released by the officer, he shall immediately report that fact to the Department. Any owner who, after the levy and seizure by an officer and before the officer reports the levy and seizure to the Department, shall fraudulently assign or transfer his title to or interest in a motor vehicle, trailer, or semitrailer or cause...
its certificate of title to be assigned or transferred or cause a
security interest to be shown on its certificate of title shall be
guilty of a Class 1 misdemeanor.

There are several rules of statutory construction applicable to your inquiry. The use of the word “shall” in a statute ordinarily implies that its provisions are mandatory. Furthermore, neither § 46.2-644 nor any other provision in Chapter 6 of Title 46.2 contains any definition of the terms “levy” or “seize” as those terms are used in § 46.2-644. In the absence of any such definition, the terms must be given their common, ordinary meaning. “Levy,” as used in § 46.2-644, means “[t]he imposition of a fine or tax; the fine or tax so imposed.” “Seize” means “[t]o forcibly take possession (of ... property); ... [t]o be in possession (of property).”

For a levy to constitute a lien on the title of a motor vehicle by virtue of a sheriff’s execution of a writ of fieri facias on such vehicle, § 46.2-644 specifically requires that the sheriff make levy on and take possession of the motor vehicle. The sheriff must also report the levy and seizure of the vehicle to the Department on forms provided by the Department for that purpose. I find no language in § 46.2-644, however, that requires the sheriff to notify the Department when he has not physically taken possession of the vehicle. Therefore, I must conclude that § 46.2-644 does not require the sheriff to notify the Department of a levy made on a vehicle pursuant to a writ of fieri facias that is not accompanied by physical seizure of the vehicle.

You next ask whether a vehicle that has been levied on but not seized by the sheriff and therefore not reported to the Department, and which is sold by the debtor after levy but prior to sheriff’s auction, is a vehicle that the sheriff may sell at auction.

In the case of Toyota Motor Credit Corp. v. C.L. Hyman Auto Wholesale, Inc., the Supreme Court of Virginia notes that the General Assembly enacted the motor vehicle titling statutes in Article 2, Chapter 6 of Title 42.1, which includes § 46.2-644, “to protect the public by providing for the issuance of certificates of title as evidence of ownership of motor vehicles and to provide potential buyers and creditors with a single place where information about the status of motor vehicles could be found.” The Court also observes:

These statutes ... eliminated any requirement that a lien against a motor vehicle be recorded in the county or city where the purchaser or debtor resides or in any other manner available for recording a security interest in personal property, but imposed the new condition that a security interest in a motor vehicle would not be perfected “as to third parties” unless shown on the certificate of title.

The Court explains that

§ 46.2-638 specifically provides that a certificate of title showing a security interest “shall be adequate notice to the
Commonwealth, creditors, and purchasers that a security interest in the motor vehicle exists." We have recognized that the converse is also true.

[W]hen a certificate of title is issued which fails to show a lien or encumbrance, it is notice to the world that the property is free from any lien or encumbrance, and if transferred to a bona fide purchaser the latter would obtain a good title.

To hold otherwise would eliminate the ability of potential buyers and lenders to rely on the information contained in certificates of title.

Reading § 46.2-644 as a whole, when a sheriff has levied on and seized a vehicle, any sale of such vehicle by the debtor is "fraudulent," and such debtor "shall be guilty of a Class 1 misdemeanor." Section 46.2-644 does not, however, provide for any such criminal penalty when the sheriff levies by virtue of a fieri facias on a vehicle but does not physically take possession of the vehicle. "While in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity." When the sheriff levies on but does not seize a vehicle, he is not required to report such levy to the Department. Consequently, the certificate of title on the vehicle maintained by the Department will not show a lien resulting from the fieri facias. A bona fide purchaser of such vehicle, therefore, has no notice of a lien and obtains title to the vehicle free from any such lien.

I must, therefore, conclude that a vehicle levied on but not seized and subsequently sold by the debtor may not be sold at sheriff's auction.

1Article 2, Chapter 6 of Title 46.2 relates to the titling of vehicles.

2"Fieri facias" means "[a] writ of execution that directs a sheriff to seize and sell a defendant's property to satisfy a money judgment." BLACK'S LAW DICTIONARY 641 (7th ed. 1999). Generally, with regard to tangible personal property, the Supreme Court of Virginia has held that an execution by levy under a writ of fieri facias is not complete until the property is sold:

"The levy does not divest the defendant of the property and transfer of title to the plaintiff, or even to the sheriff. The property still remains in the defendant, notwithstanding the levy, and only a special interest is vested in the sheriff, as a mere bailee, to enable him to keep the property safely, and defend it against wrongdoers. While subject to the levy it is in the custody of the law, and the sheriff has a naked power to sell it and pass the title from the owner to the purchaser.... Now until this last step is taken [the sale], the thing remains in fieri, and may, in a certain manner and under certain circumstances, be so undone as that the plaintiff may be placed in the same situation in which he was before he sued out execution ...."


3See Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) (noting that "shall" is word of command, used in connection with mandate); see also Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that "shall" generally indicates procedures are intended to be mandatory, imperative or limited); Op. Va. Att'y Gen.: 1997 at 16, 17; 1996 at 20, 21; 1991 at 126, 126, and opinions cited therein; id. at 127, 129, and opinions cited therein.
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Black's Law Dictionary, supra note 2, at 919.

Id. at 1363.


Section 46.2-644.


256 Va. at 246, 506 S.E.2d at 15 (citation omitted) (quoting Credit Corp., 164 Va. at 582-83, 180 S.E. at 409).


The use of the conjunctive "and" in § 46.2-644 indicates that sale by a debtor of a vehicle subject to a lien is fraudulent when a sheriff not only has levied on but also has seized such vehicle. See Op. Va. Att'y Gen.: 1997 at 99, 100; 1990 at 209, 210.


OP. NO. 01-026
MOTOR VEHICLES: TITLING AND REGISTRATION OF MOTOR VEHICLES.
CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY OFFICERS).
COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, ETC. - TREASURERS.
TAXATION: LOCAL OFFICERS - TREASURERS - REVIEW OF LOCAL TAXES - COLLECTION BY TREASURERS, ETC.

Duty of Norfolk city treasurer to collect outstanding fines owed for violation of city code governing vehicular parking before issuing license decals to delinquent applicant is not discretionary; treasurer may not refuse to enforce Norfolk city code.

THE HONORABLE JOHN H. RUST JR.
MEMBER, HOUSE OF DELEGATES
FEBRUARY 28, 2001

You ask whether the treasurer for the City of Norfolk may refuse to enforce the city's prohibition against issuing a city decal to an applicant having two or more outstanding parking tickets.

You advise that, pursuant to § 46.2-752(D) of the Code of Virginia, the City of Norfolk adopted an ordinance prohibiting the issuance of vehicle license decals to an applicant who has two or more parking tickets due and owing the city for sixty days or more. You also advise that the city treasurer believes that he has discretionary authority regarding enforcement of the subject ordinance. You also relate that the city has privatized the enforcement of parking regulations.
The contractor, however, has no authority regarding the issuance of city decals to applicants who have unpaid parking tickets.

Section 74 of the charter for the City of Norfolk pertains to the city treasurer and provides:

The city treasurer ... shall give bond in such sum not less than one hundred thousand dollars, as the council may prescribe, with surety to be approved by the council, conditioned for the faithful discharge of his official duties in relation to the revenue of the city, and of such other official duties as may be imposed upon him by this charter and the ordinances of the city. Subject to the supervision of the city manager, he shall collect and receive all city taxes, levies, assessments, license taxes, rents, water rents, fees and all other revenues or moneys accruing to the city .... He shall perform such other duties, have such powers and be liable to such penalties as are now or may hereafter be prescribed by law or ordinance.

The office of treasurer is a constitutional office. The powers and duties of a treasurer are generally set out in Article 2, Chapters 31 and 39 of Title 58.1. In addition, § 15.2-1608 provides that “[t]he treasurer shall exercise all the powers conferred and perform all the duties imposed upon treasurers by law.” The use of the word “shall” in a statute ordinarily implies that its provisions are mandatory. Section 15.2-1608 also provides that the treasurer “may perform such other duties ... as the governing body may request.” The use of the word “may” indicates the grant of permissive, rather than mandatory, authority.

Prior opinions of the Attorney General conclude that it is the duty of a county treasurer to issue local automobile licenses and collect the fees authorized by local ordinance. The conclusions of these opinions will also apply to city treasurers. These conclusions are based on the duties of treasurers as prescribed in §§ 15.2-1636.3 and 58.1-3127. Section 15.2-1636.3 provides that county treasurers shall collect license fees; § 15.2-1636.4 provides that city treasurers must collect license fees. Section 58.1-3127(A) requires city and county treasurers to receive levies and other amounts payable into the treasury of the political subdivisions they serve. A 1975 opinion considers whether a city may impose the obligation of collecting city parking fines on the office of treasurer. The opinion concludes that a city council may validly delegate the duty of collecting parking fines to the treasurer. The opinion also concludes that there is no authority which permits a city treasurer to refuse to accept responsibility for collecting parking fines on behalf of the city.

To determine legislative intent, statutes dealing with the same subject matter must be construed together to achieve a harmonious result, resolving conflicts to give effect to each statute, to the maximum extent possible. In addition, when it is not clear which of two statutes apply, the more specific statute prevails over the more general. The two enactments by the General Assembly pertaining to this matter are § 74 of the city charter and § 15.2-1608. Section 74 of the city charter specifically sets forth the duties of the treasurer for the
City of Norfolk. Section 15.2-1608 generally sets forth the duties of all treasurers in the Commonwealth. Where the duties specified in these two enactments differ, the more general must give way to the specific. Clearly, § 74 of the city charter is more specific with regard to the duties of the Norfolk city treasurer. Section 74 requires the treasurer to "perform such other duties ... as are now or may hereafter be prescribed by law or ordinance." 1

Additionally, I am required to consider the rule of statutory construction that the purpose underlying a statute's enactment is particularly significant in construing it. Clearly, the purpose of § 46.2-752(D) is to provide a city with an enforcement mechanism to collect delinquent fines by requiring the payment of all outstanding fines owed for violation of ordinances governing the parking of vehicles in the city. It is quite clear that the City of Norfolk requires city vehicle licenses to be withheld until fines resulting from two or more outstanding parking tickets due and owing for sixty days or more are paid. It is the duty of the city treasurer to issue city vehicle licenses and collect the authorized fees. Without the enforcement of the pertinent city ordinance by the city treasurer, § 46.2-752(D) is meaningless to the City of Norfolk. I am required to apply the rule of statutory construction that "every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary." 1

Accordingly, I must conclude that the treasurer for the City of Norfolk does not have discretionary authority regarding enforcement of the city ordinance prohibiting the sale of motor vehicle license decals to an applicant who has been delinquent for at least sixty days in the payment of two or more city parking tickets. I am of the opinion, therefore, that the treasurer may not refuse to enforce § 24-172(b) of the Norfolk city code.

1Section 46.2-752(D) authorizes cities to prohibit the local licensing of any motor vehicle, trailer, or semitrailer "unless all fines owed to the jurisdiction by the owner of the vehicle, trailer, or semitrailer for violation of the jurisdiction's ordinances governing parking of vehicles have been paid."

2No [city] license shall be issued [for a motor vehicle, trailer or semitrailer] if the applicant thereafter has two (2) or more outstanding unpaid parking tickets due and owing to the City of Norfolk for sixty (60) days or more and such tickets remain unpaid when the motor vehicle, trailer or semitrailer license is sought. NORFOLK, VA., CODE § 24-172(b) (2001).


VA. CONST. art. VII, § 4; see also VA. CODE ANN. § 15.2-1600(A) (Michie Repl. Vol. 1997) (codifying parallel statute).


See Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) (noting that "shall" is word of command, used in connection with mandate); see also Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that "shall" generally indicates procedures are intended to be mandatory, imperative or limited); Op. Va. Att'y Gen.: 1997 at 16, 17; 1996 at 20, 21; 1991 at 126, 126, and opinions cited therein; id. at 127, 129, and opinions cited therein.


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"Id. at 138.
"Id.
"Prillaman v. Commonwealth, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957) (noting that statutes relating to same subject are not to be considered in isolation but must be construed together to produce harmonious result that gives effect to all provisions if possible); 1991 Op. Va. Att’y Gen. 159, 160.
"See 1A Norman J. Singer, Sutherland Statutory Construction § 21.14, at 129 (5th ed. 1993) (stating that disjunctive "or" usually separates words in alternate relationship, indicating that either of separated words may be used without other); see also 1989 Op. Va. Att’y Gen. 228, 229 (noting use of "or" is disjunctive).

01-088
PENSIONS, BENEFITS AND RETIREMENT: HEALTH INSURANCE CREDITS FOR CERTAIN RETIREES.
COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, ETC.

Locality, which contributes to its retirees’ health insurance, may take into account state credit paid toward health insurance of retiree of local constitutional officer.

THE HONORABLE GLENN M. WEATHERHOLTZ
MEMBER, HOUSE OF DELEGATES
OCTOBER 30, 2001

You ask whether a locality, which makes contributions to the health insurance of its retirees, may take into account a state credit paid toward the health insurance of a retiree of a local constitutional officer.

You advise that a constituent retired, prior to his sixty-fifth birthday, from the Rockingham County sheriff’s office, with twenty-nine years of service. The retiree receives a monthly credit toward his health insurance coverage in the amount of $43.50 from the Virginia Retirement System and $72.50 from the county.

You advise further that Rockingham County has amended its policy regarding its contributions to the health insurance of employees who retire before age sixty-five, to equal the amount paid to state retirees. You believe that your constituent’s county-paid credit of $72.50 will be increased by $43.50 to $116. You indicate further that you have been told that your constituent will not be entitled to the $43.50 credit paid by the Virginia Retirement System.1
A letter to your constituent from the Rockingham County administrator's office restates the county's past practice of providing health insurance credits to county employees, including constitutional officers, in the amount of $2.50 per month for each year of service. Prior to the amendment, constitutional officers received an additional state credit of $1.50, for a combined credit of $4. The retired constituent thus appears to have been receiving a local credit of $72.50 and a state credit of $43.50, per month for 29 years of service.

The county administrator's office advises that the county's contribution has been increased to $4, thus ensuring that all county employees, including constitutional officers, receive the same benefit from all sources. The administrator's office notes that, since constitutional officers receive a state credit of $1.50, the local contribution for such officers and their employees shall remain at $2.50. Consequently, constitutional officers and their employees receive a total credit of $4 from all sources. Based on the above, you are concerned that your constituent will not be eligible to receive the $43.50 credit paid by the Virginia Retirement System if the county increases its contribution.

Section 51.1-1400(A) of the Code of Virginia provides a credit toward the cost of health insurance coverage for retired state employees in the amount of $4 per month for every year of service. Section 51.1-1403(A) provides a similar credit for retired constitutional officers and their employees in the amount of $1.50 per month for each year of service. The Commonwealth pays for these credits.

In addition, § 51.1-1403(B) authorizes localities that participate in the Virginia Retirement System to provide an additional credit to constitutional officers and their employees of $1 per month for each year of service. While local participation in the Virginia Retirement System is optional, some localities elect to establish their own program for retiree health insurance credits to provide a higher level of benefits. Because the county administrator's office relates that Rockingham County is paying more than $1 per month for each year of service, I shall assume, for the purposes of this opinion, that the county has established its own retirement program.

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature. The purpose underlying a statute's enactment is particularly significant in construing it. Moreover, statutes should not be interpreted in ways that produce absurd or irrational consequences. Instead, they should be harmonized with other existing statutes where possible to produce a consistently logical result that gives effect to the legislative intent.

Section 15.2-1605.1 authorizes counties to "supplement the compensation" of constitutional officers, and § 51.1-1403 authorizes localities to provide health insurance credits to retired constitutional officers and their employees. A locality that elects to participate in the Virginia Retirement System may provide an additional health insurance credit of $1 for retired constitutional officers, and $1.50 for retired local government employees.
The Court of Appeals of Virginia has noted that, "[w]here a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation."

Because the General Assembly expressly requires that localities participating in the Virginia Retirement System health insurance credit plan provide different benefits to retired constitutional officers and to retired local government employees, it is clear that localities may also contribute different amounts under their local plans. Consequently, I must conclude that a locality, which makes contributions to its retirees' health insurance, may, if it so chooses, take into account the state credit paid toward the health insurance of a retiree of a local constitutional officer.

1Your constituent, in fact, will continue to receive a $43.50 credit from the Commonwealth, regardless of the amount the county pays toward the health insurance coverage for its constitutional officers and employees.

2I shall assume that the county administrator's office has correctly interpreted the locality's plan. In instances when a request requires an interpretation of a local ordinance, the Attorney General traditionally has declined to respond in order to avoid becoming involved in matters purely of local concern and over which the local governing body has control. Op. Va. Att'y Gen.: 1995 at 240, 241; 1986-1987 at 347, 348; 1976-1977 at 17, 17.

3Section 51.1-1403(A) uses the term "local officer," which includes the "sheriff of any county ..., or deputy or employee of any such officer." VA. CODE ANN. § 51.1-124.3 (Michie Supp. 2001).


9Section 51.1-1403(B).


You ask for a review of a 1995 resolution establishing the Southwest Virginia Community Corrections Program pursuant to the Comprehensive Community Corrections Act for Local-Responsible Offenders, §§ 53.1-180 through 53.1-185.3 of the Code of Virginia ("Community Corrections Act"), regarding compliance with the requirements of §§ 15.2-1300 and 53.1-185.3.

The Community Corrections Act governs the establishment and maintenance of local community-based probation programs by any city or county or combination thereof. Section 15.2-1300(A) provides for the joint exercise of a power by two or more political subdivisions "except where an express statutory procedure is otherwise provided for the joint exercise." This exception is consistent with the long-standing principle of statutory construction that the more specific statute prevails over the general statute. In the instant case, §§ 53.1-180 through 53.1-185.3 provide express statutory procedures for the establishment and maintenance of the program in issue among two or more localities. Accordingly, § 15.2-1300, by its own terms, is not applicable to your inquiry inasmuch as express statutory procedures are set forth in the Community Corrections Act. Therefore, a review of the 1995 resolution with respect to § 15.2-1300 is unnecessary.

With regard to whether the 1995 resolution is in compliance with the requirements of § 53.1-185.3, I note that this statute was amended during the 2000 Session of the General Assembly to provide that, "[i]n cases of multijurisdictional participation, the governing authorities of the participating localities shall select one of the participating cities or counties, with its consent, to act as administrator and fiscal agent for the funds awarded for purposes of implementing the ... community-based probation program." The use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive.

Accordingly, I must conclude that the provision contained in the 1995 resolution, wherein the Southwest Virginia Community Criminal Justice Board selects a consenting participating city or county to act as administrator and fiscal agent for funds awarded to implement the community-based probation programs and services, does not comply with § 53.1-185.3. The selection of the administrator and fiscal agent must be made by the governing authorities of the participating localities.

3The 1995 resolution enclosed with your letter reveals the eight county and two city participants in the program.
6See Andrews v. Shepherd, 201 Va. 412, 414-15, 111 S.E.2d 279, 281-82 (1959) (discussing intent of "shall" as mandatory rather than directory); see also Schmidt v. City of Richmond, 206 Va. 211,
You ask whether chiropractors may lawfully provide physical therapy modalities as part of treatment program for patients, and therefore, practice physical therapy.

You advise that, since the enactment of Chapter 34.1 of Title 54.1, §§ 54.1-3473 through 54.1-3483 of the Code of Virginia,¹ questions have arisen regarding whether chiropractors may lawfully perform physical therapy modalities on their patients. Chapter 34.1 creates an independent Board of Physical Therapy and removes the regulation of physical therapists and physical therapist assistants from the Board of Medicine.² Chapter 34.1 also sets forth the requirements for the licensure of physical therapists in the Commonwealth.³ You relate that chiropractors are not acknowledged by some as being lawfully authorized to perform physical therapy on their patients.

Section 54.1-2900, a portion of Chapter 29 of Title 54.1, governing medicine and other healing arts,⁴ defines the term “practice of chiropractic” as “the adjustment of the twenty-four movable vertebrae of the spinal column, and assisting nature for the purpose of normalizing the transmission of nerve energy, but does not include the use of surgery, obstetrics, osteopathy or the administration or prescribing of any drugs, medicines, serums or vaccines.” This definition expressly excludes certain modalities, but otherwise permits a broad range of practice, limited only to the twenty-four movable vertebrae of the spinal column and normalizing the transmission of nerve energy. Physical therapy as a treatment modality is not specifically excluded from this scope of practice, and chiropractors regularly have employed elements of this treatment modality in their course of practice. Similarly, the “practice of medicine or osteopathic medicine” is defined broadly to include “the prevention, diagnosis and treatment of human physical or mental ailments, conditions, diseases, pain or infirmities by any means or method.”⁵ Nothing is excluded from the permissible range of treatments that may be performed by these licensed practitioners. Doctors of medicine and doctors of osteopathic medicine, therefore, have employed elements of physical therapy in the course of their practice.

The General Assembly did not change the definitions of “practice of chiropractic” or “practice of medicine or osteopathic medicine” when it enacted Chapter
34.1 of Title 54.1. Additionally, the General Assembly did not express a clear intention to override existing provisions of law when it established the Board of Physical Therapy. It is axiomatic that the primary goal of statutory interpretation is to interpret statutes in accordance with the legislature’s intent. Therefore, statutes must be construed in a manner that ascertains and gives effect to legislative intent. Such intent “must be gathered from the words used, unless a literal construction would involve a manifest absurdity.” Finally, the entire statutory provision must be reviewed to ascertain legislative intent.

Based on the above, I am of the opinion that the statutory changes enacted by the General Assembly in 2000 were not intended to change, and did nothing to change, the scope of practice of chiropractors, and I am further of the opinion that chiropractors may lawfully provide physical therapy modalities as part of a treatment program for patients and, therefore, practice physical therapy.

7Watkins, 161 Va. at 930, 172 S.E. at 447 (quoting Floyd v. Harding, 69 Va. (28 Gratt.) 401, 405 (1877)).
8See Commonwealth v. Jones, 194 Va. 727, 731, 74 S.E.2d 817, 820 (1953) (noting that, to derive true purpose of act, statute should be construed to give effect to its component parts).

01-064

PROPERTY AND CONVEYANCES: CONDOMINIUM ACT.

Nonresident condominium unit owner whose unit leases for period less than 20 years has not disposed of unit and is not disqualified from membership eligibility on unit owners’ association board of directors.

THE HONORABLE L. KAREN DARNER
MEMBER, HOUSE OF DELEGATES
JULY 30, 2001

You ask whether § 55-79.78(A) of the Code of Virginia disqualifies nonresident condominium unit owners who lease their units to others from membership on the unit owners’ association board of directors in the same manner as it disqualifies unit owners who sell their units.

You advise that the Southampton condominium board of directors has relied on § 55-79.78(A) as the basis for adopting a policy that nonresident unit owners who lease their units are ineligible to serve on the board. You advise further
that the condominium bylaws require that board members be unit owners; however, the bylaws are silent as to whether directors must be residents in the condominiums. You relate that, prior to adoption of the new policy, there was no requirement for residency, and over the past twenty years, at least five non-resident unit owners have served on the board.

Chapter 4.2 of Title 55, §§ 55-79.39 through 55-79.103, comprises the Condominium Act. The facility referred to and owned as a "condominium" is one in which owners have individual ownership and use of distinct units along with ownership in undivided common interests in the common elements of the facility. Section 55-79.40(A) provides that the Condominium Act "shall apply to all condominiums." Section 55-79.45 provides that "[n]o condominium shall come into existence except by the recordation of condominium instruments pursuant to the provisions of this chapter." Section 55-79.73(A) provides for the self-government of a condominium by requiring that "[t]here shall be recorded simultaneously with the declaration a set of bylaws providing for the self-government of the condominium by an association of all the unit owners."

The Supreme Court of Virginia has noted that "[t]he power exercised by a [condominium unit owners' association] is contractual in nature and is the creature of the condominium documents to which all unit owners subjected themselves in purchasing their units. It is a power exercised in accordance with the private consensus of the unit owners." Unit owners' concerns about the application of the bylaws of an association to a specific factual situation, such as the subject board eligibility rule, are concerns that may be settled pursuant to §§ 55-79.78(A) and 55-79.41.

Section 55-79.78(A) provides:

If the condominium instruments provide that any officer or officers must be unit owners, then any such officer who disposes of all of his units in fee and/or for a term or terms of six months or more shall be deemed to have disqualified himself from continuing in office unless the condominium instruments otherwise provide, or unless he acquires or contracts to acquire another unit in the condominium under terms giving him a right of occupancy thereto effective on or before the termination of his right of occupancy under such disposition or dispositions.

Section 55-79.41 contains definitions of terms used in the Condominium Act:

'Dispose'... refers to any voluntary transfer of a legal or equitable interest in a condominium unit to a purchaser, but shall not include the transfer or release of security for a debt.

'Officer' means any member of the executive organ or official of the unit owners' association.
'Purchaser' means any person or persons, other than a declarant, who acquire by means of a voluntary transfer a legal or equitable interest in a condominium unit, other than (i) a leasehold interest, including renewal options, of less than twenty years or (ii) as security for a debt.

In construing statutes, the statutory definition must prevail over a common law definition. The Virginia Supreme Court has stated that "[a] primary rule of statutory construction is that courts must look first to the language of the statute. If a statute is clear and unambiguous, a court will give the statute its plain meaning." I am of the opinion that the mere leasing of a unit, for a period of less than twenty years, does not meet the definition of the term "dispose," and therefore, does not disqualify a unit owner who becomes a nonresident from membership eligibility on the association's board of directors. The Condominium Act requires that a policy prohibiting nonresident owners from serving on the association's board of directors must be reflected in the bylaws.

1You provide with your request a copy of the Southampton condominium bylaws for review. This Office must decline to render an opinion regarding interpretation of any such condominium documents which, in reality, are private agreements among the several co-owners of the association. This Office traditionally has declined to render opinions in matters of a purely private nature and has limited responses to requests for opinions to matters which concern an interpretation of federal or state law, rule or regulation. 1986-1987 Op. Va. Att'y Gen. 347, 348. I trust you will understand the rationale for this long-standing practice.


3See VA. CODE ANN. § 55-79.54 (Michie Supp. 2001) (explaining contents of declaration as containing, e.g., name and location of condominium, metes and bounds description, delineation of common elements and unit boundaries, etc.).


5See Life & Casualty Co. v. Unemployment Compensation Comm'n, 178 Va. 46, 57, 16 S.E.2d 357, 361 (1941).


OP. NO. 01-006
PROPERTY AND CONVEYANCES: FORM AND EFFECT OF DEEDS AND COVENANTS.
CORPORATIONS: VIRGINIA LIMITED LIABILITY COMPANY ACT.
Authority of Virginia limited liability company to serve as trustee in deed of trust on real property.

THE HONORABLE ALBERT TEICH JR.
CLERK, CIRCUIT COURT OF THE CITY OF NORFOLK
JUNE 22, 2001

You ask whether § 55-58.1(2) of the Code of Virginia permits a Virginia limited liability company to serve as a trustee in a deed of trust on real property.

Under the Virginia Limited Liability Company Act, §§ 13.1-1000 through 13.1-1073, "a limited liability company is an unincorporated association with
a registered agent and office." Specifically, § 13.1-1009 provides that "[u]nless the articles of organization provide otherwise, every limited liability company has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs." Such powers include the power to "receive and hold real and personal property as security for repayment."2

Section 55-58.1 contains certain requirements regarding the recordation of certain deeds of trusts and provides that "[n]o person not a resident of this Commonwealth may be named or act, in person or by agent or attorney, as the trustee of a security trust, either individually or as one of several trustees, the other or others of which are residents of this Commonwealth."3

The General Assembly does not define the term "person" as it is used in § 55-58.1.4 Section 1-13.19, however, defines "person," as applied generally in the construction of all provisions of the Code, to include "any individual, corporation, partnership, association, company, business, trust, joint venture or other legal entity."5 I am not aware of any statute that prohibits extension of the word "person" to include limited liability companies.6 Therefore, applying this definition to § 55-58.1, and assuming that the deed of trust falls within the purview of such statute,7 it is my opinion that a Virginia limited liability company may serve as a trustee in such deed of trust.8

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4Compare VA. CODE ANN. § 13.1-1069 (Michie Repl. Vol. 1999) (authorizing inclusion of "limited liability company" within definition of term "person" whenever such term is used in Code "to include both corporation and partnership").


8You also inquire whether the limited liability company set forth in the deed of trust as the trustee is in compliance with the Code with respect to the location of its principal office. I am required to take notice that a clerk must record a document that meets basic statutory requirements without inquiry into the legal sufficiency of the writing; thus, it is not within the power of the clerk to determine whether an instrument presented for filing meets the requirements of any particular provision of law. See Op. Va. Att’y Gen.: 1986-1987 at 159, 160; 1971-1972 at 65, 65.

OP. NO. 01-027

TAXATION: ELECTRIC UTILITY CONSUMPTION TAX — NATURAL GAS CONSUMPTION TAX.

CONSTITUTION OF THE UNITED STATES: ARTICLE VI (SUPREMACY CLAUSE).

Commonwealth may not levy electric and natural gas consumption taxes on diplomats from foreign countries to whom Secretary of State has granted diplomatic immunity from taxation; such prohibited taxation extends to portion of taxes remitted to localities.
Method of Identifying foreign nation diplomats for purposes of exemption from electric and natural gas consumption taxes.

THE HONORABLE CLINTON MILLER  
CHAIRMAN, STATE CORPORATION COMMISSION  
MAY 16, 2001

You first ask whether the Commonwealth may levy the electric and gas consumption taxes prescribed by §§ 58.1-2900 and 58.1-2904 of the Code of Virginia on diplomats from foreign countries, and if not, whether such prohibited taxation extends to the portion of taxes remitted by the provider to localities in the Commonwealth.

You advise that the electric and natural gas consumption taxes became effective January 1, 2001, and that such taxes are payable to the state and to the localities in increments. As required by §§ 58.1-2901 and 58.1-2905, service providers and pipeline distribution companies or gas utilities collect the respective taxes as a line item on their monthly bills to consumers. The companies remit to the State Corporation Commission and to the locality a portion of the taxes collected. Finally, you advise that the State Corporation Commission has received inquiries from individuals claiming diplomatic status concerning collection of the electric and gas consumption taxes.

In 1961, the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations to establish rules for the conduct of diplomatic relations between sovereign countries. The Vienna Convention exempts a guest nation diplomatic agent from all dues and taxes, personal or real, national, regional or municipal, except:

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services ....

"The privilege extended to an individual diplomat is merely incidental to the benefit conferred on the government [that the diplomat] represents." The Vienna Convention became applicable to the United States upon passage of the Diplomatic Relations Act. The purpose of the Diplomatic Relations Act is "to complement the 1961 Vienna Convention on Diplomatic Relations." The Diplomatic Relations Act provides that the President of the United States may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for the mission, the members of the mission, their families, and the diplomatic couriers which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention.

The legislative history of this provision reflects that it was enacted to provide the President with "discretion to extend, on a reciprocal basis, more favorable treatment or less favorable treatment than the Convention specifies, to members of missions." The President has delegated this power to the Secretary of
State. In addition, the Foreign Missions Act vests broad authority over foreign missions in the Secretary of State. The Act defines "foreign mission" as any mission to or agency or entity in the United States which is involved in the diplomatic, consular, or other activities of, or which is substantially owned or effectively controlled by—

(A) a foreign government ....

The Foreign Missions Act expressly authorizes the Secretary of State to decide what constitutes a foreign mission for the purposes of the Act. It also provides that “[d]eterminations with respect to the meaning and applicability of the terms used in subsection (a) of § 4302 shall be committed to the discretion of the Secretary.” Once foreign missions are identified, the Act vests broad authority over the missions in the Secretary of State. The Act provides that

[the treatment to be accorded to a foreign mission in the United States shall be determined by the Secretary after due consideration of the benefits, privileges, and immunities provided to missions of the United States in the country or territory represented by that foreign mission, as well as matters relating to the protection of the interests of the United States.]

The Supremacy Clause of the Constitution of the United States provides that federal laws and treaties are the "supreme law of the land." By virtue of this clause, an exemption provided by such law or treaty would supersede state law. Thus, foreign nationals who enjoy diplomatic immunity from taxation do so by virtue of an internationally agreed status. Therefore, it is my opinion that when the Secretary of State makes the appropriate determinations under the Diplomatic Relations Act and the Foreign Missions Act, the Commonwealth may not levy the electric and natural gas consumption taxes prescribed by §§ 58.1-2900 and 58.1-2904 on diplomats from foreign countries. Furthermore, I am of the opinion that such prohibited taxation extends to the portion of taxes remitted to localities.

Your final inquiry concerns the method of identifying diplomats from foreign countries for purposes of exemption from the electric and natural gas consumption taxes prescribed by §§ 58.1-2900 and 58.1-2904.

I am advised that, pursuant to the authority of the Foreign Missions Act, the United States Department of State, Office of Foreign Missions, issues tax exemption cards to certain official personnel from foreign countries who are stationed in the United States while working as diplomats, consular officers, or staff members at foreign embassies and consulates, and other organizations, such as the United Nations. Upon the request of the foreign official personnel, a notice is also issued to the service providers, and pipeline distribution companies or gas utilities regarding the diplomat's exemption from payment of a utility tax. Furthermore, I am advised that a diplomat may contact those providers directly to claim the exemption. The provider, then, will contact the
State Department with the name of the diplomat to verify exemption from taxation. The State Department will advise the provider directly regarding whether the diplomat is exempt from payment of the tax on the particular service.


United States v. Arlington, 669 F.2d 925, 930 (4th Cir. 1982).


"[M]embers of the mission' are the head of the mission and the members of the staff of the mission," and "diplomatic agent' is the head of the mission or a member of the diplomatic staff of the mission." Vienna Convention art. 1(b), (e), supra note 4, at 3230, 3231; see also 22 U.S.C. § 254a(1) (defining "members of a mission").


U.S. Const. art. VI, cl. 2.

Section 58.1-3122.2 of the Code of Virginia authorizes a commissioner of the revenue to "provide remote access, including access through the global information system known as the Internet, to all nonconfidential public records maintained by his office." The clear and unambiguous language of this statute expressly authorizes a commissioner of the revenue to provide Internet access to nonconfidential public records maintained by his office. Accordingly, a commissioner of the revenue may provide Internet access to such nonconfidential records.

Section 58.1-3(A) provides that, "[e]xcept in accordance with a proper judicial order or as otherwise provided by law," tax officials shall not disclose any information acquired in the performance of their duties "with respect to the transactions, property, including personal property, income or business of any person, firm or corporation." Section 58.1-3(B) provides, however, that this prohibition "shall not be construed to prohibit a local tax official from disclosing whether a person, firm or corporation is licensed to do business in that locality." With respect to this particular section, a 1995 opinion of the Attorney General notes that this language allows disclosure of the names of persons who are licensed to do business in that locality. Similarly, the names of firms or corporations licensed to do business in the locality comprise nonconfidential information pursuant to this section.

Accordingly, I must concur with the 1995 opinion of the Attorney General. It is, therefore, my opinion that a commissioner of the revenue may publish on an Internet web page the names of businesses licensed to do business in his or her locality.


OP. NO. 01-043

TAXATION: GENERAL PROVISIONS OF TITLE 58.1 (SECRET OF INFORMATION) — MISCELLANEOUS TAXES — FOOD AND BEVERAGE TAX — LOCAL OFFICERS — COMMISSIONERS OF THE REVENUE — TREASURERS.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY OFFICERS).

Commissioner of revenue may disseminate to treasurer or his employees confidential meals tax information that is necessary for treasurer to fulfill his duty to collect meals taxes. Bank designated by treasurer as depository to receive payments due county has authority to receive meals tax payments; its knowledge of proprietary information related to treasurer’s collection is not tantamount to violation of secrecy of information provisions.

THE HONORABLE GERALDINE M. WHITING
COMMISSIONER OF THE REVENUE FOR ARLINGTON COUNTY
AUGUST 24, 2001

You request guidance regarding the applicability of the confidentiality provisions of § 58.1-3 of the Code of Virginia to information contained on the master computer file maintained by a commissioner of the revenue.
You relate that the commissioner of the revenue for Arlington County maintains a master computer file which contains business information about taxpayers who pay meals taxes. You also relate that the treasurer has gained access to the master file so that he may mail such taxpayers forms and instructions concerning the payment of county meals taxes at a bank with which the treasurer has contracted. You inquire whether (1) the treasurer's access and use of information from the commissioner's meals tax computer file, or (2) the bank's use of information related to acceptance of meals tax payments violates the confidentiality provisions of § 58.1-3.

Section 58.1-3833 authorizes counties to impose meals taxes. With respect to such taxes, the Attorney General concludes that, because no statute directs local governments to maintain any particular type of system in connection with the administration of local meals taxes, the adoption of reasonable record-keeping procedures is a matter for determination by the governing body and local tax officials. Additionally, this Office has noted that the duty to administer these taxes is not a statutory duty of a constitutional officer, but a constitutional officer may voluntarily assume such duty.

Section 58.1-3(A) provides, in part:

Except in accordance with a proper judicial order or as otherwise provided by law, the ... commissioner of the revenue, treasurer, or any other state or local tax or revenue officer or employee ... shall not divulge any information acquired by him in the performance of his duties with respect to the transactions, property, including personal property, income or business of any person, firm or corporation.

The section further provides that the prohibition does not apply to "[a]cts performed or words spoken or published in the line of duty under the law." A prior opinion of the Attorney General concludes that, in general, § 58.1-3 establishes the confidentiality of master computer file records of a commissioner of the revenue and prohibits the unauthorized dissemination of, or access to, such confidential information. Thus, unless the records are deemed nonconfidential or are excepted from the provisions of § 58.1-3, information on the master computer file is protected.

The Attorney General previously has noted that, with regard to the meals tax, disclosure of the amount of tax owed for a particular time necessarily reveals the volume of business conducted by the individual or business during that time period. Accordingly, the opinion concludes that such information is business information coming within the purview of § 58.1-3. Therefore, the amount of meals taxes owed by an individual or business and recorded in the master computer file, as well as other information which would indicate proprietary business information, is protected from disclosure.

Provided that the information on the master computer file is protected information, it must next be determined whether an exception to § 58.1-3 allows for dissemination of this information.
Under § 58.1-3(A)(2), the prohibition against disclosure of protected taxpayer information does not apply to "[a]cts performed or words spoken or published in the line of duty." The Attorney General previously has concluded that this line of duty exception allows tax officials to disclose information to other such officers and employees. In general, the duties of a commissioner of the revenue concern the assessment of taxes whereas the duties of a treasurer concern the collection of taxes. Accordingly, with respect to the first part of your inquiry, it is my opinion that, to the extent such information is necessary for the treasurer to fulfill his duty to collect meals taxes, the dissemination to him or his employees of otherwise confidential taxpayer information is allowable under § 58.1-3.

Regarding the second part of your inquiry, § 58.1-3 generally does not authorize the disclosure of protected taxpayer information to third parties. Section 58.1-3149, however, specifically provides:

All money received by a treasurer for the account of either the Commonwealth or the treasurer's county ... shall be deposited intact by the treasurer as promptly as practical after its receipt in a bank or savings institution authorized to act as depository therefor. All deposits made pursuant to this provision shall be made in the name of the treasurer's county .... The treasurer may designate any bank or savings and loan association authorized to act as a depository to receive any payments due to the county ... directly, either through a processing facility or through a branch office.

In analyzing § 58.1-3149 with the confidentiality provisions of § 58.1-3, several rules of statutory construction apply. First, a statute should not be construed to frustrate its purpose. Secondly, statutes related to the same subject should be considered in pari materia. Finally, statutes dealing with the same subject matter should be construed to achieve a harmonious result.

The plain language of § 58.1-3149 clearly authorizes a local treasurer to select a bank as a depository for the funds he collects and further authorizes him to designate such bank to receive payments due the county. Reading this statute in harmony with § 58.1-3, it would be illogical to apply § 58.1-3 to prohibit a bank duly designated by a treasurer to receive local meals tax payments. I assume from the facts presented that the bank in issue has been duly selected by the county treasurer to receive meals tax payments. Accordingly, it is my opinion that the bank is authorized to receive such payments, and its knowledge of proprietary information related thereto, if any, is not tantamount to a violation of § 58.1-3.

Deduction for long distance telephone call charges from gross receipts of mobile telephone company for local business license tax purposes is not applicable to carrier costs incurred by company.

THE HONORABLE ROSS A. MUGLER
COMMISSIONER OF THE REVENUE FOR THE CITY OF HAMPTON
MARCH 30, 2001

You ask whether § 58.1-3731 of the Code of Virginia, which excludes charges for long distance telephone calls from the gross receipts of telephone companies for local business license tax purposes, is applicable to certain “costs” incurred by a mobile telephone service provider.

You relate that a mobile telephone service provider offers free statewide calling. You further relate that such company allows a subscriber to the service to place a telephone call from anywhere in Virginia to anywhere else in Virginia without incurring any charges specifically for long distance telephone calls. You state that the company does, however, incur additional carrier costs once a call is placed to or from an area outside of its local access area. With respect
to such calls, there are times when the company incurs long distance costs, but the subscriber incurs, and the company receives, no related long distance charges. You inquire whether these carrier costs are tantamount to long distance charges subject to the § 58.1-3731 exclusion from the company's gross receipts.

Section 58.1-3731 authorizes localities to impose a license tax on telephone and telegraph companies at a certain percentage of the company's gross receipts accruing from sales to consumers. "[I]n the case of telephone companies," however, § 58.1-3731 provides that "charges for long distance telephone calls shall not be included in gross receipts for purposes of license taxation."

A primary goal of statutory construction is to interpret statutes in accordance with the legislature's intent. Additionally, although tax statutes generally are strictly construed, with any reasonable doubt concerning a locality's power to tax resolved against the taxation, exemptions from taxation are construed strictly against the taxpayer. The term "gross receipts," for the purposes of license taxation, "means the whole, entire, total receipts, without deduction." Thus, there are no deductions or exclusions from taxation "except as provided by law." Thus, expenses or costs incurred by a retailer generally are not deducted or excluded unless specifically authorized by statute.

Section 58.1-3731 unambiguously mandates that "charges for long distance telephone calls shall not be included in [the] gross receipts [of telephone calls] for purposes of license taxation." The Supreme Court of Virginia has stated that "'[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied.' "'"Take the words as written" ... and give them their plain meaning." Implicit in the language "charges for long distance" in § 58.1-3731 is the premise that such charges are charged to and paid by the consumer. In the situation you present, there are no such charges to the consumer. Rather, the charges in issue are paid by the retailer and represent a cost to the retailer. I am unaware of any statute allowing the deduction of such charges by the retailer in computing its gross receipts for local business license tax purposes.

Accordingly, it is my opinion that the § 58.1-3731 deduction for long distance telephone call charges from the gross receipts of a mobile telephone company is not applicable to the carrier costs incurred by such company.

5 Dep't Tax'n, Guidelines for Bus., Prof'l & Occupational License Tax § 1, at 5 (1997) (defining "gross receipts").
6 See 1990 Op. Va. Att'y Gen. 224, 225 (concluding that, except for exclusion from gross receipts of amount of trade-in allowance as is stipulated by statute, motor vehicle dealer may not deduct expenses for labor or materials used to recondition trade-in vehicle for resale when computing gross receipts).
OP. NO. 01-035

TAXATION: LICENSE TAXES.

Exception to federal preemption applies to local license tax levied on businesses participating in TRICARE health insurance program because tax is imposed on broad range of business activity and not solely on cost of individual health care benefits.

THE HONORABLE ROSS A. MUGLER
COMMISSIONER OF THE REVENUE FOR THE CITY OF HAMPTON
OCTOBER 31, 2001

You ask whether federal law preempts the authority of a locality to levy a local business license tax on businesses participating in the TRICARE health insurance program.

You relate that a local company is a prime contractor under a Department of Defense managed health care support contract referred to as TRICARE. You also relate that the company has contracted with another local company to fulfill certain administrative duties pertinent to the TRICARE contract. You further relate that the first company has stated that it is an insurer and the second company has stated that it is not an insurer. You note that neither company is subject to taxation under Chapter 25 of Title 58.1 of the Code of Virginia, which subjects insurance companies to state license taxation. You inquire whether federal law preempts local business license taxation of such companies.

The TRICARE program provides health insurance for military personnel and their dependents and was designed by the Department of Defense to reduce costs for the military hospital system through a regionalized managed care program. The federal regulations establishing the TRICARE program are contained in 32 C.F.R. § 199.17 (2000). With respect to preemption, § 199.17(a)(7)(i) generally preempts state and local laws “relating to health insurance, prepaid health plans, or other health care delivery or financing methods.” Accordingly, § 199.17(a)(7)(ii) directs that any state or local law “relating to health insurance, prepaid health plans, or other health care delivery or financing methods is preempted and does not apply in connection with TRICARE regional contracts.” Importantly, § 199.17(a)(7)(iii) provides:

Preemption, however, does not apply to taxes, fees, or other payments on net income or profit realized by such entities in the conduct of business relating to [Department of Defense] health services contracts, if those taxes, fees or other payments are applicable to a broad range of business activity.
Regarding the preemption of state and/or local laws by federal law, it is important to note that § 199.17(a)(7) is not a blanket preemption of state or local laws; rather, it sets forth, in detail, when state and local laws are preempted by the federal law and when they are not. "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." Thus, the preemption provisions of § 199.17(a)(7) apply only to state or local laws articulated in such section whereas state or local laws which come within the exception designated in § 199.17(a)(7)(iii) are not preempted.

The primary goal of statutory construction is to discern and give effect to legislative intent. In examining § 199.17(a)(7), paragraphs (a)(7)(i) and (ii) provide for preemption of state and local laws relating to "health insurance, prepaid health plans, or other health care delivery or financing methods." (Emphasis added.) This language indicates the intent of Congress to preempt state or local laws which impact methods of providing health care services through TRICARE. Section 199.17(a)(7)(iii), however, in providing that preemption does not apply to "taxes, fees, or other payments on net income or profit realized," so long as such "taxes, fees, or other payments are applicable to a broad range of business activity," indicates Congress' intent to distinguish between laws specifically affecting the provision of health care and laws reflecting a broader business application.

It is my opinion that a local business license tax comes within the purview of § 199.17(a)(7)(iii), and is not preempted. Significantly, paragraph (a)(7)(iii) also provides that, for the purpose of assessing the effect of federal preemption of state and local taxes regarding Department of Defense health services contracts, interpretations must be consistent with § 8909(f) of the Federal Employees Health Benefits Program.

Similar to § 199.17(a)(7), § 8909(f)(1) prohibits the imposition by a state or locality of any "tax, fee, or other monetary payment ..., directly or indirectly, on a carrier or an underwriting or plan administration subcontractor" of the Federal Employees Health Benefits Program with respect to payments made from the Employees Health Benefits Fund. Section 8909(f)(2) provides that

[paragraph (1) shall not be construed to exempt any carrier or underwriting or plan administration subcontractor ... from the imposition ... of a tax, fee, or other monetary payment on the net income or profit accruing to or realized by such carrier or underwriting or plan administration subcontractor ..., if that tax, fee, or payment is applicable to a broad range of business activity.

The court decisions under § 8909(f) have not dealt specifically with a local business license tax; however, they are instructive in determining whether such a tax is intended to be preempted by federal law.

In the case of Health Maintenance Organization of New Jersey v. Whitman, the State of New Jersey imposed an assessment on certain health insurance carriers which was used to defray financial losses incurred by those carriers who
provided a disproportionate share of higher-risk individual health insurance coverage. The court held that, since the assessment had the effect of increasing the cost of individual health care benefits, such assessment was preempted by § 8909(f). In so holding, the court found that, because the assessment was imposed only on the hospital services industry, it was not imposed on a broad range of business activity as would preclude preemption pursuant to § 8909(f)(2). The court noted that, for a tax, fee, or monetary payment to apply to a broad range of business activity, it must, at the very least, apply to more than a single industry.

In the case of Connecticut v. United States, the State of Connecticut imposed a six percent sales tax on hospital charges for patient care services which was paid into the state's general fund and a one percent "provider tax" on hospitals' gross earnings. The court held that these taxes were not preempted by § 8909(f). Regarding the sales tax, the court found that the tax was applied and administered in conformity with the state's general sales tax and thus was applicable to the broad range of business activity exception provided in § 8909(f)(2). With respect to the provider tax, the court determined that, because the tax was assessed on gross earnings of hospitals and was paid into the state's general fund, it, too, was not preempted by § 8909(f).

Unlike the tax at issue in Whitman, the local business license tax is not a singular tax applicable to one industry; rather, it is applicable to a multitude of businesses. In addition, it is not a tax assessed on or relative to the cost of individual health care benefits, as was the tax at issue in Whitman. Like the taxes at issue in Connecticut, the local business license tax is uniformly assessed on a broad range of business activity. Accordingly, the local business license tax is a general tax imposed on businesses rather than a tax unique or specific to the financing or delivery methods of health insurance carriers.

Therefore, it is my opinion that the local business license tax comes within the purview of 32 C.F.R. § 199.17(a)(7)(iii) and is thus not preempted.

1Note that § 58.1-3703(C)(11) exempts from local license taxation insurance companies subject to taxation under Chapter 25 of Title 58.1.
672 F.3d 1123 (3rd Cir. 1995).
7Id.
8Id.
9Id. at 1132.
101 F. Supp. 2d 147, 150 (D. Conn. 1998).
11Id. at 153.
12Id.
13Id.

"Id.

OP. NO. 01-106
TAXATION: MISCELLANEOUS TAXES – ADMISSION TAX.
EDUCATIONAL INSTITUTIONS: NORFOLK STATE UNIVERSITY.

Commonwealth and its Instrumentalities, including Norfolk State University, are not subject to duty of collecting local admissions tax charged for attendance at classified public and private events. Ordinance purporting to impose duty on Commonwealth or its Instrumentalities to collect admissions tax is ultra vires.

THE HONORABLE SHARON M. MCDONALD
COMMISSIONER OF THE REVENUE FOR THE CITY OF NORFOLK
NOVEMBER 20, 2001

You ask whether Norfolk State University is required to collect and remit the admission tax imposed by ordinance of the City of Norfolk. You indicate that the question turns on whether the University, an institution of higher education, is within the ambit of § 58.1-3817(2) of the Code of Virginia.

Section 58.1-3817 divides into six classes "events to which admission is charged ... for the purposes of taxation." Section 58.1-3817(2) classifies for taxation "[a]dmissions charged for attendance at public and private elementary, secondary, and college school-sponsored events, including events sponsored by school-recognized student organizations."

In a 1983 opinion, the Attorney General concludes that an ordinance is ultra vires to the extent it imposes the obligation to collect a meals tax on the Commonwealth and her instrumentalities, including institutions of higher education. Although you observe that the conclusion in the 1983 opinion is not dispositive of your question, the legal principles governing the analysis in that opinion do, in fact, clearly apply to the question you pose.

It has long been a rule of statutory construction that "the Commonwealth is not bound by a statute of general application, no matter how comprehensive the language, unless named expressly or included by necessary implication." The Supreme Court of Virginia has held that "[t]axes are not to be assessed against [the State] or its subdivisions unless the right to tax is made plain," because "the functions of government shall not be unduly impeded." Thus, without express legislative authority, a locality may not impose a tax or the economic incidence of a tax on the Commonwealth or its agencies and instrumentalities. The 1983 opinion regarding application of the meals tax extends the rationale to the duty to collect and report a local tax.

The City of Norfolk necessarily relies on the language of § 58.1-3817 to impose on Norfolk State University the duty to collect the admission tax. This statute does not expressly mention or necessarily implicate the Commonwealth and its instrumentalities within its terms. The purpose of § 58.1-3817 is to classify
the public and private events to which admission is charged for purposes of local taxation. The language of the statute clearly does not subject the Commonwealth to the duty of collecting the classified admissions taxes.

Based on the above, I am of the opinion that the Commonwealth and its instrumentalities, including Norfolk State University, are not subject to the duty of collecting local admissions taxes. Given the bias against imposition of such duties on the Commonwealth inherent in the controlling principles of law summarized above, any doubt is to be resolved in favor of the Commonwealth. Accordingly, I am of the opinion that an ordinance purporting to impose a duty on the Commonwealth or its instrumentalities to collect an admission tax is ultra vires. ¹


²You also ask whether Norfolk State University is a "college" as this word is used in § 58.1-3817(2). Norfolk State University is one of the state-supported institutions of higher education listed in § 23-9.5 defined as a “public college.” VA. CODE ANN. § 23-9.10:3 (Michie Repl. Vol. 2000). An “institution of higher education” “[o]perates a facility as a college or university ... which offers degrees or other indicia of a level of educational attainment beyond the secondary school level.” VA. CODE ANN. § 23-265(2) (Michie Repl. Vol. 2000). In addition, an “institution of higher education” “[u]ses the term ‘college’ or ‘university,’ or words of like meaning” interchangeably. Section 23-265(3). The question of whether Norfolk State is a “college,” however, is not a relevant or germane factor to the main question you have posed.

³The term "ultra vires" means “[u]nauthorized; beyond the scope of power allowed or granted ... by law.” BLACK'S LAW DICTIONARY 1525 (7th ed. 1999).


⁵Commonwealth v. Spotsylvania, 225 Va. 492, 494, 303 S.E.2d 887, 889 (1983); see also Deal v. Commonwealth, 224 Va. 618, 620, 299 S.E.2d 346, 347 (1983) (holding that Commonwealth is person or party within intent of statute only when named expressly or by necessary implication).


⁹1983-1984, supra, at 383 (noting that prohibition against local taxes being imposed on Commonwealth, in absence of express statutory authority, extends to prohibit imposition on Commonwealth of duty to collect and make reports for any local tax).

¹⁰See id. (concluding that, if town ordinance had sought to impose meals tax on University as seller of meals, ordinance would be ultra vires with respect to Commonwealth and her instrumentalities, including University).

OP. NO. 01-095

TAXATION: MISCELLANEOUS TAXES – CONSUMER UTILITY TAXES.

Town that is not separate school district and that imposed tax on town consumers of local cellular telecommunication service after January 1, 2000, has no authority to impose such tax.
THE HONORABLE WILLIAM C. MIMS
MEMBER, SENATE OF VIRGINIA
DECEMBER 28, 2001

You ask whether, pursuant to § 58.1-3812 of the Code of Virginia, a town has the authority to impose a consumer utility tax on town consumers of local telecommunication service if the county in which the town is located has implemented such a tax.

You relate that the Town of Purcellville has been studying an ordinance to impose a consumer utility tax on cellular telephone consumers, and that such tax has been part of the town’s budget process for five years. The town included the tax in its 2001-2002 fiscal year budget. The town held a public hearing on the matter on May 8, 2001, and a public hearing on the actual ordinance to implement a cellular tax on June 12, 2001, and implemented the tax on July 10, 2001. The Town of Purcellville notified Loudoun County on July 16, 2001, of its plan to implement the cellular tax. The Loudoun County board of supervisors adopted the county budget in April 2001. The county board held a public hearing on June 30, 2001, and adopted a consumer utility tax on July 16, 2001, to be levied on the county’s cellular telephone consumers. On August 9, 2001, the county board chairman notified the town that the county ordinance and consumer utility tax preempt the town’s tax.

Section 58.1-3812(C) provides:

No county shall impose a tax hereunder within the limits of any incorporated town located within such county when such town constitutes a separate school district and such town imposes a town tax authorized by this section. No county shall impose a tax hereunder within the limits of any incorporated town located within such county when such town has enacted an ordinance on or before January 1, 2000, to impose a tax hereunder and such ordinance remains in effect. Except as provided in this subsection, no town shall impose a tax hereunder if the county within which such town is located imposes a county tax authorized by this section.

"It is well established that '[t]he province of [statutory] construction lies wholly within the domain of ambiguity.' Consequently, "that which is plain needs no interpretation." "The manifest intention of the legislature, clearly disclosed by its language, must be applied.""

Section 58.1-3812(C) provides that a town may not impose a consumer utility tax on consumers of local telecommunication services when the county within which the town is located imposes such a tax. Section 58.1-3812(C) provides two exceptions to the county's imposition of such a tax: when an incorporated town "constitutes a separate school district," and when the town imposes a similar town tax under an existing ordinance enacted "on or before January 1, 2000."
You provide no facts indicating that the town is a separate school district, and we understand it is not. You advise, however, that the town held a public hearing on June 12, 2001, concerning the imposition of a utility tax on consumers of local cellular telecommunication service, and implemented the tax on July 10, 2001. Both dates clearly are after January 1, 2000. Consequently, the two exceptions allowed under § 58.1-3812(C) are not applicable to the facts you present. I am, therefore, of the opinion that the town may not impose the tax.

1Winston, 196 Va. at 408, 83 S.E.2d at 731.

OP. NO. 01-029

TAXATION: MISCELLANEOUS TAXES — REVIEW OF LOCAL TAXES — CORRECTION OF ASSESSMENTS, REMEDIES AND REFUNDS.

Restaurant is not entitled to refund of local meals taxes erroneously collected from customers and remitted to county.

THE HONORABLE BRENDA B. RICKMAN
COMMISSIONER OF THE REVENUE FOR THE CITY OF FRANKLIN
AUGUST 31, 2001

You ask for guidance relating to the refund of local meals taxes. You relate that a restaurant charged its customers local meals taxes on certain nonfood items. You also relate that the monies collected from those taxes have been remitted to the locality. You further relate that the restaurant, upon discovering that it erroneously charged its customers such taxes, seeks a refund of such monies. Lastly, you state that there are no records indicating which customers were overcharged by the restaurant.

The Supreme Court of Virginia has stated that there is no common law remedy to address the erroneous collection of taxes. Accordingly, the Court notes that the authority to refund taxes must be derived from a statutory remedy. In the matter for which you seek guidance, the General Assembly has provided no statutory remedy for the refund of the tax you describe. Therefore, the restaurant is not entitled to a refund of the local meals tax which it erroneously collected from its customers.


OP. NO. 01-017

Amendments proposed in 2001 Appropriation Act satisfy conditions regarding general fund revenues required to implement additional phase of personal property tax reduction. Requirement that tax bills reflect 70% tax reduction on their face must be followed by all localities. Procedures for levying or reimbursing taxes should legislature change reimbursement percentage amount for any tax year after locality has printed its tangible personal property tax bills.

MR. RICHARD D. HOLCOMB
COMMISSIONER, DEPARTMENT OF MOTOR VEHICLES
FEBRUARY 9, 2001


You relate that the Personal Property Tax Relief Act assigns a certification responsibility to the Commissioner of the Department of Motor Vehicles. The Act directs that the Department promulgate guidelines for the reconciliation of local reimbursements. The Commissioner must certify annually the sum necessary to fund the payments to taxpayers and local treasurers.

You advise that some localities must mail tangible personal property tax bills prior to adjournment of the 2001 Session of the General Assembly. Section 58.1-3426(B) requires the local treasurer to include "on the face of tangible personal property tax bills" the amount paid by the Commonwealth as a deduction for qualifying vehicles. You note that § 58.1-3524(B)(4) sets reimbursement to taxpayers at "70 percent of the reimbursable amount" for each qualifying vehicle "for any tax year beginning in calendar year 2001." Therefore, you ask whether the amendments to the 2000 Appropriation Act, allocating 70% tax relief for any tax year beginning in calendar year 2001, as proposed by the Governor on December 20, 2000, meet the requirements of § 58.1-3524.

The Personal Property Tax Relief Act contemplates phasing out local personal property tax obligations for personal use vehicles owned by natural persons over a period of five years beginning in calendar year 1998. Section 58.1-3524(B) sets forth the reimbursement percentage levels for the five-year period. Section 58.1-3524(C) provides that the percentage levels set forth in § 58.1-3524(B) "shall not be increased at the beginning of any calendar year above the percentage level ... in the preceding tax year" when any of the following conditions exist:

1. Actual general fund revenues for a fiscal year, including transfers, are less than the projected general fund revenues,
as reported in the general appropriation act in effect at that time, by one-half of one percent or more of the amount of actual general fund revenues for such fiscal year;

2. The general fund revenue forecast provided by the Governor in December pursuant to § 2.1-393 indicates that general fund revenues, excluding transfers, for any fiscal year will be less than five percent greater than general fund revenues for the immediately preceding fiscal year; or

3. The general fund revenue forecast provided by the Governor in December pursuant to § 2.1-393 indicates that total general fund revenues available for appropriation, including transfers, for either of the fiscal years covered by the general appropriation act in effect at that time will be less than the general fund appropriations for such fiscal year or years.

The first of the three conditions required to implement an additional phase of the tax reduction is that the actual general fund revenues for fiscal year 2000, including transfers, must, at a minimum, come within one-half of one percent of official projections. In a presentation to the Senate and House Finance Committees and the House Appropriations Committee, the Secretary of Finance reported that general fund revenues, including transfers, for fiscal year 2000 exceed the official forecast by a total of $24.1 million or two-tenths of one percent. Thus, the first condition is met. The second condition is that the official general fund revenue forecast for fiscal year 2001 must be at least five percent more than general fund revenues for 2000. The general fund revenue forecast, as reported by the Governor in his annual budget address, estimates an increase of 5.7% for fiscal year 2001 and 7% for fiscal year 2002. Thus, the second condition is met. The final condition is that the official general fund revenue forecast, including transfers, for the fiscal year must meet or exceed the amount of funds in the current budget. The official forecast for total general fund revenues, including transfers, in the Governor's proposed budget exceed current appropriations by $97.5 million. Thus, the third condition is met, and all the conditions set forth in § 58.1-3524(C) to implement an additional phase of the tax reduction are satisfied.

It is, therefore, my opinion that the amendments proposed in the 2001 Appropriation Act satisfy the requirements of § 58.1-3524.

You next ask whether localities that issue personal property tax bills prior to adjournment of the 2001 Session of the General Assembly must include on the face of such bills a 70% tax reduction to be paid by the Commonwealth for qualifying vehicles.

Section 58.1-3912(E) requires that each tangible personal property tax bill contain the following information on its face:

(i) whether the vehicle is a qualifying vehicle as defined in § 58.1-3523; (ii) a deduction for the amount to be paid by the Commonwealth as determined by § 58.1-3524; (iii) the
vehicle's registration number pursuant to § 46.2-604; (iv) the amount of tangible personal property tax levied on the vehicle; and (v) if the locality prorates personal property tax pursuant to § 58.1-3516, the number of months for which a bill is being sent.

The 2001 Session of the General Assembly continues to consider this matter. Furthermore, any action taken by the General Assembly in this matter is subject to gubernatorial review. In addition, any action taken by the Governor following his review is again subject to General Assembly action, which may, in turn, again be reviewed by the Governor. Accordingly, it is unknown at this time whether, or when, a change to the 70% reduction rate might be adopted. A statute speaks as of the time it takes effect and not as of the time it is passed. Consequently, any acts purporting to have been done under a statute before it takes effect are null and void. Therefore, the requirement in § 58.1-3524(B)(4) that tax bills reflect a 70% tax reduction must be followed by all localities in the Commonwealth.

If the General Assembly changes the reimbursement percentage for qualifying vehicles for a tax year in which a locality has already printed its tangible personal property tax bills, then the locality must follow the procedures described in § 58.1-3524(E)(1). The Supreme Court of Virginia has stated that "the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction." If the General Assembly decreases the percentage of reimbursement, the locality may (1) levy an additional amount reflecting the difference in the percentage shown on the original tax bill and the modified percentage, or (2) carry forward and include the additional amount due on a subsequent tax bill. When a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute. Therefore, a locality must follow the procedures set forth in § 58.1-3524(E)(1), should the General Assembly modify the reimbursement percentage amount for any tax year in which the locality has already printed its tangible personal property tax bills.

Your final inquiry is whether the Personal Property Tax Relief Act permits localities to recover any resulting underestimations in revenue, should the 2001 General Assembly decide not to fund the amount of reimbursement to taxpayers at 70% of the reimbursable amount for each qualifying vehicle.

The Supreme Court of Virginia has stated that, "[i]f the language used [in a statute] is plain and unambiguous, and its meaning clear and definite, effect must be given to it." In such cases, courts must find the meaning within the statute itself. Section 58.1-3524(E)(1) notes that, when a locality has printed its tangible personal property tax bills prior to the decision of the General Assembly not to fund the full amount of the tax relief, the locality may either levy an additional tax bill for the amount of any underestimation or carry forward the additional amount and include it in the next regular tax assessment owed by the taxpayer. Section 58.1-3524(E)(2) states that, when a locality has not printed its tangible personal property tax bills prior to such an enactment
by the General Assembly, the locality may adjust its tax bills to reflect the change in the reimbursement percentage enacted by the General Assembly.

In short, it is my opinion that, as a matter of law, the conditions required to implement the next phase of car tax reduction have been met. Unless the General Assembly changes existing law, taxpayers are legally entitled to the 70% relief established by § 58.1-3524(B)(4), and tax bills issued by localities must reflect that 70% reduction. If the legislature changes the law so as to provide less tax relief, localities will have to bill their taxpayers for an additional amount to make up the difference.

1Within thirty days of receipt of certifications from local treasurers and after review of such certifications, the Commissioner must certify the amount to be reimbursed to each taxpayer and make a written request to the Comptroller for payment. VA. CODE ANN. § 58.1-3525(B)(3)(b) (Michie Repl. Vol. 2000).
4Section 58.1-3912(A) requires city and county treasurers to mail a bill for the payment of taxes, "not later than fourteen days prior to the due date of the taxes."
5A regular session of the General Assembly convened in an odd-numbered year shall not continue longer than 30 days. VA. CONST. art. IV, § 6. The 2001 Regular Session of the General Assembly, however, has been extended beyond the 30-day limit provided in § 6 and shall adjourn by Saturday, February 24, 2001. 2001 Va. Acts H.J. Res. 507, R. 17, at 1637, 1639 (agreed to by both houses, Jan. 10, 2001).
7"Reimbursable amount" means the value of a qualifying vehicle, up to the first $20,000 of value, multiplied by the effective tax rate in effect in the locality on July 1, 1997, or August 1, 1997, whichever is greater." VA. CODE ANN. § 58.1-3523 (Michie Repl. Vol. 2000).
1See § 58.1-3524(B).
11Section 2.1-393 requires the Governor, every year by December 15, to prepare and submit to the General Assembly "an estimate of anticipated general fund revenue, and estimates of anticipated revenues for each of the major nongeneral funds, for a prospective period of six years."
1See Ronald L. Tillett, Sec'y Fin., Actual Fiscal Year 2000 Revenues and the State of the Virginia Economy (Aug. 21, 2000).
12"Qualifying vehicle" means any passenger car, motorcycle, and pickup or panel truck, as those terms are defined in § 46.2-100, that is determined by the commissioner of the revenue of the
county or city in which the vehicle has situs as provided by § 58.1-3511 to be (i) privately owned or (ii) leased pursuant to a contract requiring the lessee to pay the tangible personal property tax on such vehicle. Section 58.1-3523.

"VA. CONST. art. V, § 6 (authorizing Governor to amend and return legislation passed by Senate and House of Delegates and to sign or veto reconsidered bill).


Fairbanks, etc., Co. v. Cape Charles, 144 Va. 56, 63, 131 S.E. 437, 439 (1926); see also Town of South Hill v. Allen, 177 Va. 164, 165, 12 S.E.2d 770, 774 (1941); Hammer v. Commonwealth, 169 Va. 355, 364-65, 193 S.E. 496, 499-500 (1937); Woodward v. Staunton, 161 Va. 671, 674, 171 S.E. 590, 591 (1933).


OP. NO. 00-109


CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE (COLLECTION AND DISPOSITION OF STATE REVENUES).

Transfer of $15.9 million from 2000-2002 biennial budget, containing approximately $5 million in anticipated excess revenues, prior to enactment, effected tax relief in manner consistent with terms of Tax Relief Act and Appropriation Acts for 1998-2000 biennium. Criteria established in Tax Relief Act for funding tax relief exceeding estimates of Department of Motor Vehicles is consistent with constitutional mandate directing General Assembly to establish criteria ensuring equitable expense-revenue ratio. Provided Governor proposes budget amendments addressing difference between estimated cost of funding personal property tax relief for year ended June 30, 2000, and localities' requests for reimbursements of their qualifying reduced revenues for that year, revenues will be sufficient to meet expenditures, and $15.9 million transfer will not create unbalanced budget, in violation of Constitution. Responsibility of Comptroller to reimburse localities for reduced personal property tax revenues attributable to contemplated tax relief within 2 business days of submission of proper claims is consistent with Appropriation Acts and Tax Relief Act, and is presumed consistent with Constitution. Transfer of funds to meet reimbursement requirements of Act, therefore, was authorized by General Assembly.

THE HONORABLE PHILLIP A. HAMILTON
MEMBER, HOUSE OF DELEGATES
JANUARY 8, 2001

In a previous request for an official opinion, you inquired whether funds that are not available in a current state budget may be transferred from the next biennial budget without prior approval from the General Assembly. Your inquiry arose from the reported transfer of approximately $15.9 million from the budget approved by the General Assembly for fiscal year 2001 in order to pay for car tax relief in June 2000, as set out by the General Assembly in the 1998 and
1999 Appropriation Acts. I analyzed the transfer in the context of the Personal Property Tax Relief Act of 1998, the 1998 and 1999 Appropriation Acts for the 1998-2000 biennium, and relevant correspondence between the Auditor of Public Accounts and the Comptroller. Assuming that the necessary approvals within the Executive Branch for transfers in general occurred and the transfer in question was proper in that respect, I concluded that the transfer of funds to meet the reimbursement requirements of the Personal Property Tax Relief Act of 1998 was within the overall intent of the Act, and thus, was authorized by the General Assembly.

You now provide additional information that the 2000-2002 biennial budget contains approximately $5 million in anticipated excess revenues. Furthermore, approximately $15.9 million was transferred from the 2000-2002 biennial budget, prior to its enactment, for expenditures that were anticipated to be paid from revenue in the 1998-2000 biennial budget. You observe that the transferred revenue of $15.9 million exceeds the budgeted excess revenue of $5 million anticipated in the 2000-2002 budget.

In construing the constitutionality of the transfer of funds, I note the following. The Code of Virginia constitutes a single body of law. Moreover, whenever possible, courts accord statutes that meaning which renders them constitutional. Thus, individual provisions, whether constitutional or statutory, are rarely construed in a vacuum. Rather, the legislature is presumed to have intended each enactment to have a meaning that is consistent with other provisions of the law and that is not superfluous.

"The powers of the General Assembly are broad and plenary," except as restrained by the Constitution of the United States or the Constitution of Virginia. The Supreme Court of Virginia has stated, "[m]oreover, an act of the General Assembly is presumed to be constitutional, and every reasonable doubt must be resolved in favor of the act's constitutionality."

Article X, § 7 of the Constitution of Virginia provides that "the Governor, subject to such criteria as may be established by the General Assembly, shall ensure that no expenses ... be incurred which exceed total revenues." The General Assembly authorizes the Governor to address discrepancies between the funding for personal property tax relief based on estimated local revenue reductions and the localities' subsequent requests for actual property tax reimbursements. There are two additional pieces to the tax relief package enacted by the General Assembly that are relevant to your inquiry. First, the General Assembly clearly stated in the 1998 and 1999 Appropriation Acts that the contemplated tax relief would be provided on an equitable basis. Second, the General Assembly decreed that the localities would be reimbursed, subject to any appropriate adjustments after a postpayment reconciliation process, within two business days of submitting a proper claim. Construing all the legislative enactments as a harmonious whole, with a presumption of constitutionality, the Personal Property Tax Relief Act sets forth the criteria for providing funding if the estimated costs of the tax relief are less than the subsequently incurred actual reimbursements to the localities. Section 58.1-3533 of the Act
includes the measures for balancing the Personal Property Tax Relief Fund. While the General Assembly apparently did not anticipate the precise set of facts that led to the transfer in question, it specifically authorized similar actions in comparable circumstances, as noted in the prior opinion to you. 13

You first ask whether any Virginia statute, including the Personal Property Tax Relief Act, supersedes Article X, § 7.

While the Personal Property Tax Relief Act, of course, does not supersede any article of the Constitution, the Act, along with the pertinent provisions of the Appropriation Acts, must be interpreted in conjunction with, rather than separate and apart from, Article X, § 7. The Comptroller's action effected the tax relief the General Assembly intended to provide in a manner consonant with the terms of the Personal Property Tax Relief Act and the relevant Appropriation Acts. Thus, according the Act a construction that is consistent with Article X, § 7, the General Assembly established criteria for funding temporarily any actual tax relief that exceeded the estimates of the Department of Motor Vehicles. Assuming the shortfall is addressed in the Governor's next budget, as contemplated by the Personal Property Tax Relief Act, the questioned transfer was within the criteria, and thus, was authorized by the General Assembly.

You next ask whether it is permissible under Article X, § 7 to transfer revenue from one state biennial budget, prior to its effective date, to another state biennial budget, if the Commonwealth's expenses exceed total biennial budget revenues from which the revenues are transferred.

Article X, § 7 requires the Governor to ensure that there is a balanced budget in accordance with the "criteria ... established by the General Assembly." Such requirement must be harmonized with the provisions of the Personal Property Tax Relief Act, i.e., the criteria that establish the timing and method of payments intended to ensure that the Act is revenue neutral from a local personal property tax perspective. Provided the Governor's proposed budget amendments allocate funds to fully address any underestimation of the cost of the tax relief, less overpayments of reimbursements to the various localities (which had not been calculated at time of the transfer in question), I must conclude that the Act is being administered in a manner that is consistent with the criteria established by the General Assembly. Moreover, in such circumstances, if the Commonwealth's anticipated expenses exceed its anticipated revenues, the shortfall will not be attributable to the questioned transfer.

You also ask whether the transfer of revenue from a biennial budget, prior to its effective date, which exceeds the amount of revenue anticipated to be available upon enactment of the budget, causes the future biennial budget to be out of balance and in violation of any provision of the Virginia Constitution.

As noted above, under the criteria established by the General Assembly for the administration of the Personal Property Tax Relief Act, provided the Governor proposes budget amendments that address the difference between the estimated cost of funding personal property tax relief for the year ended June 30, 2000, and the localities' requests for reimbursements of their qualify-
ing reduced revenues for that year, there will be sufficient revenues to meet the expenditures that have been incurred. Thus, there is no reason to believe that the transfer in question created a budget which was unbalanced, in violation of the Constitution.

Your final inquiry is whether any state official may transfer state revenues that exceed the revenues budgeted in an appropriation act, prior to its effective date, to an existing state biennial budget, without the approval of the General Assembly.

The Personal Property Tax Relief Act charges the Comptroller with the responsibility of reimbursing localities for reduced personal property tax revenues attributable to the contemplated tax relief within two business days of the submission of proper claims. That statutory responsibility is consistent with the 1998 and 1999 Appropriation Acts, the remaining provisions of the Act, and is presumed consistent with the Constitution. I, therefore, conclude that the action taken was consistent with the overall intent of the Act and was authorized by the General Assembly.

In summary, the additional information you have provided gives no basis for altering the conclusion contained in the initial response to your inquiry. Consequently, it remains my opinion that the transfer of funds to meet the reimbursement requirements of the Personal Property Tax Relief Act of 1998 was within the overall intent of the Act and, thus, was authorized by the General Assembly.

1"The fiscal year shall commence on the first day of July and end on the thirtieth day of June." VA. CODE ANN. § 2.1-197 (Michie Repl. Vol. 1995).


3See Branch v. Commonwealth, 14 Va. App. 836, 419 S.E.2d 422 (1992) (declaring that statues should be construed to harmonize with other statues, because Virginia Code is one body of law).


9Terry v. Mazur, 234 Va. 442, 449, 362 S.E.2d 904, 908 (1987). In assessing the transfer, in addition to the considerations discussed in my previous opinion to you (see supra note 2) and the analysis set forth in the above text, I am also guided by the doctrine that an act is not to be declared unconstitutional unless the court is driven to that conclusion. See Roanoke v. Michael's Bakery Corp., 180 Va. 132, 142, 21 S.E.2d 788, 792 (1942); Richmond Linen Co. v. Lynchburg, 160 Va.
WILLS AND DECEDENTS' ESTATES: WILLS.

Commissioner of revenue has no authority to effect change in real property ownership on land books based on recorded deed of gift, with attached holographic will that has not been recorded or probated.

THE HONORABLE SUSAN P. FORD
COMMISSIONER OF THE REVENUE FOR POWHATAN COUNTY
OCTOBER 31, 2001

You ask whether a commissioner of the revenue may make changes on the land book based on a recorded deed of gift, with an attached holographic will, which has not been recorded or probated.

You relate that real property taxes attributable to certain real property are currently charged to a particular owner of record. You also relate that a recorded deed purporting to be a deed of gift conveys the real property from certain grantors who are not the owners of record. You further relate that attached to this deed is a document purporting to be a holographic will in which the owner of record conveys the property to one of the grantors in the deed of gift. You state that there is no reference to a will book where such will may be recorded nor has such will been probated. You inquire whether the documents submitted effect a transfer of ownership of the property so that the land books may be changed to reflect such transfer.

Section 58.1-3281 of the Code of Virginia requires the commissioner of the revenue to ascertain "the person to whom [real property] is chargeable with taxes," and provides further that "the owner ... shall be assessed for the taxes." Section 58.1-3312 provides that changes that occur in a city or county are to be entered when the commissioner of the revenue makes out his land book. Section 58.1-3313 provides that "land which has been correctly charged to one person shall not afterwards be charged to another without evidence of record that such charge is proper."

The Attorney General previously has concluded that §58.1-3313 requires evidence of recorded documents before the commissioner of the revenue may change
the real estate records when land has been correctly charged. Thus, a commissioner of the revenue has authority to change the name of the record owners accordingly upon his determination that the evidence of record is sufficient.

A prior opinion of the Attorney General concludes that a change to the land books may be entered based on probate records. In the instant case, a recorded deed has been presented in which the grantors are not the owners of record and to which is attached a holographic will purporting to convey the property in issue. This will, however, has not been recorded or probated. It is, therefore, my opinion that there is not sufficient evidence of record to establish a transfer of ownership of the property.

Accordingly, based on the limited facts presented, I am of the opinion that there is not sufficient evidence of record to effect a change in ownership of the property on the land books. 

1"No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly in the handwriting of the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. If the will be wholly in the handwriting of the testator that fact shall be proved by at least two disinterested witnesses." Va. Code Ann. § 64.1-49 (Michie Repl. Vol. 1995).


Compare 1973-1974 Op. Va. Att'y Gen. 62, 63 (concluding that quitclaim deed executed and recorded by person other than record owner is not sufficient basis for commissioner of revenue to change name of record owner for purpose of assessing real estate taxes).
You relate that Middlesex County has been reassessing the real estate in the county. You also relate that the county has an appointed board of equalization involved in this process.

The 1994 Session of the General Assembly amended the statutory procedure for taxing manufactured homes. The legislation changed all references to "mobile home(s)" in §§ 58.1-3520 and 58.1-3521 of the Code of Virginia to "manufactured home(s)," and added § 58.1-3522 as follows:

Manufactured homes installed according to the Uniform Statewide Building Code shall be assessed at the same time as the assessment of the real property on which the manufactured home is installed. Such homes shall be assessed in the same manner and using the same methods applied to improvements and buildings which are assessed in accordance with Article 7 (§ 58.1-3280 et seq.) of Chapter 32 of [Title 58.1].

Prior opinions of the Attorney General conclude that these homes should be classified and taxed as real or personal property, depending on how the common law doctrine of fixtures applies to the facts and circumstances of each case. The three tests applied by the Supreme Court of Virginia in determining whether an item of personal property placed upon realty becomes a fixture are: "(1) annexation of the property to the realty, (2) adaptation to the use or purpose to which that part of the realty with which the property is connected is appropriated, and (3) the intention of the parties." Thus, a manufactured home that has become affixed to real estate is classified and taxed as real estate and must be treated as such for all purposes, including administrative and judicial review. Section 58.1-3379 requires boards of equalization to hear and consider complaints related to equalization of real estate assessments. Accordingly, an assessment of such real estate is subject to review by a board of equalization.

With respect to manufactured homes that have not become affixed to real estate and are taxed as a separate class of tangible personal property, § 58.1-3522 does not purport to change the classification of the property to real estate. Rather, this section merely requires that manufactured homes classified as tangible property be taxed in the same manner, using the same methods as real estate. Such homes, therefore, although assessed in the same manner, using the same methods, and taxed at the same rate as real estate, are still treated as tangible personal property for all other purposes, such as applications for the correction of tangible personal property assessments under § 58.1-3980. Because a board of equalization reviews real estate assessments, and not tangible personal property assessments, the local board of equalization would not review a tangible personal property assessment of a manufactured home.

2. Id. at 251-52.
3. Id. at 252.
You ask whether the recording of a "credit line leasehold deed of trust" in accordance with a debtor's plan of reorganization confirmed by the bankruptcy court is subject to state and local recordation taxes.1

It is well-settled that a federal law supplants a conflicting state law, by virtue of the Supremacy Clause of the Constitution of the United States.2 Under the federal Bankruptcy Code, "[t]he issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed3 ..., may not be taxed under any law imposing a stamp tax or similar tax."4 Thus, assuming that the deed of trust in question falls within these parameters and is presented for recording in accordance with a bankruptcy court's order of confirmation of a debtor's plan of reorganization, such deed of trust is not subject to a stamp tax or similar tax.

In determining whether recordation taxes fall within the Bankruptcy Code exemption, the Department of Taxation has repeatedly concluded that transfers of property pursuant to a properly confirmed plan of reorganization may not be taxed under any law imposing a stamp or similar tax, which includes a recordation tax.5 Although administrative interpretations are not necessarily controlling, great weight is to be given to the construction of a statute by a state official charged with its administration.6 In my opinion, therefore, the Bankruptcy Code exemption is applicable to the instrument in issue.7

You ask whether a certain motor vehicle owned by a serviceman domiciled in Virginia is subject to local tangible personal property taxation.

You relate that the motor vehicle of the serviceman domiciled in Virginia is located in Germany. I assume that the serviceman is in Germany in compliance with military orders and that the vehicle is parked, stored, or garaged in Germany. Additionally, you relate that the vehicle is not registered in Virginia. You state that the personal property assessment on the motor vehicle is based on the Soldiers' and Sailors' Civil Relief Act.

The Soldiers' and Sailors' Civil Relief Act of 1940, as amended,1 exempts a serviceman from taxation on his personal property in any state except his state of domicile.2 Therefore, whereas a Virginia locality cannot tax motor vehicles owned by nondomiciliary service people who are stationed in Virginia,3 the Soldiers' and Sailors' Civil Relief Act does not operate to prohibit a Virginia locality from taxing motor vehicles owned by service people domiciled in Virginia in accordance with the Virginia statutes that govern local tangible personal property taxation. Accordingly, your inquiry must be resolved pursuant to the Virginia statute that governs it.

Section 58.1-3511(A) of the Code of Virginia establishes the situs of tangible personal property for local personal property taxation.4 As a general rule, property is taxable in the jurisdiction in which the property is located on tax day, rather than in the jurisdiction in which the owner is domiciled.5 The situs of certain mobile property, such as motor vehicles, is the jurisdiction in which the property is normally parked or garaged.6 Section 58.1-3511(A) provides three instances in which the domicile of the owner, rather than where the vehicle is normally parked or garaged, controls situs: (1) when it cannot be determined where the vehicle is normally parked or garaged; (2) when the owner is domiciled in another state and pays a personal property tax on the same vehicle in the state of his domicile; and (3) when the vehicle is owned by a student attending an institution of higher education.7

Under the common-law doctrine of mobilia sequuntur personam,8 the situs for the taxation of movable personal property is the domicile of the owner.9 This
common-law rule, however, may be changed by the legislature at its pleasure.\textsuperscript{10} A 1995 opinion of the Attorney General recognizes that § 58.1-3511(A) changes the common-law rule for most tangible personal property.\textsuperscript{11} The opinion further notes that the statute expressly retains the rule in the three instances stated above.\textsuperscript{12} Accordingly, situs for the motor vehicle in question is the jurisdiction in which the vehicle is parked or garaged unless it falls within one of the express provisions in the statute in which domicile is regarded as the taxable situs.\textsuperscript{13}

Based on the facts that you provide, I must conclude that the motor vehicle in question does not fall within any of the statutory provisions that enable a Virginia locality to utilize the serviceman's domicile as the taxable situs for his motor vehicle rather than where the motor vehicle is parked or garaged. Accordingly, it is my opinion that the vehicle is not subject to local tangible personal property taxation.\textsuperscript{14}

\textsuperscript{11}See id. § 574(1); United States v. Arlington County, Commonwealth of Virginia, 326 F.2d 929, 933 (1964).
\textsuperscript{13}Section 58.1-3511(A) provides: "The situs for the assessment and taxation of tangible personal property, merchants' capital and machinery and tools shall in all cases be the county, district, town or city in which such property may be physically located on the tax day. However, the situs for purposes of assessment of motor vehicles, travel trailers, boats and airplanes as personal property shall be the county, district, town or city where the vehicle is normally garaged, docked or parked; however, the situs for vehicles with a weight of 10,000 pounds or less registered in Virginia but normally garaged, docked or parked in another state shall be the locality in Virginia where registered. Any person domiciled in another state, whose motor vehicle is principally garaged or parked in this Commonwealth during the tax year, shall not be subject to a personal property tax on such vehicle upon a showing of sufficient evidence that such person has paid a personal property tax on the vehicle in the state in which he is domiciled. In the event it cannot be determined where such personal property, described herein, is normally garaged, stored or parked, the situs shall be the domicile of the owner of such personal property. However, in the event the owner of the motor vehicle is a full-time student attending an institution of higher education, the situs shall be the domicile of such student, provided the student has presented sufficient evidence that he has paid a personal property tax on the motor vehicle in his domicile. Any person who shall pay a personal property tax on a motor vehicle to a county or city in this Commonwealth and a similar tax on the same vehicle in the state of his domicile, or in the state where such vehicle is normally garaged, docked, or parked, may apply to such county or city for a refund of such tax payment. Upon a showing of sufficient evidence that such person has paid the tax for the same year in the state in which he is domiciled, the county or city may refund the amount of such payment." See 1995 Op. Va. Att'y Gen. 268, 269.
\textsuperscript{15}See id.
\textsuperscript{17}"Movables follow the person—i.e., the law of the person." BLACK'S LAW DICTIONARY 1019 (7th ed. 1999).
\textsuperscript{18}See Hogan v. County of Norfolk, 198 Va. 733, 734, 96 S.E.2d 744, 745 (1957).
\textsuperscript{19}Id. at 735, 96 S.E.2d at 745.
"See id.

"Section 58.1-3511(A) also provides that "the situs for vehicles with a weight of 10,000 pounds or less registered in Virginia ... shall be the locality in Virginia where registered."

"To the extent my conclusion conflicts with a 1973 opinion concluding that a vehicle owned by a Virginia domiciliary serviceman but garaged outside the Commonwealth may be taxed by the Virginia locality of domicile, such opinion is expressly overruled. 1972-1973 Op. Va. Att’y Gen. 410.

OP. NO. 01-054
TAXATION: TAX EXEMPT PROPERTY.
Commissioner of revenue is proper official to determine whether rental property owned by town is exempt from real estate taxation.

THE HONORABLE TERRY G. KILGORE
MEMBER, HOUSE OF DELEGATES
JUNE 29, 2001

You ask whether certain property owned by the Town of Clintwood is exempt from real estate taxation.

You relate that the town mayor recently received tax statements on property owned by, and located within the corporate limits of, the town. You understand that the property was either donated to or purchased by the town, or purchased with specific funds. One of the parcels is wooded land that is proposed to be used as a nature trail, and another parcel is a parking lot. The town receives rental income from a portion of the property it owns. The rental income, however, is not enough to offset the maintenance of the property and the assessed taxes. Finally, you relate that this is the first year the town has received a tax statement on any town-owned property.

Section 58.1-3606(A)(1) of the Code of Virginia exempts from taxation "property owned directly or indirectly by the Commonwealth, or any political subdivision thereof." A tax exemption granted by classification of the General Assembly under § 58.1-3606 is limited by § 58.1-3603(A), which states:

Whenever any building or land, or part thereof, exempt from taxation pursuant to [§ 58.1-3606] and not belonging to the Commonwealth is a source of revenue or profit, whether by lease or otherwise, all of such buildings and land shall be liable to taxation as other land and buildings in the same county, city or town. When a part but not all of any such building or land, however, is a source of revenue or profit, and the remainder of such building or land is used by any organization exempted from taxation pursuant to [§ 58.1-3606] for its purposes, only such portion as is a source of profit or revenue shall be liable for taxation.

Leasing by the tax exempt owner does not automatically subject the otherwise tax exempt property to taxation. The Supreme Court of Virginia has construed the terms “revenue” and “profit” to mean “substantial net profit.” As a result,
the property loses its tax exempt status only if the owner derives a substantial net profit from a lease after deducting all expenses. Whether an owner has derived a substantial net profit is a question of fact for the commissioner of the revenue to determine. I must, therefore, defer to the commissioner of the revenue for a response as to whether the property owned by the Town of Clintwood is exempt from real estate taxation.


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2001 REPORT OF THE ATTORNEY GENERAL

TAXATION: VIRGINIA FUELS TAX ACT.

CONSTITUTION OF VIRGINIA: LEGISLATURE.

Gasoline retailer who meets definition of "distributor" and complies with licensure requirements described in Act may be licensed by Commissioner of Department of Motor Vehicles as distributor. Jobber may be licensed either as distributor or transporter of motor fuel to gasoline retailer. Liability for payment of tax on motor fuel removed from terminal rack. First person who receives fuel upon its removal from terminal, and who is not simply motor fuel transporter, is entitled to 1% collection allowance upon remittance of tax payment to supplier. Legislative decision to permit entity that pays supplier for fuel at terminal rack to take advantage of 1% discount does not create classification between jobbers and gasoline retailers that would constitute prohibited special legislation.

THE HONORABLE WARREN E. BARRY
MEMBER, SENATE OF VIRGINIA
JANUARY 18, 2001

You inquire regarding the Virginia Fuels Tax Act, which has been reenacted as Chapter 22 of Title 58.1, §§ 58.1-2200 through 58.1-2290 of the Code of Virginia (the "2001 Act"). You believe the effect of the 2001 Act is to move the point of taxation by the Commonwealth on motor fuels from the distributors and dealers to the supplier, at the point of distribution at the terminal rack.

You advise that motor fuel is delivered and sold to consumers under different marketing plans. Gasoline retailers whose motor fuel is delivered directly to them by an oil company or refiner are entitled to obtain a license from the Department of Motor Vehicles (the "Department"). remit the tax payment to the company or refiner, and take the one percent deduction provided under the 2001 Act. You advise also that a petroleum jobber who receives motor fuel from the terminal rack and delivers it to motor fuel retail sites owned and operated by gasoline retailers remits the tax to the supplier, and the jobber may take the one percent deduction.

You relate that some gasoline retailers who own and operate stations have agreements with petroleum jobbers who obtain motor fuel from the terminal rack and deliver the fuel to the gasoline retailer upon leaving the terminal.
Consequently, you advise that, if the gasoline retailer is not licensed by the Department as a distributor, the jobber delivering the motor fuel to the retailer remits the applicable tax to the supplier (a refiner), and the jobber (a licensed distributor) receives the one percent deduction.

You advise that the one percent allowance is provided to licensed distributors to offset costs associated with dead storage in underground storage tanks and shrinkage due to temperature-related evaporation. You relate that, although a jobber, acting as a licensed distributor and not as a transporter of fuel, delivers motor fuel to a gasoline retailer directly from the terminal facility, the retailer has the dead storage and absorbs the cost of shrinkage. You also advise that the retailer pays for gross gallons delivered by the jobber but actually sells net gallons, lower than the gross amount, due to temperature-related evaporation.

You first ask whether a gasoline retailer who receives motor fuel from a jobber transporting fuel from a supplier may obtain a license from the Department as a distributor.

The reading of a statute as a whole influences the proper construction of ambiguous individual provisions. The 2001 Act defines the following terms used in the 2001 Act:

"Distributor" means a person who acquires motor fuel from a supplier or from another distributor for subsequent sale.

"Retailer" means a person who (i) maintains storage facilities for motor fuel and (ii) sells the fuel at retail or dispenses the fuel at a retail location.

"Supplier" means (i) a position holder, (ii) a person who receives motor fuel pursuant to a two-party exchange, or (iii) a fuel alcohol provider. A licensed supplier includes a licensed elective supplier and licensed permissive supplier.

The 2001 Act does not define the term "jobber." I am, however, advised that the term "jobber" has been used for many years in the industry to mean either a distributor or a transporter of fuel.

Section 58.1-2204 lists persons required to obtain a license from the Commissioner of the Department before performing any activity associated with the licensure requirement. The list of required persons who must obtain a license from the Department does not include distributors. Section 58.1-2206, however, provides that "[a] person who conducts the activities of a distributor or a permissive supplier may obtain a license issued by the Commissioner for that activity." Section 58.1-2208(B) contains the procedures for obtaining a license under the 2001 Act:

An applicant for a license as a ... distributor ... shall satisfy the following requirements:
1. If the applicant is a corporation, the applicant shall either be incorporated in the Commonwealth or authorized to transact business in the Commonwealth;

2. If the applicant is a limited liability company, the applicant shall be organized in the Commonwealth or authorized to transact business in the Commonwealth;

3. If the applicant is a limited liability partnership, the applicant shall either be formed in the Commonwealth or authorized to transact business in the Commonwealth; or

4. If the applicant is an individual or a general partnership, the applicant shall designate an agent for service of process and provide the agent's name and address.

Finally, § 58.1-2211(A) requires that "an applicant for a license as a ... distributor ... shall file with the Commissioner a bond, certificate of deposit, or irrevocable letter of credit" which "shall be conditioned upon compliance with the requirements of [the 2001 Act], be payable to the Commonwealth, and be in the form required by the Commissioner."

"The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow or strained construction." Accordingly, it is my opinion that a gasoline retailer who meets the definition of "distributor" in § 58.1-2201 and complies with the licensure requirements in §§ 58.1-2206, 58.1-2208 and 58.1-2211 may be licensed as a distributor under the 2001 Act.

You next ask whether the gasoline retailer who holds a license from the Department as a distributor is entitled to the one percent collection allowance when he remits the tax payment directly to the supplier of motor fuel.

Section 58.1-2219 provides:

A. The tax imposed pursuant to § 58.1-2217 at the point that motor fuel is removed by a system transfer from a terminal in Virginia shall be paid by the position holder of the fuel; however, if the position holder is not the terminal operator, the terminal operator and position holder shall be jointly and severally liable for the tax.

B. The tax imposed pursuant to § 58.1-2217 at the point that motor fuel is removed at a terminal rack in Virginia shall be payable by the person that first receives the fuel upon its removal from the terminal. If the motor fuel is first received by an unlicensed distributor, the supplier of the fuel shall be liable for payment of the tax due on the fuel. If the motor fuel is sold by a person who is not licensed as a supplier, then (i) the terminal operator and (ii) the person selling the fuel shall be jointly and severally liable for payment of the tax due on the fuel. If the motor fuel removed is not dyed diesel fuel but the shipping document issued for the fuel states that
the fuel is dyed diesel fuel, the terminal operator, the supplier, and the person removing the fuel shall be jointly and severally liable for payment of the tax due on the fuel.

Section 58.1-2201 defines "position holder" as

a person who holds an inventory position of motor fuel in a terminal, as reflected on the records of the terminal operator. A person holds an "inventory position of motor fuel" when he has a contract with the terminal operator for the use of storage facilities and terminaling services for fuel at the terminal.

Under § 58.1-2219(B), the motor fuel tax is imposed "at the point that the motor fuel is removed at a terminal rack in Virginia," and it is "payable by the person that first receives the fuel upon its removal from the terminal." Section 58.1-2201 defines "removal" as "a physical transfer other than by evaporation, loss, or destruction. A physical transfer to a transport truck or other means of conveyance outside the terminal transfer system is complete upon delivery into the means of conveyance."

Under the provisions of § 58.1-2219(B), therefore, fuel is removed from the terminal upon the loading of the fuel into a transport truck. If the person receiving the fuel is a licensed distributor, then the distributor is responsible for paying the motor fuel tax at the point the fuel is removed from the terminal rack into the truck. Consequently, § 58.1-2219(B) would require a jobber who is a licensed distributor to remit the tax to the supplier. If the jobber is not a licensed distributor, however, the supplier is liable under § 58.1-2219(B) for the tax on the fuel. The scheme set forth in the 2001 Act, therefore, maintains the point of taxation at the terminal rack. "The manifest intention of the legislature, clearly disclosed by its language, must be applied."

When the jobber or some other independent truck company simply picks up fuel for the gasoline retailer, and the gasoline retailer pays the supplier for the fuel, it is my opinion that the gasoline retailer is responsible for the tax under § 58.1-2219(A). In such an instance, the jobber or independent truck company is a "motor fuel transporter," as that term is defined in § 58.1-2201, who has no duty to remit taxes or file a monthly return under § 58.1-2230, but rather, may only be required to file an informational return under § 58.1-2241. Should the jobber pay the supplier for the fuel placed in his transport, the jobber is the first person who "receives the fuel upon its removal from the terminal" pursuant to § 58.1-2219(B) and is entitled to take the one percent collection allowance. Should the gasoline retailer pay the supplier for the fuel, however, then such retailer is the first person who "receives the fuel upon its removal from the terminal" pursuant to § 58.1-2219(B), and the jobber is simply hauling the fuel for the retailer. When the gasoline retailer pays the supplier for the fuel, including the § 58.1-2219(B) tax on the fuel, he is entitled to the one percent collection allowance when he remits the tax payment to the supplier.

You third inquiry concerns a situation in which a gasoline retailer whose motor fuel is delivered to the retail site by a jobber is not licensed as a distributor
and is not eligible for the one percent deduction on the payment of motor fuel
taxes. You ask whether, in such a situation, the 2001 Act constitutes special
interest legislation in that it discriminates against and treats classes of the
same trade differently.

The Supreme Court of Virginia has defined "special laws" prohibited by Article
IV, § 14 of the Constitution of Virginia as those which, by force of an inherent
limitation, arbitrarily separate persons, places or things of the same general
class."[A] general law ... applies to all who are similarly situated." A law
may apply only to a small class of persons, or even a single locality, without
being prohibited by Article IV, § 14, if it applies to all parts of the Common-
wealth where similar conditions exist.  

Review of any statute for possible violation of the constitutional prohibition
on special legislation must begin with the presumption of constitutionality
that attaches to all acts of the General Assembly. The Virginia Supreme
Court has often stated, ""If any state of facts can be reasonably conceived,
that would sustain [a classification], that state of facts at the time the law
was enacted must be assumed."" The distinction between general laws that
are permitted and special laws that are not must be determined on a case-by-
case basis. The Supreme Court has also noted that "courts uphold acts of
the legislature when their constitutionality is debatable."  

The Supreme Court has found that constitutional prohibitions against special
legislation do not prohibit classifications, as long as the classification is not
purely arbitrary. "It must be natural and reasonable, and appropriate to the
occasion. There must be some such difference in the situation of the subjects of
the different classes as to reasonably justify some variety of rule in respect
thereto." In the facts you present, a gasoline retailer who meets the definition
of "distributor" in § 58.1-2201 and complies with the requirements for licensure
may be licensed as a distributor under the 2001 Act. In addition, a jobber may
be licensed either as a distributor or simply a transporter of gasoline to a gas-
oline retailer. Consequently, both may be licensed as a distributor and, depend-
ning on who pays the supplier for the fuel, both may take advantage of the one
percent discount under the 2001 Act. Consequently, the legislative decision to
permit the entity that pays the supplier for the fuel at the terminal rack to
take advantage of the one percent discount clearly does not create a classifica-
tion between jobbers and gasoline retailers. The 2001 Act does not, therefore,
in my opinion, constitute prohibited special legislation.

1See 2000 Va. Acts: ch. 729, at 1475, 1508; ch. 758, at 1580, 1613 (enacting clauses 3 and 4, which
repeal Chapter 21 of Title 58.1, §§ 58.1-2100 to 58.1-2147, and reenacting Virginia Fuels Tax Act
as of Jan. 1, 2001).


3"Elective supplier" means a supplier who (i) is required to be licensed in the Commonwealth and
(ii) elects to collect the tax due the Commonwealth on motor fuel that is removed at a terminal
located in another state and has Virginia as its destination state." VA. CODE ANN. § 58.1-2201
"Permissive supplier" means an out-of-state supplier who elects, but is not required, to have a supplier's license under [the 2001 Act]." Section 58.1-2201.

"Jobber" is defined generally as "a wholesaler who operates on a small scale or who sells only to retailers and institutions." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 630 (1996).

Section 58.1-2204(A) requires "[a] person [to] obtain a license issued by the Commissioner before conducting the activities of:

1. A refiner, who shall be licensed as a supplier;
2. A supplier;
3. A terminal operator;
4. An importer;
5. An exporter;
6. A blender;
7. A motor fuel transporter;
8. A bulk user of undyed diesel fuel;
9. A retailer of undyed diesel fuel;
10. An aviation consumer;
11. A bonded importer; or
12. An elective supplier."

See supra note 6.


"Motor fuel transporter" means a person who transports motor fuel outside the terminal transfer system by means of a transport truck, a railroad tank car, or a marine vessel." Section 58.1-2201.


"Motor fuel transporter" means a person who transports motor fuel outside the terminal transfer system by means of a transport truck, a railroad tank car, or a marine vessel." Section 58.1-2201.

County Bd. of Supervisors v. Am. Trailer Co., 193 Va. at 78, 68 S.E.2d at 120.


Peery v. Board of Funeral Directors, 203 Va. at 165, 123 S.E.2d at 97.

Martin's Ex'r v. Commonwealth, 126 Va. at 612, 102 S.E. at 80.

OP. NO. 01-055

WELFARE (SOCIAL SERVICES): ADOPTION.

Circuit court may not waive order of reference to local director of social services for investigation and report to be undertaken in stepparent adoption proceeding when consent by noncustodial birth parent has not been obtained.

THE HONORABLE ROSSIE D. ALSTON JR.

JUDGE, CIRCUIT COURT OF PRINCE WILLIAM COUNTY

DECEMBER 27, 2001
You ask whether, pursuant to §§ 63.1-219.48(C) and 63.1-219.49(A) of the Code of Virginia, the circuit court has the discretion to waive an order referring a stepparent adoption matter to the local director of social services.

You relate that the custodial natural mother and stepfather of a child have petitioned the court to adopt the child. You relate further that the natural father of the child has been properly served, but has not consented to the adoption. You inquire whether the court must issue an order referring the matter to the local director of social services or whether the court has discretion to waive such a requirement.

"[L]egal adoption in England and in the United States exists only by statute. There is no such thing as a common-law legal adoption." Article 4, Chapter 10.2 of Title 63.1, §§ 63.1-219.48 and 63.1-219.49, contains the statutory requirements for stepparent adoption. Specifically, § 63.1-219.48(C) enumerates five circumstances wherein the court may proceed to order a proposed adoption without referring the matter to the local director of social services, none of which are applicable to the situation you present. Relative to your inquiry, § 63.1-219.48(C) provides:

When the custodial birth parent of a child born to parents who were not married to each other at the time of the child's conception or birth marries and the new spouse of such custodial birth parent desires to adopt such child, on a petition filed by the custodial birth parent and spouse for the adoption and change of name of the child, the court may proceed to order the proposed adoption and change of name without referring the matter to the local director of social services if (i) the noncustodial birth parent consents, under oath, in writing to the adoption ....

The mechanism in § 63.1-219.48(C) for adoption of a stepchild is more expeditious than the detailed procedure set forth in alternate adoption statutes for the general placement of children for adoption by a parent or guardian with the requirement of judicial consent imposed therein. Pursuant to § 63.1-219.48(C)(i), the natural mother and her spouse may file a petition for stepparent adoption and proceed with the adoption through an order by the court without referring the matter to the local director of social services, so long as the natural father consents to the adoption. Consent by the noncustodial birth parent, therefore, is a requisite element for implementing an adoption pursuant to this provision.

Section 63.1-219.49(A) provides that "[f]or adoptions under [Article 4], an investigation and report [by the local director of social services] shall be undertaken only if the court in its discretion determines that there should be an investigation before a final order of adoption is entered." Although this section grants the court the discretion to determine whether an investigation and a report are necessary in stepparent adoption proceedings, it is my opinion that it does not provide to the court the discretion to waive the order of reference in the circumstances you present.
Sections 63.1-219.48(C)(i) and 63.1-219.49(A) were enacted as part of a general recodification of adoption statutes. This recodification, however, was not intended to change the policy of such statutes; rather, it reflects only a reorganization of the prior law. Additionally, as a general rule, a statute that is recodified is presumed to be incorporated into the new Code without substantive change, unless it clearly appears from new language that the legislature intended a change. In this case, however, the General Assembly enacted no change in the language of these statutes. Waiving the order of reference in the situation you present, wherein the consent of the birth father has not been obtained, results in negating the consent requirement of § 63.1-219.48(C)(i). There is no indication from the recodification of these statutes that such a result was intended.

Accordingly, it is my opinion that when consent by the natural father has not been obtained, the circuit court may not waive an order of reference to the local director of social services for an investigation and report to be undertaken in a stepparent adoption proceeding under § 63.1-219.48(C)(i).

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City of Richmond may use funds derived from fees assessed for certain civil actions and court cases to defray increases in cost of heating, cooling, electricity, and ordinary maintenance of courthouses located within city; may not use such funds to pay entire cost of utilities and routine courthouse maintenance.

Duty of county sheriff to enforce local ordinance requiring vehicle owners to display current county decals.

Every county and city has duty to provide and maintain adequate courthouse facilities within locality.

Interjurisdictional law-enforcement authority of sheriff's office to go beyond locality served by sheriff is limited to activities prescribed by statute. Officer properly engaged in activity so prescribed beyond territorial limits of his locality is authorized to act in same manner and is subject to same limitations as would apply to law-enforcement officer of extraterritorial locality responding to such activities.

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**DEPARTMENT OF CRIMINAL JUSTICE SERVICES**

(See Commissions, Boards and Institutions)

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